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

THURMAN GAINES,  
  
                                Plaintiff,  
  
                    v.  
  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,  
  
                                Defendants.

Case No. 1:15-cv-00587-LJO-SAB (PC)  
  
ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS, DENYING,  
WITHOUT PREJUDICE, DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT ON  
NON-EXHAUSTION GROUNDS, AND  
REFERRING MATTER FOR ALBINO  
EVIDENTIARY HEARING  
  
(ECF Nos. 77, 87)

Plaintiff Thurman Gaines is a state prisoner proceeding *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 5, 2019, the assigned Magistrate Judge issued findings and recommendations recommending that Defendant Horowitz’s motion for summary judgment on the issue of exhaustion be denied without prejudice, and that this matter be set for an Albino evidentiary hearing on the issue of whether Plaintiff filed an administrative appeal grieving Defendant’s denial of a lower tier and lower bunk chrono. (ECF No. 87.) The parties were granted thirty (30) days to file written objections to the findings and recommendations. (Id. at 25-26.) On October 7, 2019, Defendant timely filed objections. (ECF No. 90.) Following an extension of time, Plaintiff timely filed his objections on November 1, 2019. (ECF No. 92.)

1 Defendant filed a response to Plaintiff's objections on November 14, 2019. (ECF No. 93.)

2 In Defendant's objections, Defendant argues that summary judgment should be granted in  
3 Defendant's favor because Plaintiff had not exhausted all of his available administrative remedies  
4 before he filed this action. (ECF No. 90.) First, Defendant argues that Plaintiff's allegation that  
5 he filed a relevant grievance that was never processed is only supported by self-serving inmate  
6 declarations and fails to establish a triable issue of whether prison officials prevented or interfered  
7 with Plaintiff's attempts to exhaust his administrative remedies. (Id. at 2-3, 5-6.) However,  
8 "[a]lthough the source of the evidence may have some bearing on its credibility and on the weight  
9 it may be given by a trier of fact, the district court may not disregard a piece of evidence at the  
10 summary judgment stage solely based on its self-serving nature." Nigro v. Sears, Roebuck &  
11 Co., 784 F.3d 495, 498 (9th Cir. 2015). Further, the undersigned agrees with the Magistrate  
12 Judge's determination that the declarations of Plaintiff, Victor Cooper, and Darrell Harris create a  
13 triable issue of fact regarding whether prison officials prevented Plaintiff from exhausting his  
14 administrative remedies by losing and failing to process the administrative appeal of Defendant's  
15 denial of Plaintiff's request for a lower tier and lower bunk chrono that Plaintiff states he  
16 submitted on July 21, 2014. Therefore, Defendant's first objection is overruled.

17 Second, Defendant argues that, even presuming that Plaintiff did submit a relevant  
18 grievance on July 21, 2014 and that Plaintiff's grievance was lost and not processed by prison  
19 officials, Plaintiff has still not exhausted all of his administrative remedies prior to filing this  
20 action because Plaintiff did not file a new grievance on the same topic or file a grievance asking  
21 for the missing grievance to be reinstated. (ECF No. 90, at 2.) However, the undersigned finds  
22 that no regulation requires an inmate to file a new grievance on the same topic or file a new  
23 grievance regarding the missing grievance in order to exhaust administrative remedies. Further,  
24 the undersigned agrees with the Magistrate Judge that, while Plaintiff could have filed a request  
25 pursuant to California Code of Regulations, title 15, § 3086(a) asking about the status of the  
26 grievance he submitted on July 21, 2014, Plaintiff's failure to file such a request only goes to  
27 Plaintiff's credibility, not to the exhaustion requirement. Therefore, Defendant's second  
28 objection is overruled.

1 In Plaintiff's objections, Plaintiff contends that the Magistrate Judge's findings and  
2 recommendations should be adopted except for the portion of the findings and recommendations  
3 recommending that the undersigned preclude Plaintiff from using any evidence that was not  
4 disclosed by the January 22, 2018 opposition to Defendant's motion for sanctions in opposition to  
5 Defendant's motion for summary judgment or at any Albino evidentiary hearing. (ECF No. 87, at  
6 7-11.) Plaintiff first argues that the Court should decline to adopt the recommendation regarding  
7 the sanction because Plaintiff believes that he likely did disclose the witnesses, Albert Sanchez  
8 and Norberto Robancho, prior to January 22, 2018. (ECF No. 92, at 2.) However, while Plaintiff  
9 provided letters and declarations from Albert Sanchez and Norberto Robancho to the Court on  
10 December 7, 2017, the documents related only to Plaintiff's alleged falls. (ECF No. 48, at 33-35,  
11 37.) The letters and declarations did not disclose that the inmates had knowledge that Plaintiff  
12 had submitted an inmate grievance regarding Defendant's denial of Plaintiff's request for a lower  
13 tier and lower bunk chrono. Therefore, the first time that Plaintiff disclosed that Inmates Sanchez  
14 and Robancho had any knowledge regarding Plaintiff's attempt to exhaust administrative  
15 remedies was in Plaintiff's opposition to Defendant's motion for summary judgment, filed  
16 pursuant to the prison mailbox rule on June 27, 2019 and docketed on July 1, 2019.  
17 Consequently, Plaintiff's first objection is overruled.

18 Second, Plaintiff argues that the undersigned should decline to adopt the recommendation  
19 regarding the evidentiary sanction because, in their memorandum decision vacating the  
20 undersigned's grant of terminating sanctions, the Ninth Circuit Court of Appeals stated that "it is  
21 not clear whether an evidentiary sanction is warranted given that Gaines eventually complied with  
22 his discovery obligations to defendant's satisfaction." (ECF No. 69, at 2.)

23 Upon remand, the District Court must proceed on the terms of the Ninth Circuit's  
24 mandate. Stacy v. Colvin, 825 F.3d 563, 567-68 (9th Cir. 2016). The District Court may,  
25 however, decide anything not foreclosed by the mandate, so long as the District Court does not  
26 take actions that contradict it. Id. at 568; Firth v. United States, 554 F.2d 990, 993-94 (9th Cir.  
27 1977) ("... a mandate is controlling as to all matters within its compass, while leaving any issue  
28 not expressly or impliedly disposed of on appeal available for consideration by the trial court on

1 remand.”). Furthermore, while the “law of the case” doctrine limits district court reconsideration  
2 of issues previously determined, the doctrine does not apply to issues or claims that were not  
3 actually decided. Mortimer v. Baca, 594 F.3d 714, 720 (9th Cir. 2010); Odima v. Westin Tucson  
4 Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995).

5 In this case, the Ninth Circuit’s mandate was to vacate the undersigned’s grant of  
6 terminating sanctions and to remand the action for further proceedings. (ECF No. 69, at 2-3.)  
7 While the Ninth Circuit’s memorandum decision stated that it was not clear whether an  
8 evidentiary sanction was warranted, the Court finds that this language does not foreclose the  
9 imposition of an evidentiary sanction on grounds not actually decided by the Ninth Circuit.  
10 Therefore, the undersigned finds that imposition of an evidentiary sanction prohibiting Plaintiff  
11 from using any evidence that was not disclosed by Plaintiff’s January 22, 2018 opposition to  
12 Defendant’s motion for sanctions or Plaintiff’s prior discovery responses to support his  
13 opposition to Defendant’s motion for summary judgment or at any Albino evidentiary hearing is  
14 appropriate in the instant action. See Cassett v. Stewart, 406 F.3d 614, 621 (9th Cir. 2005)  
15 (district court is free to do anything not foreclosed by the mandate or counter to the “spirit” of the  
16 circuit court’s decision) (quoting United States v. Kellington, 217 F.3d 1084, 1092-93 (9th Cir.  
17 2000)). Consequently, Plaintiff’s second objection is overruled.

18 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a  
19 *de novo* review of this case. Having carefully reviewed the entire file, including Plaintiff’s and  
20 Defendant’s objections, the Court finds that the findings and recommendations are supported by  
21 the record and by proper analysis.

22 Accordingly, IT IS HEREBY ORDERED that:

- 23 1. The findings and recommendations issued on September 5, 2019, (ECF No. 87),  
24 are adopted in full;
- 25 2. Defendant Horowitz’s motion for summary judgment for failure to exhaust  
26 administrative remedies, (ECF No. 77) is DENIED WITHOUT PREJUDICE;
- 27 3. This matter be set for an Albino hearing on the issue of whether Plaintiff filed an  
28 administrative appeal grieving Defendant’s denial of a lower tier and lower bunk

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chrono; and

4. This matter is referred back to the assigned Magistrate Judge for further proceedings.

IT IS SO ORDERED.

Dated: January 15, 2020

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE