

1 dispositive motion deadline as June 5, 2020. (Doc. No. 63). On May 28, 2019, Plaintiff filed a
2 merits-based motion for summary judgment² (Doc. No. 29) and on July 8, 2019, Defendants filed
3 an exhaustion-based motion for summary judgment. (Doc. No. 32). Plaintiff's merits-based
4 motion for summary judgment was denied (Doc. Nos. 53, 64), and Defendants' exhaustion-based
5 motion for summary judgment was denied. (Doc. Nos. 49, 56). The case proceeded to discovery.
6 On June 5, 2020, Defendants' filed a merits-based motion for summary judgment. (Doc. No. 65).
7 On June 9, 2020, Plaintiff filed a second merits-based motion for summary judgment. (Doc. No.
8 66). The Court now considers whether to strike Plaintiff's second merits-based motion for
9 summary judgment as untimely and repetitive, as moved for by the Defendants. (Doc. No. 69).

10 II. APPLICABLE LAW AND ANALYSIS

11 A. Timeliness

12 As an initial matter, Plaintiff's second motion for summary judgment was filed on June 9,
13 2020, three days after the dispositive motions deadline.³ (See Doc. No. 63). Plaintiff states that
14 he mistakenly believed the dispositive motions deadline was July 5, 2020, not June 5, 2020.
15 (Doc. No. 70 at 3).

16 A document filed *pro se* is "to be liberally construed." *Erickson v. Pardus*, 551 U.S. 89,
17 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Bretz v. Kelman*, 773 F.2d 1026,
18 1027 n.1 (9th Cir. 1985) (en banc) ("[W]here the petitioner is *pro se*, particularly in civil rights
19 cases, [the Court is obligated] to construe the pleadings liberally and to afford the petitioner the
20 benefit of any doubt."). A three-day filing delay is not excessive, and Defendants have not
21 demonstrated that they suffered any prejudice from the delay. See *Ross v. White*, No. 2:17-CV-
22 04149-ODW-JC, 2018 U.S. Dist. LEXIS 116508, at *2 (C.D. Cal. July 12, 2018) (denying
23 motion to strike entirety of answer filed three days late, noting lack of evidence of prejudice or
24 harm and in light of the general proposition that cases should be decided on the merits).

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26 ² Although Plaintiff titled his motion for summary judgment, in part, as a motion addressing exhaustion,
Plaintiff also addresses the merits of his case. (See generally Doc. No. 29).

27 ³ The parties agree that Plaintiff filed his second motion for summary judgment on June 9, 2020, the date
28 Plaintiff provided prison officials with the motion for mailing in accordance with the prison mailbox rule.
(Doc. No. 69 at 3; Doc. No. 70 at 3).

1 Accordingly, considering that Plaintiff is proceeding *pro se* in this matter and that Defendants
2 have not shown they were prejudiced by the three-day delay, the court will *nunc pro tunc*
3 consider Plaintiff’s motion timely filed.

4 B. Plaintiff Relies on Expanded Record

5 The Court now turns to Defendants’ argument that Plaintiff’s second motion for summary
6 judgment should be stricken as repetitive. (Doc. No. 69 at 4-6). Defendants argue that Plaintiff’s
7 second motion for summary judgment simply rehashes arguments made in his first motion for
8 summary judgment. (*Id.*).

9 “Rule 56 [of the Federal Rules of Civil Procedure] . . . does not bar successive motions.”
10 *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010). And the Ninth Circuit has
11 explicitly held “that district courts have discretion to entertain successive motions for summary
12 judgment.” *Id.* Because the “denial of summary judgment does not preclude a contrary later
13 grant of summary judgment,” allowing a party to “file a second motion for summary judgment is
14 logical, and it fosters the ‘just, speedy, and inexpensive’ resolution of suits.” *Id.* (quoting Fed. R.
15 Civ. P. 1). Permitting a successive summary judgment motion is especially appropriate where the
16 motion relies on new evidence or an expanded factual record. *Id.*

17 Here, Plaintiff filed his first motion for summary judgment prior to the close of discovery.
18 Although the basic gravamen of Plaintiff’s arguments are the same between the two motions—
19 that Defendants retaliated against him for exercising his right to file prison grievances—Plaintiff
20 has further developed his arguments in his second motion for summary judgment and has relied
21 on an expanded record.⁴ For example, Plaintiff has produced and relies upon Defendants’
22 discovery responses. (Doc. No. 66 at 5-10, 18, 20). Moreover, Plaintiff has produced additional
23 documentary evidence in his second motion for summary judgment, such as the first level
24 screening for grievance No. KVSP-O-16-01786 (*id.* at 37-38); property grievance form No.

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26 ⁴ In Plaintiff’s first motion for summary judgment, he alleges that Defendants placed him on “c-status” in
27 retaliation for being a “legal beagle.” (Doc. No. 29 at 7). In his second motion for summary judgment,
28 Plaintiff again argues that Defendants placed him on c-status in retaliation for being a legal beagle in
violation of his First Amendment rights. (*See generally* Doc. No. 66).

1 KVSP-0-16-03072 and accompanying third-level modification order (*id.* at 47-48, 50); and
2 Plaintiff's own declaration. (*Id.* at 51-52).

3 Taking into consideration that successive motions for summary judgment are permitted in
4 the Ninth Circuit, that this court has the discretion to allow such motions, and that Plaintiff relies
5 on an expanded record in his second motion, the Court will permit and consider Plaintiff's second
6 motion for summary judgment. Accordingly, Defendants' motion to strike Plaintiff's second
7 motion for summary judgment is denied.

8 The Court's ruling to accept Plaintiff's second motion for summary judgment is not to be
9 construed as a ruling on the merits of Plaintiff's second motion. The Court will consider the
10 merits of Plaintiff's second motion and Defendants' objections thereto in due course.

11 Accordingly, it is ORDERED:

12 Defendants' motion to strike Plaintiff's second motion for summary judgment (Doc. No.
13 69) is DENIED.

14 IT IS SO ORDERED.

15 Dated: June 2, 2021

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17 HELENA M. BARCH-KUCHTA
18 UNITED STATES MAGISTRATE JUDGE

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