

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LARRY SALAS
CDCR No. AY-1376

Plaintiff,

v.

MILISSA BURNS (ERRONEOUSLY
SUED AS “RN BURNS”)

Defendants

Case No.: 16cv736-JAH (JLB)

**ORDER ADOPTING THE
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION [DOC
NO. 34] AND DISMISSING
PLAINTIFF’S SECOND AMENDED
COMPLAINT [DOC NO. 6] AS TO
ALL DEFENDANTS**

BACKGROUND

On March 28, 2016, Plaintiff Larry Salas, a state prisoner proceeding *pro se* (“Plaintiff”), filed a civil rights complaint against Defendants San Diego County Jail & Medical and Milissa Burns (“Burns”) (collectively, “Defendants”), alleging that Plaintiff was denied access to “adequate and competent medical treatment[,]” in violation of 42 U.S.C. § 1983 (“§ 1983”). *See* Doc. No. 1. Plaintiff did not prepay the filing fee required

1 by 28 U.S.C. § 1914(a) at the time of filing. Instead, he filed a motion for leave to proceed
2 *in forma pauperis* (“IFP”), pursuant to 28 U.S.C. § 1915(a). *See* Doc. No. 2. On April 8,
3 2016, the Court granted Plaintiff’s IFP motion, but dismissed Plaintiff’s Complaint for
4 failing to state a claim. *See* Doc. No. 3.¹

5 On April 15, 2016, Plaintiff filed an amended Complaint (“FAC”), naming the
6 Defendants in the original Complaint, as well as the San Diego Sheriff’s Department. *See*
7 Doc. No. 4. On May 24, 2016, the FAC was dismissed for failure to state a claim. *See* Doc.
8 No. 5. Plaintiff was granted forty-five days leave to file a second amended Complaint
9 (“SAC”). On July 5, 2016, Plaintiff filed his SAC naming Doctor John Doe and RN Burns
10 as defendants. *See* Doc. No. 6. On July 25, 2016, the Court dismissed the Complaint against
11 Doctor John Doe for failure to state a claim. *See* Doc. No. 7. The Court also directed the
12 U.S. Marshal to effect service of the SAC on Defendants RN Burns, San Diego County Jail
13 & Medical, and San Diego Sheriff’s Department. *Id.* Summons was returned executed as
14 to all Defendants on July 25, 2016. *See* Doc. No. 8. On August 19, 2016, Plaintiff filed two
15 freestanding motions to appoint counsel and compel discovery, which were both denied on
16 September 7, 2016. *See* Doc. Nos. 12, 14, 17, 18.

17 On September 7, 2016, Defendant Burns filed the instant motion to dismiss the SAC
18 with prejudice, contending that Plaintiff does not, and cannot, state a cognizable § 1983
19 claim because (1) there are insufficient factual allegations to show that Plaintiff had a
20 serious medical need; (2) there is no allegation that Burns knew of and disregarded an
21 excessive risk to Plaintiff’s health and safety based on the existence of a serious medical
22 condition; and (3) the case citations and legal arguments in Plaintiff’s Complaint cannot be
23 admitted or denied by Defendant Burns, rendering them immaterial and inappropriate. *See*
24

25
26 ¹ The Court found that the Complaint named improper Defendants, and contains “minimal allegations as
27 to whom [Plaintiff] claims violated his constitutional rights[, and]... contains no facts sufficient to show
28 that any individual acted with deliberate indifference... by knowing of and disregarding an[y] excessive
risk to his health and safety.” (internal citations omitted). The Court granted Plaintiff forty-five days
leave to amend the Complaint.

1 Doc. No. 16 at 1. On December 5, 2016, Plaintiff filed an opposition to Defendant’s motion
2 to dismiss the SAC. *See* Doc. No. 30.

3 On April 7, 2017, pursuant to 28 U.S.C. § 636(b)(1), the Honorable Judge Jill L.
4 Burkhart, United States Magistrate Judge, submitted a report and recommendation
5 (“Report”) to this Court recommending that Plaintiff’s SAC be dismissed without prejudice
6 and with leave to amend as to Defendant Burns for failure to state a claim, and denying
7 Defendant Burns’ motion to strike case citations and legal argument. *See* Doc. No. 34.
8 Judge Burkhart found that Plaintiff’s deliberate indifference claim was insufficiently plead.
9 *Id.* Pursuant to Fed. R. Civ. P. 72(b)(2), objections to the Report were due no later than
10 May 1, 2017. On May 1, 2017, Plaintiff filed a request for an extension of time to object
11 to the Report. *See* Doc. No. 36. On May 3, 2017, the Court granted Plaintiff’s motion, and
12 extended the deadline for filing objections to July 3, 2017. *See* Doc. No. 37. No objections
13 were timely received. Accordingly, for the reasons set forth below, this Court **ADOPTS**
14 the Magistrate Judge’s Report in its entirety, and **DISMISSES** Plaintiff’s SAC as to
15 Defendant Burns.

16 DISCUSSION

17 The district court’s role in reviewing a magistrate judge’s report and
18 recommendation is set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28
19 U.S.C. § 636(b)(1). When a party objects to the magistrate judge’s report and
20 recommendation, the district court “shall make a *de novo* determination of those portions
21 of the report . . . to which objection is made,” and may “accept, reject, or modify, in whole
22 or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. §
23 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3).

24 When no objections are filed, the district court is not required to review the
25 magistrate judge’s report and recommendation. *See Wang v. Masaitis*, 416 F.3d 992, 1000
26 n. 13 (9th Cir. 2005) (stating that “*de novo* review of a [magistrate judge’s report and
27 recommendation] is only required when an objection is made”); *United States v. Reyna–*
28 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that 28 U.S.C. § 636(b)(1)(c)

1 “makes it clear that the district judge must review the magistrate judge’s findings and
2 recommendations *de novo* if objection is made, but not otherwise”). This rule of law is well
3 established within the Ninth Circuit and this district. *See Hasan v. Cates*, No. 11–cv–1416,
4 2011 WL 2470495 (S.D. Cal. June 22, 2011) (Whelan, T.) (adopting in its entirety, and
5 without review, a report and recommendation because neither party filed objections to the
6 report despite having the opportunity to do so); *accord Ziemann v. Cash*, No. 11–cv–2496,
7 2012 WL 5954657 (S.D. Cal. Nov. 26, 2012) (Benitez, R.); *Rinaldi v. Poulos*, No. 08–cv–
8 1637, 2010 WL 4117471 (S.D. Cal. Oct. 18, 2010) (Lorenz, J.).

9 Here, the record reflects that no party filed objections to the Report. Thus, in the
10 absence of any objections, the Court **ADOPTS** the Report. For the reasons stated in the
11 Report, which is incorporated herein by reference, the SAC is **DISMISSED WITH**
12 **PREJUDICE** as to Defendant Milissa Burns. The Clerk of Court shall enter judgment
13 reflecting the foregoing.

14 **IT IS SO ORDERED.**

15
16 DATED: July 21, 2017

17
18 
19 _____
20 JOHN A. HOUSTON
21 United States District Judge
22
23
24
25
26
27
28