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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFTON HUTCHINS, JR.,

Plaintiff,

v.

A. JOHAL<sup>1</sup>,

Defendant.

Case No. 1:15-cv-01537-DAD-HBK

FINDINGS AND RECOMMENDATIONS TO  
GRANT DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT<sup>2</sup>

FOURTEEN-DAY OBJECTION PERIOD

(Doc. No. 59)

ORDER DIRECTING CLERK OF COURT TO  
CORRECT DOCKET

Pending before the Court is Defendant Johal's Motion for Summary Judgment filed on December 23, 2019.<sup>3</sup> (Doc. No. 59, "MSJ"). Plaintiff filed an opposition and Defendant filed a reply. (Doc. Nos. 67, 68). For the reasons stated below, the undersigned finds no genuine dispute as to any material facts and recommends Defendant Johal's MSJ be granted.

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<sup>1</sup> The docket currently reflects the names of other defendants who have been dismissed from this action. As discussed *infra*, this action is proceeding only against Defendant A. Johal. (*See* Doc. No. 55). Accordingly, the Clerk of Court is directed to terminate the following defendants from the docket: Bill Lockyer, Sheheta, Ramos, Patel, J. Katavich, and J. Lewis.

<sup>2</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2019).

<sup>3</sup> This case was reassigned to the undersigned on November 17, 2020. (Doc. No. 69). The stay entered in this case was recently lifted. (*See* Doc. Nos. 49, 72).

1 **I. BACKGROUND**

2 **A. Procedural History**

3 Plaintiff Clifton Hutchins, Jr. (“Plaintiff” or “Hutchins”), a state prisoner, initiated this  
4 action by filing a *pro se* civil rights complaint under 42 U.S.C. § 1983 on September 11, 2015.  
5 (Doc. No. 1). Plaintiff is proceeding on his second amended complaint (“SAC”). (Doc. No. 21).  
6 On October 17, 2016, the then-assigned magistrate judge found that Hutchins’ SAC stated  
7 cognizable claims of Eighth Amendment medical deliberate indifference and First Amendment  
8 retaliation against Defendant Johal but found that all other claims and Defendants should be  
9 dismissed. (Doc. No. 20 at 11). Plaintiff advised the Court he agreed “to proceed only on the  
10 claims the court found cognizable.” (Doc. No. 24). In response to the SAC, Defendant Johal  
11 filed a Rule 12(b)(6) motion arguing the SAC failed to state any cognizable claims and claiming  
12 Defendant Johal was entitled to qualified immunity. (Doc. No. 30-1). The then-assigned  
13 magistrate judge issued findings and recommendations to deny Defendant’s motion to dismiss  
14 (Doc. No. 34) and these findings and recommendations were adopted by the District Court (Doc.  
15 No. 37). Defendant Johal then filed an answer to the complaint. (Doc. No. 38). Thereafter,  
16 Defendant Johan moved for exhaustion-based summary judgment. (Doc. No. 41). The Court  
17 granted in part and denied in part Defendant’s exhaustion-based motion for summary judgment,  
18 finding Hutchins had exhausted his medical deliberate indifference claim, but had not exhausted  
19 his retaliation claim and dismissed the retaliation claim. (Doc. Nos. 53, 55). Thus, this case  
20 proceeds only against Defendant Johal on Plaintiff’s Eighth Amendment medical deliberate  
21 indifference claim as described below.

22 **B. Evidence Submitted by the Parties**

23 After discovery and in compliance with the modified scheduling order (Doc. No. 58),  
24 Johal timely filed the instant merits based MSJ. (Doc. No. 59). In support, Johal submits a  
25 statement of undisputed facts (Doc. No. 59-2 at 1-8); Johal’s declaration (*id.* at 10-16); excerpts  
26 from Plaintiff’s medical records (*id.* at 21-55, 84-127); excerpts from Plaintiff’s deposition  
27 transcript (*id.* at 57-70); declaration and CV of Bennett Feinberg (*id.* at 72-82); and a statement  
28 of undisputed facts (Doc. No. 59-2). Plaintiff’s opposition to Defendant’s motion for summary

1 judgment (Doc. No. 67) includes his own declaration (*id.* at 12-13); various medical records and  
2 health care services request forms (*id.* at 15-28, 44); handwritten objections on a portion of  
3 Defendant’s statement of undisputed facts (*id.* at 30); and a copy of Defendant’s answer to the  
4 complaint (*id.* at 32-42). Defendant filed a reply to Plaintiff’s opposition (Doc. No. 68); a reply  
5 to Plaintiff’s response to Defendant’s statement of undisputed facts (Doc. No. 68-1 at 1-17);  
6 Defendant’s own declaration in support of his reply to Plaintiff’s opposition (*id.* at 19-20);  
7 objections to evidence Plaintiff submitted in support of his opposition (Doc. No. 68-2 at 1-4);  
8 declaration of L. Morales in support of Defendant’s reply to Plaintiff’s opposition (*id.* at 6-7); and  
9 a copy of Defendant’s notice of deposition of Plaintiff and request for production of documents  
10 (*id.* at 9-12).

## 11 **II. APPLICABLE LAW**

### 12 **A. Summary Judgment Standard**

13 The “purpose of summary judgment is to pierce the pleadings and to assess the proof in  
14 order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co. Ltd. v.*  
15 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). Summary judgment is  
16 appropriate when there is “no genuine dispute as to any material fact and the movant is entitled  
17 to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary judgment should be entered  
18 “after adequate time for discovery and upon motion, against a party who fails to make a  
19 showing sufficient to establish the existence of an element essential to that party’s case, and on  
20 which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
21 322 (1986). The moving party bears the “initial responsibility” of demonstrating the absence of  
22 a genuine issue of material fact. *Id.* at 323. An issue of material fact is genuine only if there is  
23 sufficient evidence for a reasonable fact finder to find for the non-moving party, while a fact is  
24 material if it “might affect the outcome of the suit under the governing law.” *Anderson v.*  
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

26 If the moving party meets its initial burden, the burden then shifts to the opposing party  
27 to present specific facts that show there to be a genuine issue of a material fact. *See* Fed R. Civ.  
28 P. 56(e); *Matsushita*, 475 U.S. at 586. An opposing party “must do more than simply show that

1 there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 587. The  
2 party is required to tender evidence of specific facts in the form of affidavits, and/or admissible  
3 discovery material, in support of its contention that a factual dispute exists. Fed. R. Civ. P.  
4 56(c); *Matsushita*, 475 U.S. at 586 n.11. The opposing party is not required to establish a  
5 material issue of fact conclusively in its favor; it is sufficient that “the claimed factual dispute be  
6 shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.”  
7 *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir.  
8 1987). However, “failure of proof concerning an essential element of the nonmoving party’s  
9 case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323.

10 The court must apply standards consistent with Rule 56 to determine whether the  
11 moving party demonstrated there is no genuine issue of material fact and showed judgment to be  
12 appropriate as a matter of law. See *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).  
13 “[A] court ruling on a motion for summary judgment may not engage in credibility  
14 determinations or the weighing of evidence.” *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir.  
15 2017) (citation omitted). The evidence must be viewed “in the light most favorable to the  
16 nonmoving party” and “all justifiable inferences” must be drawn in favor of the nonmoving  
17 party. *Orr v. Bank of America*, NT & SA, 285 F.3d 764, 772 (9th Cir. 2002). The mere scintilla  
18 of evidence is not sufficient to establish a genuine dispute to defeat an otherwise properly  
19 supported summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.  
20 However, where “opposing parties tell two different stories, one of which is blatantly  
21 contradicted by the record” courts “should not adopt that version of the facts for purposes of  
22 ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007).

### 23 **B. Eighth Amendment Medical Deliberate Indifference**

24 The Constitution indisputably requires prison officials to provide inmates with reasonably  
25 adequate medical care. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To hold an official liable for  
26 violating this duty under the Eighth Amendment, the inmate must satisfy two prongs, an objective  
27 prong and subjective prong. First, the inmate must suffer from a serious medical need (the  
28 objective prong); and, second the official must be deliberately indifferent to the inmate’s serious

1 medical need (the subjective prong). *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012),  
2 *overruled in part on other grounds, Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th Cir. 2014);  
3 *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012). A medical need is “serious” if the  
4 failure to treat “could result in further significant injury or the unnecessary and wanton infliction  
5 of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted). The  
6 “second prong—defendant’s response to the need was deliberately indifferent—is satisfied by  
7 showing (a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need  
8 and (b) harm caused by the indifference.” *Id.* (internal citations omitted). This standard requires  
9 that the prison official must not only “be aware of facts from which the inference could be drawn  
10 that a substantial risk of serious harm exists,” but that person “must also draw the  
11 inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “If a [prison official] should have  
12 been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no  
13 matter how severe the risk.” *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir.  
14 2002). This “subjective approach” focuses only “on what a defendant’s mental attitude actually  
15 was.” *Farmer*, 511 U.S. at 839.

16 Deliberate indifference is a higher standard than medical negligence or malpractice, and a  
17 difference of opinion between medical professionals—or between a physician and the prisoner—  
18 generally does not amount to deliberate indifference. *See generally Toguchi v. Chung*, 391 F.3d  
19 1051 (9th Cir. 2004); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (A mere “difference  
20 of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference.”).  
21 To prevail on a claim involving choices between alternative courses of treatment, a prisoner must  
22 show that the chosen course of treatment “was medically unacceptable under the circumstances,”  
23 and was chosen “in conscious disregard of an excessive risk to [the prisoner’s] health.” *Jackson*,  
24 90 F.3d at 332.

25 An “inadvertent failure to provide medical care” will not sustain a claim. *Estelle v.*  
26 *Gamble*, 429 U.S. 97, 105 (1976). Misdiagnosis alone is not a basis for a claim, *see Wilhelm v.*  
27 *Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012), and a “mere delay” in treatment, “without more, is  
28 insufficient to state a claim of deliberate medical indifference,” *Shapley v. Nevada Bd. of State*

1 *Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). Instead, a prisoner must show that a delay  
2 “would cause significant harm and that defendants should have known this to be the case.”  
3 *Hallett v. Morgan*, 296 F.3d 732, 746 (9th Cir. 2002).

### 4 III. ANALYSIS

#### 5 A. Allegations in Support of Medical Deliberate Indifference Claim in SAC

6 According to the allegations in the SAC, Defendant was deliberately indifferent to  
7 Hutchins’ serious medical need when she tapered and discontinued the morphine prescribed to  
8 treat his knee and shoulder pain, and instead prescribed him acetaminophen with codeine  
9 (“Tylenol-3”) and ibuprofen, which caused him side effects. (*See generally* Doc. No. 21).  
10 Hutchins states he had shoulder surgery in 2013 and was prescribed morphine for his pain after  
11 the surgery. (*Id.* at 3). Hutchins alleges he was prescribed and took morphine to address his pain  
12 from January 2014 until October 7, 2014. (*Id.*, ¶ 2). On or about August 16, 2014, Hutchins  
13 submitted a health care services request form requesting a refill of his morphine and requesting  
14 his ibuprofen prescription be discontinued because it caused him severe stomach pain, nausea,  
15 and dizziness. (*Id.* at 4, ¶ 5). After not receiving an answer to the August 16 request, Hutchins  
16 submitted a second health care services request on August 21, 2014. (*Id.*). Hutchins claims he  
17 did not receive a refill for his morphine and was experiencing chronic arthritis in his left shoulder  
18 and both knees and a tear in his left meniscus. (*Id.*). Hutchins states although he submitted  
19 multiple health care services request forms, his requests went unanswered and he had no pain  
20 medication causing him to needlessly suffer pain from September 8-12, 2014. (*Id.* at 4-5, ¶ 7).<sup>4</sup>

21 On or about September 12, 2014, Defendant Johal examined Hutchins and reduced his  
22 morphine dosage from 30 milligrams to 15 milligrams. (*Id.*). Plaintiff alleges Johal stated she  
23 was reducing Hutchins’ pain medication because he is an addict and because he complained too  
24 much. (*Id.* at 5-6). According to Plaintiff, when Johal discontinued his morphine on October 7,  
25 2014, she knew it would cause him excruciating knee and shoulder pain. (*Id.*). Hutchins avers he  
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27 <sup>4</sup> Plaintiff’s allegations at ¶¶ 2 and 7 are contradictory. Plaintiff states he was prescribed and was taking  
28 morphine from “January 2014, through October 7, 2014” but then states he suffered needlessly because he  
had no pain medication from September 8-12, 2014. (Doc. No. 21 at 3-5).

1 went without pain medication from October 7-13, 2014. (*Id.*). He alleges Johal took him off  
2 morphine to “teach him a lesson” and “ensure he suffered.” (*Id.*). Hutchins claims Johal did not  
3 taper Hutchins from morphine gradually, as required by California’s Prison Health Care Services  
4 (“CPHCS”) Pain Management Guidelines. (*Id.*).

5 On October 8, 2014, Hutchins had arthroscopic surgery. (*Id.* at 8). His surgeon, Dr. Paik,  
6 noted Hutchins could not take ibuprofen because it upset his stomach. (*Id.*). On or about October  
7 8, 2014, Hutchins submitted an inmate request for interview form, asking Johal to reinstate his  
8 morphine prescription. (*Id.* at 7). Johal failed and/or refused to respond in a timely manner.  
9 (*Id.*). However, Hutchins acknowledges Johal examined him on or about October 13, 2014, at  
10 which time he renewed his request for pain medication. (*Id.*). Hutchins appraised Johal he was  
11 having withdrawal symptoms, pain, and chills. (*Id.*). Hutchins claims Johal advised him that she  
12 would only prescribe him Tylenol-3 and ibuprofen because he was an addict. (*Id.*). Hutchins  
13 states he told Johal those medications caused him abdominal pain, nausea, and dizziness. (*Id.*).  
14 Johal allegedly told Hutchins to stop complaining to her supervisor and to leave her office. (*Id.*).

15 Hutchins contends Johal’s decision to discontinue his morphine prescription was “not  
16 based upon all objective information pursuant to CPHCS” guidelines. (*Id.*). On January 21,  
17 2015, Hutchins’ patient-inmate health appeal log was filed in the appeal’s coordinator office, in  
18 which he complained, *inter alia*, that Johal was wrongfully denying him his morphine  
19 prescription. (*Id.*). From February through July 2015, Hutchins proceeded through the 602-  
20 inmate appeal process, where he sought, *inter alia*, a reinstatement of his morphine prescription.  
21 (*Id.* at 10). Hutchins’ appeal was denied at the third level of review with a finding that Hutchins  
22 was receiving all medically necessary care. (*Id.*). As relief in his SAC, Hutchins seeks a  
23 declaratory judgment stating Johal was deliberately indifferent to his medical needs and  
24 compensatory and punitive damages.

#### 25 **B. Plaintiff’s Failure to Properly Oppose the Motion**

26 Hutchins filed an opposition to Defendant’s motion for summary judgment, but he failed  
27 to provide a separate statement of undisputed facts as required by Local Rule 260(a). (Doc. No.  
28 67). Instead, Hutchins describes in his opposition the exhibits he submitted and submits his own

1 declaration which again describes exhibits attached to his opposition. (*Id.* at 1-13). Hutchins also  
2 submitted a copy of one page of Defendant’s statement of undisputed facts on which he  
3 handwrote objections. (*Id.* at 30). Thus, Plaintiff has failed to address the bulk of Defendant’s  
4 statement of undisputed facts.

5 As the non-moving party, Hutchins is required to provide affidavits, and/or admissible  
6 discovery material demonstrating a factual dispute exists. Fed. R. Civ. P. 56(c); *Matsushita*, 475  
7 U.S. at 586 n.11. Where a party fails to do so, “Rule 56 is clear that although a court *may* deem  
8 facts admitted in the exercise of its discretion, it need not do so.” *Warkentin v. Federated Life*  
9 *Ins. Co.*, 594 F. App’x 900, 902-903 (2014); *see* Fed. R. Civ. P. 56 Advisory Committee Notes  
10 (2010) (noting that “the court may choose not to consider [a] fact as undisputed, particularly if the  
11 court knows of record materials that show grounds for genuine dispute”). Nor may the Court  
12 automatically grant summary judgment to a defendant solely because a plaintiff fails to properly  
13 oppose the motion. *Cristobal v. Siegel*, 26 F.3d 1488, 1494-95 & n.4 (9th Cir. 1994); *Martinez v.*  
14 *Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003).

15 However, summary judgment cannot be avoided by making conclusory allegations  
16 unsupported by factual data. *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912,  
17 922 (9th Cir. 2001) (*citing Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)). Where, as here, a  
18 party fails to properly support an assertion of fact or fails to challenge the facts asserted by the  
19 moving party, the non-moving party may be deemed to have admitted the validity of those facts.  
20 *See* Fed. R. Civ. P. 56(e)(2). The Court will nonetheless consider the entire record and deem only  
21 those facts true which are properly supported by evidence.

### 22 **C. Statement of Undisputed Facts**

23 Defendant’s MSJ attaches a list of undisputed facts. (Doc. No. 59-2). Each listed fact  
24 cites to either Johal’s declaration (*id.* at 10-16); Plaintiff’s medical records (*id.* at 21-55, 84-127);  
25 Plaintiff’s deposition testimony (*id.* at 57-70); or a declaration submitted by Dr. Bennett Feinberg  
26 (*id.* at 72-82). As discussed earlier, Plaintiff failed to provide his own statement of undisputed  
27 facts and failed to present evidence refuting the bulk of Defendant’s facts. However, Plaintiff has  
28 submitted, along with his opposition, his own declaration (Doc. No. 67 at 12-13); various medical



1 records and health care services request forms (*id.* at 15-28, 44); and handwritten objections at  
2 various parts of Defendant’s statement of undisputed facts (*id.* at 30). Having reviewed the  
3 record, the undersigned finds the following relevant facts to be undisputed, unless otherwise  
4 noted.

- 5 • Hutchins has had three surgeries while incarcerated: knee surgery in 2009, shoulder  
6 surgery in 2013, and knee surgery in 2014. (Doc. No. 59-2 at 59-62).
- 7 • Hutchins was prescribed morphine in the “early part of 2014,” a couple months after  
8 his second surgery for his shoulder. (*Id.* at 63).
- 9 • On August 16, 2014, Hutchins submitted a health care services request form  
10 requesting his morphine prescription to be refilled and stating his current medication  
11 upsets his stomach.<sup>5</sup> (Doc. No. 67 at 15). Hutchins has presented no evidence that  
12 Johal read or knew about this form. (Doc. No. 68 at 5).
- 13 • On August 21, 2014, Hutchins submitted a health care services request form again  
14 requesting that his medication, presumably his morphine, be refilled. (Doc. No. 59-2  
15 at 97).
- 16 • On September 12, 2014, Dr. Johal examined Hutchins for his complaints of chronic  
17 knee and shoulder pain. (*Id.* at 12 ¶ 6; 18).
- 18 • At the September 12, 2014 appointment, Dr. Johal renewed Hutchins’ morphine  
19 prescription of 30 milligrams of morphine in the morning and 15 milligrams of  
20 morphine in the evening. (*Id.* at 12, ¶ 9). Johal stated she would refer Hutchins’ case  
21 to the pain committee. (*Id.* at 18). Also, on September 12, 2014, Johal prescribed  
22 Hutchins ibuprofen and ranitidine, which is prescribed to counteract upset stomach  
23 issues caused by ibuprofen. (*Id.* at 24). Hutchins states that he believes Johal  
24 prescribed him ibuprofen at this appointment as well. (*Id.* at 65).
- 25 • Based on the physical examination and Hutchins’ history, Dr. Johal presented  
26 Hutchins’ case to the Pain Management Committee. (*Id.* at ¶ 12). Plaintiff handwrites

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27  
28 <sup>5</sup> The Court notes that the current medication in question is nearly illegible. However, it appears that  
Hutchins wrote “Motrin” as the medication that upset his stomach.

1 “disputed” next to this fact without any explanation or evidence. (Doc. No. 67 at 30).

- 2 • On September 17, 2014, the Pain Management Committee decided to taper, and  
3 eventually discontinue, Hutchins’ morphine prescription. (Doc. No. 59-2 at 12, ¶ 10,  
4 *id.* at 19). Plaintiff disputes this fact but provides no evidence. Instead, he points out  
5 the form wrongly has Corcoran Substance Abuse Facility written on it. (Doc. No. 67  
6 at 30). In reply, Defendant explains the form is a template used by multiple facilities,  
7 which is why the wrong facility appeared on the form. (Doc. No. 68-1 at 20, ¶ 3).
- 8 • Dr. Johal was not a *voting* member of the Pain Management Committee on September  
9 17, 2014. (*Id.* at ¶ 10) (emphasis added). Plaintiff disputes this, pointing to  
10 Defendants’ answer to the SAC stating, “Defendant admits she was a *member* of the  
11 Pain Management Committee at Wasco State Prison.” (Doc. No. 38 at 5) (emphasis  
12 added). The Court notes that the operative difference here is between a *member* and a  
13 *voting member* of the committee. Specifically, in her Answer, Defendant admits she  
14 was a member of Committee “and the Committee reviewed her recommendation to  
15 taper and deactivate Plaintiff’s morphine prescription.” (*Id.*, ¶ 27).
- 16 • Per the CCHCS Pain Management Guidelines, opioids, like morphine, are not the  
17 preferred treatment for chronic pain. Opioid therapy for chronic nonmalignant pain  
18 should never be considered a long-term solution. Prescriptions for morphine are  
19 restricted to those inmate-patients with objective evidence of severe disease. The  
20 inmate patient may develop an addiction to morphine if used long term. (Doc. No. 59-  
21 2 at 12, ¶ 11). Plaintiff states that this fact is “undisputed.” (Doc. No. 67 at 30).
- 22 • On or around September 23, 2014, Dr. Johal refilled Hutchins’ morphine prescription  
23 for seven days with a tapering dose of 15 milligrams twice a day, and instructions to  
24 further taper his prescription to 15 milligrams daily after an additional seven days, as  
25 recommended by the Pain Management Committee. (Doc. No. 59-2 at 12, ¶ 12; *id.* at  
26 26).
- 27 • On or around October 7, 2014, Hutchins’ morphine prescription was discontinued, as  
28 recommended by the Pain Management Committee. (*Id.* at 13, ¶ 13).

- 1 • Hutchins had surgery on his knee on October 8, 2014. (*Id.* at 13, ¶ 14).
- 2 • After his October 8, 2014 knee surgery, Dr. Paik, the surgeon, prescribed Hutchins  
3 Tylenol-3. The surgeon did not prescribe him morphine. (Doc. No. 59-2 at 67; Doc.  
4 No. 67 at 23).
- 5 • On October 8, 2014, Hutchins requested to interview Dr. Johal, claiming that he was  
6 having “withdrawals” and that the Tylenol-3 was not “taking the edge off [his] pain.”  
7 There were no allegations that the Tylenol-3 was causing any negative physical side  
8 effects in this interview request. (Doc. No. 21 at 19).
- 9 • At some point, a physician ordered that Hutchins’ ibuprofen be stopped. (Doc. No. 67  
10 at 27). However, the date and physician on this medical record are illegible. (*Id.*)
- 11 • Following an October 13, 2014 appointment, Dr. Johal submitted a request for  
12 services for physical therapy for Hutchins’ right knee, referred him for a steroid shot  
13 for his shoulder, referred him to a psychologist for pain management, and prescribed  
14 him pain medication on an as needed basis, including Tylenol-3 and ibuprofen, as well  
15 as ranitidine. (Doc. No. 59-2 at 13, ¶ 17; *id.* at 28, 30-32).
- 16 • When Dr. Johal treated Hutchins, he had not identified an allergy to ibuprofen or  
17 Tylenol-3 and his medical records did not notate an allergy to these medications. (*Id.*  
18 at 78-79, ¶¶ 32, 33).
- 19 • Johal states Hutchins never informed her that acetaminophen with codeine or  
20 ibuprofen causes him abdominal pain, nausea, or dizziness. (*Id.* at 14, ¶ 20). Hutchins  
21 states Johal knew he had “issues” with ibuprofen and Tylenol 3. (*Id.* at 64).
- 22 • On October 20, 2014, Dr. Paik stated that Hutchins was “unable to take anti-  
23 inflammatory drug as it upsets his stomach.” (*Id.* at 52).
- 24 • On October 25, 2014, Hutchins submitted a health care services request form in which  
25 he requested pain medication and stated that ibuprofen and Tylenol-3 cause him  
26 extreme nausea and dizziness. (Doc. No. 67 at 16). Hutchins presents no evidence to  
27 demonstrate Johal knew of or read this form. (Doc. No. 68 at 5).
- 28 • On October 31, 2014, Hutchins had another appointment with Dr. Johal. Hutchins

1 informed Dr. Johal nothing worked for his pain except morphine. Johal told Hutchins  
2 he should at least try to take the prescribed pain medication. (*Id.* at 14, ¶ 22; 48).

3 Hutchins presents no evidence he told Johal that Tylenol-3 and ibuprofen gave him  
4 side-effects during this appointment.

- 5 • Also, on October 31, 2014, Johal prescribed ranitidine, a medication to mitigate  
6 stomach issues caused by ibuprofen. (*Id.* at 14 ¶ 22; 50).
- 7 • Johal states she did not see Dr. Paik’s typed report before her appointment with  
8 Hutchins on October 31, 2014. That report stated Hutchins could not take anti-  
9 inflammatory drugs because they upset his stomach. (*Id.* at 14 ¶ 23).
- 10 • On November 7, 2014, Johal had an appointment with Hutchins where Johal  
11 documented Hutchins was doing fine and Hutchins did not report any new problems.  
12 Hutchins was participating in physical therapy and tolerating it well. (*Id.* at ¶ 24; 54).
- 13 • On or about December 20, 2014, Hutchins was seen by Dr. Sheh, who stated in  
14 progress notes that Hutchins requested morphine because Tylenol-3 will not “work  
15 with his stomach.” (*Id.* at 121).
- 16 • Johal states her decision to prescribe Hutchins Tylenol-3 and ibuprofen was not made  
17 in conscious disregard to Hutchins’ pain. (*Id.* at 16, ¶ 27).
- 18 • Dr. Feinberg states Johal’s decision to treat Hutchins with Tylenol-3 and ibuprofen  
19 was medically appropriate. (*Id.* at 78-79, ¶ 32, 33).

20 **D. The Undisputed Material Facts Show Johal Was Not Deliberately Indifferent**

21 Johal argues she is entitled to summary judgment because the undisputed facts do not  
22 demonstrate that she acted with medical deliberate indifference to Hutchins. (Doc. No. 59-1 at  
23 14-20). Specifically, Johal argues she did not disregard a serious risk of harm to Hutchins when  
24 she discontinued his morphine and instead prescribed him multiple forms of pain relief, including  
25 ibuprofen and Tylenol-3, a steroid shot, physical therapy, a knee brace, a referral to an orthopedic  
26 surgeon and a referral to a psychologist for pain management. (*Id.* at 14-15). Further, Johal  
27 argues that Hutchins’ disagreement with Johal’s course of treatment is merely a difference of  
28 opinion that does not rise to the level of a constitutional violation. (*Id.* at 15-16).

1           The undersigned first must consider whether Defendant, the moving party, has met her  
2 initial burden of showing *prima facie* entitlement to summary judgment on the issue of Plaintiff’s  
3 medical deliberate indifference claim. *Celotex Corp.*, 477 U.S at 323. The *prima facie* elements  
4 of medical deliberate indifference are (1) a “serious medical need by demonstrating that failure to  
5 treat a prisoner’s condition could result in further significant injury or the unnecessary and  
6 wanton infliction of pain” and (2) that the defendant’s “response to the need was deliberately  
7 indifferent.” *Wilhelm*, 680 F.3d at 1122 (internal quotation marks and citation omitted).

8                           **1. Objective Prong: Serious Medical Need**

9           The undisputed facts, when viewed in the light most favorable to Hutchins, indicate  
10 Hutchins had a serious medical need. A serious medical need is evidenced by “the existence of  
11 an injury that a reasonable doctor or patient would find important and worthy of comment or  
12 treatment; the presence of a medical condition that significantly affects an individual’s daily  
13 activities; or the existence of chronic and substantial pain.” *McGuckin v. Smith*, 974 F.2d 1050,  
14 1059-60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d  
15 1133 (9th Cir. 1997) (en banc). Here, the record reveals Hutchins had various physical ailments  
16 (knee and shoulder conditions necessitating surgery) that caused him “severe pain while  
17 performing daily life activities.” (Doc. No. 21 at 9, ¶ 24-28). Plaintiff also states Tylenol-3 and  
18 ibuprofen caused him stomach pain, nausea, dizziness, and made him feel nauseous. (Doc. No.  
19 59-2 at 65-66; Doc. No. 21 at 11, ¶ 4-9). A reasonable jury therefore could find that Plaintiff’s  
20 chronic pain and medication side effects constituted a serious medical need.

21                           **2. Subjective Prong: Failure to Respond Resulting in Harm**

22           The Court now considers whether the subjective prong of deliberate indifference—failure  
23 to respond to a prisoner’s pain, resulting in harm—has been negated by Defendant. *Jett*, 439 F.3d  
24 at 1096. This standard requires the prison official to not only “be aware of facts from which the  
25 inference could be drawn that a substantial risk of serious harm exists,” but that person “must also  
26 draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To prevail on a claim  
27 involving choices between alternative courses of treatment, as is the issue here, a prisoner must  
28 show that the chosen course of treatment “was medically unacceptable under the circumstances,”

1 and was chosen “in conscious disregard of an excessive risk to [the prisoner’s] health.” *Jackson*  
2 *v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

3 **i. Discontinuation of Morphine**

4 The Court first considers whether the undisputed facts demonstrate that Johal was  
5 deliberately indifferent when she discontinued Hutchins’ morphine prescription. It is undisputed  
6 that Hutchins’ case was presented to the pain committee and the committee recommended  
7 Hutchins’ morphine be tapered and discontinued. Also, it is undisputed that Johal recommended  
8 tapering and discontinuing Hutchins’ morphine. The issue in dispute is whether Johal’s  
9 recommendation to taper and discontinue morphine was “medically unacceptable under the  
10 circumstances” and was chosen in “conscious disregard of an excessive risk” to Hutchins’ health.  
11 *Jackson*, 90 F.3d 332.

12 As an initial matter, a mere “difference of medical opinion . . . [is] insufficient, as a matter  
13 of law, to establish deliberate indifference.” *Id.* And simply showing that a course of treatment  
14 proves to be ineffective, without showing that the medical professional’s conduct was medically  
15 unacceptable under the circumstances and chosen in conscious disregard to Plaintiff’s health,  
16 does not establish a claim for deliberate indifference. *Nicholson v. Finander*, No. CV 12-9993-  
17 FMO-JEM, 2014 U.S. Dist. LEXIS 51417, 2014 WL 1407828, at \*9 (C.D. Cal.  
18 2014) (citing *Estelle*, 429 U.S. at 105; *Toguchi*, 391 F.3d at 1058). Further, Plaintiff does not  
19 have a right to dictate what medications he is prescribed. *Stiltner v. Rhay*, 371 F.2d 420, 421 n.3  
20 (9th Cir. 1967) (allegations that a prisoner feels he is not receiving the “the kind and quality of  
21 medical treatment he believes is indicated” does not demonstrate deliberate indifference).

22 Multiple district courts in this circuit have held that a plaintiff’s denial of morphine or  
23 other pain medication does not amount to deliberate indifference. *See, e.g., Arellano v. Sedighi*,  
24 No. 15-cv-02059-AJB-BGS, 2020 U.S. Dist. LEXIS 182939, at \*145-46 (S.D. Cal. Oct. 1,  
25 2020) (“Plaintiff’s request for . . . Morphine is a difference of opinion and preference by Plaintiff.  
26 But failure to provide Plaintiff with the specific medication he requested and differences in  
27 judgment regarding an appropriate medical treatment is not enough to establish deliberate  
28 indifference.”); *Gonzales v. Ugwueze*, No. 1:11-CV-01588-LJO, 2014 U.S. Dist. LEXIS 7315, at

1 \*9 (E.D. Cal. Jan. 21, 2014), subsequently aff'd, 594 F. App'x 448 (9th Cir. 2015) (plaintiff's  
2 opinion that he should have been provided other types of pain medication does not create a  
3 dispute of material fact to preclude summary judgment); *Gonzales v. Ugwueze*, No. 1:11-CV-  
4 01588-LJO, 2014 U.S. Dist. LEXIS 7315, 2014 WL 223506, at \*9 (E.D. Cal. Jan. 21, 2014),  
5 subsequently aff'd, 594 F. App'x 448 (9th Cir. 2015) (plaintiff's opinion that he should have been  
6 provided other types of pain medication does not create a dispute of material fact to preclude  
7 summary judgment); *Parlin v. Sodhi*, No. 10-6120 VBF (MRW), 2012 U.S. Dist. LEXIS 159187,  
8 at \*4 (C.D. Cal. Aug. 2012) (“[P]laintiff’s claim is that he did not receive the type of treatment  
9 and pain medication that he wanted when he wanted it. His preference for stronger medication [. . .]  
10 . .] represents precisely the type of difference in medical opinion between lay prisoner and  
11 medical personnel that is insufficient to establish a constitutional violation.”).

12 Further, doctors’ decisions to discontinue narcotics or opioids in favor of safer  
13 medications have been found medically acceptable in other cases before this court. *See e.g.*,  
14 *Solomon v. Negrete*, No. 2:10-cv-2103 WBS AC P, 2014 U.S. Dist. LEXIS 18556 (E.D. Cal.  
15 Feb.11, 2014), *rep. and reco. adopted*, 2014 U.S. Dist. LEXIS 35338 (E.D. Cal. Mar.14, 2014)  
16 (granting defendants’ motion for summary judgment on plaintiff’s claim challenging the  
17 discontinuance of a morphine prescription with the use of an alternate prescription for  
18 ibuprofen); *Fischer v. Algers*, No. 2:12-cv-2595 MCE CKD P, 2014 U.S. Dist. LEXIS 94678,  
19 (E.D. Cal. July 10, 2014), *rep. and reco. adopted*, 2014 U.S. Dist. LEXIS 199015 (E.D. Cal. Aug.  
20 15, 2014) (recommending defendants’ motion for summary judgment be granted on plaintiff’s  
21 claim challenging his taper from morphine, to Tylenol 3 with codeine, to ibuprofen).  
22 Accordingly, Johal’s recommendation to the committee to taper and discontinue the morphine  
23 prescription cannot amount to deliberate indifference.

24 Moreover, Johal presents undisputed evidence that her recommendation to taper and  
25 discontinue Hutchins’ morphine was not medically unacceptable under the circumstances.  
26 Morphine is not a long-term treatment option for pain under CDCR guidelines. (Doc. No. 59-2 at  
27 12, ¶ 11). The prison’s pain committee was comprised of the Chief Physician and Surgeon, a  
28 psychiatrist, physiologist, pharmacist, and other physicians. (*Id.* at 12, ¶ 10). The pain committee

1 concluded that Hutchins should be discontinued from his morphine. (*Id.*). A doctor's choice to  
2 follow a pain committee's recommendation does not amount to deliberate indifference. *See*  
3 *Scherffius v. Smith*, No. 2:13-cv-1277 JAM DB P, 2019 U.S. Dist. LEXIS 221738, at \*33-35  
4 (E.D. Cal. Dec. 26, 2019) (finding no deliberate indifference where doctor followed the pain  
5 committee's recommendation to discontinue plaintiff's morphine and place plaintiff on non-  
6 narcotic medication); *Miller v. Cal. Dep't of Corr. & Rehab. (CDCR)*, No. 16-cv-02431-EMC,  
7 2018 U.S. Dist. LEXIS 11716, at \*53-54 (N.D. Cal. Jan. 24, 2018) (same). Further, Johal  
8 presents the medical opinion of Dr. Bennett Feinberg, who opined that Johal's choice of Tylenol-  
9 3 and ibuprofen rather than morphine was medically appropriate under the circumstances. (Doc.  
10 No. 59-2 at 78-79).

11 Further, Johal presents evidence that she did not taper and discontinue Hutchins'  
12 morphine in conscious disregard to an excessive risk to Hutchins' health. *Wilson v. Seiter*, 501  
13 U.S. 294, 297 (1991) (finding that there must be sufficient facts to indicate a culpable state of  
14 mind on the part of the defendants). Johal tapered the morphine over a two-week period and then  
15 prescribed Hutchins multiple different forms of alternative pain relief, including ibuprofen and  
16 Tylenol-3, a steroid shot, physical therapy, a knee brace, and a referral to a psychologist for pain  
17 management. (Doc. No. 59-1 at 14-15); *see O'Brien v. Saha*, No. 19-cv-01957-JLS (JLB), 2021  
18 U.S. Dist. LEXIS 18731, at \*60 (S.D. Cal. Jan. 30, 2021) (no finding of deliberate indifference  
19 where plaintiff was provided with multiple alternatives to morphine for pain relief, such as  
20 Tylenol, ibuprofen, steroid injection, physical therapy, and mental health services).

21 The burden now shifts to Hutchins to present specific facts that show a genuine issue of a  
22 material fact as to the tapering and discontinuation of his morphine. *See Fed R. Civ. P. 56(e)*;  
23 *Matsushita*, 475 U.S. at 586. As an initial matter, Hutchins does not identify any medical records  
24 which support his claim that he should not have had his morphine discontinued and he has not  
25 provided any opinion from a medical expert or any other admissible testimony from a medical  
26 provider in that regard. Hutchins does not assert that he is a medical expert. Hutchins' self-  
27 assessment that his treatment with morphine should have been continued would be inadmissible  
28 at trial and a reasonable trier of fact would have no evidence upon which to find those alleged



1 facts. Fed. R. Civ. P. 56(c)(4); *see also Arellano*, 2020 U.S. Dist. LEXIS 182939, at \*142  
2 (finding no genuine issue of material fact where plaintiff did “not [provide] any evidence to  
3 support his own medical opinion” that the medication prescribed to him was an ineffective or  
4 inappropriate treatment); *Jackson v. Blain*, No. CV 20-1932-SVW (KS), 2020 U.S. Dist. LEXIS  
5 240327, at \*22 (C.D. Cal. Nov. 12, 2020) (“Plaintiff may believe that his chronic pain should be  
6 treated indefinitely with opioid analgesics, but his belief does not render a contrary decision by a  
7 medical professional unconstitutional under the Eighth Amendment.).

8         Construing the evidence in the light most favorable to Hutchins, the undersigned finds no  
9 evidence to raise a triable issue of fact as to whether Defendant was deliberately indifferent to  
10 Hutchins’ medical need when she tapered and discontinued his morphine prescription. The  
11 undersigned recommends that Defendant be granted summary judgment on this claim.

#### 12                                 **ii. Side Effects of Tylenol-3 and Ibuprofen**

13         The undersigned now considers whether the undisputed facts demonstrate that Johal was  
14 deliberately indifferent when she prescribed Hutchins Tylenol-3 and ibuprofen, which caused him  
15 painful side effects. It is not disputed that Johal prescribed Hutchins Tylenol-3 and ibuprofen, or  
16 that he suffered painful side effects as a result. The issue in dispute is whether Johal’s  
17 prescription of Tylenol-3 and ibuprofen was “medically unacceptable under the circumstances”  
18 and was chosen in “conscious disregard of an excessive risk” to Hutchins’ health. *Jackson*, 90  
19 F.3d 332.

20         Defendant presents evidence that her course of treatment was not medically unacceptable  
21 under the circumstances. As stated previously, Johal prescribed Hutchins a wide range of  
22 treatments for his pain in addition to Tylenol-3 and ibuprofen. A defendant “cannot be said to  
23 have been indifferent” to an inmate’s pain if they “took steps to address it.” *DeGeorge v.*  
24 *Mindoro*, No. 17-CV-06069-LHK, 2019 WL 2123590, at \*7 (N.D. Cal. May 15, 2019). Further,  
25 Johal prescribed Hutchins ranitidine, which is a drug prescribed to counteract side effects of  
26 ibuprofen. (Doc. No. 59-2 at 14, ¶ 22); *Tiemens v. Andreasen*, No. CIV S-09-0052 FCD EFB P,  
27 2011 U.S. Dist. LEXIS 15869, at \*21 (E.D. Cal. Feb. 16, 2011) (finding that defendants  
28 reasonably addressed plaintiff’s stomach symptoms, which were caused by side effects of his

1 prescribed medication, through antacid medication). Finally, Johal presents the Declaration of  
2 Dr. Feinberg, who opines that “Dr. Johal’s decision to prescribe Plaintiff ibuprofen to treat his  
3 pain was medically appropriate” and “Dr. Johal’s decision to prescribe Plaintiff Tylenol #3 to  
4 treat his pain was medically appropriate.” (Doc. No. 59-2 at 78, ¶32 and 79, ¶ 33).

5 Further, Defendant presents evidence she did not act in conscious disregard to an  
6 excessive risk to Hutchins’ health when she prescribed him Tylenol-3 and ibuprofen. Defendant  
7 submits evidence Hutchins took Tylenol-3 and ibuprofen in the past without complaints. (*Id.* at  
8 14, ¶ 22). Where a doctor is aware that a prisoner has taken certain medications in the past  
9 without issue, her act of prescribing such medications cannot constitute deliberate indifference  
10 because her “actions were informed by her past experience treating” the prisoner. *Toguchi v.*  
11 *Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004); *see also Arellano*, 2020 U.S. Dist. LEXIS 182939,  
12 at \*144 (finding that a health care provider’s prescription of medication that prisoner tolerated in  
13 the past did not constitute medical deliberate indifference). Johal also points to the fact that  
14 Hutchins’ medical chart did not document any allergies to Tylenol-3 and ibuprofen. (Doc. No.  
15 59-2 at 14, ¶ 22). *See Toguchi*, 391 F.3d at 1058 (“Because [the doctor] did not believe that  
16 Cogentin use presented a serious risk of harm to [plaintiff], her conduct cannot constitute  
17 deliberate indifference.”); *Thomas v. Antipov*, No. 2:11-cv-1138-MCE-EFB P, 2014 U.S. Dist.  
18 LEXIS 175688, at \*32-33 (E.D. Cal. Dec. 18, 2014) (finding that under *Toguchi*, a doctor’s  
19 decision to prescribe Tylenol-3 cannot constitute deliberate indifference if [the doctor] did not  
20 believe that the medication presented a serious risk of harm to plaintiff).

21 The burden now shifts to Hutchins to present specific facts that show a genuine issue of a  
22 material fact. *See Fed R. Civ. P. 56(e); Matsushita*, 475 U.S. at 586. As stated previously,  
23 Hutchins does not identify any medical records which support his claim that Johal was  
24 deliberately indifferent in prescribing him Tylenol-3 and ibuprofen. Nor does he provide an  
25 opinion from a medical expert or any admissible testimony from a medical provider in this  
26 regard. Hutchins does not state that he is a medical professional. Hutchins’ self-assessment that  
27 the Tylenol-3 and ibuprofen prescription was improper would thus be inadmissible at trial and a  
28 reasonable trier of fact would have no evidence upon which to find those alleged facts. Fed. R.

1 Civ. P. 56(c)(4).

2 And even if Hutchins can show that Johal prescribed the medications despite knowing the  
3 medications caused side effects, this at most constitutes negligence. Negligence will not support  
4 a claim of deliberate indifference to serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106,  
5 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Broughton v. Cutter Lab.*, 622 F.2d 458, 460 (9th Cir.  
6 1980). Claims arising from side effects of medication only state a claim of negligence, not  
7 medical deliberate indifference. *Wynn v. Angelone*, No. 94-15393, 1994 U.S. App. LEXIS  
8 28382, at \*4 (9th Cir. Oct. 6, 1994) (finding that where a doctor prescribed ibuprofen that caused  
9 prisoner ill effects, doctor was not deliberately indifferent—most that was shown was negligence  
10 or medical malpractice); *Pierce v. Lopez*, No. 1:10-cv-00486-AWI-MJS (PC), 2012 U.S. Dist.  
11 LEXIS 57398, at \*12 (E.D. Cal. Apr. 23, 2012) (doctor’s failure to recognize side effects from  
12 antibiotics was only negligence, not deliberate indifference); *Uhuru v. Greenman*, No. CV 07-  
13 02937-JVS (VBK), 2009 U.S. Dist. LEXIS 134432, at \*24 (C.D. Cal. Sep. 21, 2009) (finding that  
14 defendant doctors were “not liable for the side effects of medications used to control plaintiff’s  
15 mental health” because plaintiff’s injuries due to side effects of his medication stated only a claim  
16 of negligence); *Murillo v. Thornton*, No. 07-CV-0197 W(POR), 2008 U.S. Dist. LEXIS 1520, at  
17 \*4 (S.D. Cal. Jan. 9, 2008) (prisoner’s allegations that defendant “prescribed him the wrong  
18 medication and did not inform him about the side effects,” causing plaintiff “severe stomach  
19 aches and headaches for four months,” failed to state an Eighth Amendment claim).

20 Viewing the evidence in the light most favorable to the nonmoving party, Plaintiff fails to  
21 show Johal’s prescription of Tylenol-3 and ibuprofen was medically unacceptable under the  
22 circumstances. See *Jackson*, 90 F.3d at 332. Further, Hutchins fails to present evidence  
23 Johal chose to prescribe these medications in conscious disregard of an excessive risk to  
24 Hutchins’ health. *Id.*

25 Therefore, in light of the above, the undersigned finds Johal was not deliberately  
26 indifferent to Hutchins’ medical needs when she prescribed him Tylenol-3 and ibuprofen.  
27 Summary judgment should be granted in favor of Defendant on this claim.

28 Accordingly, it is **RECOMMENDED**:

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1. Defendant’s Motion for Summary Judgment (Doc. No. 59) is GRANTED.
2. Judgment be entered in favor of the Defendant; all deadlines be terminated; and the case be closed.


Further, it is **ORDERED**:

The Clerk of Court is directed to amend the docket to reflect Johal as the sole Defendant in this matter.

**NOTICE TO PARTIES**

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: October 6, 2021

  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE