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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

PATRICK KUNKEL,

Plaintiff,

v.

N. DILL, et al.,

Defendants.

CASE NO. 1:09-cv-00686-LJO-BAM PC

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND GRANTING IN  
PART AND DENYING IN PART  
DEFENDANTS’ MOTION FOR SUMMARY  
JUDGMENT

(ECF Nos. 137, 145, 146, 154, 162, 172, 173)

ORDER GRANTING DEFENDANTS’  
MOTION TO STRIKE PLAINTIFF’S  
SURREPLY, DENYING PLAINTIFF’S  
MOTION TO FILE A SURREPLY, AND  
STRIKING PLAINTIFF’S SURREPLY FROM  
THE RECORD

(ECF Nos. 147, 148, 149, 150)

ORDER GRANTING DEFENDANT ZAMORA  
THE OPPORTUNITY TO FILE A MOTION  
FOR SUMMARY JUDGMENT NUNC PRO  
TUNC TO JUNE 13, 2012

Plaintiff Patrick Kunkel (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On May 23, 2012, findings and recommendations issued recommending granting in part and denying in part Defendants’ motion for summary judgment and notifying the parties that objections were to be filed within thirty days. (ECF No. 162.) On July 13, 2012, an amended second informational order issued pursuant to Woods v. Carey, 684 F.3d 934, 939 (9th Cir. 2012), and

1 Plaintiff was granted the opportunity to file a supplemental opposition to the motion for summary  
2 judgment. (ECF No. 168, 169.) Plaintiff was specifically advised in the order permitting Plaintiff  
3 an opportunity to file a supplemental opposition that if he did file a supplemental opposition his  
4 existing opposition would be considered in resolving the motion for summary judgment. (Order 2:1-  
5 15, ECF No. 169.) On July 31, 2012, Plaintiff filed objections to the findings and recommendations  
6 and on August 3, 2012, Defendants filed a reply. (ECF Nos. 172, 173.) More than thirty days have  
7 passed and Plaintiff has not filed a supplemental opposition to Defendants' motion for summary  
8 judgment. Since Plaintiff has not filed a supplemental opposition in compliance with the July 13,  
9 2012 order, his existing opposition shall be considered in resolving Defendants' motion for summary  
10 judgment.

11 In his objection to the motion for summary judgment, Plaintiff attempts to make new  
12 arguments and produce new evidence that was not included in his opposition to the motion for  
13 summary judgment. Plaintiff had the opportunity to present his evidence and make his arguments  
14 in the opposition to Defendants' motion for summary judgment, and was granted the opportunity to  
15 file a supplemental opposition which he failed to do. The Court declines to exercise its discretion  
16 to consider Plaintiff's arguments and evidence asserted for the first time in the objection to the  
17 findings and recommendations.<sup>1</sup> Espinosa -Matthews v. California, 432 F.3d 1021, 1026 n.4 (9th  
18 Cir. 2005); United States v. Howell, 231 F.3d 615, 621-622 (9th Cir. 2000).

19 Plaintiff argues that based upon the procedure used to process requests for medical services  
20 Defendant Araich would have been aware of his requests for pain medication. Plaintiff failed to  
21 present any evidence of the procedure used to process requests for medical services in his opposition  
22 to the motion for summary judgment. However, the Magistrate Judge reviewed the requests for  
23 medical services that Plaintiff submitted in his opposition and found there is no indication that these  
24 requests were seen by Defendant Araich prior to the dates she treated Plaintiff, if at all.

25 Further, Plaintiff argues that the Magistrate Judge failed to include evidence he submitted  
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27 <sup>1</sup>In the reply, Defendants raise objections to Plaintiff's evidence, since the Court declines to consider new  
28 evidence submitted in the objection to the findings and recommendations, the Court shall not address Defendants'  
evidentiary objections.

1 in the findings and recommendations. In making the findings and recommendations the Magistrate  
2 Judge considered all relevant evidence which Plaintiff had submitted in his opposition. Evidence  
3 Plaintiff alleges has been excluded is evidence that was found to be inadmissible and therefore  
4 appropriately was not considered. Plaintiff also continues to argue that the medication he was given  
5 was not recommended to treat the type of pain he was experiencing. Plaintiff is not a medical  
6 expert, and therefore, he is not competent to testify to matters that require scientific, technical, or  
7 other specialized knowledge. Fed. R. Civ. P. 702. Even if the medication prescribed to Plaintiff was  
8 primarily used for the treatment of other medical conditions or types of pain, that is not sufficient  
9 to create a triable issue of material fact. Defendants have presented evidence that the medication  
10 Plaintiff was prescribed was widely used to treat chronic pain.

11 Finally, Plaintiff must do more than attack the credibility of defendants' evidence to survive  
12 summary judgment. See National Union Fire. Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th  
13 Cir. 1983) (“[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining  
14 his or her credibility suffices to avert . . . judgment.”).

15 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a  
16 de novo review of this case. Having carefully reviewed the entire file, the undersigned finds the  
17 findings and recommendations to be supported by the record and by proper analysis.

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. The findings and recommendations, filed May 23, 2012, is adopted in full;
- 20 2. Defendants' motion to strike Plaintiff's sur-reply, filed February 13, 2012, is  
21 GRANTED;
- 22 3. Plaintiff's motion to file a sur-reply, filed February 27, 2012 is DENIED;
- 23 4. Plaintiff's sur-reply, filed February 10, 2012, is STRICKEN FROM THE RECORD;
- 24 5. Defendants' motion for summary judgment, filed November 11, 2011, is GRANTED  
25 IN PART AND DENIED IN PART as follows:
  - 26 a. Defendant Araich's motion for summary judgment is GRANTED;
  - 27 b. Defendant Mackey's motion for summary judgment is GRANTED for her  
28 treatment of Plaintiff on February 15, 2007, and DENIED for her refusal to

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allow Plaintiff to see a physician on February 20, 2007;

c. Defendant Robaina’s motion for summary judgment is DENIED;

d. Defendant Dileo’s motion for summary judgement is DENIED;

e. Defendant Ali’s motion for summary judgment is GRANTED;

6. Defendant Zamora is granted an opportunity to file a motion for summary judgment nunc pro tunc to June 16, 2012; and

7. This action is referred back to the Magistrate Judge for consideration of Defendant Zamora’s motion for summary judgment.

IT IS SO ORDERED.

**Dated: August 29, 2012**

**/s/ Lawrence J. O’Neill**  
**UNITED STATES DISTRICT JUDGE**