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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

ROMAINE L. NEVELS,  
Plaintiff,  
v.  
DEBBIE ASCUNION, et al.,  
Defendants.

CASE NO. CV 17-6434-JVS (AS)  
**ORDER ACCEPTING FINDINGS,  
CONCLUSIONS AND RECOMMENDATIONS  
OF UNITED STATES MAGISTRATE  
JUDGE**

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Third Amended Complaint, all of the records herein, and the Report and Recommendation of a United States Magistrate Judge. After having made a de novo determination of the portions of the Report and Recommendation to which the parties' Objections were directed, the Court finds that Defendants' and Plaintiff's respective Objections to the Report and Recommendation are without merit and do not cause the Court to reconsider its decision to accept the Magistrate Judge's conclusions and recommendations.

1 Defendants argue in their Objections that Plaintiff failed to  
2 exhaust administrative remedies as to any Defendant, including  
3 Avalos, because he never received a third-level decision on the  
4 merits of his appeal. (Defs.' Objections at 1-4). As Defendants  
5 acknowledge, this argument directly contradicts their own Motion  
6 for Summary Judgment ("Motion"), in which they asserted, multiple  
7 times, that Plaintiff exhausted his remedies as to Defendant  
8 Avalos, even though the third-level decision merely affirmed the  
9 prior appeal's cancellation for untimeliness. (Motion at 3, 8)  
10 (citing Defs.' SUF ¶ 16). According to Defendants, these clear  
11 statements in their own Motion were based on a mistake of law,  
12 which they now wish to correct. (Defs.' Objections at 3-4). They  
13 contend that Plaintiff's claims are in fact unexhausted because a  
14 third-level decision affirming the cancellation of an inmate's  
15 prior appeal does not satisfy the administrative exhaustion  
16 requirements. (Defs.' Objections at 2). Defendants present this  
17 new argument based on facts that were already in the record.

18  
19 The Court has discretion to consider arguments raised for the  
20 first time in a party's objections.<sup>1</sup> See Brown v. Roe, 279 F.3d

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21  
22 <sup>1</sup> Defendants contend, incorrectly, that the Court is required  
23 to consider their argument because their Motion raised the issue  
24 of exhaustion on other grounds, and the underlying facts were  
25 already in the record. (Defs.' Objections at 4). On this point,  
26 they rely on cases from the Fourth Circuit, despite that the Fourth  
27 and Ninth Circuits differ on this issue. See Brown v. Roe, 279  
28 F.3d 742, 745-46 ("[W]e do not go as far as the Fourth Circuit,  
which has held that a district court *must* consider new arguments  
raised for the first time in an objection to a magistrate judge's  
findings and recommendation.") (citation omitted). In the Ninth  
Circuit, the matter is clearly within the Court's discretion. Id.  
at 744-46.

1 742, 744 (2002); United States v. Howell, 231 F.3d 615, 621 (9th  
2 Cir. 2000). Defendants do not merit such consideration here,  
3 particularly as they have no excuse for failing to assert the  
4 argument before. Indeed, because Defendants' Motion expressly  
5 conceded that the third-level decision exhausted Plaintiff's  
6 remedies against Avalos, they arguably waived this issue. See Lira  
7 v. Herrera, 427 F.3d 1164, 1171 (9th Cir. 2005) (PLRA's exhaustion  
8 requirement is waived if not raised by defendant); cf. Ross v.  
9 Davis, 2019 WL 5459604, at \*4 (C.D. Cal. Sept. 16, 2019) (in habeas  
10 action, government's "express waiver was not rendered invalid by  
11 the possibility that its position on exhaustion was  
12 incorrect"), report and recommendation adopted, 2019 WL 5455715  
13 (C.D. Cal. Oct. 24, 2019) (citing Eichwedel v. Chandler, 696 F.3d  
14 660, 671 (7th Cir. 2012)).

15  
16 Moreover, even if the Court considered Defendants' new  
17 argument and agreed that the third-level decision on Plaintiff's  
18 appeal did not qualify for exhaustion under applicable regulations,  
19 dismissal still would not be warranted. To support their claim  
20 that Plaintiff's appeal did not suffice, Defendants cite Gil v.  
21 Spaulding, 2017 WL 6594637 (E.D. Cal. Dec. 26, 2017), in which the  
22 district court dismissed an inmate's civil rights claims for lack  
23 of exhaustion because the inmate's administrative third-level  
24 appeal had been cancelled as untimely, and he failed to demonstrate  
25 that the cancellation was improper. Gil, 2017 WL 6594637, at \*5-  
26 8. The plaintiff in Gil argued that he had been unable to timely  
27 submit the appeal because his second-level response arrived after  
28 the appeal deadline. The court rejected this argument in part

1 because the defendants provided declarations from appeals examiners  
2 which described the procedures used to ensure timely processing  
3 and delivery of appeal responses, and averred that there was no  
4 record of delay in the inmate's case. The court also noted that  
5 in contrast to other district court cases - specifically, Thorns  
6 v. Ryan, 2008 WL 544398 (S.D. Cal. Feb. 26, 2008), and Sanchez v.  
7 Penner, 2008 WL 544591 (E.D. Cal. Feb. 26, 2008) - the plaintiff  
8 in Gil had not been transferred when the second-level response was  
9 issued, and he had not inquired into the status the response or  
10 noted its delay in his belated third-level appeal. Gil, 2017 WL  
11 6594637, at \*6-7; see Thorns, 2008 WL 544398, at \*3-4 (dismissal  
12 for lack of exhaustion due to cancelled third-level appeal was not  
13 warranted where plaintiff asserted that he had received the second-  
14 level decision late, and he offered supporting evidence showing  
15 that he had been transferred to another facility after the decision  
16 was purportedly issued, had made several unsuccessful attempts to  
17 obtain a copy of the decision, and had explained within his late  
18 third-level appeal that he had only recently received the second-  
19 level decision); Sanchez, 2008 WL 544591, at \*6 (defendant failed  
20 to rebut prisoner's evidence that his appeal was late due to his  
21 transfer to a different prison).

22  
23 Here, as in Gil, Plaintiff has argued that he was unable to  
24 timely submit his third-level appeal because his second-level  
25 response was delivered to him after the appeal deadline.  
26 Defendants have neglected even to address this argument. Moreover,  
27 unlike in Gil, Plaintiff has provided evidence, in the form of his  
28 deposition testimony and signed statements, attesting that he was

1 transferred multiple times while awaiting the second-level  
2 response, and that he submitted several inquiries regarding the  
3 status of the response. (See Opposition to Motion at 4-10; Dkt.  
4 No. 119 at 2-4; Pl.'s Depo. at 101-02). Administrative documents  
5 in the record also reflect that Plaintiff raised this issue in his  
6 late third-level appeal and in his subsequent appeal of the  
7 cancellation. (See Jung Decl. ¶ 6, Exh. B at 9, 55-57, 68).

8  
9 Defendants have offered nothing to rebut Plaintiff's evidence  
10 here. Accordingly, even if Defendants had not waived this issue,  
11 their argument would fail. As in Sanchez and Thorns, Plaintiff  
12 has satisfied his burden under the applicable standard to show that  
13 further administrative remedies were rendered effectively  
14 unavailable. See Sapp v. Kimbrell, 623 F.3d 813, 822 (9th Cir.  
15 2010) (exhaustion is not required "when circumstances render  
16 administrative remedies effectively unavailable") (citation  
17 omitted); Thorns, 2008 WL 544398, at \*3-4 (denying motion to  
18 dismiss); Sanchez, 2008 WL 544591, at \*6 (denying motion for  
19 summary judgment); see also Gil, 2017 WL 6594637, at \*7-8  
20 (distinguishing Thorns and Sanchez and granting summary judgment  
21 for lack of exhaustion).

22  
23 Defendants' other arguments were addressed in the Report and  
24 Recommendation and merit little discussion here. Defendants  
25 dispute the Magistrate Judge's conclusion that Plaintiff's appeals  
26 regarding the incident with Defendant Avalos also sufficed to  
27 exhaust administrative remedies for his excessive-force claim  
28

1 against Defendant Barbato.<sup>2</sup> (Defs.' Objections at 5-10). Although  
2 the appeals did not mention that Plaintiff was struck by any officer  
3 other than Avalos, the appeals did allege that Officers Barbato  
4 and Im maliciously wielded their batons against the inmates in the  
5 incident. (Jung Decl. ¶ 6, Exh. B at 10-11). Plaintiff's appeal  
6 to the third level also referenced the officers' incident reports,  
7 in which Barbato and others attested that Barbato himself struck  
8 Plaintiff with his baton (albeit just once in the knee) while  
9 Avalos and Im were striking the other two inmates with whom  
10 Plaintiff had been struggling. (Id. at 11, 21-36). Based on these  
11 facts, regarding a fast-moving incident in which multiple officers  
12 were using force against several inmates in a struggle, Plaintiff's  
13 appeals gave prison officials at least "enough information" to  
14 allow them to investigate the matter and "take appropriate  
15 responsive measures" regarding Defendant Barbato's involvement.  
16 See Griffin v. Arpaio, 557 F.3d 1117, 1121 (9th Cir. 2009); see  
17 also Washington v. Guerra, 2017 WL 1197861, at \*5 (C.D. Cal. Jan.  
18 31, 2017) (prisoner exhausted remedies with respect to claims  
19 against defendants, including some officers not named in  
20 administrative appeals, because the appeals alleged excessive force  
21 on particular date and referenced incident reports that identified  
22 the defendant officers' involvement, so that "prison officials  
23 plainly knew" defendants were involved in the alleged excessive-  
24 force incident), report and recommendation adopted, 2017 WL 1197667

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25  
26 <sup>2</sup> The Magistrate Judge determined that Plaintiff exhausted  
27 available remedies regarding all three Defendants, but the claim  
28 against Defendant Im need not be addressed because it fails on the  
merits, for the reasons stated in the Report and Recommendation.

1 (C.D. Cal. Mar. 29, 2017) (citing Reyes v. Smith, 810 F.3d 654,  
2 659 (9th Cir. 2016)).

3  
4 Defendants have therefore failed to demonstrate any basis for  
5 dismissal on exhaustion grounds. As for the merits, Defendants  
6 contend that evidence of the officers' malicious intent is  
7 "equivocal" and "contradictory." (Defs.' Objections at 11-14).  
8 However, construed under the proper standard, Plaintiff's  
9 statements consistently attest that Avalos and Barbato continued  
10 striking him multiple times even after he was subdued, creating a  
11 genuine dispute of material fact as to whether Defendants used  
12 excessive force in violation of Plaintiff's Eighth Amendment  
13 rights. (See Pl.'s Opposition to Motion at 6, 27; Third Amended  
14 Complaint at 4; Pl.'s Depo. at 53-54).

15  
16 Plaintiff's Objections similarly fail to identify any basis  
17 to depart from the Magistrate Judge's recommendations. Although  
18 he opposes the dismissal of his claim against Defendant Im, he  
19 remains unable to point to any plausible facts showing that Im had  
20 a realistic opportunity to intervene and protect Plaintiff from  
21 any alleged excessive force during the incident. (Pl.'s Objections  
22 at 6-9). Otherwise, Plaintiff apparently disputes the  
23 recommendation to deny as moot the filing construed as Plaintiff's  
24 Motion to Amend his Third Amended Complaint. (Pl.'s Objections at  
25 3-4). Plaintiff contends that he "mislabeled" the document, and  
26 had intended merely to give notice of the exhibits attached to it.  
27 (Id.). Regardless, these exhibits were already part of the record,  
28 and do not affect the Court's analysis of the issues presented in

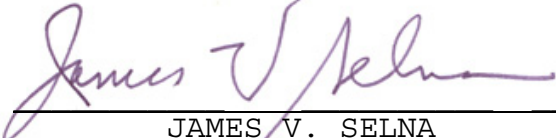
1 Defendants' Motion. Plaintiff's remaining objections do not merit  
2 further discussion.<sup>3</sup>

3  
4 **IT IS ORDERED** that (1) Defendants' Motion for Summary Judgment  
5 is GRANTED IN PART AND DENIED IN PART, as follows: (a) the Motion  
6 is GRANTED to the extent that Plaintiff's claims against Defendant  
7 Im are DISMISSED with prejudice; (b) the Motion is otherwise  
8 DENIED; and (3) the filing construed as Plaintiff's Motion to Amend  
9 the Third Amended Complaint (Dkt. No. 122) is DENIED AS MOOT.

10  
11 **IT IS FURTHER ORDERED** that the Clerk serve copies of this  
12 Order on Plaintiff and counsel for Defendants.

13  
14 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

15 DATED: February 19, 2021

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18 JAMES V. SELNA  
19 UNITED STATES DISTRICT JUDGE

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23 <sup>3</sup> Along with his Objections, Plaintiff filed a Motion for  
24 Appointment of Counsel. (Dkt. No. 133). The Court has previously  
25 denied several motions to appoint counsel for Plaintiff in this  
26 case (see Dkt. Nos. 12, 44, 50, 83), but a separate order will  
27 issue to address whether this relief is now warranted going  
28 forward. The Court observes, however, that Plaintiff appears to  
have handled the issues in the case adequately thus far without  
counsel, and all filings have been construed in light of  
Plaintiff's status as a pro se inmate.