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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 KING MWASI,) No. 2:15-cv-04152-DOC (JDE)
12 Plaintiff,)
13 v.) ORDER ACCEPTING
14 DAVID J. MONTOYA, et al.,) AMENDED SUPERSEDING
15 Defendants.) REPORT AND
16) RECOMMENDATION OF
) UNITED STATES MAGISTRATE
) JUDGE

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18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the records on file,
19 including the Complaint (Dkt. 1) filed by Plaintiff King Mwasi (“Plaintiff”),
20 Plaintiff’s First Amended Complaint (Dkt. 25, “FAC”), the Report and
21 Recommendation of the previously assigned United States Magistrate
22 regarding the FAC (Dkt. 27), this Court’s Order Accepting the Report and
23 Recommendation of the previously assigned Magistrate Judge regarding the
24 FAC, ordering dismissal of certain claims with prejudice (Dkt. 33), Plaintiff’s
25 operative Second Amended Complaint (Dkt. 71, “SAC”), the Motion for
26 Partial Summary Judgment as to Plaintiff’s Eighth Amendment deliberate
27 indifference claim against Defendants Enriquez and Montoya (Dkt. 112,
28 “Motion”), Plaintiff’s Opposition to the Motion (Dkt. 120), the Reply in

1 support of the Motion (Dkt. 121), the Report and Recommendation as to the
2 Motion issued by the currently assigned Magistrate Judge (Dkt. 123,
3 “Report”), and Plaintiff’s Objections to the Report (Dkt. 126, “Objections”).

4 With his Objections, Plaintiff purports to offer new a new declaration
5 relating to the May 2011 “incident” at issue. Objections at 7-9. This
6 declaration does not relate to the failure of service issue raised in the Report.
7 See Report at 17-19. The Court has discretion but is not required to consider
8 new evidence offered for the first time with objections to a Report and
9 Recommendation. See United States v. Howell, 231 F.3d 615, 621-22 (9th Cir.
10 2000). The Court exercises its discretion to not consider this new evidence
11 relating to events from 2011, as Plaintiff had a full and fair opportunity to
12 present evidence in opposition to the Motion, having received two extensions
13 of time to do so, resulting in Plaintiff having more than three months to submit
14 evidence in opposition to the Motion. Plaintiff does not explain here why such
15 evidence was not submitted during that three-month period when such
16 evidence was required to be presented to oppose the Motion. In addition, the
17 day after the Motion was filed, Plaintiff was advised that he “must set out
18 specific facts in declarations [etc.] . . .” with any opposition to the Motion if he
19 contested facts raised in the Motion, and a failure to do so would result in
20 “Defendants’ evidence being accepted as true.” See Dkt. 113 at 2. Plaintiff
21 offers no explanation why the “new” declaration was not submitted with his
22 Opposition. The Court declines to consider the new evidence here.

23 The Court has engaged in a de novo review of those portions of the
24 Report to which objections have been made. The Court accepts the findings
25 and recommendation of the magistrate judge.

26 Therefore, IT IS HEREBY ORDERED that:

- 27 1. The Motion (Dkt. 112) is GRANTED; Plaintiff’s Eighth
28 Amendment deliberate indifference claim against defendants

1 Montoya and Enriquez is DISMISSED with prejudice, to be
2 reflected in the final judgment in this action;

3 2. Plaintiff's claims alleged against defendant Cash are DISMISSED
4 without prejudice for failure to timely serve process under Rule 4,
5 to be reflected in the final judgment in this action;

6 3. As the time for the filing of dispositive motions has passed, the
7 following claims remain to be tried: (1) Eighth Amendment
8 excessive force claim against Montoya and Enriquez; (2) Eighth
9 Amendment failure to intervene claim against Franklin; and (3)
10 state law claims for assault, battery, and negligence against
11 Montoya, Enriquez, and Franklin.

12 4. Per the terms of the referral order (Dkt. 3), the referral of certain
13 pretrial matters to the assigned Magistrate Judge is terminated.
14 The assigned Magistrate Judge is hereby authorized to investigate,
15 and, if warranted, initiate and/or oversee ADR efforts and report
16 results of such efforts by July 1, 2021. Other than such ADR
17 efforts, the case is STAYED pending the conclusion of such ADR
18 efforts or July 1, 2021, whichever occurs first.

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20 Dated: February 10, 2021



21 HON. DAVID O. CARTER
22 United States District Judge
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