Mathew W. dos Santos, OSB No. 155766
mdossantos@aclu-or.org
Kelly K. Simon, OSB No. 154213
ksimon@aclu-or.org
ACLU Foundation of Oregon, Inc.
PO Box 40585
Portland, OR 97240

Aliza Kaplan, OSB No. 135523
akaplan@lclark.edu
Criminal Justice Reform Clinic at Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland, OR 97219

Daniel Bartz, OSB No. 113226
3418 Kinsrow Ave
Eugene, OR 97401
danielbbartz@gmail.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

TERRI CARLISLE,

Plaintiff,

v.

DOUGLAS COUNTY, Oregon; CORRECT CARE SOLUTIONS, LLC; JOHN HANLIN; MIKE ROOT; STEVEN BLUM, M.D.; NURSE DOE; MEDICAL ASSISTANT DOE; CORRECTIONAL OFFICER DOE(S),

Defendants.

Case No.: 6:17-cv-00837-AA

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

PLAINTIFF'S POINTS AND AUTHORITIES IN REPLY

Nothing raised by Defendants shows that there is a genuine issue of material fact on the issues raised in Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"). Therefore, summary judgment should be granted to Plaintiff in this case. Defendants' arguments for Defendant Blum break down in certain key areas: (1) misunderstanding the import of nonbinding and distinguishable case law, (2) mischaracterizing the facts of and over-relying on the discussion on July 9, 2015, and (3) failing to point to any facts that dispute that Plaintiff's pain was a serious medical need. Defendants' arguments for Correct Care Solutions ("Correct Care") also break down because they misinterpret case law and fail to appreciate the import of the relevant facts. Defendants have presented no evidence of a dispute of material facts in opposition to Plaintiff's Motion for Summary Judgment, so the court should grant summary judgment to Plaintiff as a matter of law.

A. Defendants fail to point to facts that show Defendant Blum did anything other than act in conscious disregard of Plaintiff's serious medical need.

1. Defendants failed to present a legal or factual dispute about Defendant Blum's deliberate indifference.

Although Defendants identify a number of grounds that Plaintiff used to assert that Defendant Blum was deliberately indifferent, the entirety of Section I of Defendants' Response to Plaintiff's Motion for Summary Judgment ("Defendants' Response") focuses solely on Defendant Blum's initial decision to discontinue Plaintiff's gabapentin. Defendants fail to address any other of Plaintiff's arguments of deliberate indifference. Defendants fail to appreciate that the analysis cannot end with the initial decision.[1] It was the initial decision along

[1] Plaintiff does not concede that Defendant Blum's decision to discontinue Ms. Carlisle's gabapentin was constitutional.

with the failure to respond to or offer treatment after Plaintiff's complaints of severe pain that meets the Eighth Amendment threshold of knowing of and disregarding her serious medical need. As Defendants' Response admits, Defendant Blum's failure to take any action to alleviate Plaintiff's severe pain was a decision he deliberately made after he "received, reviewed and considered" her complaints of pain and another doctor's insistence that she have her medication reinstated.[2] This is exactly what it means to ignore or choose a course of action in "conscious disregard" of a patient's serious medical need. And that is exactly what the Eighth Amendment proscribes.

All of the cases on which Defendants rely support Plaintiff's Motion. While none of the cases on which Defendants rely are binding on this court, each of the cases Defendant cites for the proposition that Defendant Blum's decision to discontinue was constitutional are distinguishable. In fact, they show exactly why Defendant Blum's response was constitutionally inadequate.

Defendants first point to a footnote in *Billings v. Gates*, 323 Or. 167, 916 P.2d 291, 299 (1996), a state court decision, for the overarching proposition that Defendant Blum's treatment did not fall below the standard of care nor was it deliberately indifferent.[3] The "sole issue" in *Billings* was the correct standard of medical care for incarcerated patients under the Oregon Constitution's prohibition on cruel and unusual punishment. *Id.* at 169. In *Billings*, the petitioner successfully defeated a motion to dismiss his habeas petition when he alleged that his high arches caused him pain to the point he was unable to walk, that he was indigent and could not afford to purchase arch supports, and that the prison doctors refused to provide arch supports for

[2] Defs.' Resp. Pl.'s Mot. Summ. J. p. 7, ECF No. 57
[3] Defs.' Resp. Pl.'s Mot. Summ. J. p. 8, ECF No. 57

him. *Id.* at 182. The *Billings* court does ultimately look to Eighth Amendment case law to interpret Oregon's constitution, and concludes that a prison doctor's decision to do nothing in the face of an incarcerated patient's severe foot pain describes facts to satisfy the objective and subjective elements of the "cruel and unusual punishment" analysis. *Id.* This is the same argument that Plaintiff makes: that in spite of knowledge of Plaintiff's severe foot pain, Defendant Blum did nothing to attempt to alleviate it.

Defendants also point to *Morgan v. Maas*, No. 94-035834, 1995 WL 759203 (9th Cir. 1995),[4] in which the court framed the appropriate standard that "[p]rison officials act with deliberate indifference if they purposefully ignore or fail to respond to a prisoner's medical needs." *Id.* at *3 (citing *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992)). Defendants claim that Defendant Blum should be similarly successful to Dr. Vargo in defeating a claim of deliberate indifference, but fail to appreciate that Defendant Blum did not act similarly to Dr. Vargo. In *Morgan*, the only constitutional challenge to Dr. Vargo was his failure to inform corrections officers of the patient's potential medical need, which the court decided was not implicated by the non-emergency nature of the patient's underlying illness. *Id.* That is in no way similar to Defendant Blum's failure to treat Plaintiff's known pain. It is notable, however, despite the *Morgan* plaintiff's inevitable death, the court *did* find deliberate indifference as to the five hour delay that jailer Tran caused the plaintiff in getting to the emergency room. The court found that during that relatively short window of time, the plaintiff endured "pain, mental anguish and suffering." *Id.*at *2. That five hours of pain and suffering was sufficient evidence of deliberate indifference.

[4] Plaintiff notes that this is an unpublished opinion, which is not precedential per Ninth Circuit Rule 36-3(a).

Taplet v Brooks, 432 Fed. Appx. 697 (9th Cir. May 11, 2011)[5] is no more helpful to Defendants. *Taplet* is a failure to diagnose case involving mental health concerns, not a failure to treat pain case. *Id.* In *Taplet,* the plaintiff's expert opinions outlined the standard of care but did not offer an opinion as to the diagnosis, prognosis or a violation of the standard of care as to the plaintiff. *Id.* at 698. These deficiencies were problematic for the court because the only other evidence the plaintiff could point to was a previous diagnosis and the plaintiff's own conclusory statements. Unlike in *Taplet,* Plaintiff's diagnosis and attendant pain symptoms are not in question. All the doctors who testified as to the specifics of Plaintiff's medical need, including Defendant Blum, either agreed with or did not dispute that she had a longstanding neuropathy diagnosis that caused her to suffer pain. *Taplet* does not affirmatively require that Eighth Amendment plaintiffs provide the court with a specific expert opinion as to the violation of the standard of care in every case. It was only fatal as to the specific circumstances of *Taplet's* complaint.

Finally, Defendants rely on a series of cases in which courts upheld decisions to discontinue medications *where some other form of treatment was provided*.[6] *See Turner v. Multnomah Cty.*, 3:12-cv-01851, 2015 WL 3492705 (D. Or. June 3, 2015) (finding that a nurse was not deliberately indifferent to a patient's back pain when an incarcerated patient was already receiving, *inter alia*, Neurontin, and the nurse provided the patient with a comprehensive exam and additional medication); *accord Peters v. Figuerroa,* 96-15758, 1997 WL 117092 (9th Cir. Mar. 13, 1997) (affirming grant of summary judgment to Defendants when a prison doctor treated a patient's staph infection "numerous times" and where the "evidence showed only a

[5] *Taplet* is also an unpublished opinion that does not hold precedential value.
[6] Plaintiff again notes the cases cited are all unpublished and not binding on this court.

difference of medical opinion, if that"); *accord Barnes v. Norton*, 2:15-cv-157, 2018 WL 1578137 (D. Utah Mar. 29, 2018) (finding that a pro se plaintiff could not defeat a prison doctor's motion for summary judgment when a prison doctor discontinued a patient's Neurontin *and offered him other medications*); *accord Todd v. Bigelow*, 497 Fed. Appx. 839 (10th Cir. 2012) (finding that a pro se plaintiff could not defeat a prison doctor's motion for summary judgment when a prison doctor discontinued a patient's Neurontin *and offered him other medications within a week*[7]); *accord Shockley v. Fox*, 444 Fed. Appx. 36 (5th Cir. 2011) (affirming dismissal of an Eighth Amendment claim that alleged an incarcerated patient was denied narcotic pain medication per policy *and "offered other medications"*) (emphasis added); *accord Reed v. Sapp*, 99-5752, 2000 WL 571994 (6th Cir. May 5, 2000) (granting summary judgment to defendant prison officials when contrary to an incarcerated patient's assertions, the patient "was prescribed pain medication and was examined by nearly a dozen different doctors" in addition to being given medical tests and physical therapy, all showing that the patient "made no showing that he suffered a grave medical condition *that was left untreated*") (emphasis added). Plaintiff's medical need was left entirely untreated. These cases all provide examples of how Defendant Blum *could have* acted constitutionally, but did not.

The above cases are entirely distinguishable from Plaintiff's case because Defendant Blum provided her with no treatment whatsoever for her pain. That difference is further bolstered by the fact that Defendant Blum, Defendants' expert, and Plaintiff's community physician all agreed that chronic nerve pain is a medical need that they all regularly treat. Such

[7] The Tenth Circuit states that a replacement medication was offered "[i]n the following month." In reality the medication was offered within 7 days. *See Todd v. Bigelow*, No. 2:09-cv-808, 2012 WL 627965 at *4 (D. Utah Feb. 24, 2012).

agreement shows that a deliberate decision to provide no treatment for Plaintiff's chronic nerve pain falls well below both the community and constitutional standards.

2. The conversation between Ms. Dicke and Ms. Carlisle on July 9, 2015 does not insulate Defendant Blum from liability.

Defendants would like to argue that Ms. Carlisle's unwillingness to talk to a non-prescribing nurse, Ms. Dicke, about medication changes is a refusal of care as a matter of law that would excuse Defendant Blum's deliberate indifference both before and after that conversation took place. The conversation between Ms. Dicke and Ms. Carlisle cannot be understood as such an absolute refusal of care as either a matter of law or fact because the conversation did not have the elements of a proper refusal as outlined in Defendant Correct Care's own policy,[8] nor was the refusal informed as a matter of law.[9] Further, as Plaintiff

---

[8] Defendant Correct Care's "Informed Consent and Right to Refuse" policy states in relevant part:

> 5.5. Any health evaluation and treatment refusal is documented and must include the following:
>
> 5.5.1 Description of the nature of the service being refused,
> 5.5.2 Evidence that the patient has been made aware of any adverse consequences to health that may occur as a result of the refusal
> 5.5.3 The signature of the patient, and
> 5.5.4 The signature of a health services staff witness
>
> …
>
> 5.7 In the case of medication refusals, documentation on the MAR will indicate the patient refused the medication. If a patient refuses doses of essential medications on three consecutive days, the patient should be referred to the prescribing provider.

Simon Decl. Ex. A, p. 1.

[9] "Prisoners have the right to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment, as well as a reasonable explanation of the viable alternative treatments that can be made available in a prison setting." *White v. Napoleon*, 897 F.2d 103,111 (3rd Cir. 1990). This right is "useless without knowledge of the proposed treatment." *Id.* at 113; *and see Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) (citing *White v. Napoleon* with approval).

previously argued in her Motion and Response to Defendant's Motion, no specific alternative treatment was presented to Ms. Carlisle to refuse, and Defendant Blum admitted he never contemplated providing Ms. Carlisle with an alternative treatment.[10] Even if the court were to interpret the July 9, 2015 conversation as a refusal of care, it does nothing to excuse the undisputed fact that Defendants knew about but made no attempt to alleviate Ms. Carlisle's severe pain for over a month after both her gabapentin and Motrin were discontinued. At most, the July 9, 2015 conversation creates a dispute of material fact as to Defendant Blum's failure to treat Ms. Carlisle's severe pain *after* July 9, 2015. However, even Defendant Correct Care's own policy contemplates that in the context of essential medications, a single refusal does not alleviate healthcare providers' duty to continue making attempts to provide them to the patient.[11]

3. Defendants have made no argument in their own Motion or in their Response to Plaintiff's motion that Ms. Carlisle's serious medical need is in dispute.

The Eighth Amendment standard itself clearly contemplates that pain is a serious medical need. *See, e.g., McGuckin v. Smith,* 974 F.2d 1050, 1059 (9th Cir. 2006) (describing a serious medical need as being a condition that the failure to treat could result in "the unnecessary and wanton infliction of pain") (citing *Estelle v. Gamble,* 429 U.S. 97, 105 (1976)). While Defendants' Response mentions in half of a sentence that "a dispute exists as to whether plaintiff had a serious medical need,"[12] Defendants fail to present any facts or law that create this purported dispute. As Plaintiff laid out in her Motion, the parties' testimony, the parties' Joint Statement of Agreed Facts, the testimony of Ms. Carlisle's physician, the testimony of

[10] Pl.'s Mot. Summ. J. pp. 10-11, ECF No. 51
[11] See note 8, supra.
[12] Defs.' Resp. Pl.'s Mot. Summ. J. p. 6, ECF No. 57

Defendants' expert, and a variety of federal case decisions make clear that the severe nerve pain Ms. Carlisle suffers constitutes a serious medical need.

B. Defendant Correct Care's discontinuation policy is deliberately indifferent.

While Defendants assert that Defendant Correct Care's policy is "a standard policy that is widely accepted as constitutional,"[13] Defendants have only pointed to two non-binding district court opinions, neither of which supports the constitutionality of the policy. First, Defendants misplace their reliance on a prisoner's First Amendment retaliation claim, *Hicks v. Dotson*, 73 F. Supp. 3d 1296 (E.D. Wash. 2014), arguing that the legitimate interest of regulating medication to prevent abuse patently justifies Defendant Correct Care's policy.[14] The *Hicks* court only looked to the legitimate interests of the prison policy causing a change in the plaintiff's medication because plaintiff argued such a change was retaliatory for exercising his right to file grievances. *Id.* at 1300. Whether an action reasonably advanced a legitimate penological goal is an explicit part of the legal test for prisoners' First Amendment claims. *Id.* This is not a First Amendment case. Even if the court were to consider the legitimate penological goal of regulating medication abuse, the record includes testimony from Defendant Blum and his expert describing ways that the prison could have balanced that interest and their constitutional obligation to provide Plaintiff with medically necessary care (e.g. provide gabapentin crushed in water).[15]

Defendants' second case involved the discontinuation of a depression medication that the plaintiff was hoarding. *Armfield v. La. Corr. Servs.*, 3:10-cv-0175, 2010 WL 1790482 at *3 (W.D. La. Mar. 29, 2010). That an incarcerated pro se plaintiff, with all the barriers that entails, did not adequately show the reasons why a discontinuation policy was "unsound" should not be

[13] Defs.' Resp. Pl.'s Mot. Summ. J. p. 15, ECF No. 57.
[14] Defs.' Resp. Pl.'s Mot. Summ. J. p. 15-16, ECF No. 57.
[15] Pl.'s Mot. Summ. J. p. 9, ECF No. 51

given much weight here. Similarly, that a single district court in another circuit characterizes such a policy as not "unsound" in an unpublished opinion does not decide that all similar policies are manifestly *constitutional*. Defendants also leave out important facts that weighed into the court's conclusion, which were that the doctor implementing the policy was able to make a determination based on additional factors, including subsequent observations that the plaintiff did not suffer any adverse effects. *Id.* at *3. The undisputed facts in this case demonstrate that is not how Defendant Correct Care's policy worked. Under Defendant Correct Care's policy, it did not matter that Plaintiff suffered pain as a result of the discontinuation, no individualized medical determinations were required beyond a categorical determination regarding whether the medication was classified as "critical," and neither alternative treatment nor any follow-up observations were required. These crucial gaps show the policy is constitutionally infirm.

CONCLUSION

For the reasons stated above, in Plaintiff's Motion for Summary Judgment and in Plaintiff's Response to Defendants' Motion for Summary Judgment, Ms. Carlisle respectfully requests that this Court enter judgment in favor of Plaintiff on her claims for relief against Defendants.

DATED: January 25, 2019.

ACLU FOUNDATION OF OREGON, INC.

s/ Kelly K. Simon

Mathew dos Santos, OSB No. 155766
mdossantos@aclu-or.org
Kelly K. Simon, OSB No. 154213
ksimon@aclu-or.org
Aliza Kaplan, OSB No. 135523
akaplan@lclark.edu
Daniel Bartz, OSB No. 113226
danielbbartz@gmail.com
Attorneys for Plaintiff