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

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TONY ROBERTS,

CASE NO. 15cv1044-WQH-PCL

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Plaintiff,

ORDER

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v.

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J. BEARD, et al.,

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Defendant.

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HAYES, Judge:

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The matter before the Court is the review of the Report and Recommendation (ECF No. 40) issued by United States Magistrate Judge Peter C. Lewis.

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I. Background

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On May 8, 2015, Plaintiff Tony Roberts (Plaintiff), a state prisoner proceeding pro se, initiated this action by filing a Complaint pursuant to 42 U.S.C. § 1983 against Defendants A. Buenrostro, R. Davis, C. Meza, A. Parker, R. Santiago, K. Seibel, and R. Solis (collectively, Defendants).¹ (ECF No. 1, 2). The Complaint alleges that Defendants violated Plaintiff's First Amendment right to file grievances and Eighth Amendment right to be free from cruel and unusual punishment.

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On January 11, 2016, Defendant Buenrostro filed a motion to dismiss for failure

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¹ Plaintiff's Complaint also named Defendants J. Beard, D. Paramo, S. Sanchez, L. Ciborowski, and D. Arguilez (ECF No. 1) but these defendants have not filed a response to the Plaintiff's Complaint and did not join in the motion for summary judgment and motion to dismiss. (ECF No. 27, 38). The Court denied Plaintiff's motion for default judgment against these five defendants on February 11, 2016 because Plaintiff had not shown they had been duly served. (ECF No. 31 at 3).

1 to state a claim for relief and a motion for summary judgment on exhaustion grounds
2 (ECF No. 27). Plaintiff filed a response in opposition to Defendant Buenrostro's
3 motions on February 5, 2016. (ECF No. 28). On March 16, 2016, Defendants R.
4 Santiago, C. Meza, A. Parker, R. Davis, R. Solis, and K. Seibel joined Defendant
5 Buenrostro and filed a joint motion to dismiss and motion for summary judgment. (ECF
6 No. 38). Plaintiff filed a response in opposition on April 8, 2016. (ECF No. 40).

7 On June 16, 2016, the Magistrate Judge issued the Report and Recommendation,
8 recommending that the Court deny the motion for summary judgment and grant in part
9 and deny in part the motion to dismiss. (ECF No. 40). The Court recommended that
10 the motion for summary judgment be denied on procedural grounds. *Id.* at 4. The
11 Report and Recommendation states "The proper procedural mechanism for evaluating
12 the exhaustion issue in this case would be on a post-answer motion for summary
13 judgment so that Plaintiff can be afforded the opportunity to conduct discovery and put
14 forth his own outside evidence regarding the exhaustion issue." *Id.*

15 The Court recommended that the motion to dismiss for failure to state a claim
16 with regard to the First Amendment claims be denied. *Id.* at 6. The Report and
17 Recommendation concludes that Plaintiff stated First Amendment claims in his
18 allegations that Defendants labeled Plaintiff a "snitch" in the presence of other inmates,
19 "sexually molested him in retaliation for prior First Amendment-protected conduct",
20 or "terrorized" Plaintiff after Plaintiff wrote to the class monitors of the mental health
21 delivery system." *Id.* The Report and Recommendation also rejects Defendants'
22 argument that the favorable termination doctrine bars Plaintiff's retaliation claim with
23 respect to Defendant Buenrostro. *Id.* at 6 n.1.

24 The Court recommended that the motion to dismiss for failure to state a claim
25 with regard to the Eighth Amendment claim be granted for all but Defendant
26 Buenrostro. *Id.* at 6. The Report and Recommendation states, "The Court fails to see
27 any other proper Eighth Amendment claims in the Complaint other than the one stated
28 against Defendant Buenrostro for molestation." *Id.*

1 The Court granted Plaintiff one extension of time to file objections to the Report
2 and Recommendation. (ECF No. 45). The final Order issued by the Court stated that
3 "Plaintiff shall file any objections to the Report and Recommendation on or before
4 August 29, 2016. Defendants shall file any reply on or before September 12, 2016."
5 *Id.* The docket reflects that no objections have been filed.

6 **II. Discussion**

7 The duties of the district court in connection with a report and recommendation
8 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28
9 U.S.C. § 636(b). The district judge must "make a de novo determination of those
10 portions of the report . . . to which objection is made," and "may accept, reject, or
11 modify, in whole or in part, the findings or recommendations made by the magistrate."
12 28 U.S.C. § 636(b). The district court need not review de novo those portions of a
13 Report and Recommendation to which neither party objects. See *Wang v. Masaitis*, 416
14 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
15 (9th Cir. 2003) (en banc) ("Neither the Constitution nor the [Federal Magistrates Act]
16 requires a district judge to review, de novo, findings and recommendations that the
17 parties themselves accept as correct.").

18 The Court has reviewed the Report and Recommendation, the record, and the
19 submissions of the parties. The Court concludes that the Magistrate Judge correctly
20 recommended that Defendants' motion for summary judgment be denied and that the
21 motion to dismiss be denied in part and granted in part. The Report and
22 Recommendation is adopted in its entirety.

23 **III. Conclusion**

24 IT IS HEREBY ORDERED that (1) the Report and Recommendation (ECF No.
25 40) is ADOPTED in its entirety, (2) the motion for summary judgment (ECF No. 27,
26 38) is DENIED, (3) the motion to dismiss Plaintiff's Eighth Amendment claim as to
27 Defendant Buenrostro (ECF No. 27, 38) is DENIED, (4) the motion to dismiss
28 Plaintiff's Eighth Amendment claims as to all other served Defendants (ECF No. 27,

1 38) is GRANTED, and (5) the motion to dismiss Plaintiff's First Amendment claims
2 as to all served Defendants (ECF No. 27, 38) is DENIED.

3 DATED: September 15, 2016

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5 **WILLIAM Q. HAYES**
6 United States District Judge

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