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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 DENY PLAINTIFF'S MOTION TO
ALTER OR AMEND JUDGMENT**

(Doc. 60)

FOURTEEN-DAY DEADLINE

17 Judgment was entered for the defendants on September 7, 2018, following the district
18 judge's adoption in full of the findings and recommendations to grant summary judgment on
19 plaintiff's Eighth Amendment and negligence claims. (Docs. 56, 59.) Plaintiff now moves
20 pursuant to Federal Rule of Civil Procedure 59(e) to modify the judgment.¹ (Doc. 60.)

21 Federal Rule of Civil Procedure 59(e) permits a party to move a court to alter or amend
22 its judgment. "A district court may grant a Rule 59(e) motion if it 'is presented with newly
23 discovered evidence, committed *clear error*, or if there is an intervening change in the controlling
24 law.'" Wood v. Ryan, 759 F.3d 1117, 1121 (9th Cir. 2014) (internal quotation marks omitted)
25 (quoting McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999) (*en banc*)) (emphasis in
26 original). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of
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28 ¹ Plaintiff also filed a Notice of Appeal in the Ninth Circuit Court of Appeals. (Doc. 61.) Proceedings in that court, however, have been held in abeyance pending resolution of the instant motion. (Doc. 64.)

1 finality and conservation of judicial resources.” Kona Enters., Inc. v. Estate of Bishop, 229 F.3d
2 877, 890 (9th Cir. 2000). Ultimately, whether to grant or deny a motion for reconsideration is in
3 the “sound discretion” of the district court. Navajo Nation v. Norris, 331 F.3d 1041, 1046 (9th
4 Cir. 2003) (citing Kona Enters., 229 F.3d at 883). A party may not raise new arguments or present
5 new evidence if it could have reasonably raised them earlier. Kona Enters., 229 F.3d at 890 (citing
6 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)).

7 The July 12, 2018 findings and recommendations held, in part, that plaintiff did not submit
8 any evidence linking his constipation and hernia to Tylenol 3. Plaintiff’s motion to alter or amend
9 judgment is based primarily on the argument that medical evidence was unnecessary to show that
10 his severe constipation was caused by Tylenol 3 since “even a layman knows that the medicine
11 Tylenol 3, causes severe constipation.” Pl.’s Mot. to Alter or Amend J. at 2. He then argues that
12 this constipation caused him to force himself to defecate on August 18, 2015, resulting in a hernia.
13 The remainder of his arguments reflects those previously presented in his opposition to
14 defendants’ motion for summary judgment and his objections to the findings and
15 recommendations.

16 Even assuming *arguendo* that it is common knowledge that Tylenol 3 causes constipation,
17 plaintiff did not complain of ordinary constipation in this case. Rather, his complaint is premised
18 on the *severity* of the constipation—marked, as he claims, by prolonged periods of constipation,
19 discomfort, and pain. This side-effect is not in fact common knowledge, and plaintiff bore the
20 burden of proving that it was linked to the Tylenol 3. He also needed to prove that one or both of
21 the defendants acted with deliberate indifference in continuing to prescribe plaintiff Tylenol 3
22 and/or failing to properly treat the constipation, and that the constipation in turn caused the hernia.
23 The fact remains now, as it did on initial consideration of the defendants’ motion for summary
24 judgment, that the evidence simply does not support plaintiff’s version of events. As the Court
25 determined in the findings and recommendations:

26 Consistent with Plaintiff’s allegations, the record reveals that
27 Plaintiff complained often about Tylenol 3’s ineffectiveness,
28 abdominal pain, and constipation. Contrary to his allegations,
however, Dr. Kokor conducted several physical examinations to
determine the source of Plaintiff’s abdominal pain, examinations

1 that ultimately proved unsuccessful and resulted in a plan to treat the
2 problem symptomatically. When Plaintiff did eventually present
3 with a lump in his abdomen, Dr. Kokor immediately diagnosed him
4 with a hernia and referred him for surgery. Incidentally, while
5 Plaintiff attributes the source of his hernia to Tylenol 3, he admits
6 that no medical provider has ever associated the two. As for
7 Plaintiff's constipation, the record reveals that Plaintiff's complaints
8 were considered at his medical appointments, and he was prescribed
9 fiber tabs, stool softeners, Milk of Magnesia, and Lactulose to
10 relieve the pain. Lastly, though Plaintiff repeatedly submitted 7362
11 Forms and complained during his medical appointments concerning
12 Tylenol 3's alleged ineffectiveness, the undisputed facts establish
13 that he was twice offered alternative medication to help control his
14 pain, alternatives that Plaintiff refused. Thus, Dr. Kokor decided to
15 continue him on Tylenol 3 with Salsalate until the December 2015
16 change to methadone.

17 At best, Plaintiff's claims in this case amount to a dispute as to the
18 proper course of treatment. While Plaintiff is clearly dissatisfied
19 with the level of care that he received from Dr. Kokor, the
20 undisputed facts before the Court simply do not support a claim of
21 deliberate indifference based on Plaintiff's claim of an unreasonable
22 course of treatment or delay in medical care.

23 (Doc. 56 at 11.) Plaintiff has presented no argument or evidence that would undermine these
24 findings. Importantly, he has failed, pursuant to Rule 59, to present newly discovered evidence,
25 show that the Court committed clear error, or argue an intervening change in controlling law that
26 would necessitate alteration or amendment of the judgment. Wood, 759 F.3d at 1121.

27 Accordingly, the Court **RECOMMENDS** that plaintiff's motion to alter or amend
28 judgment (Doc. 60) be **DENIED**.

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1 These findings and recommendations will be submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within 14 days
3 after being served with the findings and recommendations, the parties may file written objections
4 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings
5 and Recommendation.” A party may respond to another party’s objections by filing a response
6 within 14 days after being served with a copy of that party’s objections. The parties are advised
7 that failure to file objections within the specified time may result in the waiver of rights on appeal.
8 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d
9 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.

11 Dated: December 14, 2018

12 /s/ Jennifer L. Thurston
13 UNITED STATES MAGISTRATE JUDGE
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