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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JUAN RODRIGUEZ,  
Plaintiff,  
v.  
Dr. K. TOOR,  
Defendant.

**Case No. 1:16-cv-00504-DAD-JLT (PC)**  
**FINDINGS AND RECOMMENDATION TO GRANT DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**  
**(Doc. 19)**  
**OBJECTIONS DUE WITHIN 21 DAYS**

Plaintiff proceeds against Defendant on a claim under the Eighth Amendment of deliberate indifference to Plaintiff’s serious medical needs by not referring Plaintiff for hip surgery as recommended by outside medical specialists. Defendant contends that he did not disregard, ignore, or fail to respond to Plaintiff’s medical needs, but that Plaintiff’s claim, at most, amounts to a difference in medical opinion, entitling Defendant to summary judgment. (Doc. 19.) For the reasons discussed below, the Court finds that Defendant’s motion should be **GRANTED** as it establishes the absence of genuine issues of material fact.

**I. Procedural History**

This action proceeds on Plaintiff’s First Amended Complaint (Doc. 6) for violation of the Eighth Amendment against Defendant. (Docs. 7, 9, 10.) On September 28, 2017, Defendant

1 filed a motion for summary judgment under Federal Rule of Civil Procedure<sup>1</sup> 56. (Doc. 19.)  
2 Plaintiff was provided timely notice of the requirements for opposing a motion for summary  
3 judgment in an order that issued on October 2, 2017. *Woods v. Carey*, Nos. 09-15548, 09-16113,  
4 2012 WL 2626912 (9th Cir. Jul. 6, 2012), *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), *Rand*  
5 *v. Rowland*, 154 F.3d 952 (9th Cir. 1998), and *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir.  
6 1988). That notice warned Plaintiff that his failure to file an opposition or a statement of non-  
7 opposition to Defendant's motion could result in dismissal for failure to prosecute and that his  
8 failure to contradict Defendant's motion with declarations or other evidence would result in  
9 Defendant's evidence being taken as truth upon which final judgment may be entered. (Doc. 20.)  
10 Despite lapse of more than a month beyond the allowed time, Plaintiff has filed neither an  
11 opposition, nor a statement of opposition to Defendant's motion. Thus, the Court deems the  
12 submitted. L.R. 230 (I).

## 13 **II. Plaintiff's Claims**

14 Plaintiff is proceeding against Dr. Toor on allegations that Dr. Toor has been his primary  
15 care provider since Plaintiff arrived at Valley State Prison in 2012. Dr. Toor had access to  
16 Plaintiff's medical history via his Unit Health Record, which Dr. Toor referred to when treating  
17 Plaintiff. Plaintiff's UHR shows that he had a hip replacement in March 2011 and had four  
18 corrective surgeries from 1996 through 2003. Between April 2011 and February 2014, various  
19 CDC physicians consulted with outside specialists and obtained both x-rays and CT scans of  
20 Plaintiff's hip and the prosthesis in it -- all of which revealed instability and a need for surgical  
21 repair. From April 2012 to March 2014, various specialists recommended corrective surgery.  
22 Despite this, on at least five different occasions, Dr. Toor allegedly sought further consultations  
23 and outside opinions to confirm whether Plaintiff needed surgery.

24 From January 2013 to April 2014, Dr. Toor increased Plaintiff's pain medication from  
25 Tylenol-#3 (Codeine) to Morphine and then to stronger and stronger doses of Morphine, to  
26 address Plaintiff's increasing hip pain. Plaintiff alleges that, though it took a while for his surgery  
27 to be financially approved, after it was approved, Dr. Toor failed to refer him for it; rather from

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28 <sup>1</sup> The Federal Rules of Civil Procedure will hereinafter be referred to as "Rule \*."

1 February 2014 to June of that same year, Dr. Toor repeatedly counseled Plaintiff to “think about  
2 it” before he would schedule it. Plaintiff submitted an inmate appeal requesting the surgery in  
3 September 2014 which was ultimately denied stating “it is [Dr. Toor’s] responsibility to  
4 determine the necessity for additional follow up consultations . . . recommendations suggested by  
5 the specialist.” Plaintiff’s hip prosthesis is allegedly failing while his pain and instability increase  
6 and mobility decreases.

7 **III. Summary Judgment Standard**

8 Summary judgment is appropriate where there is “no genuine dispute as to any material  
9 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Washington*  
10 *Mutual Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). An issue of fact is genuine only if there  
11 is sufficient evidence for a reasonable fact finder to find for the non-moving party, while a fact is  
12 material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty*  
13 *Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1422, 1436  
14 (9th Cir. 1987). The Court determines only whether there is a genuine issue for trial and in doing  
15 so, it must liberally construe Plaintiff’s filings because he is a *pro se* prisoner. *Thomas v. Ponder*,  
16 611 F3d 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted).

17 In addition, Rule 56 allows a court to grant summary adjudication, or partial summary  
18 judgment, when there is no genuine issue of material fact as to a particular claim or portion of that  
19 claim. Fed. R. Civ. P. 56(a); *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir.  
20 1981) (“Rule 56 authorizes a summary adjudication that will often fall short of a final  
21 determination, even of a single claim . . .”) (internal quotation marks and citation omitted). The  
22 standards that apply on a motion for summary judgment and a motion for summary adjudication  
23 are the same. *See* Fed. R. Civ. P. 56 (a), (c); *Mora v. Chem-Tronics*, 16 F.Supp.2d 1192, 1200  
24 (S.D. Cal. 1998).

25 Each party’s position must be supported by (1) citing to particular parts of materials in the  
26 record, including but not limited to depositions, documents, declarations, or discovery; or (2)  
27 showing that the materials cited do not establish the presence or absence of a genuine dispute or  
28 that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.

1 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not  
2 cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen v. San*  
3 *Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v. Navajo*  
4 *County, Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

5 The Defendant does not bear the burden of proof at trial and, in moving for summary  
6 judgment, they need only prove an absence of evidence to support Plaintiff's case. *In re Oracle*  
7 *Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*,  
8 477 U.S. 317, 323, 106 S.Ct. 2548 (1986)). If a defendant meets this initial burden, the burden  
9 then shifts to Plaintiff "to designate specific facts demonstrating the existence of genuine issues  
10 for trial." *In re Oracle Corp.*, 627 F.3d at 387 (citing *Celotex Corp.*, 477 U.S. at 323). This  
11 requires Plaintiff to "show more than the mere existence of a scintilla of evidence." *Id.* (citing  
12 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). An issue of fact is genuine only if  
13 there is sufficient evidence for a reasonable fact finder to find for the non-moving party, while a  
14 fact is material if it "might affect the outcome of the suit under the governing law." *Anderson*,  
15 477 U.S. at 248; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1422, 1436 (9th Cir. 1987).

16 In judging the evidence at the summary judgment stage, the Court may not make  
17 credibility determinations or weigh conflicting evidence, *Soremekun v. Thrifty Payless Inc.*, 509  
18 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all  
19 inferences in the light most favorable to the nonmoving party and determine whether a genuine  
20 issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v.*  
21 *City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted),  
22 *cert. denied*, 132 S.Ct. 1566 (2012). Inferences, however, are not drawn out of the air; the  
23 nonmoving party must produce a factual predicate from which the inference may reasonably be  
24 drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),  
25 *aff'd*, 810 F.2d 898 (9th Cir. 1987).

26 Where, as here, the opposing party fails to file an opposition, a district court may not grant  
27 a motion for summary judgment solely on this basis. *Cristobal v. Siegel*, 26 F.3d 1488, 1494-95  
28 & n. 4 (9th Cir.1994). However, an unopposed motion for summary judgment may be granted if

1 the movant's papers are sufficient to support the motion and do not on their face reveal a genuine  
2 issue of material fact. See *United States v. Real Property at Incline Village*, 47 F.3d 1511,  
3 1519-20 (9th Cir.1995) (holding local rule cannot mandate automatic entry of judgment for  
4 moving party without consideration of whether motion and supporting papers satisfy  
5 Fed.R.Civ.P. 56), *rev'd on other grounds sub nom. Degen v. United States*, 517 U.S. 820 (1996).

#### 6 **IV. Discussion and Analysis**

##### 7 **A. Legal Standard Under the Eighth Amendment**

8 Prison officials violate the Eighth Amendment if they are "deliberate[ly] indifferen[t] to [a  
9 prisoner's] serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "A medical need  
10 is serious if failure to treat it will result in "significant injury or the unnecessary and wanton  
11 infliction of pain.""  
12 *Peralta v. Dillard*, 744 F.3d 1076, 1081-82 (2014) (quoting *Jett v. Penner*,  
13 439 F.3d 1091, 1096 (9th Cir.2006) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th  
14 Cir.1992), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th  
15 Cir.1997) (en banc)).

16 To maintain an Eighth Amendment claim based on medical care in prison, a plaintiff must  
17 first "show a serious medical need by demonstrating that failure to treat a prisoner's condition  
18 could result in further significant injury or the unnecessary and wanton infliction of pain. Second,  
19 the plaintiff must show the defendants' response to the need was deliberately indifferent."  
20 *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (quoting *Jett*, 439 F.3d at 1096  
21 (quotation marks omitted)).

22 As to the first prong, indications of a serious medical need "include the existence of an  
23 injury that a reasonable doctor or patient would find important and worthy of comment or  
24 treatment; the presence of a medical condition that significantly affects an individual's daily  
25 activities; or the existence of chronic and substantial pain." *Colwell v. Bannister*, 763 F.3d 1060,  
26 1066 (9th Cir. 2014) (citation and internal quotation marks omitted); accord *Wilhelm*, 680 F.3d at  
27 1122; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). Plaintiff's hip condition is accepted  
28 as a serious medical need.

As to the second prong, deliberate indifference is "a state of mind more blameworthy than

1 negligence” and “requires ‘more than ordinary lack of due care for the prisoner’s interests or  
2 safety.’ ” *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (quoting *Whitley*, 475 U.S. at 319).  
3 Deliberate indifference is shown where a prison official “knows that inmates face a substantial  
4 risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”  
5 *Id.*, at 847. In medical cases, this requires showing: (a) a purposeful act or failure to respond to a  
6 prisoner’s pain or possible medical need and (b) harm caused by the indifference. *Wilhelm*, 680  
7 F.3d at 1122 (quoting *Jett*, 439 F.3d at 1096). “A prisoner need not show his harm was  
8 substantial; however, such would provide additional support for the inmate’s claim that the  
9 defendant was deliberately indifferent to his needs.” *Jett*, 439 F.3d at 1096, citing *McGuckin*, 974  
10 F.2d at 1060.

11 Deliberate indifference is a high legal standard. *Toguchi v. Chung*, 391 F.3d 1051, 1060  
12 (9th Cir.2004). “Under this standard, the prison official must not only ‘be aware of the facts from  
13 which the inference could be drawn that a substantial risk of serious harm exists,’ but that person  
14 ‘must also draw the inference.’ ” *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). “‘If a prison  
15 official should have been aware of the risk, but was not, then the official has not violated the  
16 Eighth Amendment, no matter how severe the risk.’” *Id.* (quoting *Gibson v. County of Washoe,*  
17 *Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

18 To prevail on a deliberate-indifference claim, a plaintiff must also show that harm resulted  
19 from a defendant’s wrongful conduct. *Wilhelm*, 680 F.3d at 1122; *see also Jett*, 439 F.3d at 1096;  
20 *Hallett v. Morgan*, 296 F.3d 732, 746 (9th Cir. 2002) (prisoner alleging deliberate indifference  
21 based on delay in treatment must show delay led to further injury).

## 22 **B. Defendants’ Undisputed Facts**

23 Defendants’ evidence shows that, at all relevant times, Plaintiff was an inmate  
24 incarcerated at VSP. (Separate Statement of Undisputed Material Facts “SSUMF” No. 1.) At all  
25 relevant times, Defendant was a physician and surgeon employed at VSP. (SSUMF No. 3.)  
26 Defendant is board certified in internal medicine. (SSUMF No. 4.) Plaintiff suffered an injury to  
27 his right hip in 1985; as a result, Plaintiff underwent five surgeries over a period of several years.  
28 (SSUMF No. 7.) During the time period complained of by Plaintiff in the FAC, Dr. Toor saw

1 him numerous times and made several referrals for Plaintiff to see an orthopedic specialist for his  
2 hip condition. (SSUMF No. 9.) Plaintiff's main complaint against Dr. Toor is that Plaintiff  
3 needed a hip replacement, which was not provided to him. (SSUMF No. 6.) Plaintiff underwent a  
4 CT Scan of his right hip on March 30, 2012. The scan showed various post-operative changes  
5 from past multiple hip surgeries. (SSUMF No. 9.)

6 In 2014, Dr. Toor referred Plaintiff to the University of California, Davis Orthopedics  
7 Department, where Plaintiff was advised of a possible need for hip replacement surgery. (SSUMF  
8 No. 10.) Dr. Toor then submitted a request for hip replacement surgery, but it was denied by his  
9 supervisor and the regional physician advisor on March 6, 2014. (SSUMF No. 10.) Dr. Toor then  
10 referred Plaintiff to another orthopedic specialist for a second opinion which occurred on March  
11 20, 2014. (SSUMF No. 11.) At that time, Plaintiff was still considering a hip replacement. *Id.*  
12 However, since Plaintiff was being managed with opiate medications, a cane and orthopedic  
13 shoes, he appeared to be functioning reasonably well in the facility. There were times when  
14 Plaintiff's pain was aggravated but, for the most part, he walked on his own with a cane and  
15 adequately performed his activities of daily living. (SSUMF No. 12.)

16 Given Plaintiff's relatively young age (52), his multiple prior hip surgeries, and complex  
17 hip, it was Dr. Toor's professional judgment that conservative management of Plaintiff's medical  
18 condition was reasonable and the best option at that time. (SSUMF No. 14.)

19 All of the medical care and treatment rendered to Plaintiff by Dr. Toor was appropriate  
20 and consistent with Plaintiff's symptoms, medical condition and history, and at all times within  
21 the community standard of care and consistent with the degree of knowledge and skill ordinarily  
22 possessed and exercised by members of the medical profession under similar circumstances. Dr.  
23 Toor has never refused or denied Plaintiff appropriate medical treatment or evaluation. (SSUMF  
24 No. 14.) Dr. Toor provided Plaintiff with medical care and treatment every time he saw Plaintiff  
25 and was never deliberately indifferent to any of Plaintiff's serious medical needs. (SSUMF No.  
26 15.) At all relevant times, Dr. Toor treated Plaintiff with dignity and respect in an honest effort to  
27 attend to Plaintiff's condition. At no time did Dr. Toor refuse to provide Plaintiff medical care or  
28 treatment or referral to a specialist as medically indicated. At no time did Dr. Toor intentionally

1 or knowingly cause Plaintiff any injury or harm. (SSUMF No. 16.)

2 **C. Defendant's Motion**

3 Defendant argues that the above facts show that he requested surgery for Plaintiff, but that  
4 it was denied by the authorizing authority. After that denial, Dr. Toor obtained a second outside  
5 opinion, but was unsuccessful obtaining authorization for Plaintiff to have hip surgery.  
6 Thereafter, Dr. Toor testified in his declaration that, he provided Plaintiff with appropriate  
7 medications and believed that conservative management of Plaintiff's hip condition was  
8 appropriate, particularly given Plaintiff's young age. Defendant contends that, aside from the  
9 surgical denial, Plaintiff essentially has a difference of opinion with Dr. Toor's treatment, which  
10 is not actionable. The Court agrees that, to the extent Dr. Toor has shown that Plaintiff's  
11 allegations against him amount to a difference of opinion, it is insufficient to establish a factual  
12 dispute of a material issue. *See Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

13 Further, when resolving a claim under the Eighth Amendment against individual  
14 defendants, causation must be resolved via "a very individualized approach which accounts for  
15 the duties, discretion, and means of each defendant." *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th  
16 Cir. 1988) *citing with approval Williams v. Bennett*, 689 F.2d 1370, 1384 (11th Cir. 1982)  
17 ("There can be no duty, the breach of which is actionable, to do that which is beyond the power,  
18 authority, or means of the charged party. One may be callously indifferent to the fate of prisoners  
19 and yet not be liable for their injuries. Those whose callous indifference results in liability are  
20 those under a duty -- possessed of authority and means -- to prevent the injury.") The pivotal  
21 facts presented show that Dr. Toor did not have authority to authorize Plaintiff's hip surgery, but  
22 submitted a request for it to be authorized. When Dr. Toor's authorization request was denied, he  
23 directed treatment to ameliorate Plaintiff's symptoms, which was the extent of Dr. Toor's  
24 authorization.

25 The Court finds that Dr. Toor has met his burden to demonstrate the absence of a genuine  
26 issue of material fact. The burden therefore shifts to Plaintiff to establish that a genuine issue as  
27 to any material fact exists. *See Matsushita*, 475 U.S. at 586. At the pleading stage, Plaintiff's  
28 factual allegations in the FAC were accepted as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009),



1 and liberally construed to state a cognizable claim, *Hebbe v. Pliker*, 627 F.3d 338, 342 (9th Cir.  
2 2010). However, on summary judgment, the factual allegations in the FAC are akin to self-  
3 serving testimony which may be discounted since they do not equate to admissible evidence. *See*  
4 *Nigro v. Sears, Roebuck and Co.*, 784 F.3d 495, 497-98 (9th Cir. 2015). This is because there is  
5 no evidence before the Court to show that Plaintiff has any medical training to be able to opine on  
6 the quality and appropriateness of care Dr. Toor provided. As Dr. Toor correctly points out, in  
7 complex medical cases, expert medical opinion testimony is necessary to establish deliberate  
8 indifference and causation of injuries. *See Hutchinson v. United States*, 838 F.2d 390 (9th Cir.  
9 1988).

10 Dr. Toor is entitled to summary judgment since Plaintiff has not demonstrated “the  
11 existence of genuine issues for trial.” *In re Oracle Corp.*, 627 F.3d at 387 (citing *Celotex Corp.*,  
12 477 U.S. at 323). Thus, the Court finds that Defendant’s motion for summary judgment should  
13 be **GRANTED** on the merits of Plaintiff’s deliberate indifference claim. Defendant’s request for  
14 qualified immunity need not be reached since he is entitled to summary judgment on the merits of  
15 Plaintiff’s claim.

16 **V. Conclusions and Recommendations**

17 As set forth herein, this Court finds that Defendant has met his burden and his motion for  
18 summary judgment should be granted. Accordingly, the Court **RECOMMENDS**:

- 19 (1) that Defendant Dr. Toor is entitled to judgment as a matter of law and his Motion  
20 for Summary Judgment, filed on September 28, 2017 (Doc. 19), should be  
21 **GRANTED**; and  
22 (2) that the Clerk of the Court should be directed to enter judgment against Plaintiff  
23 and for Defendant Dr. K. Toor and this action should be closed.

24 These Findings and Recommendations will be submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 21**  
26 **days** after being served with these Findings and Recommendations, the parties may file written  
27 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
28 Findings and Recommendations.” The parties are advised that failure to file objections within the

1 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
2 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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4 IT IS SO ORDERED.

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Dated: December 14, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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