

# Appendix A

**CERTIFICATE OF SERVICE BY MAILING**

I, \_\_\_\_\_, hereby certify, pursuant to NRCP 5(b), that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I mailed a true and correct copy of the foregoing, “\_\_\_\_\_”

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

_____	_____
_____	_____
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_____	_____

CC:FILE

**DATED:** this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
#  
/In Propria Personam  
Post Office Box 208, S.D.C.C.  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

APR 30 2024

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

ESTEBAN HERNANDEZ,

Plaintiff-Appellant,

v.

HOWELL, warden; ARANAS, Dr.; JAMES  
DZURENDA; NEVADA DEPARTMENT  
OF CORRECTIONS; SDCC; NEVADA  
DEPARTMENT OF CORRECTIONS;  
MICHAEL MINEV; LANDSMAN, Dr.,

Defendants-Appellees.

No. 22-16922

D.C. No. 2:18-cv-01449-MMD-  
CLB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Miranda M. Du, District Judge, Presiding

Submitted April 22, 2024\*\*

Before: CALLAHAN, LEE, and FORREST, Circuit Judges.

Nevada state prisoner Esteban Hernandez appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate

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\* 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).

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 Cir. 2004), and we affirm.

The district court properly granted summary judgment because Hernandez failed to raise a genuine dispute of material fact as to whether defendants were deliberately indifferent in treating Hernandez's Hepatitis C and liver mass. *See id.* at 1057-60 (prison officials act with deliberate indifference only if they know of and disregard an excessive risk to the prisoner's health; medical malpractice, negligence, or difference of opinion concerning the course of treatment does not amount to deliberate indifference); *see also Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074-75 (9th Cir. 2013) (a supervisor may be held liable only "if he or she was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation" (citation and internal quotation marks omitted)).

Hernandez's challenge to the district court's denial of his motion for preliminary injunctive relief is moot. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992) (when underlying claims have been decided, the reversal of a denial of preliminary injunction would have no practical consequences, and the issue is therefore moot).

The district court did not abuse its discretion in denying Hernandez's

discovery motions. *See Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010) (setting forth standard of review); *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (discovery rulings “will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant” (citation and internal quotation marks omitted)).

**AFFIRMED.**

# Appendix B

Petitioner/In Propria Persona  
Post Office Box 208, SDCC  
Indian Springs, Nevada 89070-0208

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STATE OF NEVADA

\_\_\_\_\_  
Plaintiff,

vs.

\_\_\_\_\_  
Defendant.  
\_\_\_\_\_

CASE No. \_\_\_\_\_

DEPT.No. \_\_\_\_\_

DESIGNATION OF RECORD ON APPEAL

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The above-named Plaintiff hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

RESPECTFULLY SUBMITTED BY: \_\_\_\_\_

\_\_\_\_\_  
#  
\_\_\_\_\_

Plaintiff/In Propria Persona

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 \* \* \*

4 ESTEBAN HERNANDEZ,

5 Plaintiff,

6 v.

7 WARDEN HOWELL, *et al.*,

8 Defendants.

Case No. 2:18-CV-1449-MMD-CLB

REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE<sup>1</sup>

[ECF No. 102]

9  
10 This case involves a civil rights action filed by Plaintiff Esteban Hernandez  
11 ("Hernandez") against Defendants Romeo Aranas ("Aranas"), James Dzurenda  
12 ("Dzurenda"), Henry Landsman ("Landsman"), Michael Minev ("Minev") and Jerry Howell  
13 ("Howell") (collectively referred to as "Defendants"). Currently pending before the Court is  
14 Defendants' motion for summary judgment. (ECF Nos. 102, 104, 109.)<sup>2</sup> Hernandez  
15 opposed the motion, (ECF No. 110), and Defendants replied. (ECF No. 112, 114.)<sup>3</sup> For  
16 the reasons stated below, the Court recommends that Defendants' motion for summary  
17 judgment, (ECF No. 102), be granted.

18 I. PROCEDURAL HISTORY

19 Hernandez is an inmate currently in the custody of the Nevada Department of  
20 Corrections ("NDOC"). On August 3, 2018, Hernandez filed a civil rights complaint under  
21 42 U.S.C. § 1983 for events that occurred while Hernandez was incarcerated at the  
22 Southern Desert Correctional Center ("SDCC"). (ECF No. 5.) On December 2, 2019, the  
23 District Court entered a screening order on Hernandez's complaint (ECF No. 4), allowing

24  
25 <sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du,  
26 United States District Judge. The action was referred to the undersigned Magistrate  
27 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

28 <sup>2</sup> ECF No. 104 consists of Hernandez's medical records filed under seal. ECF No.  
109 is an erratum to the motion for summary judgment.

<sup>3</sup> ECF No. 114 consists of Hernandez's medical records filed under seal.



1 Hernandez to proceed on an Eighth Amendment deliberate indifference to serious  
2 medical needs claim against Defendants based on denial of treatment for hepatitis C  
3 ("Hep-C"). (See *id.* at 6.) The District Court dismissed, without prejudice, an Eighth  
4 Amendment violation based on failure to inform Hernandez that he had tested positive for  
5 Hep-C and conduct follow-up testing. (*Id.*)

6 Around the same time Hernandez filed his complaint, many other individuals in the  
7 custody of the NDOC filed similar actions alleging that the NDOC's policy for treating hep-  
8 C amounted to deliberate indifference in violation of the Eighth Amendment. (See ECF  
9 No. 6.) Thus, the Court consolidated numerous actions, including Hernandez's case, for  
10 the purpose of conducting consolidated discovery. (See ECF No. 7.) Hernandez opted to  
11 be excluded from the class action, but his case remained stayed through the pendency  
12 of the class action. (See ECF No. 10.) On September 2, 2020, the stay was lifted in this  
13 case. (ECF No. 12.) On December 11, 2020, Hernandez filed an amended complaint,  
14 without first seeking leave of court. (ECF No. 32.) Thus, the Court struck the improperly  
15 filed complaint, with leave to re-file the amended complaint with an accompanying motion  
16 requesting to do so, as required in accordance with Local Rule 15-1(a). (ECF No. 34.) On  
17 December 21, 2020, Defendants filed their notice of acceptance of service for the original  
18 complaint. (ECF No. 33.) Defendants filed their answer on December 31, 2020. (ECF No.  
19 35.) On January 12, 2021, Hernandez filed his motion for leave to file an amended  
20 complaint to add two additional Defendants Dr. Henry Landsman and Medical Director  
21 Michael Minev to his Eighth Amendment deliberate indifference claim. (ECF No. 37.) The  
22 Court granted Hernandez's motion to amend in its entirety, (ECF No. 49) and the  
23 amended complaint is now the operative complaint in this case (ECF No. 50).

24 On April 14, 2022, Defendants filed their motion for summary judgment arguing  
25 Hernandez cannot prevail as: (1) Hernandez was treated appropriately and in accordance  
26 with the medical directives and standards of care; (2) many of the Defendants were not  
27 treating physicians and thus did not personally participate in the alleged constitutional  
28 violations; and (3) Defendants are entitled to qualified immunity. (ECF No. 102.)

## II. FACTUAL BACKGROUND

Hep-C is a blood borne pathogen transmitted primarily by way of percutaneous exposure to blood. "HCV" is chronic Hep-C as diagnosed by a qualified medical practitioner. (ECF No. 102-2 at 17.) Chronic Hep-C results in liver fibrosis. (ECF No. 102-7 at 2 (Declaration of Dr. Minev).) Fibrosis is the initial stage of liver scarring. (*Id.*) Chronic Hep-C builds up fibrosis (scar tissue) in the afflicted person's liver. (*Id.*) When the fibrosis increases, it can lead to cirrhosis of the liver, a liver disease that forestalls common liver function. (*Id.*) When liver cells are not functioning, certain clinical signs will appear on the patient, which include but are not limited to: (1) spider angiomas (vascular lesions on the chest and body); (2) palmar erythema (reddening of the palms); (3) gynecomastia (increase in breast gland size); (4) ascites (accumulation of fluid in the abdomen); and (5) jaundice (yellow discoloration of the skin and mucous membranes). (*Id.*)

Medical Directive ("MD") 219 governs treatment of HCV at the NDOC. (See ECF No. 102 at 5.) At the time Hernandez filed his initial grievance related to his Hep-C treatment at issue in this case, inmates that tested positive for HCV were enrolled in the Infectious Disease Chronic Clinic for Hep-C. (*Id.*) A non-invasive method of procuring a patient's Chronic Hep-C progression, in addition with the clinical signs, is through the Aspartate Aminotransferase Platelet Ratio Index ("APRI") formula. (ECF No. 102-7 at 3.) To calculate a patient's APRI score, the patient's blood platelet count, which is obtained through a blood test, is necessary. (*Id.*) An APRI score is calculated using the AST to Platelet Ratio Index. (*Id.*) Direct acting antiviral ("DAA") treatment, such as Epclusa, is an FDA-approved treatment for HCV. (ECF No. 102-1 at 6 (defining DAA).)

The current version of MD 219 established three priority levels for DAA treatment. (*Id.* at 7-12.) This priority level system guarantees that all HCV patients will receive DAAs as needed and required to treat their condition, while at the same time providing medical personnel with discretion and flexibility to safeguard that those in a lower level of priority obtain expedited DAA treatment when in the sound judgment of the medical provider examining the patient it is determined that it is medically necessary. (*Id.* at 10.)

1 Hernandez was enrolled in the Chronic Disease Clinic for HCV in 2012 and was  
2 continuously followed by NDOC for the disease. (ECF No. 104-1 (sealed).) On October  
3 18, 2018, Hernandez's APRI score was 0.718 and he did not exhibit any symptoms of  
4 decreased liver function. (ECF No. 102-7 at 4.) At the time Hernandez began grieving this  
5 issue in late 2016, Minev states Hernandez was not a candidate for the advanced Chronic  
6 Hepatitis-C treatment program available at the time. (*Id.*)

7 On February 27, 2019, Hernandez received a CT scan of his abdomen, which  
8 showed a "large irregularly shaped hypoattenuating lesion in the lateral segment of the  
9 left hepatic lobe. Finding may represent focal hepatic steatosis." (ECF Nos. 104-3  
10 (sealed).) The CT scan otherwise showed that Hernandez's liver and portal veins,  
11 gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, stomach were all  
12 "normal". (*Id.*) On February 28, 2019, Hernandez received an MRI, which showed  
13 cholelithiasis and two hepatic nodules. (*Id.*) A follow-up MRI performed on March 4, 2019  
14 showed a large left lobe liver hemangioma. (*Id.*) An additional MRI was performed on  
15 June 20, 2019, which again indicated a stable hemangioma without a malignant type  
16 enhancement. (ECF No. 104-4 (sealed).) A follow-up visit with an oncologist was  
17 recommended and approved by NDOC in July 2019. (ECF No. 104-6 (sealed).) Dr.  
18 Carducci, an outside medical provider, determined a biopsy was not necessary. (ECF  
19 Nos. 104-7, 104-8 (sealed).) A second MRI was performed on January 7, 2020, which  
20 indicated a stable, marginally smaller mass and no new lesions in the liver. (ECF No. 104-  
21 5 (sealed).)

22 In 2020, Hernandez received DAA treatment Epclusa and lab work completed in  
23 April 2021 shows Hernandez is no longer positive for HCV. (ECF Nos. 104-2, 104-9  
24 (sealed).)

### 25 III. LEGAL STANDARDS

26 "The court shall grant summary judgment if the movant shows that there is no  
27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
28 of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The

1 substantive law applicable to the claim determines which facts are material. *Coles v.*  
2 *Eagle*, 704 F.3d 624, 628 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242,  
3 248 (1986)). Only disputes over facts that address the main legal question of the suit can  
4 preclude summary judgment, and factual disputes that are irrelevant are not material.  
5 *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020). A dispute is “genuine” only where  
6 a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248.

7 The parties subject to a motion for summary judgment must: (1) cite facts from the  
8 record, including but not limited to depositions, documents, and declarations, and then  
9 (2) “show[] that the materials cited do not establish the absence or presence of a genuine  
10 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”  
11 Fed. R. Civ. P. 56(c)(1). Documents submitted during summary judgment must be  
12 authenticated, and if only personal knowledge authenticates a document (i.e., even a  
13 review of the contents of the document would not prove that it is authentic), an affidavit  
14 attesting to its authenticity must be attached to the submitted document. *Las Vegas*  
15 *Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011). Conclusory statements,  
16 speculative opinions, pleading allegations, or other assertions uncorroborated by facts  
17 are insufficient to establish the absence or presence of a genuine dispute. *Soremekun v.*  
18 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

19 The moving party bears the initial burden of demonstrating an absence of a  
20 genuine dispute. *Soremekun*, 509 F.3d at 984. “Where the moving party will have the  
21 burden of proof on an issue at trial, the movant must affirmatively demonstrate that no  
22 reasonable trier of fact could find other than for the moving party.” *Soremekun*, 509 F.3d  
23 at 984. However, if the moving party does not bear the burden of proof at trial, the moving  
24 party may meet their initial burden by demonstrating either: (1) there is an absence of  
25 evidence to support an essential element of the nonmoving party’s claim or claims; or (2)  
26 submitting admissible evidence that establishes the record forecloses the possibility of a  
27 reasonable jury finding in favor of the nonmoving party. See *Pakootas v. Teck Cominco*  
28 *Metals, Ltd.*, 905 F.3d 565, 593-94 (9th Cir. 2018); *Nissan Fire & Marine Ins. Co. v. Fritz*

1 Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). The court views all evidence and any  
2 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*  
3 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). If the moving party does not meet its  
4 burden for summary judgment, the nonmoving party is not required to provide evidentiary  
5 materials to oppose the motion, and the court will deny summary judgment. *Celotex*, 477  
6 U.S. at 322-23.

7 Where the moving party has met its burden, however, the burden shifts to the  
8 nonmoving party to establish that a genuine issue of material fact actually exists.  
9 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). The  
10 nonmoving must “go beyond the pleadings” to meet this burden. *Pac. Gulf Shipping Co.*  
11 *v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (internal quotation  
12 omitted). In other words, the nonmoving party may not simply rely upon the allegations or  
13 denials of its pleadings; rather, they must tender evidence of specific facts in the form of  
14 affidavits, and/or admissible discovery material in support of its contention that such a  
15 dispute exists. See Fed.R.Civ.P. 56(c); *Matsushita*, 475 U.S. at 586 n. 11. This burden is  
16 “not a light one,” and requires the nonmoving party to “show more than the mere existence  
17 of a scintilla of evidence.” *Id.* (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387  
18 (9th Cir. 2010)). The non-moving party “must come forth with evidence from which a jury  
19 could reasonably render a verdict in the non-moving party’s favor.” *Pac. Gulf Shipping*  
20 *Co.*, 992 F.3d at 898 (quoting *Oracle Corp. Sec. Litig.*, 627 F.3d at 387). Mere assertions  
21 and “metaphysical doubt as to the material facts” will not defeat a properly supported and  
22 meritorious summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
23 475 U.S. 574, 586–87 (1986).

24 When a *pro se* litigant opposes summary judgment, his or her contentions in  
25 motions and pleadings may be considered as evidence to meet the non-party’s burden to  
26 the extent: (1) contents of the document are based on personal knowledge, (2) they set  
27 forth facts that would be admissible into evidence, and (3) the litigant attested under  
28 penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923

1 (9th Cir. 2004).

2 Upon the parties meeting their respective burdens for the motion for summary  
3 judgment, the court determines whether reasonable minds could differ when interpreting  
4 the record; the court does not weigh the evidence or determine its truth. *Velazquez v. City*  
5 *of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The court may consider evidence in  
6 the record not cited by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3).  
7 Nevertheless, the court will view the cited records before it and will not mine the record  
8 for triable issues of fact. *Oracle Corp. Sec. Litig.*, 627 F.3d at 386 (if a nonmoving party  
9 does not make nor provide support for a possible objection, the court will likewise not  
10 consider it).

#### 11 **IV. DISCUSSION**

12 On April 14, 2022, Defendants filed the instant motion for summary judgment  
13 arguing: (1) Defendants were not deliberately indifferent to Hernandez's serious medical  
14 needs; (2) Howell, Aranas, Dzurenda, and Minev had no personal participation in the  
15 alleged constitutional violations; and (3) alternatively, Defendants are entitled to qualified  
16 immunity. (ECF No. 102.)

##### 17 **A. Deliberate Indifference to Serious Medical Needs**

18 The Eighth Amendment "embodies broad and idealistic concepts of dignity,  
19 civilized standards, humanity, and decency" by prohibiting the imposition of cruel and  
20 unusual punishment by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal  
21 quotation omitted). The Amendment's proscription against the "unnecessary and wanton  
22 infliction of pain" encompasses deliberate indifference by state officials to the medical  
23 needs of prisoners. *Id.* at 104 (internal quotation omitted). It is thus well established that  
24 "deliberate indifference to a prisoner's serious illness or injury states a cause of action  
25 under § 1983." *Id.* at 105. Article 1, Section 6 of the Nevada Constitution mirrors the Eighth  
26 Amendment's Cruel and Unusual Punishment Clause, and provides protections that are  
27 coextensive with the Eighth Amendment of the United States Constitution. Courts in this  
28 district have applied the same legal standards to the cruel and unusual punishment

1 corollary included in Article 1, Section 6 of the Nevada Constitution as are applied to the  
2 corollaries in the United States Constitution. *See, e.g., Fowler v. Sisolak*, No. 2:19-cv-  
3 01418-APG-DJA, 2020 WL 6270276, at \*4 (D. Nev. Oct. 26, 2020).

4 Courts in Ninth Circuit employ a two-part test when analyzing deliberate  
5 indifference claims. The plaintiff must satisfy “both an objective standard—that the  
6 deprivation was serious enough to constitute cruel and unusual punishment—and a  
7 subjective standard—deliberate indifference.” *Colwell*, 763 F.3d at 1066 (internal  
8 quotation omitted). First, the objective component examines whether the plaintiff has a  
9 “serious medical need,” such that the state’s failure to provide treatment could result in  
10 further injury or cause unnecessary and wanton infliction of pain. *Jett v. Penner*, 439 F.3d  
11 1091, 1096 (9th Cir. 2006). Serious medical needs include those “that a reasonable  
12 doctor or patient would find important and worthy of comment or treatment; the presence  
13 of a medical condition that significantly affects an individual’s daily activities; or the  
14 existence of chronic and substantial pain.” *Colwell*, 763 F.3d at 1066 (internal quotation  
15 omitted).

16 Second, the subjective element considers the defendant’s state of mind, the extent  
17 of care provided, and whether the plaintiff was harmed. “Prison officials are deliberately  
18 indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally  
19 interfere with medical treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)  
20 (internal quotation omitted). However, a prison official may only be held liable if he or she  
21 “knows of and disregards an excessive risk to inmate health and safety.” *Toguchi v.*  
22 *Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004). The defendant prison official must therefore  
23 have actual knowledge from which he or she can infer that a substantial risk of harm  
24 exists and make that inference. *Colwell*, 763 F.3d at 1066. An accidental or inadvertent  
25 failure to provide adequate care is not enough to impose liability. *Estelle*, 429 U.S. at 105–  
26 06. Rather, the standard lies “somewhere between the poles of negligence at one end  
27 and purpose or knowledge at the other. . .” *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).  
28 Accordingly, the defendants’ conduct must consist of “more than ordinary lack of due

1 care.” *Id.* at 835 (internal quotation omitted).

2 Moreover, the medical care due to prisoners is not limitless. “[S]ociety does not  
3 expect that prisoners will have unqualified access to health care....” *Hudson v. McMillian*,  
4 503 U.S. 1, 9 (1992). Accordingly, prison officials are not deliberately indifferent simply  
5 because they selected or prescribed a course of treatment different than the one the  
6 inmate requests or prefers. *Toguchi*, 391 F.3d at 1058. Only where the prison officials’  
7 “‘chosen course of treatment was medically unacceptable under the circumstances,’ and  
8 was chosen ‘in conscious disregard of an excessive risk to the prisoner’s health,’” will the  
9 treatment decision be found unconstitutionally infirm. *Id.* (quoting *Jackson v. McIntosh*,  
10 90 F.3d 330, 332 (9th Cir. 1996)). In addition, it is only where those infirm treatment  
11 decisions result in harm to the plaintiff—though the harm need not be substantial—that  
12 Eighth Amendment liability arises. *Jett*, 439 F.3d at 1096.

### 13 1. Analysis

14 Starting with the objective element, the parties agree that Hernandez’s Hep-C  
15 constitutes a “serious medical need.” However, Defendants argue summary judgment  
16 should be granted because Hernandez cannot establish the second, subjective element  
17 of his claim. Specifically, Defendants argue they were not deliberately indifferent to  
18 Hernandez’s condition. Under the subjective element, there must be some evidence to  
19 create an issue of fact as to whether the prison official being sued knew of, and  
20 deliberately disregarded the risk to Hernandez’s safety. *Farmer*, 511 U.S. at 837. “Mere  
21 negligence is not sufficient to establish liability.” *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th  
22 Cir. 1998). Moreover, this requires Hernandez to “demonstrate that the defendants’  
23 actions were both an actual and proximate cause of [his] injuries.” *Lemire v. California*,  
24 726 F.3d 1062, 1074 (9th Cir. 2013) (citing *Conn v. City of Reno*, 591 F.3d 1081, 1098-  
25 1101 (9th Cir. 2010), *vacated by City of Reno, Nev. v. Conn*, 563 U.S. 915 (2011),  
26 *reinstated in relevant part* 658 F.3d 897 (9th Cir. 2011)).

27 Here, as detailed above, Defendants submitted authenticated and undisputed  
28 evidence regarding the medical treatment Hernandez received while incarcerated related



1 to his Hep-C. (See ECF Nos. 104-1, 104-2, 104-3, 104-4, 104-5, 104-6, 104-7, 104-8,  
2 104-9 (sealed).) According to this evidence, Hernandez was first enrolled in CCC for  
3 monitoring of his Hep-C in 2012. (ECF No. 104-1 (sealed).) Hernandez received routine  
4 care through the CCC for his Hep-C. (*Id.*)

5 On October 18, 2018, Hernandez's APRI score was 0.718 and he did not exhibit  
6 any symptoms of decreased liver function. (ECF No. 102-7 at 4.) APRI scores of above  
7 0.5 indicate there is likely some liver damage (fibrosis). (*Id.* at 3.) APRI scores above 1.5  
8 indicate a patient likely has or is quickly approaching cirrhosis of the liver. (*Id.*) At the time  
9 Hernandez began grieving this issue in late 2016, Minev states Hernandez was not a  
10 candidate for the advanced Chronic Hepatitis-C treatment program available at the time.  
11 (*Id.*)

12 On February 27, 2019, Hernandez received a CT scan of his abdomen, which  
13 showed a "large irregularly shaped hypoattenuating lesion in the lateral segment of the  
14 left hepatic lobe. Finding may represent focal hepatic steatosis." (ECF Nos. 104-3  
15 (sealed).) The CT scan otherwise showed that Hernandez's liver and portal veins,  
16 gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, stomach were all  
17 "normal". (*Id.*) On February 28, 2019, Hernandez received an MRI, which showed  
18 cholelithiasis and two hepatic nodules. (*Id.*) A follow-up MRI performed on March 4, 2019  
19 showed a large left lobe liver hemangioma. (*Id.*) An additional MRI was performed on  
20 June 20, 2019, which again indicated a stable hemangioma without a malignant type  
21 enhancement. (ECF No. 104-4 (sealed).) A follow-up visit with an oncologist was  
22 recommended and approved by NDOC in July 2019. (ECF No. 104-6 (sealed).) Dr.  
23 Carducci, an outside medical provider, determined a biopsy was not necessary. (ECF  
24 Nos. 104-7, 104-8 (sealed).) A second MRI was performed on January 7, 2020, which  
25 indicated a stable, marginally smaller mass and no new lesions in the liver. (ECF No. 104-  
26 5 (sealed).)

27 In 2020, Hernandez received DAA treatment Epclusa and lab work completed in  
28 April 2021 indicate Hernandez is no longer positive for HCV. (ECF Nos. 104-2, 104-9

1 In addition to APRI scores, Minev also considers the inmates' clinical signs of forestalled  
2 or reduced liver function. He almost always declined to recommend an NDOC inmate with  
3 Hep-C, who has an APRI score near or below 1.0 for advanced forms of Hep-C treatment  
4 due to risk that drug intervention may cause to a patient with Hep-C. All inmates who test  
5 positive for HCV and are otherwise medically indicated receive advanced treatment. (ECF  
6 No. 29-5.)

7 Moreover, as to Hernandez specifically, Minev stated he reviewed Hernandez's  
8 medical records and can attest that Hernandez suffered from Chronic Hepatitis C and his  
9 APRI score, based on blood test results in October 2018, was 0.718. Hernandez did not  
10 exhibit any symptoms of decreased liver function, namely: (1) spider angiomas; (2)  
11 palmar erythema; (3) gynecomastia; (4) ascites; or (5) jaundice. Based on Hernandez's  
12 APRI score and lack of clinical signs indicating decreased liver function, Hernandez was  
13 not a candidate for HCV treatment at the time of his grievance. Hernandez has since  
14 received treatment and no longer shows HCV in his system. (ECF No. 102-7.)

15 Based on the above evidence, the Court finds that Defendants have submitted  
16 authenticated evidence that establishes they affirmatively monitored and ultimately  
17 treated Hernandez's Hep-C. Therefore, the Court finds Defendants have met their initial  
18 burden on summary judgment by showing the absence of a genuine issue of material fact  
19 as to the deliberate indifference claim. *See Celotex Corp.*, 477 U.S. at 325. The burden  
20 now shifts to Hernandez to produce evidence that demonstrates an issue of fact exists as  
21 to whether Defendants were deliberately indifferent to his medical needs. *Nissan*, 210  
22 F.3d at 1102.

23 Hernandez's opposition reiterates his claim that the delay in providing him  
24 treatment for his Hep-C caused him further damage, including what he asserts is a  
25 cancerous tumor on his liver. (ECF No. 110.) Hernandez asserts Defendants were  
26 deliberately indifferent to Hernandez because they failed to test Hernandez for multiple  
27 years and have failed to do a biopsy to determine the "extent of cancer". (*Id.* at 25.)  
28 Hernandez points to several of his own medical records, mainly lab records, to support

1 (sealed).)

2 Defendant Aranas, former Medical Director for the NDOC, and Defendant  
3 Dzurenda, former Director of the NDOC, each filed declarations in support of the motion  
4 for summary judgment, stating that they did not recall having direct interactions with  
5 Hernandez and did not treat Hernandez. They further stated that they did not deny  
6 treatment to Hernandez, as decisions for treatment were made by the Utilization Review  
7 Panel or the treating physician. (ECF No. 102-3, 102-6.)

8 Defendant Howell, Warden for the NDOC, filed a declaration in support of the  
9 motion for summary judgment, stating that he had no authority to order treatment for HCV  
10 for Hernandez, as he was not part of the committee that could have ordered treatment,  
11 and Howell did not recall any contact with Hernandez relating to his medical conditions  
12 and did not substantively respond to any medical grievances. (ECF No. 102-4.)

13 Defendant Landsman, former Senior Physician at the SDCC, filed a declaration in  
14 support of the motion for summary judgment, stating Hernandez has been under the  
15 continuous care of many NDOC doctors. Landsman was not a member of the Hepatitis  
16 Review Committee tasked with the responsibility of approving treatment for Hep-C, he  
17 did not deny Hernandez treatment, and referred him to outside medical care when  
18 indicated. Landsman did not diagnose with Hernandez as suffering from advanced  
19 cirrhosis of the liver or as suffering symptoms associated with HCV infection. Hernandez  
20 did not exhibit any symptoms of decreased liver function, namely: (1) spider angiomas;  
21 (2) palmar erythema; (3) gynecomastia; (4) ascites; or (5) jaundice. (ECF No. 102-5.)

22 Defendant Minev, current NDOC Medical Director, filed a declaration in support of  
23 the motion for summary judgment, stating as follows: if a patient's APRI score is above  
24 0.5, there is likely some liver damage (fibrosis) and if the APRI score is above 1.5, the  
25 patient likely has or is quickly approaching cirrhosis of the liver. The APRI score is not  
26 definitive but is a reliable indicator of liver fibrosis. As part of his duties, Minev oversees  
27 the Chronic Hep-C treatment program at SDCC. He has reviewed test results and medical  
28 records of NDOC inmates to determine who required advanced forms of Hep-C treatment.

1 his assertions. However, as discussed above, Hernandez's medical records from the  
2 Centennial Hills Hospital showed a hepatic nodule, which was described as: "Statistically,  
3 the differential in a noncirrhotic patient without a history of malignancy favors benign  
4 etiologies". (ECF No. 104-3, 104-4 (sealed).) The records indicate Hernandez does not  
5 have cirrhosis of the liver, and the nodule is likely benign. The benign nature of the nodule  
6 was confirmed in follow up visits, and Dr. Carducci, an outside medical provider, did not  
7 feel that a biopsy of the "stable hemangioma" was necessary. (ECF No. 104-7, 104-8  
8 (sealed).)

9 Aside from his own assertions and medical records (much of which were provided  
10 with Defendants' summary judgment), Hernandez provides no further evidence or support  
11 that a delay in treatment for his Hep-C was the cause of any damage. He has not come  
12 forward with evidence to show Defendants knew of an excessive risk to his health and  
13 disregarded that risk. The evidence before the Court shows Hernandez was treated for  
14 his Hep-C through monitoring and other actions and there is no evidence showing that  
15 his Hep-C or any delay in providing treatment was the cause of any damage. Further,  
16 there is no evidence that Hernandez's nodule is cancerous. Therefore, Hernandez has  
17 failed to meet his burden on summary judgment to establish that prison officials were  
18 deliberately indifferent to his medical needs as he failed to come forward with any  
19 evidence to create an issue of fact as to whether Defendants deliberately denied, delayed,  
20 or intentionally interfered with the treatment plan. See *Hallett*, 296 F.3d at 744.

21 Moreover, to the extent that Hernandez's assertions in this case are based upon  
22 his disagreement with Defendants' choice of treatment, this does not amount to deliberate  
23 indifference. See *Toguchi*, 391 F.3d at 1058. In cases where the inmate and prison staff  
24 simply disagree about the course of treatment, only where it is medically unacceptable  
25 can the plaintiff prevail. *Id.* Therefore, Hernandez has failed to show that the NDOC's  
26 "chosen course of treatment was medically unacceptable under the circumstances." *Id.*  
27 Accordingly, Hernandez fails to meet his burden to show an issue of fact that Defendants  
28 were deliberately indifferent to his needs because Hernandez has only shown that he

disagrees between alternative courses of treatment, such as being given drug intervention treatment as opposed to having his HCV monitored for progression.

Based on the above, the Court recommends that Defendants' motion for summary judgment as to the medical deliberate indifference claim be granted.<sup>4</sup>

**V. CONCLUSION**

For good cause appearing and for the reasons stated above, the Court recommends that Defendants' motion for summary judgment, (ECF No. 102), be granted.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

**VI. RECOMMENDATION**

**IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary judgment, (ECF No. 102), be **GRANTED**; and,

**IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** in favor of Defendants and **CLOSE** this case.

**DATED:** September 7, 2022.

  
UNITED STATES MAGISTRATE JUDGE

<sup>4</sup> Because the Court finds that Hernandez's claim fails on the merits, the Court need not address Defendants' personal participation or qualified immunity arguments.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ESTEBAN HERNANDEZ,

Plaintiff,

v.

WARDEN HOWELL, *et al.*,

Defendants.

Case No. 2:18-cv-01449-MMD-CLB

ORDER

**I. SUMMARY**

*Pro se* Plaintiff Esteban Hernandez, who is incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), brings this action under 42 U.S.C. § 1983 against Defendants Romeo Aranas, James Dzurenda, Henry Landsman, Michael Minev, and Jerry Howell (collectively, "Defendants"). (ECF No. 50.) Before the Court is a Report and Recommendation ("R&R") of United States Magistrate Judge Carla L. Baldwin (ECF No. 120), recommending the Court grant Defendants' motion for summary judgment (ECF No. 102 ("Motion"))<sup>1</sup> on Plaintiff's Eighth Amendment deliberate indifference to medical needs claim. Plaintiff filed an objection to the R&R (ECF No. 123 ("Objection")), to which Defendants responded (ECF No. 124). Because the Court agrees with Judge Baldwin's analysis as to Defendants' Motion and because Plaintiff fails to meet his evidentiary burden, the Court will accept and adopt the R&R in full. Accordingly, the Court will grant Defendants' Motion.

**II. BACKGROUND**

The Court incorporates by reference Judge Baldwin's description of the case's factual background and procedural history provided in the R&R, which the Court adopts.

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<sup>1</sup>The Court reviewed the parties' response and reply. (ECF Nos. 110, 112.)

(ECF No. 120 at 1-4.)

### III. DISCUSSION

Judge Baldwin recommends that Defendants' Motion be granted because Defendants offer "authenticated evidence that establishes [Defendants] affirmatively monitored and ultimately treated [Plaintiff's] Hep-C." (*Id.* at 12.) Judge Baldwin found that no genuine issue of material fact exists as to Plaintiff's deliberate indifference claim. (*Id.* at 12-13.) Specifically, Plaintiff failed to show that Defendants' alleged delay in treatment specifically caused him further harm (e.g., cirrhosis of the liver) or that Defendants deliberately denied, delayed, or intentionally interfered with Plaintiff's treatment plan. (*Id.*) Plaintiff objects to Judge Baldwin's findings and recommendation, appearing to argue that: (1) the differences in medical opinions between two doctors who treated him create a genuine issue of material fact as to Defendants' deliberate indifference; and (2) NDOC staff took an unreasonably long time to test and treat Plaintiff's Hep-C. (ECF No. 123 at 3-9.)

Neither of Plaintiff's arguments is persuasive. First, Plaintiff offers no evidence creating an issue of fact as to whether Defendants knew of, and deliberately disregarded, an excessive risk to Plaintiff's health. (ECF No. 120 at 13.) Defendants proffer undisputed evidence—including several declarations and lab reports—documenting the extended, routine medical treatment Plaintiff received while incarcerated. (*Id.* at 9-12.) Plaintiff has seen prison doctors and outside physicians on numerous occasions. (*Id.*) In his Objection, Plaintiff relies on many of the same lab reports to support his arguments. (ECF No. 123 at 18-19, 39-51.) Plaintiff urges the Court to deny Defendants' Motion because two doctors who treated him—Dr. Brian Vicuna and Dr. Carducci—appear to have disagreed as to whether to order a biopsy to determine the "extent of cancer" on a "tumor" detected in a CT scan of Plaintiff's abdomen. (ECF Nos. 110 at 25, 120 at 12, 123 at 3.) As Judge Baldwin found, Plaintiff's medical records do not show he had a cancerous tumor or cirrhosis of the liver; Plaintiff had a hepatic nodule that was likely benign, which multiple doctors confirmed in follow-up visits. (ECF Nos. 104-3 (sealed), 104-4 (sealed), 104-7

(sealed), 104-8 (sealed), 120 at 13.) While it is true that Dr. Vicuna initially recommended a biopsy during Plaintiff's March 2019 visit, the lab report for that same visit also indicated that Plaintiff's liver, portal veins, gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, and stomach were all "normal." (ECF Nos. 104-3 (sealed), 120 at 10.) Furthermore, Plaintiff received in total three MRI scans of his abdomen area to inspect this nodule, and NDOC later approved a follow-up oncology appointment in July 2019. (ECF Nos. 104-3 (sealed), 104-4 (sealed), 104-6 (sealed), 120 at 10.) After multiple follow-up appointments concerning Plaintiff's hepatic nodule, Dr. Carducci's decision to forego a biopsy due to the nodule's benign nature does not contradict Dr. Vicuna's findings or any subsequent treatment. In any event, evidence of differing medical opinions between two doctors does not create an issue of fact as to whether Defendants knew of, and deliberately disregarded, an excessive risk to Plaintiff's health. See, e.g., *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) ("A difference of [medical] opinion does not amount to deliberate indifference to [a prisoner's] serious medical needs.") (citing *Estelle v. Gamble*, 429 U.S. 107 (1976)).

To the extent Dr. Carducci's decision to forego a biopsy was negligent, that medical decision alone does not amount to deliberate indifference. See *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 2010) ("Mere negligence is not sufficient to establish [Eighth Amendment] liability."); *Estelle*, 429 U.S. at 105-06 (noting that "an inadvertent failure to provide adequate medical care," without more, is insufficient to constitute deliberate indifference); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (recognizing deliberate indifference as "lying somewhere between . . . negligence . . . and purpose or knowledge").

Additionally, Plaintiff fails to "demonstrate that the defendants' actions were both an actual and proximate cause of [his] injuries." *Lemire v. California*, 726 F.3d 1062, 1074 (9th Cir. 2013); see also *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (requiring a showing of harm caused by the indifference). In his Objection, Plaintiff argues Defendants unreasonably delayed routine Hep-C testing, resolution of his kites and grievances, and



1 follow-up appointments while in NDOC's custody. (ECF No. 123 at 5-7.) However, as  
2 Judge Baldwin and Defendants note, Plaintiff offers no evidence showing that the alleged  
3 delays in treatment specifically caused Plaintiff to develop cirrhosis or other medical  
4 harms. (ECF Nos. 120 at 13, 124 at 5.) To the extent Plaintiff disagreed with Defendants'  
5 choice and timeline of Hep-C treatment, mere disagreement about the course of  
6 treatment does not amount to deliberate indifference under the Eighth Amendment. See  
7 *Toguchi v. Chong*, 391 F.3d 1051, 1058 (9th Cir. 2004) (recognizing that "mere difference  
8 of medical opinion" is not enough to establish deliberate indifference) (internal quotation  
9 marks and citation omitted); *Sanchez*, 891 F.2d at 242.

10 After conducting *de novo* review, the Court agrees with Judge Baldwin's  
11 determination that Plaintiff fails to establish a genuine issue of material fact as to whether  
12 Defendants deliberately denied, delayed, or intentionally interfered with Plaintiff's medical  
13 treatment and whether such a delay caused him harm. See *Hallett v. Morgan*, 296 F.3d  
14 732, 744 (9th Cir. 2022) (explaining the "deliberate indifference" prong of its two-part  
15 Eighth Amendment analysis); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th  
16 Cir. 2003) ("[D]e novo review of the magistrate judges' findings and recommendations is  
17 required if, but *only* if, one or both parties file objections to the findings and  
18 recommendations."). Accordingly, the Court adopts Judge Baldwin's recommendation  
19 that Defendants' Motion be granted as to Plaintiff's Eighth Amendment claim for  
20 deliberate indifference to a serious medical need.<sup>2</sup>

#### 21 IV. CONCLUSION

22 The Court notes that the parties made several arguments and cited to several  
23 cases not discussed above. The Court has reviewed these arguments and cases and  
24 determines that they do not warrant discussion as they do not affect the outcome of the  
25 issues before the Court.

26 ///

27  
28 <sup>2</sup>Judge Baldwin declined to address Defendants' personal participation and  
qualified immunity arguments because Plaintiff's claim fails on the merits. (ECF No. 120  
at 14 n.4.) The Court also need not address those arguments for the same reasons.

1 It is therefore ordered that Plaintiff's objection (ECF No. 123) to the Report and  
2 Recommendation of U.S. Magistrate Judge Carla L. Baldwin is overruled.

3 It is further ordered that Judge Baldwin's Report and Recommendation (ECF No.  
4 120) is accepted and adopted in full.

5 It is further ordered that Defendants' motion for summary judgment (ECF No. 102)  
6 is granted.

7 It is further ordered that the Clerk of Court enter judgment in Defendants' favor and  
8 close this case.

9 DATED THIS 5<sup>th</sup> Day of December 2022.



10  
11  
12 MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

ESTEBAN HERNANDEZ,

Plaintiff,

v.

WARDEN HOWELL, *et al.*,

Defendants.

Case No. 2:18-CV-1449-MMD-CLB

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

[ECF No. 102]

This case involves a civil rights action filed by Plaintiff Esteban Hernandez ("Hernandez") against Defendants Romeo Aranas ("Aranas"), James Dzurenda ("Dzurenda"), Henry Landsman ("Landsman"), Michael Minev ("Minev") and Jerry Howell ("Howell") (collectively referred to as "Defendants"). Currently pending before the Court is Defendants' motion for summary judgment. (ECF Nos. 102, 104, 109.)<sup>2</sup> Hernandez opposed the motion, (ECF No. 110), and Defendants replied. (ECF No. 112, 114.)<sup>3</sup> For the reasons stated below, the Court recommends that Defendants' motion for summary judgment, (ECF No. 102), be granted.

**I. PROCEDURAL HISTORY**

Hernandez is an inmate currently in the custody of the Nevada Department of Corrections ("NDOC"). On August 3, 2018, Hernandez filed a civil rights complaint under 42 U.S.C. § 1983 for events that occurred while Hernandez was incarcerated at the Southern Desert Correctional Center ("SDCC"). (ECF No. 5.) On December 2, 2019, the District Court entered a screening order on Hernandez's complaint (ECF No. 4), allowing

<sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

<sup>2</sup> ECF No. 104 consists of Hernandez's medical records filed under seal. ECF No. 109 is an erratum to the motion for summary judgment.

<sup>3</sup> ECF No. 114 consists of Hernandez's medical records filed under seal.

1 Hernandez to proceed on an Eighth Amendment deliberate indifference to serious  
2 medical needs claim against Defendants based on denial of treatment for hepatitis C  
3 ("Hep-C"). (See *id.* at 6.) The District Court dismissed, without prejudice, an Eighth  
4 Amendment violation based on failure to inform Hernandez that he had tested positive for  
5 Hep-C and conduct follow-up testing. (*Id.*)

6 Around the same time Hernandez filed his complaint, many other individuals in the  
7 custody of the NDOC filed similar actions alleging that the NDOC's policy for treating hep-  
8 C amounted to deliberate indifference in violation of the Eighth Amendment. (See ECF  
9 No. 6.) Thus, the Court consolidated numerous actions, including Hernandez's case, for  
10 the purpose of conducting consolidated discovery. (See ECF No. 7.) Hernandez opted to  
11 be excluded from the class action, but his case remained stayed through the pendency  
12 of the class action. (See ECF No. 10.) On September 2, 2020, the stay was lifted in this  
13 case. (ECF No. 12.) On December 11, 2020, Hernandez filed an amended complaint,  
14 without first seeking leave of court. (ECF No. 32.) Thus, the Court struck the improperly  
15 filed complaint, with leave to re-file the amended complaint with an accompanying motion  
16 requesting to do so, as required in accordance with Local Rule 15-1(a). (ECF No. 34.) On  
17 December 21, 2020, Defendants filed their notice of acceptance of service for the original  
18 complaint. (ECF No. 33.) Defendants filed their answer on December 31, 2020. (ECF No.  
19 35.) On January 12, 2021, Hernandez filed his motion for leave to file an amended  
20 complaint to add two additional Defendants Dr. Henry Landsman and Medical Director  
21 Michael Minev to his Eighth Amendment deliberate indifference claim. (ECF No. 37.) The  
22 Court granted Hernandez's motion to amend in its entirety, (ECF No. 49) and the  
23 amended complaint is now the operative complaint in this case (ECF No. 50).

24 On April 14, 2022, Defendants filed their motion for summary judgment arguing  
25 Hernandez cannot prevail as: (1) Hernandez was treated appropriately and in accordance  
26 with the medical directives and standards of care; (2) many of the Defendants were not  
27 treating physicians and thus did not personally participate in the alleged constitutional  
28 violations; and (3) Defendants are entitled to qualified immunity. (ECF No. 102.)

## II. FACTUAL BACKGROUND

Hep-C is a blood borne pathogen transmitted primarily by way of percutaneous exposure to blood. "HCV" is chronic Hep-C as diagnosed by a qualified medical practitioner. (ECF No. 102-2 at 17.) Chronic Hep-C results in liver fibrosis. (ECF No. 102-7 at 2 (Declaration of Dr. Minev).) Fibrosis is the initial stage of liver scarring. (*Id.*) Chronic Hep-C builds up fibrosis (scar tissue) in the afflicted person's liver. (*Id.*) When the fibrosis increases, it can lead to cirrhosis of the liver, a liver disease that forestalls common liver function. (*Id.*) When liver cells are not functioning, certain clinical signs will appear on the patient, which include but are not limited to: (1) spider angiomas (vascular lesions on the chest and body); (2) palmar erythema (reddening of the palms); (3) gynecomastia (increase in breast gland size); (4) ascites (accumulation of fluid in the abdomen); and (5) jaundice (yellow discoloration of the skin and mucous membranes). (*Id.*)

Medical Directive ("MD") 219 governs treatment of HCV at the NDOC. (See ECF No. 102 at 5.) At the time Hernandez filed his initial grievance related to his Hep-C treatment at issue in this case, inmates that tested positive for HCV were enrolled in the Infectious Disease Chronic Clinic for Hep-C. (*Id.*) A non-invasive method of procuring a patient's Chronic Hep-C progression, in addition with the clinical signs, is through the Aspartate Aminotransferase Platelet Ratio Index ("APRI") formula. (ECF No. 102-7 at 3.) To calculate a patient's APRI score, the patient's blood platelet count, which is obtained through a blood test, is necessary. (*Id.*) An APRI score is calculated using the AST to Platelet Ratio Index. (*Id.*) Direct acting antiviral ("DAA") treatment, such as Epclusa, is an FDA-approved treatment for HCV. (ECF No. 102-1 at 6 (defining DAA).)

The current version of MD 219 established three priority levels for DAA treatment. (*Id.* at 7-12.) This priority level system guarantees that all HCV patients will receive DAAs as needed and required to treat their condition, while at the same time providing medical personnel with discretion and flexibility to safeguard that those in a lower level of priority obtain expedited DAA treatment when in the sound judgment of the medical provider examining the patient it is determined that it is medically necessary. (*Id.* at 10.)

1 Hernandez was enrolled in the Chronic Disease Clinic for HCV in 2012 and was  
2 continuously followed by NDOC for the disease. (ECF No. 104-1 (sealed).) On October  
3 18, 2018, Hernandez's APRI score was 0.718 and he did not exhibit any symptoms of  
4 decreased liver function. (ECF No. 102-7 at 4.) At the time Hernandez began grieving this  
5 issue in late 2016, Minev states Hernandez was not a candidate for the advanced Chronic  
6 Hepatitis-C treatment program available at the time. (*Id.*)

7 On February 27, 2019, Hernandez received a CT scan of his abdomen, which  
8 showed a "large irregularly shaped hypoattenuating lesion in the lateral segment of the  
9 left hepatic lobe. Finding may represent focal hepatic steatosis." (ECF Nos. 104-3  
10 (sealed).) The CT scan otherwise showed that Hernandez's liver and portal veins,  
11 gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, stomach were all  
12 "normal". (*Id.*) On February 28, 2019, Hernandez received an MRI, which showed  
13 cholelithiasis and two hepatic nodules. (*Id.*) A follow-up MRI performed on March 4, 2019  
14 showed a large left lobe liver hemangioma. (*Id.*) An additional MRI was performed on  
15 June 20, 2019, which again indicated a stable hemangioma without a malignant type  
16 enhancement. (ECF No. 104-4 (sealed).) A follow-up visit with an oncologist was  
17 recommended and approved by NDOC in July 2019. (ECF No. 104-6 (sealed).) Dr.  
18 Carducci, an outside medical provider, determined a biopsy was not necessary. (ECF  
19 Nos. 104-7, 104-8 (sealed).) A second MRI was performed on January 7, 2020, which  
20 indicated a stable, marginally smaller mass and no new lesions in the liver. (ECF No. 104-  
21 5 (sealed).)

22 In 2020, Hernandez received DAA treatment Epclusa and lab work completed in  
23 April 2021 shows Hernandez is no longer positive for HCV. (ECF Nos. 104-2, 104-9  
24 (sealed).)

### 25 **III. LEGAL STANDARDS**

26 "The court shall grant summary judgment if the movant shows that there is no  
27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
28 of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The

1 substantive law applicable to the claim determines which facts are material. *Coles v.*  
2 *Eagle*, 704 F.3d 624, 628 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242,  
3 248 (1986)). Only disputes over facts that address the main legal question of the suit can  
4 preclude summary judgment, and factual disputes that are irrelevant are not material.  
5 *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020). A dispute is “genuine” only where  
6 a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248.

7 The parties subject to a motion for summary judgment must: (1) cite facts from the  
8 record, including but not limited to depositions, documents, and declarations, and then  
9 (2) “show[] that the materials cited do not establish the absence or presence of a genuine  
10 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”  
11 Fed. R. Civ. P. 56(c)(1). Documents submitted during summary judgment must be  
12 authenticated, and if only personal knowledge authenticates a document (i.e., even a  
13 review of the contents of the document would not prove that it is authentic), an affidavit  
14 attesting to its authenticity must be attached to the submitted document. *Las Vegas*  
15 *Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011). Conclusory statements,  
16 speculative opinions, pleading allegations, or other assertions uncorroborated by facts  
17 are insufficient to establish the absence or presence of a genuine dispute. *Soremekun v.*  
18 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

19 The moving party bears the initial burden of demonstrating an absence of a  
20 genuine dispute. *Soremekun*, 509 F.3d at 984. “Where the moving party will have the  
21 burden of proof on an issue at trial, the movant must affirmatively demonstrate that no  
22 reasonable trier of fact could find other than for the moving party.” *Soremekun*, 509 F.3d  
23 at 984. However, if the moving party does not bear the burden of proof at trial, the moving  
24 party may meet their initial burden by demonstrating either: (1) there is an absence of  
25 evidence to support an essential element of the nonmoving party’s claim or claims; or (2)  
26 submitting admissible evidence that establishes the record forecloses the possibility of a  
27 reasonable jury finding in favor of the nonmoving party. See *Pakootas v. Teck Cominco*  
28 *Metals, Ltd.*, 905 F.3d 565, 593-94 (9th Cir. 2018); *Nissan Fire & Marine Ins. Co. v. Fritz*

1 Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). The court views all evidence and any  
2 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*  
3 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). If the moving party does not meet its  
4 burden for summary judgment, the nonmoving party is not required to provide evidentiary  
5 materials to oppose the motion, and the court will deny summary judgment. *Celotex*, 477  
6 U.S. at 322-23.

7 Where the moving party has met its burden, however, the burden shifts to the  
8 nonmoving party to establish that a genuine issue of material fact actually exists.  
9 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). The  
10 nonmoving must “go beyond the pleadings” to meet this burden. *Pac. Gulf Shipping Co.*  
11 *v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (internal quotation  
12 omitted). In other words, the nonmoving party may not simply rely upon the allegations or  
13 denials of its pleadings; rather, they must tender evidence of specific facts in the form of  
14 affidavits, and/or admissible discovery material in support of its contention that such a  
15 dispute exists. See Fed.R.Civ.P. 56(c); *Matsushita*, 475 U.S. at 586 n. 11. This burden is  
16 “not a light one,” and requires the nonmoving party to “show more than the mere existence  
17 of a scintilla of evidence.” *Id.* (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387  
18 (9th Cir. 2010)). The non-moving party “must come forth with evidence from which a jury  
19 could reasonably render a verdict in the non-moving party’s favor.” *Pac. Gulf Shipping*  
20 *Co.*, 992 F.3d at 898 (quoting *Oracle Corp. Sec. Litig.*, 627 F.3d at 387). Mere assertions  
21 and “metaphysical doubt as to the material facts” will not defeat a properly supported and  
22 meritorious summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
23 475 U.S. 574, 586–87 (1986).

24 When a *pro se* litigant opposes summary judgment, his or her contentions in  
25 motions and pleadings may be considered as evidence to meet the non-party’s burden to  
26 the extent: (1) contents of the document are based on personal knowledge, (2) they set  
27 forth facts that would be admissible into evidence, and (3) the litigant attested under  
28 penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923



(9th Cir. 2004).

Upon the parties meeting their respective burdens for the motion for summary judgment, the court determines whether reasonable minds could differ when interpreting the record; the court does not weigh the evidence or determine its truth. *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The court may consider evidence in the record not cited by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3). Nevertheless, the court will view the cited records before it and will not mine the record for triable issues of fact. *Oracle Corp. Sec. Litig.*, 627 F.3d at 386 (if a nonmoving party does not make nor provide support for a possible objection, the court will likewise not consider it).

#### IV. DISCUSSION

On April 14, 2022, Defendants filed the instant motion for summary judgment arguing: (1) Defendants were not deliberately indifferent to Hernandez's serious medical needs; (2) Howell, Aranas, Dzurenda, and Minev had no personal participation in the alleged constitutional violations; and (3) alternatively, Defendants are entitled to qualified immunity. (ECF No. 102.)

##### A. Deliberate Indifference to Serious Medical Needs

The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency" by prohibiting the imposition of cruel and unusual punishment by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation omitted). The Amendment's proscription against the "unnecessary and wanton infliction of pain" encompasses deliberate indifference by state officials to the medical needs of prisoners. *Id.* at 104 (internal quotation omitted). It is thus well established that "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Id.* at 105. Article 1, Section 6 of the Nevada Constitution mirrors the Eighth Amendment's Cruel and Unusual Punishment Clause, and provides protections that are coextensive with the Eighth Amendment of the United States Constitution. Courts in this district have applied the same legal standards to the cruel and unusual punishment

1 corollary included in Article 1, Section 6 of the Nevada Constitution as are applied to the  
2 corollaries in the United States Constitution. See, e.g., *Fowler v. Sisolak*, No. 2:19-cv-  
3 01418-APG-DJA, 2020 WL 6270276, at \*4 (D. Nev. Oct. 26, 2020).

4 Courts in Ninth Circuit employ a two-part test when analyzing deliberate  
5 indifference claims. The plaintiff must satisfy “both an objective standard—that the  
6 deprivation was serious enough to constitute cruel and unusual punishment—and a  
7 subjective standard—deliberate indifference.” *Colwell*, 763 F.3d at 1066 (internal  
8 quotation omitted). First, the objective component examines whether the plaintiff has a  
9 “serious medical need,” such that the state’s failure to provide treatment could result in  
10 further injury or cause unnecessary and wanton infliction of pain. *Jett v. Penner*, 439 F.3d  
11 1091, 1096 (9th Cir. 2006). Serious medical needs include those “that a reasonable  
12 doctor or patient would find important and worthy of comment or treatment; the presence  
13 of a medical condition that significantly affects an individual’s daily activities; or the  
14 existence of chronic and substantial pain.” *Colwell*, 763 F.3d at 1066 (internal quotation  
15 omitted).

16 Second, the subjective element considers the defendant’s state of mind, the extent  
17 of care provided, and whether the plaintiff was harmed. “Prison officials are deliberately  
18 indifferent to a prisoner’s serious medical needs when they deny, delay, or intentionally  
19 interfere with medical treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)  
20 (internal quotation omitted). However, a prison official may only be held liable if he or she  
21 “knows of and disregards an excessive risk to inmate health and safety.” *Toguchi v.*  
22 *Chung*, 391 F.3d 1050, 1057 (9th Cir. 2004). The defendant prison official must therefore  
23 have actual knowledge from which he or she can infer that a substantial risk of harm  
24 exists and make that inference. *Colwell*, 763 F.3d at 1066. An accidental or inadvertent  
25 failure to provide adequate care is not enough to impose liability. *Estelle*, 429 U.S. at 105–  
26 06. Rather, the standard lies “somewhere between the poles of negligence at one end  
27 and purpose or knowledge at the other. . .” *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).  
28 Accordingly, the defendants’ conduct must consist of “more than ordinary lack of due

1 care.” *Id.* at 835 (internal quotation omitted).

2 Moreover, the medical care due to prisoners is not limitless. “[S]ociety does not  
3 expect that prisoners will have unqualified access to health care....” *Hudson v. McMillian*,  
4 503 U.S. 1, 9 (1992). Accordingly, prison officials are not deliberately indifferent simply  
5 because they selected or prescribed a course of treatment different than the one the  
6 inmate requests or prefers. *Toguchi*, 391 F.3d at 1058. Only where the prison officials’  
7 “‘chosen course of treatment was medically unacceptable under the circumstances,’ and  
8 was chosen ‘in conscious disregard of an excessive risk to the prisoner’s health,’” will the  
9 treatment decision be found unconstitutionally infirm. *Id.* (quoting *Jackson v. McIntosh*,  
10 90 F.3d 330, 332 (9th Cir. 1996)). In addition, it is only where those infirm treatment  
11 decisions result in harm to the plaintiff—though the harm need not be substantial—that  
12 Eighth Amendment liability arises. *Jett*, 439 F.3d at 1096.

### 13 1. Analysis

14 Starting with the objective element, the parties agree that Hernandez’s Hep-C  
15 constitutes a “serious medical need.” However, Defendants argue summary judgment  
16 should be granted because Hernandez cannot establish the second, subjective element  
17 of his claim. Specifically, Defendants argue they were not deliberately indifferent to  
18 Hernandez’s condition. Under the subjective element, there must be some evidence to  
19 create an issue of fact as to whether the prison official being sued knew of, and  
20 deliberately disregarded the risk to Hernandez’s safety. *Farmer*, 511 U.S. at 837. “Mere  
21 negligence is not sufficient to establish liability.” *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th  
22 Cir. 1998). Moreover, this requires Hernandez to “demonstrate that the defendants’  
23 actions were both an actual and proximate cause of [his] injuries.” *Lemire v. California*,  
24 726 F.3d 1062, 1074 (9th Cir. 2013) (citing *Conn v. City of Reno*, 591 F.3d 1081, 1098-  
25 1101 (9th Cir. 2010), *vacated by City of Reno, Nev. v. Conn*, 563 U.S. 915 (2011),  
26 *reinstated in relevant part* 658 F.3d 897 (9th Cir. 2011)).

27 Here, as detailed above, Defendants submitted authenticated and undisputed  
28 evidence regarding the medical treatment Hernandez received while incarcerated related

1 to his Hep-C. (See ECF Nos. 104-1, 104-2, 104-3, 104-4, 104-5, 104-6, 104-7, 104-8,  
2 104-9 (sealed).) According to this evidence, Hernandez was first enrolled in CCC for  
3 monitoring of his Hep-C in 2012. (ECF No. 104-1 (sealed).) Hernandez received routine  
4 care through the CCC for his Hep-C. (*Id.*)

5 On October 18, 2018, Hernandez's APRI score was 0.718 and he did not exhibit  
6 any symptoms of decreased liver function. (ECF No. 102-7 at 4.) APRI scores of above  
7 0.5 indicate there is likely some liver damage (fibrosis). (*Id.* at 3.) APRI scores above 1.5  
8 indicate a patient likely has or is quickly approaching cirrhosis of the liver. (*Id.*) At the time  
9 Hernandez began grieving this issue in late 2016, Minev states Hernandez was not a  
10 candidate for the advanced Chronic Hepatitis-C treatment program available at the time.  
11 (*Id.*)

12 On February 27, 2019, Hernandez received a CT scan of his abdomen, which  
13 showed a "large irregularly shaped hypoattenuating lesion in the lateral segment of the  
14 left hepatic lobe. Finding may represent focal hepatic steatosis." (ECF Nos. 104-3  
15 (sealed).) The CT scan otherwise showed that Hernandez's liver and portal veins,  
16 gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, stomach were all  
17 "normal". (*Id.*) On February 28, 2019, Hernandez received an MRI, which showed  
18 cholelithiasis and two hepatic nodules. (*Id.*) A follow-up MRI performed on March 4, 2019  
19 showed a large left lobe liver hemangioma. (*Id.*) An additional MRI was performed on  
20 June 20, 2019, which again indicated a stable hemangioma without a malignant type  
21 enhancement. (ECF No. 104-4 (sealed).) A follow-up visit with an oncologist was  
22 recommended and approved by NDOC in July 2019. (ECF No. 104-6 (sealed).) Dr.  
23 Carducci, an outside medical provider, determined a biopsy was not necessary. (ECF  
24 Nos. 104-7, 104-8 (sealed).) A second MRI was performed on January 7, 2020, which  
25 indicated a stable, marginally smaller mass and no new lesions in the liver. (ECF No. 104-  
26 5 (sealed).)

27 In 2020, Hernandez received DAA treatment Epclusa and lab work completed in  
28 April 2021 indicate Hernandez is no longer positive for HCV. (ECF Nos. 104-2, 104-9

1 (sealed).)

2 Defendant Aranas, former Medical Director for the NDOC, and Defendant  
3 Dzurenda, former Director of the NDOC, each filed declarations in support of the motion  
4 for summary judgment, stating that they did not recall having direct interactions with  
5 Hernandez and did not treat Hernandez. They further stated that they did not deny  
6 treatment to Hernandez, as decisions for treatment were made by the Utilization Review  
7 Panel or the treating physician. (ECF No. 102-3, 102-6.)

8 Defendant Howell, Warden for the NDOC, filed a declaration in support of the  
9 motion for summary judgment, stating that he had no authority to order treatment for HCV  
10 for Hernandez, as he was not part of the committee that could have ordered treatment,  
11 and Howell did not recall any contact with Hernandez relating to his medical conditions  
12 and did not substantively respond to any medical grievances. (ECF No. 102-4.)

13 Defendant Landsman, former Senior Physician at the SDCC, filed a declaration in  
14 support of the motion for summary judgment, stating Hernandez has been under the  
15 continuous care of many NDOC doctors. Landsman was not a member of the Hepatitis  
16 Review Committee tasked with the responsibility of approving treatment for Hep-C, he  
17 did not deny Hernandez treatment, and referred him to outside medical care when  
18 indicated. Landsman did not diagnose with Hernandez as suffering from advanced  
19 cirrhosis of the liver or as suffering symptoms associated with HCV infection. Hernandez  
20 did not exhibit any symptoms of decreased liver function, namely: (1) spider angiomas;  
21 (2) palmar erythema; (3) gynecomastia; (4) ascites; or (5) jaundice. (ECF No. 102-5.)

22 Defendant Minev, current NDOC Medical Director, filed a declaration in support of  
23 the motion for summary judgment, stating as follows: if a patient's APRI score is above  
24 0.5, there is likely some liver damage (fibrosis) and if the APRI score is above 1.5, the  
25 patient likely has or is quickly approaching cirrhosis of the liver. The APRI score is not  
26 definitive but is a reliable indicator of liver fibrosis. As part of his duties, Minev oversees  
27 the Chronic Hep-C treatment program at SDCC. He has reviewed test results and medical  
28 records of NDOC inmates to determine who required advanced forms of Hep-C treatment.

1 In addition to APRI scores, Minev also considers the inmates' clinical signs of forestalled  
2 or reduced liver function. He almost always declined to recommend an NDOC inmate with  
3 Hep-C, who has an APRI score near or below 1.0 for advanced forms of Hep-C treatment  
4 due to risk that drug intervention may cause to a patient with Hep-C. All inmates who test  
5 positive for HCV and are otherwise medically indicated receive advanced treatment. (ECF  
6 No. 29-5.)

7 Moreover, as to Hernandez specifically, Minev stated he reviewed Hernandez's  
8 medical records and can attest that Hernandez suffered from Chronic Hepatitis C and his  
9 APRI score, based on blood test results in October 2018, was 0.718. Hernandez did not  
10 exhibit any symptoms of decreased liver function, namely: (1) spider angiomas; (2)  
11 palmar erythema; (3) gynecomastia; (4) ascites; or (5) jaundice. Based on Hernandez's  
12 APRI score and lack of clinical signs indicating decreased liver function, Hernandez was  
13 not a candidate for HCV treatment at the time of his grievance. Hernandez has since  
14 received treatment and no longer shows HCV in his system. (ECF No. 102-7.)

15 Based on the above evidence, the Court finds that Defendants have submitted  
16 authenticated evidence that establishes they affirmatively monitored and ultimately  
17 treated Hernandez's Hep-C. Therefore, the Court finds Defendants have met their initial  
18 burden on summary judgment by showing the absence of a genuine issue of material fact  
19 as to the deliberate indifference claim. *See Celotex Corp.*, 477 U.S. at 325. The burden  
20 now shifts to Hernandez to produce evidence that demonstrates an issue of fact exists as  
21 to whether Defendants were deliberately indifferent to his medical needs. *Nissan*, 210  
22 F.3d at 1102.

23 Hernandez's opposition reiterates his claim that the delay in providing him  
24 treatment for his Hep-C caused him further damage, including what he asserts is a  
25 cancerous tumor on his liver. (ECF No. 110.) Hernandez asserts Defendants were  
26 deliberately indifferent to Hernandez because they failed to test Hernandez for multiple  
27 years and have failed to do a biopsy to determine the "extent of cancer". (*Id.* at 25.)  
28 Hernandez points to several of his own medical records, mainly lab records, to support

1 his assertions. However, as discussed above, Hernandez's medical records from the  
2 Centennial Hills Hospital showed a hepatic nodule, which was described as: "Statistically,  
3 the differential in a noncirrhotic patient without a history of malignancy favors benign  
4 etiologies". (ECF No. 104-3, 104-4 (sealed).) The records indicate Hernandez does not  
5 have cirrhosis of the liver, and the nodule is likely benign. The benign nature of the nodule  
6 was confirmed in follow up visits, and Dr. Carducci, an outside medical provider, did not  
7 feel that a biopsy of the "stable hemangioma" was necessary. (ECF No. 104-7, 104-8  
8 (sealed).)

9 Aside from his own assertions and medical records (much of which were provided  
10 with Defendants' summary judgment), Hernandez provides no further evidence or support  
11 that a delay in treatment for his Hep-C was the cause of any damage. He has not come  
12 forward with evidence to show Defendants knew of an excessive risk to his health and  
13 disregarded that risk. The evidence before the Court shows Hernandez was treated for  
14 his Hep-C through monitoring and other actions and there is no evidence showing that  
15 his Hep-C or any delay in providing treatment was the cause of any damage. Further,  
16 there is no evidence that Hernandez's nodule is cancerous. Therefore, Hernandez has  
17 failed to meet his burden on summary judgment to establish that prison officials were  
18 deliberately indifferent to his medical needs as he failed to come forward with any  
19 evidence to create an issue of fact as to whether Defendants deliberately denied, delayed,  
20 or intentionally interfered with the treatment plan. *See Hallett*, 296 F.3d at 744.

21 Moreover, to the extent that Hernandez's assertions in this case are based upon  
22 his disagreement with Defendants' choice of treatment, this does not amount to deliberate  
23 indifference. *See Toguchi*, 391 F.3d at 1058. In cases where the inmate and prison staff  
24 simply disagree about the course of treatment, only where it is medically unacceptable  
25 can the plaintiff prevail. *Id.* Therefore, Hernandez has failed to show that the NDOC's  
26 "chosen course of treatment was medically unacceptable under the circumstances." *Id.*  
27 Accordingly, Hernandez fails to meet his burden to show an issue of fact that Defendants  
28 were deliberately indifferent to his needs because Hernandez has only shown that he

disagrees between alternative courses of treatment, such as being given drug intervention treatment as opposed to having his HCV monitored for progression.

Based on the above, the Court recommends that Defendants' motion for summary judgment as to the medical deliberate indifference claim be granted.<sup>4</sup>

## V. CONCLUSION

For good cause appearing and for the reasons stated above, the Court recommends that Defendants' motion for summary judgment, (ECF No. 102), be granted.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

## VI. RECOMMENDATION

**IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary judgment, (ECF No. 102), be **GRANTED**; and,

**IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** in favor of Defendants and **CLOSE** this case.

**DATED:** September 7, 2022.



UNITED STATES MAGISTRATE JUDGE

<sup>4</sup> Because the Court finds that Hernandez's claim fails on the merits, the Court need not address Defendants' personal participation or qualified immunity arguments.



# Appendix C

1  
2 INMATE REQUEST FOR FINAL DISPOSITION OF CHARGES FOR  
3 WARRANTS AND/OR TRAFFIC VIOLATIONS  
4 WITHIN THE STATE OF: \_\_\_\_\_  
5  
6  
7

8 TO: \_\_\_\_\_  
9  
10  
11  
12  
13

14 SUBJECT: Pending charges on Nevada Department of Corrections Inmates.  
15  
16

17 The below named inmate requested that we determine whether he/she has any  
18 outstanding charges in your Court. If he/she has, he/she would like to  
19 resolve them, so that they will not continue to affect his/her rehabilitation  
20 program.

21 INMATE'S NAME: \_\_\_\_\_ NDOC NO.: \_\_\_\_\_  
22

23 AKA(s): \_\_\_\_\_  
24

25 SOCIAL SECURITY NO.: \_\_\_\_\_ D.O.B.: \_\_\_\_\_  
26

27 TYPE OF COMPLAINT: \_\_\_\_\_  
28

29 CITATION/CASE NO.: \_\_\_\_\_  
30

31 DATE OF INCIDENT: \_\_\_\_\_ CITY: \_\_\_\_\_ STATE: \_\_\_\_\_  
32

33 LOCATION OF INCIDENT: \_\_\_\_\_  
34

35 POSSIBLE RESOLUTIONS

36 \_\_\_\_\_ I AGREE TO PLEAD GUILTY IN EXCHANGE FOR MY IMPOSED SENTENCE AND/OR  
37 FINES TO BE CONVERTED TO JAIL TIME AND THAT SAID JAIL TIME BE RUN AS  
38 TIME SERVED WITH MY PRESENT NEVADA PRISON SENTENCE

39 OR

40 \_\_\_\_\_ I AGREE TO PLEAD GUILTY IN EXCHANGE FOR MY IMPOSED SENTENCE AND/OR  
41 FINES TO BE CONVERTED TO JAIL TIME AND THAT SAID JAIL TIME BE RUN AS  
42 CONCURRENT WITH MY PRESENT NEVADA PRISON SENTENCE  
43  
44

45  
46  
47 \_\_\_\_\_  
48 INMATE SIGNATURE

49 \_\_\_\_\_  
50 DATE

FORM DATE: 8/29/2006

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

**In the Matter of the Accusation and  
Petition to Revoke Probation Against:** )  
)  
)  
)

**HENRY REINHOLD LANDSMAN, M.D.)**

**Case No. D1-2009-199740**

**Physician's and Surgeon's  
Certificate No. G-44389** )  
)  
)  
)

**OAH No. 2013020727**

**Respondent** )  
)  
)  
)

**DECISION**

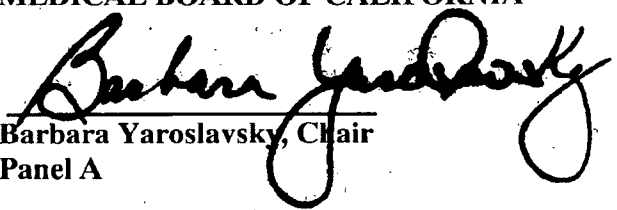
**The attached Proposed Decision is hereby adopted as the Decision and  
Order of the Medical Board of California, Department of Consumer Affairs,  
State of California.**

**This Decision shall become effective at 5:00 p.m. on July 19, 2013.**

**IT IS SO ORDERED June 20, 2013.**

**MEDICAL BOARD OF CALIFORNIA**

**By:**

  
**Barbara Yaroslavsky, Chair  
Panel A**

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to )  
Revoke Probation Against: )

**HENRY REINHOLD LANDSMAN, M.D.** )

Physician's & Surgeon's )  
Certificate No. G-44389 )

\_\_\_\_\_  
Respondent. )

MBC No. D1-2009-199740

**ORDER GRANTING STAY**

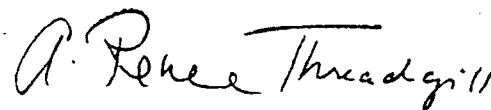
(Gov't Code Section 11521)

Henry Reinhold Landsman, M.D., has filed a Petition for Reconsideration of the Decision in this matter with an effective date of July 19, 2013. A stay of execution in this Decision is hereby granted.

Execution is stayed until July 29, 2013.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: July 17, 2013



\_\_\_\_\_  
A. Renee Threadgill  
Chief of Enforcement  
Medical Board of California

Exhibit 4

**BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition )  
to Revoke Probation Against: )

**HENRY REINHOLD LANDSMAN, M.D.)**  
Physician's and Surgeon's )  
Certificate No. G-44389 )

Case No. D1-2009-199740

Respondent. )  
\_\_\_\_\_ )

**DENIAL BY OPERATION OF LAW  
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by Henry Reinhold Landsman, M.D., and the time for action having expired at 5 p.m. on July 29, 2013, the petition is deemed denied by operation of law.

Just so you know the  
medication Prescribed by  
the hospital was  
Hydroxyzine.

Helps with anxiety, nausea,  
vomiting, allergies, skin rash, hives  
& itching  
you were prescribed it for short term

BEFORE THE  
MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition  
to Revoke Probation Against:

HENRY REINHOLD LANDSMAN, M.D.,

Physician's and Surgeon's Certificate  
No. G44389

Respondent.

Case No. D1-2009-199740

OAH No. 2013020727

**PROPOSED DECISION**

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on April 15, 2013, in Oakland, California.

Deputy Attorney General Jane Zack Simon represented complainant Linda K. Whitney, Executive Director, Medical Board of California, Department of Consumer Affairs.

Respondent Henry Reinhold Landsman, M.D., represented himself.

The record closed and the matter was submitted on April 15, 2013.

**FACTUAL FINDINGS**

1. On April 13, 1981, the Medical Board of California (board) issued Physician's and Surgeon's Certificate No. G44389 to respondent Henry Reinhold Landsman, M.D. On December 1, 2011, in Case No. 16-2009-199740, the board revoked respondent's license, but stayed the revocation and placed respondent on probation for five years subject to terms and conditions. The board's action took effect on December 2, 2011. Respondent's license was scheduled to expire on March 31, 2013.

2. Complainant Linda K. Whitney issued the accusation and petition to revoke probation in her official capacity as Executive Director of the board.

*Petition to revoke probation*

3. Case No. 16-2009-199740 arose out of a 2008 decision by the United States Department of the Army to indefinitely restrict the clinical privileges and practice of respondent at Weed Army Community Hospital. Upon review of the decision, the board concluded that it raised serious concerns about respondent's ability to practice safely. The board imposed 13 conditions of probation on respondent, including the following:

1. Clinical Training Program

Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine or an equivalent program (Program).

The Program shall consist of a Comprehensive Assessment comprised of a two-day assessment of Respondent's physical and mental health; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment pertaining to Respondent's specialty or sub-specialty, and at minimum, a 40-hour program of clinical education in the area of practice in which Respondent was alleged to be deficient and which takes into account data obtained from the assessment and any other information that the Board or its designee deems relevant. Respondent shall pay all expenses associated with the Program.

Based on Respondent's performance and test results in the assessment and clinical education portions, the Program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, treatment for any medical condition, treatment for any psychological condition or anything else affecting Respondent's practice of medicine. Respondent shall comply with Program recommendations.

At the completion of any additional educational or clinical training, Respondent shall submit to and pass an examination. The Program's determination whether or not Respondent passed the examination or successfully completed the Program shall be binding.

Respondent shall complete the Program not later than six months after Respondent's initial enrollment unless the Board or its designee agrees in writing to a later time for completion.

Failure to participate in and complete successfully all phases of the Program outlined above is a violation of probation.

If Respondent fails to complete the Program within the designated time period, Respondent shall cease the practice of medicine within 72 hours after being notified by the Division or its designee of Respondent's failure.

## 2. Notification

Prior to engaging in the practice of medicine Respondent shall provide a true copy of the Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to Respondent, at any other facility where Respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to Respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities, or insurance carrier.

## 5. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

## 11. Violation of Probation

Failure to comply with any term or condition of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed



against Respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

### 13. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

4. Dianna Gharibian is a probation inspector for the board. On November 11, 2011, Gharibian was assigned as respondent's probation inspector. She is the only inspector who has been assigned to respondent.

5. Gharibian conducted an intake interview with respondent on December 6, 2011. The interview lasted over 90 minutes. Respondent told Gharibian he was working at Los Angeles Community Hospital. During the interview, Gharibian went over each of the 13 conditions of probation with respondent and answered any questions that he had. She told him what he needed to do to comply with each condition, and impressed upon him the importance of compliance with all the conditions. Respondent told Gharibian he understood the conditions.

6. On December 20, 2011, respondent filed an action against the board in superior court, in which he seeks to set aside the board's disciplinary order in Case No. 16-2009-199740. That action is still pending. There is no evidence that the court has ordered a stay of this proceeding.

7. Respondent did not comply with Condition 1. He did not enroll in PACE or an equivalent program within 60 days of the effective date of the board's decision, as required by Condition 1. Gharibian wrote to respondent on February 17, 2012, and advised him that he was in violation of probation. On February 22, 2012, respondent requested a six-month extension to enroll in PACE. By telephone on March 1, 2012, and by mail on March 2, 2012, Gharibian denied that request and informed respondent that he was required to enroll in and complete PACE or an equivalent program as set forth in Condition 1. As of the date of hearing in this matter, respondent has not enrolled in PACE or an equivalent program.

8. Respondent did not timely comply with Condition 2. Gharibian repeatedly informed respondent that the board required proof, from the Chief of Staff or the Chief Executive Officer at Los Angeles Community Hospital, that respondent had provided that officer with a copy of the Accusation and Decision in Case No. 16-2009-199740.

Respondent represented to Gharibian that he had done so, but did not provide proof that he had done so. Ultimately, in response to a telephone call from Gharibian, the hospital provided proof of notification in August 2012.

9. Respondent did not comply with Condition 5. He did not timely file a quarterly declaration for the fourth quarter of 2011 and did not file an original quarterly declaration, signed under penalty of perjury, for the first quarter of 2012 (respondent crossed out the language that the form was signed under penalty of perjury and faxed the document to the board). Respondent has not filed any subsequent quarterly declarations.

10. Respondent did not comply with Condition 13, as he has failed to pay probation monitoring costs.

11. On May 11, 2012, the board served a Citation Order on respondent. The Citation Order was served by certified mail to respondent's address of record. The Citation Order directed respondent to provide proof of compliance with the above conditions of probation within 30 days. The Citation Order was returned to the board marked "unclaimed." On June 25, 2012, the board re-served the Citation Order by regular and certified mail to respondent's address of record, and again it was returned marked "unclaimed."

12. On September 24, 2012, the board issued a Cease Practice Order, ordering respondent to cease practice by virtue of his failure to timely enroll in and complete PACE or an equivalent program.

#### *Out-of-state discipline*

13. On December 30, 2011, the Nevada Board of Medical Examiners issued a "Findings of Fact, Conclusions of Law and Order" regarding respondent's license to practice medicine in the State of Nevada. The Nevada Board of Medical Examiners determined that respondent's care and treatment of an emergency room patient with complaints of chest pain and elevated troponin level should have caused him to continue with further evaluation and testing prior to discharge, or to transfer the patient to a more advanced medical facility, and that respondent's care and treatment of the patient fell below the standard of care. Respondent was issued a public reprimand and required to complete continuing medical education in medical record keeping.

#### *Respondent's evidence*

14. Respondent continues to dispute the merits of Case No. 16-2009-199740. Respondent maintains that he is a competent, well-trained emergency room physician.

15. Respondent has chosen not to attend PACE or an equivalent program. He advances two reasons for his decision. First, it is his conviction that if attends PACE, it would "cripple [his] practice forever." Second, one of respondent's theories in the superior

court proceeding is that the discipline imposed by the board in Case No. 16-2009-199740 is excessive; he does not want to compromise his argument in superior court by complying with the board's decision.

At hearing, respondent offered certificates to show that he has completed three "self-assessment" tests, prepared by the American Board of Emergency Medicine, in different areas of emergency medicine. These tests, however, were not approved by the board as an equivalent to PACE, and they do not in fact satisfy the requirements of the clinical training program described in Condition 1.

## LEGAL CONCLUSIONS

### *Probation revocation*

1. Respondent violated Conditions 1, 2, 5 and 13 of his probation. (Findings 3 through 12.) Each violation constitutes cause to revoke respondent's probation and impose the discipline that was stayed in the board's decision in Case No. 16-2009-199740, namely, revocation of his physician's and surgeon's certificate.

### *First cause for discipline*

2. Business and Professions Code section 141, subdivision (a), provides:

For any licensee holding a license issued by a board under the jurisdiction of a department, a disciplinary action by another state, by any agency of the federal government, or by another country for any act substantially related to the practice regulated by the California license, may be a ground for disciplinary action by the respective state licensing board. A certified copy of the record of the disciplinary action taken against the licensee by another state, an agency of the federal government, or another country shall be conclusive evidence of the events related therein.

Business and Professions Code section 2305 provides:

The revocation, suspension, or other discipline, restriction, or limitation imposed by another state upon a license or certificate to practice medicine issued by that state, or the revocation, suspension, or restriction of the authority to practice medicine by any agency of the federal government, that would have been grounds for discipline in California of a licensee under this chapter, shall constitute grounds for disciplinary action for unprofessional conduct against the licensee in this state.

3. The State of Nevada publicly reprimanded respondent's medical license for a breach of the standard of care and ordered him to take a continuing medical education class. Respondent's conduct would have been a ground for discipline in California under Business and Professions Code section 2234. Pursuant to Business and Professions Code sections 141 and 2305, the Nevada discipline can form the basis for discipline in California. Accordingly, cause for disciplinary action against respondent's license exists pursuant to Business and Professions Code sections 141 and 2305, by reason of the matters set forth in Finding 13.

*Disciplinary considerations*

4. Protection of the public is the board's highest priority. (Bus. & Prof. Code, § 2001.1.) The board placed respondent on probation to insure that he is safe to practice. The most fundamental condition of probation is the requirement that respondent enroll in and complete the clinical training program offered by PACE, or an equivalent program. Respondent has not complied with that condition, and he has made it plain that he will not comply. In addition, he did not timely comply with Condition 2 (Notification), and has not complied with Conditions 5 (Quarterly Reports) and 13 (Probation Costs). It would be contrary to the public interest to allow respondent to remain licensed, even on a probationary basis.

ORDER

The Petition to Revoke Probation concerning Physician's and Surgeon's Certificate No. G44389 issued to respondent Henry Reinhold Landsman, M.D., is granted. The stay is lifted and the certificate is revoked.

DATED: May 15, 2013

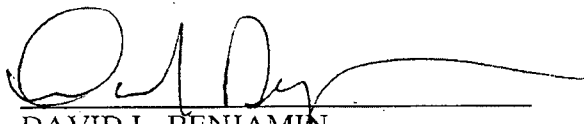
  
\_\_\_\_\_  
DAVID L. BENJAMIN  
Administrative Law Judge  
Office of Administrative Hearings

Exhibit 5

**A. Ground one:**

**Supporting FACTS** (state *briefly* without citing cases or law)

**B. Ground two:**

**Supporting FACTS** (state *briefly* without citing cases or law):

Exhibit 5

BEFORE THE BOARD OF MEDICAL EXAMINERS  
OF THE STATE OF NEVADA

\* \* \* \* \*

In the Matter of Charges and )

Case No. 14-5951-1

Complaint Against )

**FILED**

HENRY R. LANDSMAN, M.D., )

SEP 11 2015

Respondent. )

NEVADA STATE BOARD OF  
MEDICAL EXAMINERS

By: [Signature]

**SETTLEMENT AGREEMENT**

**THIS AGREEMENT** is hereby entered into by and between the Investigative Committee (IC) of the Nevada State Board of Medical Examiners (Board), composed of Theodore B. Berndt, M.D., Valerie J. Clark, BSN, RHU, LUTCF, and Michael J. Fischer, M.D., in the above-captioned matter, by and through Erin L. Albright, Esq., Board General Counsel and attorney for the IC, and Henry R. Landsman, M.D. (Respondent), as follows:

**WHEREAS**, on January 28, 2014, the Board's IC filed a Complaint in the above-captioned matter charging Respondent with engaging in conduct that is grounds for discipline pursuant to the Nevada Medical Practice Act (MPA), i.e., Chapter 630 of the Nevada Revised Statutes (NRS) and Chapter 630 of the Nevada Administrative Code (NAC), to wit: Count I, one count of obtaining, maintaining or renewing or attempting to obtain, maintain or renew a license to practice medicine by bribery, fraud or misrepresentation or by any false, misleading, inaccurate or incomplete statement, a violation of NRS 630.304(1); Count II, one count of engaging in any conduct that is intended to deceive, a violation of NRS 630.306(2)(a); Count III, one count of failure to report to the Board in writing, any disciplinary action taken by another state within thirty (30) days, a violation of NRS 630.306(11); and Count IV, one count of any disciplinary action taken by another state, a violation of NRS 630.301(1); and

[Signature]

1       **WHEREAS**, Respondent received a copy of the Complaint, reviewed it, understands it,  
2 and has had the opportunity to consult with competent counsel concerning the  
3 nature and significance of the Complaint. Respondent is fully advised concerning his rights and  
4 defenses to the Complaint, as well as the possible sanctions that may be imposed if the Board  
5 finds and concludes that he violated one or more provisions of the MPA; and

6       **WHEREAS**, Respondent understands and agrees that he has certain rights under the  
7 United States Constitution and the Constitution of the state of Nevada, as well as under the MPA  
8 and the Nevada Administrative Procedures Act (NRS Chapter 233B), including, but not limited to,  
9 the right to a formal hearing on the charges against him, the right to representation by counsel in  
10 the preparation and presentation of his defense, the right to confront and cross-examine the  
11 witnesses against him, the right to written findings, conclusions and an order regarding a final  
12 decision by the Board, and the right to judicial review of any final decision by the Board that is  
13 adverse to him; and

14       **WHEREAS**, Respondent understands and agrees that this Settlement Agreement  
15 (Agreement) is entered into by and between himself and the Board's IC, and not with the Board,  
16 but that the IC will present this Agreement to the Board for consideration in open session at a  
17 meeting duly noticed and scheduled. Respondent understands that the IC shall advocate approval  
18 of this Agreement by the Board, but that the Board has the right to decide in its own discretion  
19 whether or not to approve this Agreement; and

20       **WHEREAS**, Respondent understands and agrees that if the Board approves the terms,  
21 covenants and conditions of this Agreement, then the terms, covenants and conditions enumerated  
22 below shall be binding and enforceable upon him.

23       **NOW THEREFORE**, in order to resolve this matter and all charges alleged by the  
24 Board's IC in the above-captioned matter, Respondent and the IC hereby agree<sup>1</sup> to the following  
25 terms, covenants and conditions:  
26

27       <sup>1</sup> All agreements and admissions made by Respondent are solely for final disposition of this matter and any subsequent  
28 related administrative proceedings or civil litigation involving the Board and Respondent. Therefore, said agreements  
and admissions by Respondent are not intended or made for any other use, such as in the context of another state or  
federal government regulatory agency proceeding, state or federal civil or criminal proceeding, any state or federal  
court proceeding, or any credentialing or privileges matter.



1           **1.     Jurisdiction.** Respondent is, and at all times mentioned in the Complaint filed in  
2 the above-captioned matter was, a physician licensed to practice medicine in the state of Nevada  
3 subject to the jurisdiction of the Board to hear and adjudicate charges of violations of the MPA,  
4 and to impose sanctions as provided by the MPA.

5           **2.     Representation by Counsel/Knowing, Willing and Intelligent Agreement.**

6           Respondent acknowledges that he is not represented by counsel and wishes to proceed  
7 towards a resolution of this matter, as set forth in this Agreement, without counsel. Respondent  
8 understands and acknowledges that he may retain and consult counsel prior to entering into this  
9 Agreement. Respondent agrees that if counsel is retained for representation in this matter prior to  
10 entering into this Agreement, that counsel for the IC will be informed of such representation prior  
11 to Respondent executing this Agreement. Respondent covenants and agrees that he knowingly,  
12 willingly and intelligently enters into this Agreement.

13           **3.     Waiver of Rights.** In connection with this Agreement, and the terms, covenants  
14 and conditions contained herein, Respondent knowingly, willingly and intelligently waives all  
15 rights in connection with this Agreement, and the terms, covenants and conditions contained  
16 herein, and with the understanding that Respondent knowingly, willingly and intelligently waives  
17 all rights arising under or pursuant to the United States Constitution, the constitution of the  
18 state of Nevada, the MPA, NRS Chapter 233B, and any other statutory rights that may be available  
19 to him or that may apply to him in connection with the proceedings on the Complaint filed herein,  
20 the defense of said Complaint, the adjudication of the charges in said Complaint, and the  
21 imposition of sanctions.

22           Respondent agrees that the matter of the Complaint herein may be settled and resolved in  
23 accordance with this Agreement without a hearing or any further proceedings, and without the  
24 right to judicial review.

25           **4.     Acknowledgement of Reasonable Basis to Proceed.** Respondent covenants and  
26 agrees that the Board's IC has a reasonable basis to believe that Respondent engaged in one or  
27 more instances of conduct that is grounds for discipline pursuant to the provisions of the MPA.

28     ///

1           **5.     Consent to Entry of Order.** In order to resolve the matter of these disciplinary  
2 proceedings pending against him without incurring any further costs and expense of providing a  
3 defense to the Complaint, Respondent hereby agrees, without admission of guilt, that the Board may  
4 issue an Order finding that Respondent engaged in conduct that is grounds for discipline  
5 pursuant to the MPA, to wit: one count of failure by a licensee to report to the Board, in  
6 writing, within thirty (30) days, any disciplinary action taken against the licensee by  
7 another state, a violation of NRS 630.306(11), as set forth in Count III of the Complaint,  
8 and agrees that:

9                   a.     Respondent shall pay a fine of One Thousand and 00/100 Dollars  
10 (\$1,000.00) to the Board within thirty (30) days of the Board's acceptance, adoption and approval  
11 of this Agreement;

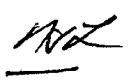
12                   b.     Pursuant to NRS 622.400, Respondent shall reimburse the sum of seven  
13 hundred sixty-eight dollars and sixty-one cents (\$768.61), the current amount of the costs incurred  
14 by the Board to investigate and prosecute this matter, along with the costs to conclude the matter,  
15 if any. The costs shall be paid to the Board within thirty (30) days of the Board's acceptance,  
16 adoption and approval of this Agreement;

17                   c.     Respondent shall receive a public reprimand;

18                   d.     The remaining Counts contained in the Complaint shall be dismissed  
19 with prejudice ; and

20                   e.     The terms of this Agreement shall be reported as required by law.

21           **6.     Release From Liability.** In execution of this Agreement, the Respondent, for  
22 himself, his executors, successors and assigns, hereby releases and forever discharges the state of  
23 Nevada, the Board, the Nevada Attorney General, and each of their members, agents and  
24 employees, in their representative capacities, and in their individual capacities, from any and all  
25 manner of actions, causes of action, suits, debts, judgments, executions, claims and demands  
26 whatsoever, known and unknown, in law or equity, that Respondent ever had, now has, may have  
27 or claim to have, against any or all of the persons or entities named in this paragraph arising out of,  
28 or by reason of, this investigation, this Agreement or its administration.



1           7.     **Procedure for Adoption of Agreement.** The IC and counsel for the IC shall  
2 recommend approval and adoption of the terms, covenants and conditions contained herein by the  
3 Board in resolution of the Complaint pending herein against Respondent. In the course of seeking  
4 Board approval, adoption and/or acceptance of this Agreement, counsel for the IC may  
5 communicate directly with the Board staff and the adjudicating members of the Board.

6           Respondent acknowledges that such contacts and communication may be made or  
7 conducted ex parte, without notice or opportunity to be heard on his part or on the part of his  
8 counsel, if any, until the public Board meeting where this Agreement is discussed, and that such  
9 contacts and communications may include, but not be limited to, matters concerning this  
10 Agreement, the Complaint, and any and all information of every nature whatsoever related to the  
11 Complaint or the proceedings herein against Respondent. The IC and its counsel agree that  
12 Respondent and/or his counsel, if any, may appear at the Board meeting where this Agreement is  
13 discussed, and if requested, respond to any questions that may be addressed to the IC or its  
14 counsel.

15           8.     **Effect of Acceptance of Agreement by Board.** In the event the Board approves,  
16 accepts and adopts the terms, covenants and conditions set out in this Agreement, counsel for the  
17 IC will cause the Board's order accepting, adopting and approving this Agreement to be entered  
18 herein, ordering full compliance with the terms herein and ordering that this case be closed,  
19 subject to the provisions in Paragraph 5.

20           9.     **Effect of Rejection of Agreement by Board.** In the event the Board does not  
21 accept, approve and adopt the terms, covenants and conditions set out in this Agreement, this  
22 Agreement shall be null, void, and of no further force and effect except as to the following  
23 covenant and agreement regarding disqualification of adjudicating Board panel members.  
24 Respondent agrees that, notwithstanding rejection of this Agreement by the Board, nothing  
25 contained herein and nothing that occurs pursuant to efforts of the IC or its counsel to seek  
26 acceptance and adoption of this Agreement by the Board shall disqualify any member of the  
27 adjudicating panel of the Board from considering the charges against Respondent and participating

28     ///

1 in the disciplinary proceedings in any role, including adjudication of the case. Respondent further  
2 agrees that he shall not seek to disqualify any such member absent evidence of bad faith.

3       **10. Binding Effect.** If this Agreement is approved by the Board, Respondent  
4 covenants and agrees that this Agreement is a binding and enforceable contract upon Respondent  
5 and the Board's IC, which contract may be enforced in a court or tribunal having jurisdiction.

6       **11. Forum Selection Clause.** Respondent covenants and agrees that in the event either  
7 party is required to seek enforcement of this Agreement in the district court, he consents to such  
8 jurisdiction, and covenants and agrees that exclusive jurisdiction shall be in the  
9 Second Judicial District Court of the state of Nevada in and for the county of Washoe.

10       **12. Attorneys' Fees and Costs.** Respondent covenants and agrees that in the event an  
11 action is commenced in the district court to enforce any provision of this Agreement, the  
12 prevailing party shall be entitled to recover costs and reasonable attorneys' fees.

13       **13. Failure to Comply With Terms.** In the event the Board enters its order approving  
14 this Agreement, should Respondent fail to comply with any term or condition recited herein, the  
15 Board shall be authorized to immediately suspend Respondent's license to practice medicine in the  
16 state of Nevada pending an order to show cause hearing, which will be duly noticed.  
17 Further, failure to comply with the terms recited herein may result in additional disciplinary action  
18 being initiated against Respondent for a violation of an order of the Board in accordance with

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1 NRS 630.3065(2)(a). Moreover, the failure of Respondent to reimburse the Board for monies  
2 agreed to be paid as a condition of settlement may subject Respondent to civil collection efforts.

3 Dated this 10<sup>th</sup> day of June, 2015.

Dated this 26 day of MAY, 2015.

4 UNDERSTOOD AND AGREED:

5 By: 

6 Erin L. Albright, Esq.  
7 Attorney for the Investigative Committee

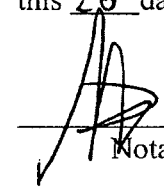
By: 

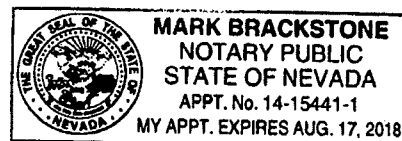
Henry R. Landsman, M.D.  
Respondent

8  
9 STATE OF NEVADA )  
10 :SS.  
11 COUNTY OF CLARK )

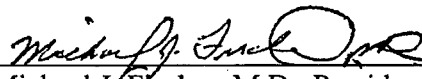
12 SUBSCRIBED and SWORN to before me

13 this 26<sup>th</sup> day of MAY, 2015.

14  
15   
16 Notary Public



1 **IT IS HEREBY ORDERED** that the foregoing Settlement Agreement is approved and accepted by the  
2 Nevada State Board of Medical Examiners on the 11<sup>th</sup> day of September 2015, with the final total  
3 amount of costs due of \$768.01.

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6 Michael J. Fischer, M.D., President  
NEVADA STATE BOARD OF MEDICAL EXAMINERS  
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**DECLARATION OF HENRY LANDSMAN**

I, Henry Landsman, am over the age of 18 and am otherwise fully competent to testify to the facts contained in this declaration.

1. I have personal knowledge of the matters asserted herein and am competent to testify thereto, save for those matters asserted on information and belief, and for those matters, I am informed and believe them to be true.

2. I was previously employed as a Senior Physician for the Nevada Department of Corrections, (NDOC) at Southern Desert Correctional Center (SDCC).

3. I was a licensed physician in the State of Nevada, trained in Emergency Medicine, at the time of these events.

4. In connection with the filing of this Declaration, I was contacted by the Office of the Attorney General, which upon information and belief, represents the Defendants in the matter entitled *Hernandez v. Howell*, currently pending in the District Court as Case No. 3:18-cv-01449-MMD-CLB. It was requested that I provide truthful and accurate information in support of a Motion for Summary Judgement that Defendants intend to file with the Court and for other proper purposes.

5. I am a physician, and was licensed to practice in the State of Nevada.

6. It is my understanding and belief that inmate Hernandez has filed complaint alleging he was denied advanced treatment for Hepatitis C.

7. Inmate Hernandez has been under the continuous care of many doctors employed by the NDOC, and has been seen and treated for various ailments over his time at SDCC.

8. I am not, nor have I been, a member of the Hepatitis Review Committee tasked with the responsibility of approving treatment for Hepatitis C. I have never denied Mr. Hernandez treatment.

9. I have never prescribed advanced treatment for Hepatitis C to Mr. Hernandez. I referred Mr. Hernandez to outside medical care when indicated.

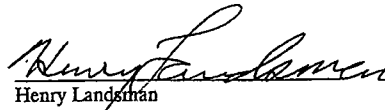
11. I have never diagnosed Mr. Hernandez as suffering from advanced cirrhosis of the liver. I never diagnosed Mr. Hernandez as suffering symptoms associated with HCV infection.

12. In my examinations of Mr. Hernandez, I never noted 1) spider angiomas (vascular lesions on the chest and body); 2) palmar erythema (reddening of the palms); 3) gynecomastia (increase

1 in breast gland size); 4) ascites (accumulation of fluid in the abdominal cavity); and 5)   
2 discoloration of the skin and mucous membranes) in the patient.

3 FURTHER I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is   
4 true and correct.

5 EXECUTED this 14<sup>th</sup> day of April, 2022.

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9 Henry Landsman

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SE 387

SER0387

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Appendix D

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9 If Defendant's claim that any document sought is protected from discovery by any privilege or  
10 otherwise, state the nature of the reason or privilege being invoked as to each document withheld.  
11

12 Dated: \_\_\_\_\_

13 Post Office Box 208 J.A.C.C.  
Indian Springs, Nevada 89070

14 Plaintiff In Pro Per  
15

16 **CERTIFICATE OF SERVICE**

17 I, \_\_\_\_\_, do hereby certify pursuant to F.R.C.P. 5(b), that  
18 on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I served a true and correct copy of the  
19 foregoing \_\_\_\_\_,  
20 by placing same into prison staff's hands at HDSP, for mailing in the U.S. Postal Service, postage  
21 pre-paid, in a sealed envelope, to the address listed below:  
22  
23  
24  
25

26 \_\_\_\_\_  
(Signature)  
27  
28

CHH- Centennial Hills Hospital Medical Center

Patient: HERNANDEZ, ESTEBAN  
MRN: CHH7314100  
DOB/Sex: 12/21/1978 / Male  
Attending: Arora, Mandip S MD

Admit: 2/27/2019  
Disch: 3/4/2019  
FIN: CHH0008006957081

Imaging

PROCEDURE  
MRI Abdomen w/ + w/o Contrast

EXAM DATE/TIME  
3/4/2019 14:55 PST

Report

aorta is normal in caliber. No adrenal mass is noted.

In the liver in segment 2 there is a lobulated T2 hyperintense mass which measures about 7.0 x 4.6 cm in size. The lesion does not restricted diffusion and is T1 hypointense with progressive peripheral discontinuous nodular enhancement compatible with a hemangioma. There is no worrisome enhancing liver mass.

IMPRESSION:

Large left lobe liver hemangioma.

Tiny cyst in the posterior tail the pancreas and lateral spleen.

Dictated By: JOEL SCHEIN MD

\*\*\*\* Final \*\*\*\*

Dictated by: Schein MD, Joel C  
Transcribed By: JCS  
Electronically Signed by: Schein MD, Joel C

Dictated DT/TM: 03/04/2019 3:40 pm  
Transcribed DT/TM: 03/04/19 15:38:07  
Signed DT/TM: 03/04/2019 3:40 pm

exhibit 11

0079

Exhibit 11

0078

## IP Clinical Summary

HERNANDEZ, ESTEBAN - CHH7314100

Patient was seen by GI. Patient had a CT of the abdomen which showed large irregularly-shaped lesion in the lateral segment of left hepatic lobe. It was followed with MRI. It showed 6 cm hepatic mass is seen again. Patient had an alpha-fetoprotein checked that was elevated and was at a level of 41.8.

Patient was seen by oncology Dr. Vicuna. An IR guided biopsy has been ordered and follow-up MRI in 8-12 weeks is recommended. After the biopsy patient is cleared both by GI as well as oncology and will follow up with them as outpatient. Please see the latest discharge reconciliation for medication details. Any additional recommendations will be dictated as addendum.

Albumin Level		03/03/2019 06:43			03/03/2019 06:43
A/G Ratio	1.0	03/03/2019 06:43	T Bilirubin	3.6 mg/dL (High)	03/03/2019 06:43
Alk Phos	115 units/L	03/03/2019 06:43	AST	212 units/L (High)	03/03/2019 06:43
ALT	182 units/L (High)	03/03/2019 06:43	Estimated Creatinine Clearance	144.03 mL/min	03/03/2019 07:22
eGFR Non-African American	120 mL/min/1.73m2	03/03/2019 06:43	eGFR African American	139 mL/min/1.73m2	03/03/2019 06:43
eGFR Pediatric	Not Reported	03/03/2019 06:43	Urase Lvl	161 units/L	02/27/2019 18:01

## General Coagulation

PT	10.9 Seconds	03/04/2019 04:51	INR	1.0	03/04/2019 04:51
PTT	31 Seconds	03/04/2019 04:51			

T Bilirubin: 3.6 mg/dL High (03/03/19 06:43:00)

## General Hematology

WBC	4.66 x10e3/mcl	03/04/2019 04:51	RBC	4.58 x10e6/mcl	03/04/2019 04:51
Hgb	14.2 gm/dL	03/04/2019 04:51	Hct	41.3 %	03/04/2019 04:51
MCV	90.2 Femtoliters	03/04/2019 04:51	MCH	31.0 pg	03/04/2019 04:51
MCHC	34.4 gm/dL	03/04/2019 04:51	RDW-CV	12.7 %	03/04/2019 04:51
RDW-SD	41.4 Femtoliters	03/04/2019 04:51	Plt	153 x10e3/mcl	03/04/2019 04:51
MPV	10.5 Femtoliters	03/04/2019 04:51	NRBC %	0.2 /100	03/03/2019 06:43
NRBC #	0.01 x10e3/mcl	03/03/2019 06:43	Neut %	52.2 %	03/04/2019 04:51
Lymph %	33.7 %	03/04/2019 04:51	Mono %	11.6 %	03/04/2019 04:51
Eos %	1.9 %	03/04/2019 04:51	Baso %	0.6 %	03/04/2019 04:51
Immature Grans %	0.4 %	03/04/2019 04:51	Neut #	2.43 x10e3/mcl	03/04/2019 04:51
Lymph #	1.57 x10e3/mcl	03/04/2019 04:51	Mono #	0.54 x10e3/mcl	03/04/2019 04:51
Eos #	0.09 x10e3/mcl	03/04/2019 04:51	Baso #	0.03 x10e3/mcl	03/04/2019 04:51
Immature Grans #	0.02 x10e3/mcl	03/04/2019 04:51			

## General Immunology/Serology

Hep A IgM	Non-Reactive	02/28/2019 02:06	Hep B Core IgM	Reactive	02/28/2019 02:06
Hep C Ab	Reactive (Abnormal)	02/28/2019 02:06			

**Discharge Orders/Instructions**  
**Discharge Request**

- 03/04/19 16:45:00 PST, Correctional Facility

## Follow Up Instructions

With	When	Contact Information
Brian Vicuna, ONC	In 1 month 04/03/2019 PDT	7445 PEAK DR LAS VEGAS, NV 89128-0000 (702)952-2140 Business (1)
Additional Instructions:		
Shahid Wahid, GAS	In 1 month 04/03/2019 PDT	2031 MCDANIEL ST SUITE 140 LAS VEGAS, NV 89030-0000 (702)633-0207 Business (1)
Additional Instructions:		
Follow up with primary care provider		
Additional Instructions:		
Pcp No, MED	In 0 days	00000-0000

Printed on: 3/4/2019 18:00 PST

Exhibit 1

0047

Page 2 of 3  
(Continued)

exhibit 1

0046

# Appendix E

1 \_\_\_\_\_ # \_\_\_\_\_  
2 Post Office Box 208 J.S.C.C.  
Indian Springs, Nevada 89070

3 Petitioner In Pro Se  
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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA  
8

9 Case No. \_\_\_\_\_

10 Plaintiff,

11 vs.

12 \_\_\_\_\_  
13 Defendant(s).  
14 \_\_\_\_\_/

**"REQUEST FOR PRODUCTION OF  
DOCUMENTS"-GOVERNMENT  
PERSONNEL/INMATES FILES,  
MINUTES, STATISTICS, AND/OR  
RECORDS AND REGULATIONS.**

15 Pursuant to Rule 34 of the Fed. R. Civ. P., Plaintiff requests that the Defendant[s] produce, permit, or  
16 make available for inspection and photocopying the following documents described in this request at a time  
17 and place to be arranged by Counsel, but in no event later than 30-days from the date of service of this request.  
18 Indeed, this request is continuing in character and requires Defendants to provide any supplemental documents  
19 if, prior to trial, Defendant's should obtain any additional or supplemental documents which are responsive to  
20 these requests.

21 **DOCUMENTS TO BE PRODUCED:**

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AARON D. FORD  
*Attorney General*

KYLE E. N. GEORGE  
*First Assistant Attorney General*

CHRISTINE JONES BRADY  
*Second Assistant Attorney General*



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701

November 15, 2021

*Exhibit C*

JESSICA L. ADAIR  
*Chief of Staff*

LESLIE NINO PIRO  
*General Counsel*

HEIDI PARRY STERN  
*Solicitor General*

*Sent via mail*

Esteban Hernandez, #62861  
Southern Desert Correctional Center  
P.O. Box 208  
Indian Springs, NV 89070

**Re: Hernandez v. Howell, et al.**  
**Case No.: 2:18-cv-01449-MMD-CLB**

Dear Mr. Hernandez:


I am in receipt of your third Request for Production of documents. As you know, discovery in this matter closes on November 29, 2021. They were mailed to this office on November 9, 2021 and received in this office on November 12, 2021. Therefore, we did not have the required 30 days to respond.

If you have any questions, or wish to discuss this matter, please do not hesitate to contact our office.

Sincerely,

AARON D. FORD  
Attorney General

By:

  
DOUGLAS R. RANDS  
Senior Deputy Attorney General  
State of Nevada  
[drands@ag.nv.gov](mailto:drands@ag.nv.gov)

AARON D. FORD  
*Attorney General*

KYLE E. N. GEORGE  
*First Assistant Attorney General*

CHRISTINE JONES BRADY  
*Second Assistant Attorney General*



STATE OF NEVADA  
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100 North Carson Street  
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JESSICA L. ADAIR  
*Chief of Staff*

LESLIE NINO PIRO  
*General Counsel*

HEIDI PARRY STERN  
*Solicitor General*

September 1, 2021

*Sent via mail*

Esteban Hernandez, #62861  
Southern Desert Correctional Center  
P.O. Box 208  
Indian Springs, NV 89070

**Re: Hernandez v. Howell, et al.**  
**Case No.: 2:18-cv-01449-MMD-CLB**

Dear Mr. Hernandez:

As you know, you have recently served discovery, including interrogatory requests on various parties. I have completed and sent you several of the responses. I am awaiting responses from two of my clients, Mr. Howell and Mr. Dzurenda to complete their responses. My researcher is going to be out of the office, but I will try to get these to you as soon as possible.

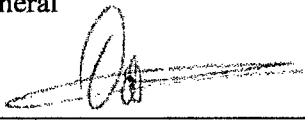
If the delay is going to be an issue going forward, please let me know and I will arrange a telephone call. I hope to have the responses to you in the next 15 days. Thank you for your understanding.

Please do not hesitate to contact our office should you have any questions regarding this matter.

Sincerely,

AARON D. FORD  
Attorney General

By:

  
DOUGLAS R. RANDS  
Senior Deputy Attorney General  
State of Nevada  
[drands@ag.nv.gov](mailto:drands@ag.nv.gov)

*Exhibit A*

AARON D. FORD  
*Attorney General*

KYLE E. N. GEORGE  
*First Assistant Attorney General*

CHRISTINE JONES BRADY  
*Second Assistant Attorney General*



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701

September 20, 2021

JESSICA L. ADAIR  
*Chief of Staff*

LESLIE NINO PIRO  
*General Counsel*

HEIDI PARRY STERN  
*Solicitor General*

*Sent via mail*

Esteban Hernandez, #62861  
Southern Desert Correctional Center  
P.O. Box 208  
Indian Springs, NV 89070

**Re: Hernandez v. Howell, et al.**  
**Case No.: 2:18-cv-01449-MMD-CLB**

Dear Mr. Hernandez:

As you know, you have recently served discovery, including interrogatory requests on various parties. Unfortunately, I am still awaiting responses from two of my clients, Mr. Howell and Mr. Dzurenda. We have contacted Mr. Howell and Mr. Dzurenda for a status on their responses and the request for production of document, and I will try to get these to you as soon as possible.


If the delay is going to be an issue going forward, please let me know and I will arrange a telephone call. I hope to have the responses to you in the next 15 days. Thank you for your understanding.

Please do not hesitate to contact our office should you have any questions regarding this matter.

Sincerely,

AARON D. FORD  
Attorney General

By:

  
DOUGLAS R. RANDS  
Senior Deputy Attorney General  
State of Nevada  
[drands@ag.nv.gov](mailto:drands@ag.nv.gov)

# Appendix F

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# Appendix G

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Further N.R.S 176.555 Motion to Modify and/or Correct a sentence, may be filed at any time.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ESTEBAN HERNANDEZ,

Plaintiff,

v.

WARDEN HOWELL, *et al.*,

Defendants.

Case No. 2:18-cv-01449-MMD-CLB

ORDER

**I. SUMMARY**

*Pro se* Plaintiff Esteban Hernandez, who is incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), brings this action under 42 U.S.C. § 1983 against Defendants Romeo Aranas, James Dzurenda, Henry Landsman, Michael Minev, and Jerry Howell (collectively, "Defendants"). (ECF No. 50.) Before the Court is a Report and Recommendation ("R&R") of United States Magistrate Judge Carla L. Baldwin (ECF No. 120), recommending the Court grant Defendants' motion for summary judgment (ECF No. 102 ("Motion"))<sup>1</sup> on Plaintiff's Eighth Amendment deliberate indifference to medical needs claim. Plaintiff filed an objection to the R&R (ECF No. 123 ("Objection")), to which Defendants responded (ECF No. 124). Because the Court agrees with Judge Baldwin's analysis as to Defendants' Motion and because Plaintiff fails to meet his evidentiary burden, the Court will accept and adopt the R&R in full. Accordingly, the Court will grant Defendants' Motion.

**II. BACKGROUND**

The Court incorporates by reference Judge Baldwin's description of the case's factual background and procedural history provided in the R&R, which the Court adopts.

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<sup>1</sup>The Court reviewed the parties' response and reply. (ECF Nos. 110, 112.)



(ECF No. 120 at 1-4.)

### III. DISCUSSION

Judge Baldwin recommends that Defendants' Motion be granted because Defendants offer "authenticated evidence that establishes [Defendants] affirmatively monitored and ultimately treated [Plaintiff]'s Hep-C." (*Id.* at 12.) Judge Baldwin found that no genuine issue of material fact exists as to Plaintiff's deliberate indifference claim. (*Id.* at 12-13.) Specifically, Plaintiff failed to show that Defendants' alleged delay in treatment specifically caused him further harm (e.g., cirrhosis of the liver) or that Defendants deliberately denied, delayed, or intentionally interfered with Plaintiff's treatment plan. (*Id.*) Plaintiff objects to Judge Baldwin's findings and recommendation, appearing to argue that: (1) the differences in medical opinions between two doctors who treated him create a genuine issue of material fact as to Defendants' deliberate indifference; and (2) NDOC staff took an unreasonably long time to test and treat Plaintiff's Hep-C. (ECF No. 123 at 3-9.)

Neither of Plaintiff's arguments is persuasive. First, Plaintiff offers no evidence creating an issue of fact as to whether Defendants knew of, and deliberately disregarded, an excessive risk to Plaintiff's health. (ECF No. 120 at 13.) Defendants proffer undisputed evidence—including several declarations and lab reports—documenting the extended, routine medical treatment Plaintiff received while incarcerated. (*Id.* at 9-12.) Plaintiff has seen prison doctors and outside physicians on numerous occasions. (*Id.*) In his Objection, Plaintiff relies on many of the same lab reports to support his arguments. (ECF No. 123 at 18-19, 39-51.) Plaintiff urges the Court to deny Defendants' Motion because two doctors who treated him—Dr. Brian Vicuna and Dr. Carducci—appear to have disagreed as to whether to order a biopsy to determine the "extent of cancer" on a "tumor" detected in a CT scan of Plaintiff's abdomen. (ECF Nos. 110 at 25, 120 at 12, 123 at 3.) As Judge Baldwin found, Plaintiff's medical records do not show he had a cancerous tumor or cirrhosis of the liver; Plaintiff had a hepatic nodule that was likely benign, which multiple doctors confirmed in follow-up visits. (ECF Nos. 104-3 (sealed), 104-4 (sealed), 104-7

(sealed), 104-8 (sealed), 120 at 13.) While it is true that Dr. Vicuna initially recommended a biopsy during Plaintiff's March 2019 visit, the lab report for that same visit also indicated that Plaintiff's liver, portal veins, gallbladder, spleen, pancreas, adrenals, kidneys, distal esophagus, and stomach were all "normal." (ECF Nos. 104-3 (sealed), 120 at 10.) Furthermore, Plaintiff received in total three MRI scans of his abdomen area to inspect this nodule, and NDOC later approved a follow-up oncology appointment in July 2019. (ECF Nos. 104-3 (sealed), 104-4 (sealed), 104-6 (sealed), 120 at 10.) After multiple follow-up appointments concerning Plaintiff's hepatic nodule, Dr. Carducci's decision to forego a biopsy due to the nodule's benign nature does not contradict Dr. Vicuna's findings or any subsequent treatment. In any event, evidence of differing medical opinions between two doctors does not create an issue of fact as to whether Defendants knew of, and deliberately disregarded, an excessive risk to Plaintiff's health. See, e.g., *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) ("A difference of [medical] opinion does not amount to deliberate indifference to [a prisoner's] serious medical needs.") (citing *Estelle v. Gamble*, 429 U.S. 107 (1976)).

To the extent Dr. Carducci's decision to forego a biopsy was negligent, that medical decision alone does not amount to deliberate indifference. See *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 2010) ("Mere negligence is not sufficient to establish [Eighth Amendment] liability."); *Estelle*, 429 U.S. at 105-06 (noting that "an inadvertent failure to provide adequate medical care," without more, is insufficient to constitute deliberate indifference); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (recognizing deliberate indifference as "lying somewhere between . . . negligence . . . and purpose or knowledge").

Additionally, Plaintiff fails to "demonstrate that the defendants' actions were both an actual and proximate cause of [his] injuries." *Lemire v. California*, 726 F.3d 1062, 1074 (9th Cir. 2013); see also *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (requiring a showing of harm caused by the indifference). In his Objection, Plaintiff argues Defendants unreasonably delayed routine Hep-C testing, resolution of his kites and grievances, and

1 follow-up appointments while in NDOC's custody. (ECF No. 123 at 5-7.) However, as  
2 Judge Baldwin and Defendants note, Plaintiff offers no evidence showing that the alleged  
3 delays in treatment specifically caused Plaintiff to develop cirrhosis or other medical  
4 harms. (ECF Nos. 120 at 13, 124 at 5.) To the extent Plaintiff disagreed with Defendants'  
5 choice and timeline of Hep-C treatment, mere disagreement about the course of  
6 treatment does not amount to deliberate indifference under the Eighth Amendment. See  
7 *Toguchi v. Chong*, 391 F.3d 1051, 1058 (9th Cir. 2004) (recognizing that "mere difference  
8 of medical opinion" is not enough to establish deliberate indifference) (internal quotation  
9 marks and citation omitted); *Sanchez*, 891 F.2d at 242.

10 After conducting *de novo* review, the Court agrees with Judge Baldwin's  
11 determination that Plaintiff fails to establish a genuine issue of material fact as to whether  
12 Defendants deliberately denied, delayed, or intentionally interfered with Plaintiff's medical  
13 treatment and whether such a delay caused him harm. See *Hallett v. Morgan*, 296 F.3d  
14 732, 744 (9th Cir. 2022) (explaining the "deliberate indifference" prong of its two-part  
15 Eighth Amendment analysis); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th  
16 Cir. 2003) ("[D]e novo review of the magistrate judges' findings and recommendations is  
17 required if, but *only* if, one or both parties file objections to the findings and  
18 recommendations."). Accordingly, the Court adopts Judge Baldwin's recommendation  
19 that Defendants' Motion be granted as to Plaintiff's Eighth Amendment claim for  
20 deliberate indifference to a serious medical need.<sup>2</sup>

#### 21 **IV. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several  
23 cases not discussed above. The Court has reviewed these arguments and cases and  
24 determines that they do not warrant discussion as they do not affect the outcome of the  
25 issues before the Court.

26 ///

27 \_\_\_\_\_  
28 <sup>2</sup>Judge Baldwin declined to address Defendants' personal participation and  
qualified immunity arguments because Plaintiff's claim fails on the merits. (ECF No. 120  
at 14 n.4.) The Court also need not address those arguments for the same reasons.

1 It is therefore ordered that Plaintiff's objection (ECF No. 123) to the Report and  
2 Recommendation of U.S. Magistrate Judge Carla L. Baldwin is overruled.

3 It is further ordered that Judge Baldwin's Report and Recommendation (ECF No.  
4 120) is accepted and adopted in full.

5 It is further ordered that Defendants' motion for summary judgment (ECF No. 102)  
6 is granted.

7 It is further ordered that the Clerk of Court enter judgment in Defendants' favor and  
8 close this case.

9 DATED THIS 5<sup>th</sup> Day of December 2022.



10  
11  
12 MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE

Appendix  
H

## II. Relevant Facts, Law and Argument

As stated above, Defendant needs a copy of his Pre-Sentence Investigation Report.

Defendant has attempted to obtain the report from the prison, who directed him to his attorney; and from his attorney, who then directed him to request it from the Clerk of the Court. NRS 176.156, entitled "Disclosure of report of presentence or general investigation; persons entitled to use report; confidentiality of report," provides in pertinent part as follows:

5. Except for the disclosures required by subsections 1 to 4, inclusive, a report of a presentence investigation or general investigation and the sources of information for such a report are confidential and must not be made a part of any public record.

Defendant therefore asks that this Court direct the clerk to provide him a copy of his pre-sentence investigation report from the files in Case No. \_\_\_\_\_ as it is the only source for Defendant to obtain a copy of this document. Defendant is indigent, but if the Court feels, under the facts and circumstances, that Defendant should pay for a copy of the PSI, that the amount be charged to his NDOC inmate account and the copy of the PSI be transmitted to him.

Defendant is making this Motion and requesting it be heard on an Order Shortening Time, pursuant to Local Rule 11, and in good faith, so that his request can be expedited to ensure that he is able to comply with any deadlines applicable to the proceedings in which the PSI is required as outlined in the introduction above.

## III. Conclusion

THEREFORE, based upon the foregoing, Defendant respectfully requests that this Court:

1. Unseal his Pre-Sentence Investigation Report;