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

MORIANO MILLARE,  
  
Plaintiff,  
  
v.  
  
G. STRATTON, *et al.*,  
  
Defendants.

Case No. 16-cv-01633-BAS-MDD

**ORDER:**

**(1) APPROVING AND ADOPTING REPORT AND RECOMMENDATION IN ITS ENTIRETY (ECF No. 30); AND**

**(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS R. OLSEN, F. FERNANDEZ, H. ASBURY, G. STRATTON, G. CHARLTON, T. VASQUEZ, C. MOORE, B. SELF, B. BAENZIGER, R. OLIVARRIA, K.A. SEIBEL, V. SOSA, AND O. SHELLAND’S MOTION TO DISMISS (ECF Nos. 16, 21)**

Plaintiff Moriano Millare is a state prisoner proceeding *pro se* and *in forma pauperis*. He asserts various claims under 28 U.S.C. § 1983 and California state law against numerous corrections officials. On December 19, 2016, Defendants R. Olsen, F. Fernandez, H. Asbury, G. Stratton, G. Charlton, T. Vasquez, C. Moore, B. Self, B.

1 Baenziger, R. Olivarria, K.A. Seibel, and V. Sosa moved to dismiss counts ten  
2 through fifteen of Plaintiff’s Complaint. (ECF No. 16.) Defendant O. Shelland later  
3 joined in the motion to dismiss as to those claims that are also alleged against him—  
4 counts twelve through fifteen. (ECF No. 21.)

5 On February 28, 2017, United States Magistrate Judge Mitchell D. Dembin  
6 issued a Report & Recommendation (“R&R”) recommending this Court grant in part  
7 and deny in part the motion to dismiss. (ECF No. 30.) Specifically, the R&R first  
8 recommends the Court deny Defendants R. Olsen, R. Olivarria, B. Baenziger, B. Self,  
9 and V. Sosa’s request to dismiss Plaintiff’s tenth count for First Amendment  
10 retaliation. (*Id.* 24:9–11.) Second, the R&R similarly recommends the Court deny  
11 Defendants K.A. Seibel and G. Stratton’s request to dismiss Plaintiff’s eleventh count  
12 for First Amendment retaliation. (*Id.* 24:12–14.) Third, the R&R recommends the  
13 Court grant the thirteen Defendants’ request to dismiss with prejudice Plaintiff’s  
14 twelfth count for violation of the Eighth Amendment. (*Id.* 24:15–16.) Fourth, the  
15 R&R recommends the Court grant the thirteen Defendants’ request to dismiss with  
16 prejudice Plaintiff’s thirteenth, fourteenth, and fifteenth counts for violation of state  
17 law. (*Id.* 24:17–19.)

18 The magistrate judge ordered that any objections to the R&R be filed no later  
19 than March 22, 2017, and that any replies to the objections be filed no later than  
20 March 29, 2017. (R&R 24:22–25.) To date, the parties have not filed any objections  
21 or requests for additional time to do so.

22 The Court reviews *de novo* those portions of the R&R to which objections are  
23 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or  
24 in part, the findings or recommendations made by the magistrate judge.” *Id.* But  
25 “[t]he statute makes it clear that the district judge must review the magistrate judge’s  
26 findings and recommendations *de novo if objection is made*, but not otherwise.”  
27 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *see*  
28 *also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (concluding

1 that where no objections were filed, the district court had no obligation to review the  
2 magistrate judge’s report). “Neither the Constitution nor the statute requires a district  
3 judge to review, de novo, findings and recommendations that the parties themselves  
4 accept as correct.” *Id.* “When no objections are filed, the de novo review is waived.”  
5 *Marshall v. Astrue*, No. 08-cv-1735, 2010 WL 841252, at \*1 (S.D. Cal. Mar. 10,  
6 2010) (Lorenz, J.) (adopting report in its entirety without review because neither  
7 party filed objections to the report despite the opportunity to do so).

8 In this case, the deadline for filing objections was March 22, 2017. However,  
9 the parties have not filed any objections or requests for additional time to do so.  
10 Consequently, the Court may adopt the R&R on that basis alone. *See Reyna-Tapia*,  
11 328 F.3d at 1121. Having nonetheless reviewed the R&R, the Court agrees with the  
12 R&R’s recommendations. Accordingly, the Court hereby approves and **ADOPTS**  
13 the R&R in its entirety (ECF No. 30). The Court therefore **GRANTS IN PART** and  
14 **DENIES IN PART** Defendants R. Olsen, F. Fernandez, H. Asbury, G. Stratton, G.  
15 Charlton, T. Vasquez, C. Moore, B. Self, B. Baenziger, R. Olivarría, K.A. Seibel,  
16 and V. Sosa’s motion to dismiss (ECF No. 16), which has been joined by Defendant  
17 O. Shelland (ECF No. 21), as follows:

18 (1) The Court **DENIES** Defendants R. Olsen, R. Olivarría, B. Baenziger,  
19 B. Self, and V. Sosa’s request to dismiss Plaintiff’s tenth count for First Amendment  
20 retaliation.

21 (2) The Court **DENIES** Defendants K.A. Seibel and G. Stratton’s request  
22 to dismiss Plaintiff’s eleventh count for First Amendment retaliation.

23 (3) The Court **GRANTS** Defendants R. Olsen, F. Fernandez, H. Asbury, G.  
24 Stratton, G. Charlton, T. Vasquez, C. Moore, B. Self, B. Baenziger, R. Olivarría,  
25 K.A. Seibel, V. Sosa, and O. Shelland’s request to dismiss with prejudice Plaintiff’s  
26 twelfth count for violation of the Eighth Amendment. The Court dismisses Plaintiff’s  
27 twelfth count against these Defendants without leave to amend.

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1           (4)    The Court **GRANTS** Defendants R. Olsen, F. Fernandez, H. Asbury, G.  
2 Stratton, G. Charlton, T. Vasquez, C. Moore, B. Self, B. Baenziger, R. Olivarria,  
3 K.A. Seibel, V. Sosa, and O. Shelland’s request to dismiss with prejudice Plaintiff’s  
4 thirteenth, fourteenth, and fifteenth counts for violation of state law. The Court  
5 dismisses Plaintiff’s thirteenth, fourteenth, and fifteenth counts against these  
6 Defendants without leave to amend.

7           **IT IS SO ORDERED.**

8           **DATED: April 5, 2017**

  
**Hon. Cynthia Bashant**  
**United States District Judge**

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