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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 MARINO ANTONIO HERNANDEZ,

12 Plaintiff,

13 v.

14 WINFRED M. KOKOR, et al.,

15 Defendants.  
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**CASE NO. 1:16-cv-00716-DAD-JLT (PC)**

**FINDINGS AND RECOMMENDATIONS  
TO**

**(1) GRANT DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT ON  
PLAINTIFF'S EIGHTH AMENDMENT  
CLAIM; AND**

**(2) ENTER SUMMARY JUDGMENT SUA  
SPONTE ON PLAINTIFF'S  
NEGLIGENCE CLAIM**

**(Doc. 51)**

**FOURTEEN-DAY DEADLINE**

21  
22 Plaintiff, a state prisoner, accuses Defendants Dr. Winfred Kokor and Nurse C. Stronach of  
23 denying him treatment for chronic left ankle pain in violation of the Eighth Amendment and  
24 California state law. Defendants now move for summary judgment on the medical indifference  
25 claim because they contend there is no dispute of material fact as to whether either was  
26 deliberately indifferent to Plaintiff's medical needs.

27 Because the Court concludes there is no dispute of material fact, the Defendants are  
28

1 entitled to summary judgment on the Eighth Amendment claim. Furthermore, the Court  
2 recommends that summary judgment be entered for the Defendants sua sponte on Plaintiff's state  
3 law negligence claim.

4 **I. Plaintiff's Allegations**

5 In the complaint, Plaintiff alleges as follows:

6 Plaintiff, who suffers from long-term chronic ankle pain, has been prescribed morphine for  
7 pain management since 2008. In January 2015, Dr. Kokor abruptly discontinued Plaintiff's  
8 morphine medication and replaced it with Tylenol 3 despite a recommendation from the Medical  
9 Authorization Review Committee ("MRAC") that the morphine be tapered. In addition, Dr. Kokor  
10 continued the medication despite Plaintiff's repeated complaints of side effects.

11 On August 20, 2015, Plaintiff's intestinal wall "ruptured" due to severe constipation  
12 caused by Tylenol 3. On August 26, 2015, Dr. Kokor recommended Plaintiff for surgery to treat  
13 an inguinal hernia. Plaintiff underwent hernia surgery on January 8, 2016, and as of the date of the  
14 pleading remained wheelchair-bound. He still experiences ankle pain and continues to suffer  
15 adverse side effects, such as vomiting and urinary problems, from his current pain medication. At  
16 some point after the hernia surgery, Plaintiff was prescribed methadone for pain.

17 On July 20, 2015, Plaintiff complained to Nurse Stronach of severe pain related to the  
18 Tylenol 3, but she dismissed his pain as a "nuisance," said "I think you want to commit suicide,"  
19 and referred Plaintiff for a mental health evaluation instead of examination by a medical doctor.

20 **II. Relevant Procedural Background**

21 Plaintiff initiated this action on May 23, 2016, and is proceeding on his original complaint,  
22 which has been screened and found to state Eighth Amendment medical indifference claims  
23 against Dr. Kokor and Nurse Stronach. (Doc Nos. 1, 15.) Plaintiff was granted leave to amend, but  
24 he elected to proceed on the complaint as screened. (Doc No. 16.)

25 Defendants appeared on January 11, 2017, and filed their motion for summary judgment  
26 on November 14, 2017. (Doc Nos. 24, 51.) Plaintiff opposes the motion. (Doc No. 52.)

27 **III. Undisputed Facts**

28 At all times relevant to this action, Plaintiff was a state inmate housed at California

1 Substance Abuse Treatment Facility (“CSATF”) in Corcoran, California. Compl. ¶ 3. Dr. Kokor  
2 was employed at CSATF as a physician and surgeon. Decl. of Winfred Kokor, M.D., in Supp. of  
3 Defs.’ Mot. Summ. J. (Doc No. 51 at 20-23) ¶ 3. Nurse Stronach was employed at CSATF as a  
4 registered nurse. Decl. of Christina Stronach, R.N., in Supp. of Defs.’ Mot. Summ. J. (Doc No. 51  
5 at 24-26) ¶ 2.

6 **A. Dr. Kokor<sup>1</sup>**

7 Plaintiff has been prescribed morphine for chronic left foot pain since October 2008. See  
8 Compl. Ex. A (Doc No. 1 at 28); Ex. C (Doc No. 1 at 83).

9 Dr. Kokor began treating Plaintiff in about August 2011 when Plaintiff first arrived at  
10 CSATF. Kokor Decl. ¶ 7. At the time, Dr. Kokor addressed Plaintiff’s left ankle chronic pain and  
11 continued him on morphine. Id.

12 On January 15, 2015, the MRAC recommended that Plaintiff’s morphine, which was set to  
13 expire three days later, be tapered off and Plaintiff started on Tylenol with codeine instead. Comp.  
14 Ex. A (Doc No. 1 at 27-28). This plan was recommended despite Dr. Kokor’s request to renew the  
15 morphine prescription. Kokor Decl. ¶ 10; Compl. Ex. A (Doc No. 1 at 22).

16 Per Dr. Kokor, the MRAC’s recommendation was a “framework recommendation,” with it  
17 being “up to the individual provider to fine tune the treatment.” Kokor Decl. ¶ 9. In Plaintiff’s  
18 case, Dr. Kokor determined that, because morphine is metabolized to codeine (the active  
19 ingredient), it was unnecessary to taper it since both morphine and Tylenol 3 produce the same  
20 degree of analgesia (pain killing effect).<sup>2</sup> Id.

21 Between January and August 2015, Plaintiff filed several Health Care Services Request  
22 Forms (“7362 Form”) related to his pain medication and pain in his ankle and abdomen. On  
23 January 16, 2015, Plaintiff complained about the sudden change to Tylenol 3, which he claimed

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24 <sup>1</sup> Defendants do not submit any medical records in support of their motion, instead relying solely on Plaintiff’s  
25 deposition and the declarations of Dr. Kokor and Nurse Stronach. In compiling the evidence of Plaintiff’s  
26 interactions with the Defendants, the Court references medical records attached to Plaintiff’s pleading. (See Doc  
27 No. 1.) It also relies on summaries of other interactions that are not in the record, but which are included in the  
28 responses to an inmate grievance Plaintiff filed complaining about his pain and prescribed medication. See Compl.  
Ex. A (Doc No. 1 at 19-26). Neither party disputes the accuracy of these summaries, and the Court finds it proper  
to consider these summaries on the pending motion. See Celotex, 477 U.S. at 324.

<sup>2</sup> Plaintiff disputes this fact but submits no supporting evidence and relies instead solely on his own opinion.

1 had caused him liver enzyme issues in the past. Compl. Ex. B (Doc No. 1 at 53). On February 27  
2 and March 8, 2015, Plaintiff submitted separate 7362 Forms complaining about severe pain in his  
3 left ankle due to a broken pin; he also complained about pain in his groin, lower back, abdomen,  
4 and stomach. Id. (Doc No. 1 at 31-32). On April 15, 2015, Plaintiff complained that Tylenol 3 was  
5 not helping him, and it was causing him to suffer side effects and “strong constipation.” Id. (Doc  
6 No. 1 at 56). On May 24, 2015, Plaintiff complained about constant pain, body aches and shivers,  
7 and ankle and back pain. Id. (Doc No. 1 at 57.) On June 22, 2015, Plaintiff complained about  
8 chronic pain in his left ankle, pain, and blisters.<sup>3</sup> Id. (Doc No. 1 at 58.) On July 3, 2015, Plaintiff  
9 complained that the “pain doubles up by the cramps and the burning in my stomach....” Id. (Doc  
10 No. 1 at 60). On July 17, 2015, Plaintiff complained of “strong upset stomach,” vomiting, and  
11 cramping. Id. (Doc No. 1 at 61.) He also noted that “[t]he Tylenol 3 is hurting me and do not take  
12 away my pain on my left ankle and my stomach. Please help me!” Id. On August 11, 2015,  
13 Plaintiff’s wrote that his left ankle pain and stomach issues continue. Id. (Doc No. 1 at 63.) On  
14 August 18, 2015, he again complained of ankle pain. Id. (Doc No. 1 at 65.)

15 During this period, Plaintiff was seen multiple times by Dr. Kokor<sup>4</sup>:

- 16 • On February 9, 2015, in response to the January 16, 2015, 7362 Form, Dr. Kokor noted  
17 Plaintiff’s pain level as a 6-7/10 and offered him alternative medication, an adjuvant including  
18 Elavil at night, which Plaintiff refused. As a result, he was continued on Tylenol 3 with  
19 Salsalate. Compl. Ex. A (Doc No. 1 at 29).
- 20 • On March 12, 2015, Plaintiff complained to Dr. Kokor about constipation related to Tylenol 3.  
21 Dr. Kokor prescribed him fiber tabs, stool softeners, and Milk of Magnesia.
- 22 • On March 24, 2015, Dr. Kokor evaluated Plaintiff regarding his groin and abdominal pain,  
23 noting a history of kidney stones. He then prescribed Lactulose and stool softeners for the  
24 constipation.

25  
26 <sup>3</sup> It appears that a portion of this 7362 Form was covered during photocopying. One sentence, for example, reads  
27 only as follows: “. . . not effective for my arthritis.” While it is possible that Plaintiff was complaining once more  
about the ineffectiveness of Tylenol 3, the Court only considers those portions that are visible and legible.

28 <sup>4</sup> Unless otherwise specified, the details of Plaintiff’s medical visits are gleaned from the summaries provided in  
the responses to his inmate grievances. See Compl. Ex. A (Doc No. 1 at 19-26).

- 1 • On April 13, 2015, Dr. Kokor again examined Plaintiff, directed him to continue with his  
2 prescribed medication, and found that a referral to an orthopedic specialist was not indicated.  
3 He also issued Plaintiff a back brace for his back pain and spasms.
- 4 • On July 9, 2015, Dr. Kokor noted that Plaintiff's pain control is adequate with no medical  
5 indication for morphine, his constipation has been responding to Lactulose, and an abdominal  
6 exam was unremarkable with a plan to treat abdominal pain symptomatically.

7 On August 18, 2015, Plaintiff heard a popping in his abdomen and saw a lump protruding.  
8 Pl.'s Dep. at 53:5-10, 54:18-22 (Doc No. 51 at 100-01.) On August 26, 2015, Dr. Kokor examined  
9 Plaintiff and diagnosed him with a reducible left inguinal hernia. Compl. Ex. B (Doc No. 1 at 68);  
10 Kokor Decl. ¶ 11. Though Plaintiff attributes the hernia to the constipation side-effects from the  
11 Tylenol 3, he admits that no health care provider has ever told him that. See Pl.'s Dep. at 42:20—  
12 43:5 (Doc No. 51 at 89-90). Per Dr. Kokor's medical notes, Plaintiff "alleges this [hernia]  
13 developed recently." Compl. Ex. B (Doc No. 1 at 68). In contrast, Plaintiff claims that he had been  
14 complaining to Dr. Kokor for months about abdominal pain, but he admitted during his deposition  
15 that there was no lump in his abdomen before this medical appointment. Decl. of Pl. in Opp'n to  
16 Defs.' Mot. Summ. J. (Doc No. 52 at 6-7) ¶ 4; Pl.'s Dep. at 55:17—56:16 (Doc No. 51 at 102-03).

17 Following the examination, Dr. Kokor deemed Plaintiff to be clinically stable with no  
18 signs of incarceration, obstruction or strangulation. Compl. Ex. B (Doc No. 1 at 68); Kokor Decl.  
19 ¶ 11. He then referred Plaintiff for a heniorrhapy and prescribed Docusate, fiber, and Lactulose for  
20 Plaintiff's constipation. Id. Dr. Kokor also noted Plaintiff's complaints about the ineffectiveness of  
21 Tylenol 3: "Since the change [to Tylenol 3], patient had complained most days stating the current  
22 regimen not alleviating his pain. He has been referred for MH counseling." Compl. Ex. B (Doc  
23 No. 1 at 68). Dr. Kokor then prescribed Nortriptyline with a follow-up in 3-4 weeks. Id.  
24 Nortriptyline is often prescribed and is effective for chronic pain. Kokor Decl. ¶ 11.

25 Plaintiff declined the Nortriptyline the next day because he did not believe it was  
26 appropriate for his physical pain since his independent medical research suggested it was solely  
27 for "neurotic pain." Compl Ex. B (Doc No. 1 at 69); Pl.'s Dep. at 73:1-22 (Doc No. 51 at 41). He  
28 then filed a 7362 Form on August 29, 2015, seeking a referral to a pain management specialist,

1 and another form on August 30, 2015, again complaining of pain with no remedy. See id. (Doc  
2 No. 1 at 70-71.)

3 On December 12, 2015, Dr. Kokor changed Plaintiff's pain medication from Tylenol 3 to  
4 methadone. Pl.'s Dep. at 45:21—26:1.

5 On January 8, 2016, Plaintiff underwent a hernia surgery. Compl. Ex. "D & E" (Doc No. 1  
6 at 90).

7 **B. Nurse Stronach**

8 On January 22, 2015, Nurse Stronach assessed Plaintiff in response to a 7362 Form. See  
9 Compl. Ex. A (Doc No. 1 at 22). Nurse Stronach found that Plaintiff had a steady gait with a left  
10 foot drop; he sought to have morphine resumed, which Nurse Stronach noted was a decision to be  
11 made by the Pain Committee; and Plaintiff's request for a referral for a doctor was denied because  
12 he was already scheduled to see one.

13 On April 15, 2015, Nurse Stronach met with Plaintiff regarding his continued complaints  
14 of ankle pain. See Compl. Ex. A (Doc No. 1 at 22). She made a note of his current medications  
15 and of Plaintiff's dissatisfaction with the change to Tylenol 3. She also wrote, "I/P  
16 [Inmate/Patient] threatened to go man down and threatened to sue Dr. Kokor. I/P claims his [sic]  
17 is constipated however he had a BM [Bowel Movement] today."

18 In response to the July 17, 2015, 7362 Form, Plaintiff was seen by Nurse Stronach on July  
19 20, 2015. See Compl. Ex. B (Doc No. 1 at 61-62.) At this meeting, Plaintiff cried as he told Nurse  
20 Stronach of the severe pain in his ankle and cramps in his stomach. Compl. ¶ 20; Ex. B (Doc No. 1  
21 at 61-62.) Nurse Stronach did not refer Plaintiff to another doctor because he was scheduled was  
22 to be seen for a follow-up appointment with a doctor in 10-25 days. She then wrote: "I/P crying in  
23 clinic appears sad, whiny voice. Psych referral done to [rule out] depression, anxiety due to I/P  
24 appears sad & anxious."

25 On August 12, 2015, in response to Nurse Stronach's referral, Plaintiff was seen by a mental  
26 health professional who documented Plaintiff's physical issues with his ankle pain and pain  
27 medication. Compl. Ex. B (Doc No. 1 at 64.) After examination, the mental health provider noted  
28 that Plaintiff was "focused on increasing problem solving and assertiveness skills to increase [his]

1 ability to meet medical needs.” Id. Plaintiff was then directed to submit a referral to mental health  
2 in the future if he needs assistance. Id.

3 **IV. Legal Standards**

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

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

21 Each party’s position must be supported by (1) citing to particular parts of materials in the  
22 record, including but not limited to depositions, documents, declarations, or discovery; or (2)  
23 showing that the materials cited do not establish the presence or absence of a genuine dispute or  
24 that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.  
25 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not  
26 cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San  
27 Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo  
28 County, Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

1 Defendants do not bear the burden of proof at trial and, in moving for summary judgment,  
2 they need only prove an absence of evidence to support Plaintiff's case. In re Oracle Corp.  
3 Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S.  
4 317, 323 (1986)). If Defendants meet their initial burden, the burden then shifts to Plaintiff "to  
5 designate specific facts demonstrating the existence of genuine issues for trial." In re Oracle Corp.,  
6 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 323). This requires Plaintiff to "show more  
7 than the mere existence of a scintilla of evidence." Id. (citing Anderson, 477 U.S. at 252. An issue  
8 of fact is genuine only if there is sufficient evidence for a reasonable fact finder to find for the  
9 non-moving party, while a fact is material if it "might affect the outcome of the suit under the  
10 governing law." Anderson, 477 U.S. at 248; Wool, 818 F.2d at 1436.

11 In judging the evidence at the summary judgment stage, the Court may not make credibility  
12 determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless Inc., 509 F.3d 978,  
13 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the  
14 light most favorable to the nonmoving party and determine whether a genuine issue of material  
15 fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo  
16 Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted), *cert. denied*, 132  
17 S. Ct. 1566 (2012). Inferences, however, are not drawn out of the air; the nonmoving party must  
18 produce a factual predicate from which the inference may reasonably be drawn. See Richards v.  
19 Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir.  
20 1987).

## 21 **V. Discussion**

### 22 **A. Eighth Amendment**

#### 23 **1. Legal Standard**

24 "The treatment a prisoner receives in prison and the conditions under which he is confined  
25 are subject to scrutiny under the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 832  
26 (1994) (citing Helling v. McKinney, 509 U.S. 25, 31 (1993)). To establish a violation of the Eighth  
27 Amendment, the prisoner must "show that the officials acted with deliberate indifference to threat  
28 of serious harm or injury to an inmate." Labatad v. Corrections Corp. of America, 714 F.3d 1155,

1 1160 (9th Cir. 2013) (citing Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002).

2 The deliberate indifference standard involves both an objective and a subjective prong.  
3 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Farmer at 834.  
4 Indications of a serious medical need “include the existence of an injury that a reasonable doctor  
5 or patient would find important and worthy of comment or treatment; the presence of a medical  
6 condition that significantly affects an individual’s daily activities; or the existence of chronic and  
7 substantial pain.” Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation and internal  
8 quotation marks omitted); accord Wilhelm, 680 F.3d at 1122; Lopez v. Smith, 203 F.3d 1122,  
9 1131 (9th Cir. 2000).

10 Second, subjectively, the prison official must “know of and disregard an excessive risk to  
11 inmate health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.  
12 1995). A prison official must “be aware of facts from which the inference could be drawn that a  
13 substantial risk of serious harm exists, and . . . must also draw the inference.” Farmer, 511 U.S. at  
14 837. Liability may follow only if a prison official “knows that inmates face a substantial risk of  
15 serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at 847.

16 The question under the Eighth Amendment is whether prison officials, acting with deliberate  
17 indifference, exposed a prisoner to a sufficiently substantial “risk of serious damage to his future  
18 health . . . .” Farmer, 511 U.S. at 843 (citing Helling, 509 U.S. at 35). The Supreme Court has  
19 explained that “deliberate indifference entails something more than mere negligence . . . [but]  
20 something less than acts or omissions for the very purpose of causing harm or with the knowledge  
21 that harm will result.” Id. at 835. The Court defined this “deliberate indifference” standard as  
22 equal to “recklessness,” in which “a person disregards a risk of harm of which he is aware.” Id. at  
23 836-37.

24 Deliberate indifference is a high legal standard. Toguchi v. Chung, 391 F.3d 1051, 1060  
25 (9th Cir.2004). “Under this standard, the prison official must not only ‘be aware of the facts from  
26 which the inference could be drawn that a substantial risk of serious harm exists,’ but that person  
27 ‘must also draw the inference.’” Id. at 1057 (quoting Farmer, 511 U.S. at 837). “‘If a prison  
28 official should have been aware of the risk, but was not, then the official has not violated the

1 Eighth Amendment, no matter how severe the risk.” Id. (quoting Gibson, 290 F.3d at 1188).

2 **2. Analysis**

3 Defendants move for summary judgment on the ground that there is no dispute of material  
4 fact as to whether either was deliberately indifferent to Plaintiff’s medical needs. The Court  
5 addresses each Defendant’s arguments in turn.

6 **a. Dr. Kokor**

7 Plaintiff’s claim against Dr. Kokor is two-fold. First, he contends that Dr. Kokor improperly  
8 discontinued his morphine medication abruptly despite the MARC’s directive that it be tapered.  
9 Second, he contends that Dr. Kokor failed to properly and/or timely respond to his complaints of  
10 Tylenol 3’s ineffectiveness, abdominal pain, and constipation.

11 Initially, the parties do not dispute, and the undersigned finds, that based upon the evidence  
12 presented, a reasonable juror could conclude that Plaintiff’s chronic ankle pain and abdominal pain  
13 constitute an objective, serious medical need. See McGuckin, 974 F.2d at 1059-60 (“The existence  
14 of an injury that a reasonable doctor or patient would find important and worthy of comment or  
15 treatment; the presence of a medical condition that significantly affects an individual’s daily  
16 activities; or the existence of chronic and substantial pain are examples of indications that a  
17 prisoner has a ‘serious’ need for medical treatment.”); see also Canell v. Bradshaw, 840 F. Supp.  
18 1382, 1393 (D. Or. 1993) (the Eighth Amendment duty to provide medical care applies “to  
19 medical conditions that may result in pain and suffering which serve no legitimate penological  
20 purpose.”).

21 **i. Tapering of Medication**

22 Dr. Kokor declares that the MARC’s decision to taper the morphine to Tylenol 3 was a  
23 recommendation and not a directive. That is, it was left “up to the individual provider to fine tune  
24 the treatment,” which, in Plaintiff’s case, Dr. Kokor believed did not require tapering since the  
25 active ingredient in both morphine and Tylenol 3 is codeine with the same degree of analgesia.  
26 Though Plaintiff disputes these statements, the ultimate burden of persuasion at trial is his, and he  
27 has submitted no evidence that Dr. Kokor’s decision was medically unacceptable under the  
28 circumstances. Accordingly, summary judgment should be entered for Dr. Kokor on this claim.



1 already seen by a doctor on February 9, 2015, for “nonspecific ABD pain”; that he remained  
2 unhappy with Tylenol 3’s effectiveness; and that he was scheduled for a physician follow-up in  
3 10-25 days. While Nurse Stronach did not offer or prescribe other medication to treat Plaintiff’s  
4 pain, Plaintiff acknowledges that Nurse Stronach could not have done so since she was required to  
5 follow Dr. Kokor’s orders regarding Plaintiff’s treatment plan. See Pl.’s Dep. at 57:9-18 (Doc No.  
6 51 at 104). Lastly, because Plaintiff was crying, Nurse Stronach referred him for a psychiatric  
7 evaluation to “R/O [rule out] depression, anxiety....”

8 Although Plaintiff contends that Nurse Stronach should have referred him immediately to  
9 another doctor following this appointment instead of a mental health provider, the record reveals  
10 that Nurse Stronach was aware that Plaintiff was to be seen by a doctor soon, and Plaintiff submits  
11 no evidence that the protocol Nurse Stronach followed was medically unacceptable under the  
12 circumstances. Accordingly, summary judgment should be entered for Nurse Stronach.<sup>5</sup>

13 **B. Negligence Claim**

14 As noted supra, Plaintiff brings claims against Dr. Kokor and Nurse Stronach for deliberate  
15 indifference under the Eighth Amendment and negligence under state law. Remaining now is  
16 Plaintiff’s state law negligence claim, which is not the addressed in the Defendants’ moving  
17 papers. Nonetheless, the Court finds that Defendants are entitled to summary judgment and will  
18 recommend so accordingly.

19 Pursuant to Federal Rule of Civil Procedure 56(f),

20 (f) Judgment Independent of the Motion. After giving notice and a reasonable time to  
21 respond, the court may:

- 22 (1) grant summary judgment for a nonmovant;
- 23 (2) grant the motion on grounds not raised by a party; or
- 24 (3) consider summary judgment on its own after identifying for the parties material facts that  
25 may not be genuinely in dispute.

26 “District courts unquestionably possess the power to enter summary judgment sua sponte, even on  
27 the eve of trial.” Norse v. City of Santa Cruz, 629 F.3d 966, 971 (9th Cir. 2010) (footnote

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28 <sup>5</sup> Because the Court finds that the Defendants are entitled to summary judgment, it declines to consider their  
alternative qualified immunity argument.

1 omitted). “However, the procedural rules governing Rule 56 apply regardless of whether the  
2 district court is acting in response to a party’s motion, or sua sponte.” Norse, 629 F.3d at 971  
3 (citing Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989); Ind. Port  
4 Comm’n v. Bethlehem Steel Corp., 702 F.2d 107, 111 (7th Cir. 1983)).

5 “Reasonable notice implies adequate time to develop the facts on which the litigant will  
6 depend to oppose summary judgment.” Norse, 629 F.3d at 972 (quoting Portsmouth Square, Inc.  
7 v. S’holders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985)). However, it is well settled that  
8 a “district court may grant summary judgment without notice if the losing party has had a full and  
9 fair opportunity to ventilate the issues involved in the motion.” In re Harris Pine Mills v. Mitchell,  
10 44 F.3d 1431, 1439 (9th Cir. 1995) (quoting United States v. Grayson, 879 F.2d 620, 625 (9th Cir.  
11 1989)).

12 Pursuant to California law, a public employee is liable for injury to a prisoner “proximately  
13 caused by his negligent or wrongful act or omission.” Cal. Gov’t Code § 844.6(d). ““The elements  
14 of negligence are: (1) defendant’s obligation to conform to a certain standard of conduct for the  
15 protection of others against unreasonable risks (duty); (2) failure to conform to that standard  
16 (breach of duty); (3) a reasonably close connection between the defendant’s conduct and resulting  
17 injuries (proximate cause); and (4) actual loss (damages).” Corales v. Bennett, 567 F.3d 554, 572  
18 (9th Cir. 2009) (quoting McGarry v. Sax, 158 Cal. App. 4th 983, 994 (2008)).

19 In a negligence action the plaintiff must show the defendant's act or omission (breach of  
20 duty) was a cause of the plaintiff's injury. Jackson v. Ryder Truck Rental, Inc., 16 Cal. App. 4th  
21 1830, 1846 (1993). The element of causation generally consists of two components. Id. at 1847.  
22 The plaintiff must show (1) the defendant's act or omission was a cause in fact of the plaintiff's  
23 injury, and (2) the defendant should be held responsible for negligently causing the plaintiff's  
24 injury. Id. The second component is a normative or evaluative one that asks whether the defendant  
25 should owe the plaintiff a legal duty of reasonable care under the circumstances of the case.

26 As set forth above, Plaintiff did not make any showing that the Defendants’ conduct was  
27 medically unacceptable under the circumstances, and therefore there was no material issue of fact  
28 for trial on his deliberate indifference claims. In the context of that claim, a number of established

1 facts are fatal to Plaintiff's state law negligence claim.

2 First, to the extent Plaintiff claims he suffered ongoing pain resulting from Dr. Kokor's  
3 negligent failure to prescribe different pain medication, it has become evident that Dr. Kokor in  
4 fact twice offered different medication to Plaintiff, each of which Plaintiff himself refused. Thus,  
5 it was Plaintiff's own decision to decline the alternatives that breaks the causation element of  
6 Plaintiff's negligence claim.

7 Second, insofar as Plaintiff claims his hernia is attributable to the constipation side-effects  
8 from the Tylenol 3, Plaintiff has admitted that no health care provider has ever told him that. See  
9 Pl.'s Dep. at 42:20—43:5 (Doc No. 51 at 89-90). Without medical evidence linking the  
10 constipation to the hernia, and coupled with the evidence that the Defendants prescribed several  
11 types of medication to treat Plaintiff's constipation, Plaintiff also fails to meet the causation and  
12 breach of duty elements of a negligence claim.

13 Since Plaintiff has had a full and fair opportunity to litigate these issues and adequate time  
14 to develop the facts, the Court finds that the Defendants are also entitled to summary judgment on  
15 Plaintiff's negligence claim.

## 16 **VI. Conclusion**

17 Based on the foregoing, the Court **RECOMMENDS** that Defendants' motion for summary  
18 judgment be granted as to Plaintiff's Eighth Amendment deliberate indifference claim, that  
19 summary judgment be entered sua sponte for Defendants on Plaintiff's state law negligence claim,  
20 and that this action be dismissed.

21 These findings and recommendations will be submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within 14 days  
23 after being served with the findings and recommendations, the parties may file written objections  
24 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings  
25 and Recommendation." A party may respond to another party's objections by filing a response  
26 within 14 days after being served with a copy of that party's objections. The parties are advised  
27 that failure to file objections within the specified time may result in the waiver of rights on appeal.  
28 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d

1 1391, 1394 (9th Cir. 1991)).

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3 IT IS SO ORDERED.

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Dated: July 12, 2018

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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