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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JAMES CATO,

Plaintiff,

v.

M. DARST, et al.,

Defendants.

No. 2:17-cv-01873-TLN-EFB

ORDER

James Cato (“Plaintiff”), a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 23, 2020, the magistrate judge filed findings and recommendations which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. (ECF No. 48.) Defendants have filed objections to the Findings and Recommendations. (ECF No. 51.) Plaintiff filed a reply. (ECF No. 32.)

This Court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the Court

1 assumes its correctness and decides the motions on the applicable law. See *Orand v. United*  
2 *States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge’s conclusions of law are  
3 reviewed de novo. See *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

4 Having carefully reviewed the entire file under the applicable legal standards, the Court  
5 finds the Findings and Recommendations to be supported by the record and by the magistrate  
6 judge’s analysis.

7 The magistrate judge’s recommendation to deny Defendants’ Motion for Summary  
8 Judgment turns on the finding that Defendants failed to show there were actual remedies  
9 available to Plaintiff should he be granted the third level of review in the administrative  
10 exhaustion process. Defendants argue Plaintiff would have some remedy available to him even  
11 though an investigation had already been performed. Defendants, in their motion and reply, rely  
12 on the language of the notice partially granting Plaintiff’s second level review which indicates the  
13 availability of a remedy at the third level, but does not specify what that remedy might be. The  
14 magistrate judge found that while the language allowed Plaintiff to appeal to the third level, it was  
15 unclear whether review at that level could result in any actual remedies that were not already  
16 granted at the first and second levels. This is especially the case given that an investigation — the  
17 form of relief requested by Plaintiff — had already been performed.

18 The Court agrees with the magistrate judge’s application of *Brown v. Valoff*, 422 F.3d  
19 926, 939 (9th Cir. 2005) in finding that “to discharge their burden of showing an available  
20 administrative remedy, defendants must present evidence not only that third level review was  
21 technically possible, but that an appeal to the third level might have netted plaintiff additional  
22 relief.” (ECF No. 48 at 15.) Defendant has established that review was technically possible but  
23 failed to produce evidence showing that Plaintiff could acquire some additional relief from that  
24 review. This remains true in Defendants’ objections. For this reason, Defendants’ objections are  
25 overruled. Additionally, Defendants’ request for an Albino hearing is denied as this Court is not  
26 required to consider evidence presented for the first time in a party’s objection to a magistrate  
27 judge’s recommendation. See *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002).

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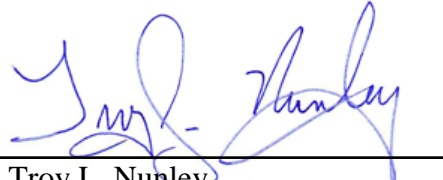
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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 23, 2020 (ECF No. 48), are adopted in full;
2. Plaintiff's February 18, 2020 Motion for Relief from Judgment (ECF No. 47) is DENIED without prejudice to its filing in Eastern District Case No. 2:14-cv-0959-TLN-KJN-P; and
3. Defendants' October 15, 2019 Motion for Summary Judgment (ECF No. 37) is DENIED.

IT IS SO ORDERED.

DATED: May 27, 2020



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Troy L. Nunley  
United States District Judge