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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

<p>LEONARD MICHAEL MARELLA,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>C.A. TERHUNE, Director of the California Department of Corrections, <i>et al.</i>,</p> <p style="text-align: right;">Defendants.</p>	<p>CASE NO. 03-cv-00660 BEN (MDD)</p> <p>ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</p> <p>[Docket Nos. 50, 127]</p>
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Plaintiff Leonard Michael Marella, a state prisoner proceeding *pro se*, filed a Complaint on April 2, 2003, pursuant to 42 U.S.C. § 1983. (Docket No. 1.) Also on April 2, 2003, Plaintiff filed a Memorandum of Facts and Claims for Relief, listing six additional claims for relief. (Docket No. 2.) Defendants filed a Motion to Dismiss on May 21, 2004, which the Court granted in part and denied in part. (Docket Nos. 26, 34.) Defendants filed a Motion for Summary Judgment on March 15, 2006. (Docket No. 50.) Plaintiff filed an opposition, and Defendants filed a reply. (Docket Nos. 75, 77.) On July 25, 2006, Magistrate Judge Anthony J. Battaglia issued an order requiring supplemental briefing regarding the impact on this case of the Supreme Court's decision in *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). (Docket No. 78.) Defendants filed a Supplemental Memorandum of Points and Authorities, Plaintiff filed an Opposition to Defendants' Supplemental Memorandum of Points and Authorities, and Defendants filed a Reply to Plaintiff's Opposition. (Docket Nos. 79, 81, 83.) On September 27, 2006, Judge Battaglia issued a Report and Recommendation recommending that

1 Defendants' Rule 12(b) motion for failure to exhaust administrative remedies be granted and finding
2 the motion for summary judgment to be moot. (Docket No. 85.) This Report and Recommendation
3 was adopted by the undersigned. (Docket No. 89.)

4 On December 21, 2006, Plaintiff filed an appeal of the adopted Report and Recommendation.
5 (Docket No. 90.) On October 5, 2009, the Ninth Circuit Court of Appeals reversed the District Court's
6 12(b) dismissal and remanded for a determination of Plaintiff's opportunity and ability to file a timely
7 grievance. (Docket No. 100.) On November 19, 2009, Judge Battaglia ordered supplemental briefing
8 regarding the exhaustion of administrative remedies. (Docket No. 101.) Defendants filed
9 Supplemental Briefing, Plaintiff filed an Affidavit in Opposition to Defendants' Supplemental
10 Briefing, and Defendants filed a Reply to Plaintiff's Affidavit. (Docket Nos. 106, 115, 116.) On
11 January 7, 2011, Judge Battaglia ordered additional supplemental briefing. (Docket No. 119.) On
12 January 24, 2011, Defendants filed additional Supplemental Briefing. (Docket No. 120.) This action
13 was transferred to Magistrate Judge Jan M. Adler on March 11, 2011, and then to Magistrate Judge
14 Mitchell D. Dembin on March 25, 2011.

15 Judge Dembin issued a thoughtful and thorough Report and Recommendation. (Docket No.
16 127.) The Report and Recommendation found that Defendants have not proven that Plaintiff failed
17 to exhaust his administrative remedies, and that the motion for summary judgment is therefore not
18 moot. In addition, the Report and Recommendation recommended that Defendants' Motion for
19 Summary Judgment be granted. Any objections to the Report and Recommendation were due
20 September 7, 2011. (*Id.*) Plaintiff did not file any objections. For the reasons that follow, the Report
21 and Recommendation is **ADOPTED**.

22 A district judge "may accept, reject, or modify the recommended disposition" of a magistrate
23 judge on a dispositive matter. FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1). "[T]he district
24 judge must determine de novo any part of the [report and recommendation] that has been properly
25 objected to." FED. R. CIV. P. 72(b)(3). However, "[t]he statute makes it clear that the district judge
26 must review the magistrate judge's findings and recommendations de novo *if objection is made*, but
27 not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)
28 (emphasis in original); *see also Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005). "Neither

1 the Constitution nor the statute requires a district judge to review, de novo, findings and
2 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328 F.3d at 1121.
3 Accordingly, the Court may grant Defendants’ Motion for Summary Judgment on this basis alone.

4 In the absence of any objections, the Court fully **ADOPTS** Judge Dembin’s Report and
5 Recommendation. Defendants’ Motion for Summary Judgment is **GRANTED**.

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7 **IT IS SO ORDERED.**

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9 DATED: September 12, 2011


HON. ROGER T. BENITEZ
United States District Court Judge

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