

1 worked one shift at Mule Creek State Prison from 6:00 a.m. to 2:00 p.m. Defendant argues that
2 he could not have been present when the alleged violation of plaintiff's rights occurred because
3 plaintiff's CT scan took place at 1:10 p.m. at San Joaquin General Hospital,¹ during the time
4 defendant was working his shift at Mule Creek State Prison.

5 As a preliminary matter, the court notes that in his objections, defendant relies in part on
6 evidence that was not part of the record when his motion for summary judgment was filed on
7 February 18, 2015.² Specifically, defendant relies on his responses to plaintiff's discovery
8 requests,³ and a CDCR "Triage and Treatment Flow Sheet" indicating that on November 8, 2012
9 plaintiff was "escorted by custody for transport" at 11:15 a.m.⁴

10 "[A] district court has discretion, but is not required, to consider evidence presented for
11 the first time in a party's objection to a magistrate judge's recommendation. Ahktar v. Mesa, 698
12 F.3d 1202, 1208 (9th Cir. 2012) (internal citations omitted). "[I]n making a decision on whether
13 to consider newly offered evidence, the district court must actually exercise its discretion, rather
14 than summarily accepting or denying the motion." Id. Here, the court declines to consider the
15 above documents, which were not properly submitted as evidence in support of defendant's
16 summary judgment motion. See Ahktar, 698 F.3d at 1208. The court further finds that even if
17 this evidence were to be considered, it would not change the result in this case, as explained
18 below.

19 ¹ Although defendant now asserts that plaintiff's CT scan took place at 1:10 p.m. on November 8,
20 2015, he did not reference the specific time of plaintiff's appointment in his motion for summary
21 judgment. See ECF No. 79. However, the report from San Joaquin General Hospital indicating
22 that plaintiff's exam was completed at 13:13, or 1:13 p.m. on November 8, 2012, was attached as
an exhibit to plaintiff's complaint. See ECF No. 1 at 29.

23 ² Defendant's motion for summary judgment was filed two months before discovery closed and
seven months before the dispositive motion deadline expired.

24 ³ In his reply brief on summary judgment, defendant stated that he served plaintiff with his
discovery responses on March 11, 2015. ECF No. 56 at 3. Defendant attached copies of the
25 proofs of service as exhibits to his reply brief, but did not attach copies of his actual responses to
26 plaintiff's discovery requests. See ECF No. 56-1. Defendant's discovery responses were first
offered as evidence in defendant's objections to the findings and recommendations of the
magistrate judge. See ECF Nos. 74-1, 74-2.

27 ⁴ It appears that the "Triage and Treatment Flow Sheet" was first submitted by defendant Rogero
28 on June 25, 2014, see ECF No. 69-5 at 4, over four months after defendant Singh's summary
judgment motion was filed.

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2 The magistrate found that while defendant's evidence established that he worked at Mule
3 Creek State Prison from 6:00 a.m. to 2:00 p.m. on November 8, 2012, ECF No. 72 at 10-11,
4 plaintiff's evidence called the weight of defendant's evidence into question such that a rational
5 trier of fact could find that defendant was at San Joaquin General Hospital during the time he was
6 assigned to work at Mule Creek State Prison, *id.* at 13. While defendant stated in his discovery
7 his responses to plaintiff's discovery requests that he was not present at San Joaquin General
8 Hospital on November 8, 2012, his sworn statements are not sufficient on summary judgment to
9 overcome plaintiff's sworn statements to the contrary. See S.E.C. v. Koracorp Industries, Inc.,
10 575 F.2d 692, 699 (9th Cir. 1978) ("[S]ummary judgment is singularly inappropriate where
11 credibility is at issue."). Thus, even taking defendant's discovery responses into account, there is
12 still a factual dispute as to whether defendant was present at San Joaquin General Hospital on
13 November 8, 2012.

14 To the extent defendant's objections are based on his assertions that plaintiff departed
15 Mule Creek State Prison at 11:15 a.m. and had a CT scan at 1:10 p.m. at San Joaquin General
16 Hospital, defendant's argument is unconvincing. With respect to defendant's motion, the time of
17 plaintiff's appointment is only significant if the parties agree that defendant actually worked his
18 assigned shift at Mule Creek State Prison from 6:00 a.m. to 2:00 p.m. on November 8, 2012.
19 Because this fact remains disputed, see ECF No. 72 at 13, defendant is not entitled to summary
20 judgment.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. The findings and recommendations filed August 25, 2015, are adopted in full; and
23 2. Defendant Singh's motion for summary judgment (ECF No.49) is denied without
24 prejudice to the filing of a summary judgment motion on alternate grounds, or joinder in
25 defendant Rogero's motion for summary for summary judgment.

26 DATED: December 8, 2015

27 /s/ John A. Mendez

28 UNITED STATES DISTRICT COURT JUDGE