



1 Amendment claims against Fink fail on the merits in view of the undisputed  
2 evidence. (ECF No. 41.) Plaintiff cross-moves for summary judgment on his claims  
3 against all Defendants. (ECF No. 44.)  
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5 On May 28, 2019, Magistrate Judge Barbara Major issued a Report and  
6 Recommendation (“R&R”) that recommends granting Defendant Fink’s motion for  
7 summary judgment based on Plaintiff’s undisputed failure to exhaust administrative  
8 remedies against Fink and because the undisputed evidence shows that Plaintiff’s  
9 Eighth Amendment claims against Fink fail as a matter of law. (ECF No. 56.) The  
10 R&R recommends denial of Plaintiff’s motion for summary judgment, partially  
11 incorporating the analysis on Fink’s motion and otherwise concluding that there are  
12 genuine disputes of material fact for Plaintiff’s claims against the remaining  
13 Defendants. (*Id.*) Upon Plaintiff’s request to extend the deadline to file objections,  
14 objections to the R&R were due no later than July 19, 2019. (ECF No. 59.) Plaintiff  
15 timely filed an Objection. (ECF No. 61.) Attached to the Objection is a declaration  
16 from Plaintiff that restates his view of the facts underlying his claims. (*Id.* Jackson  
17 Decl.) Defendants have not objected to the R&R.  
18

19 For the reasons herein, the Court (1) overrules Plaintiff’s Objection, (2)  
20 approves and adopts the R&R in part, (3) grants Defendant Fink’s motion for  
21 summary judgment based on Plaintiff’s failure to exhaust administrative remedies  
22 against Fink, and (4) denies Plaintiff’s motion for summary judgment against the  
23 remaining Defendants.  
24

### 25 LEGAL STANDARD

26 The Court reviews *de novo* those portions of an R&R to which objections are  
27 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or  
28 in part, the findings or recommendations made by the magistrate judge.” *Id.* “The

1 statute makes it clear,” however, “that the district judge must review the magistrate  
2 judge’s findings and recommendations de novo *if objection is made*, but not  
3 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en  
4 banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,  
5 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district  
6 court had no obligation to review the magistrate judge’s report). “Neither the  
7 Constitution nor the statute requires a district judge to review, de novo, findings and  
8 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328  
9 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district.  
10 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) (“Of course, de novo  
11 review of a[n] R & R is only required when an objection is made to the R & R.”);  
12 *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (adopting report in  
13 its entirety without review because neither party filed objections to the report despite  
14 the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157  
15 (S.D. Cal. 2004).

16  
17 To be effective, objections must be written and specific. *See* Fed. R. Civ. P.  
18 72(b)(2) (“[A] party may serve and file specific written objections to the proposed  
19 findings and recommendations” of the magistrate judge.) (emphasis added). In the  
20 absence of a specific objection, the court need only satisfy itself that there is no  
21 “clear error” on the face of the record before adopting the magistrate judge’s  
22 recommendation. *Singleton v. Hernandez*, No. 16-cv-2462-BAS-NLS, 2019 WL  
23 644101, at \*17 (S.D. Cal. Feb. 16, 2019); *Afrah v. Sidhu*, No. 14-CV-02303-BAS-  
24 NLS, 2015 WL 8759131, at \*1 (S.D. Cal. Dec. 14, 2015); *see also* Fed. R. Civ. P.  
25 72(b) Advisory Comm. Notes (1983) (citing *Campbell v. U.S. Dist. Court for N.*  
26 *Dist. of Cal.*, 501 F.2d 196, 206 (9th Cir. 1974)).

1 **DISCUSSION**

2 **1. Defendant Fink’s Motion for Summary Judgment**

3 Magistrate Judge Major recommends that the Court grant Defendant Fink’s  
4 motion for summary judgment for two overarching reasons. (ECF No. 56 at 7–26.)  
5 First, the R&R recommends that the Court grant summary judgment for Defendant  
6 Fink on the merits of Plaintiff’s Eighth Amendment claims against Fink, which  
7 largely concern Fink’s role as the supervisor of Defendant F. Aviles—another  
8 Defendant who Plaintiff alleges engaged in certain underlying conduct that violated  
9 Plaintiff’s Eighth Amendment rights.

10  
11 First, on the merits and with respect to Plaintiff’s claim that Fink was  
12 “deliberately indifferent” to a danger Defendant Aviles allegedly posed to Plaintiff,  
13 the R&R finds that the undisputed evidence shows only that Fink was aware that  
14 Aviles had searched Plaintiff’s prison cell two days before a March 31, 2017 incident  
15 in which Aviles allegedly taunted and threatened Plaintiff, and yanked and pulled on  
16 Plaintiff’s wrist chains. (*Id.* at 10–11.) The R&R otherwise concludes that Plaintiff  
17 fails to provide any evidence that would permit the imposition of supervisory  
18 liability on Defendant Fink, including on the grounds that Defendant Fink (1) failed  
19 to train Defendant Aviles, (2) failed to supervise Defendant Aviles, (3) failed to  
20 investigate Defendant Aviles, (4) failed to discipline Defendant Aviles, or (5)  
21 otherwise maintained an allegedly unconstitutional policy that resulted in Plaintiff’s  
22 alleged injuries. (*Id.* at 14–18.)

23  
24 Second, the R&R recommends that the Court grant summary judgment for  
25 Defendant Fink on the ground that the undisputed evidence shows that Plaintiff  
26 never exhausted administrative remedies against Fink in accordance with the Prison  
27 Litigation Reform Act’s mandatory requirement that prisoners may not bring Section  
28 1983 actions “with respect to prison conditions” in federal court “until such

1 administrative remedies as are available, are exhausted.” 42 U.S.C. § 1997e(a);  
2 (ECF No. 56 at 19–16). The R&R finds that although an administrative process  
3 exists at the prison where Plaintiff was incarcerated at the time of the alleged events  
4 and although Plaintiff submitted at least three grievances, Plaintiff never submitted  
5 a grievance against Fink or asserted misconduct by Fink in the grievances he did  
6 file.

7  
8 Although Plaintiff has filed an Objection, Plaintiff does not object to the vast  
9 majority of the R&R’s findings and recommendations on Defendant Fink’s motion  
10 for summary judgment. (ECF No. 61.) Plaintiff objects solely to a “harmless error”  
11 in the R&R’s analysis that “misinterpret[s] Plaintiff[’]s pleadings” to state that  
12 “Defendant Aviles pretended to act as though he was mentally challenged near the  
13 small management yard located in front of Defendants Fink[’]s office[.]” (*Id.* at 2.)  
14 Plaintiff objects that he “has never indicated that Defendant Fink’s office is or was  
15 near the small management yard.” (*Id.*) As Plaintiff apparently recognizes, this  
16 objection plainly does not alter the R&R’s findings and conclusions, nor does it have  
17 any bearing on Plaintiff’s undisputed failure to exhaust administrative remedies.

18  
19 Having considered the R&R and underlying papers, the Court finds no clear  
20 error in the recommendation to grant Defendant Fink’s motion for summary  
21 judgment for failure to exhaust administrative remedies and adopts the R&R to that  
22 extent. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (proper exhaustion requires  
23 “using all steps that the agency holds out, and doing so properly (so that the agency  
24 addresses the issues on the merits”) (emphasis, citation, and internal quotation marks  
25 omitted)). The Court declines to adopt the R&R’s conclusions and  
26 recommendations on the merits of Plaintiff’s claims against Defendant Fink because,  
27 as the R&R observes (ECF No. 56 at 19), “unexhausted claims cannot be brought in  
28 court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007). Plaintiff’s failure to exhaust

1 renders unnecessary a summary judgment decision on the merits of Plaintiff’s claims  
2 against Defendant Fink.<sup>1</sup> Defendant Fink is dismissed without prejudice.

3  
4 **2. Plaintiff’s Motion for Summary Judgment**

5 The R&R recommends denial of Plaintiff’s cross-motion for summary  
6 judgment on his claims against all Defendants. (ECF No. 56 at 26–33.) Because the  
7 Court has approved and adopted the R&R’s recommendation to grant Defendant  
8 Fink’s motion for summary judgment, the Court limits its analysis to the R&R’s  
9 findings and conclusions regarding Defendants Aviles, G. Mendoza, and C. Osgood.

10  
11 With respect to Plaintiff’s claims against Defendants Mendoza and Osgood,  
12 the R&R concludes that Plaintiff has not carried his initial burden to show an  
13 entitlement to summary judgment on his Eighth Amendment claims against these  
14 Defendants. Plaintiff’s claims arise from a May 3, 2017 incident in which Plaintiff  
15 was transferred from suicide watch in the mental health crisis bed alternative housing  
16 unit to a mental health crisis bed at California State Prison Lancaster. During this  
17 incident, Plaintiff allegedly asked Defendant Mendoza to be separated from another  
18 inmate who Defendant Osgood was preparing for transfer in the same escort van,  
19 but Defendant Mendoza rejected the request. The inmate allegedly taunted Plaintiff  
20 after Plaintiff stated that he was under suicide watch and the inmate kicked Plaintiff  
21 for three hours during the transport. The R&R observes that Plaintiff concedes the

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23 <sup>1</sup> The Court observes that the declaration attached to Plaintiff’s Objection  
24 appears to make a new factual assertion regarding Defendant Fink not previously  
25 presented in order to bolster the merits of Plaintiff’s Eighth Amendment claims  
26 against Fink. Plaintiff states that “[i]n the past I reported Officer Aviles, harrasment  
27 [sic] and misconduct to Sergeant Fink, during his visitation rounds in administrative  
28 segregation unit inmate cell front visits.” (ECF No. 61 Jackson Decl. ¶ 7.) Whether  
true or not, this new factual averment has no bearing on Plaintiff’s failure to exhaust  
administrative remedies for the claims he raises in this action against Defendant  
Fink.

1 existence of genuine disputes of material fact regarding this incident and that no  
2 other evidence supports Plaintiff's position as a matter of law. (ECF No. 56 at 33.)  
3 Plaintiff's Objection does not address these findings and conclusions. Having  
4 reviewed the R&R and the underlying papers, the Court finds no clear error in Judge  
5 Major's findings and recommendation to deny Plaintiff's motion for summary  
6 judgment with respect to Defendants Mendoza and Osgood.

7  
8 With respect to Plaintiff's claim against Defendant Aviles, the R&R  
9 concludes that there are genuine disputes of material fact regarding the injuries  
10 Plaintiff claims he sustained on March 31, 2017 as a result of Aviles allegedly  
11 yanking on Plaintiff's wrist chains. Plaintiff again concedes the existence of  
12 disputed facts because Plaintiff's and Aviles' declarations regarding this incident are  
13 "contradictory." (ECF No. 44 at 10.) As the R&R concludes, the evidence in the  
14 record otherwise does not show Plaintiff is entitled to summary judgment on his  
15 claim against Aviles. (ECF No. 56 at 29–30.) Defendant Aviles' crime incident  
16 report for the incident states that Plaintiff's injuries were self-inflicted, and  
17 Plaintiff's Medical Report of Injury or Unusual Occurrence reflects that Plaintiff  
18 stated that he had sustained injuries because he was scratched by his wrist chains.  
19 (*Id.* at 29.)

20  
21 Plaintiff's sole objection to this analysis is that "the Court erred [sic] and  
22 misread" the medical report Plaintiff submitted. (ECF No. 61 at 2.) Plaintiff asserts  
23 that he submitted a medical report "from the March 31, 2017 incident showing  
24 abrasions and scratch[e]s on his arms and wrist and noting that Plaintiff reported  
25 being 'snatched by waiste [sic] chains[.]'" (*Id.* at 3.) The Court does not understand  
26 Plaintiff's objection because this is precisely what the R&R accurately states  
27 regarding the medical report concerning the March 31, 2017 incident. Indeed,  
28 Plaintiff attaches to his Objection the same medical report that he submitted in his

1 summary judgment briefing. (*Compare* ECF No. 44 Ex. B *with* ECF No. 61 Ex. A  
2 at 6.) The Court therefore overrules Plaintiff’s “objection.” Having reviewed the  
3 R&R and underlying papers, the Court finds no clear error in Judge Major’s findings  
4 and recommendation to deny Plaintiff’s motion for summary judgment with respect  
5 to Defendant Aviles.

6  
7 **CONCLUSION & ORDER**

8 For the foregoing reasons, the Court (1) **OVERRULES** Plaintiff’s Objection,  
9 (ECF No. 61) and (2) **APPROVES IN PART AND ADOPTS IN PART** the R&R  
10 (ECF No. 56) as follows:

11 1. The Court **GRANTS** Defendants’ motion for summary judgment on  
12 Plaintiff’s claims against Defendant Fink solely on the ground of failure to exhaust  
13 administrative remedies. Defendant Fink is **HEREBY DISMISSED WITHOUT**  
14 **PREJUDICE**. *See Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) (noting  
15 that a judgment on the basis of failure to exhaust administrative remedies should be  
16 without prejudice).

17 2. The Court **DENIES** Plaintiff’s motion for summary judgment with  
18 respect to the remaining Defendants. This case will otherwise proceed to trial on  
19 Plaintiff’s remaining claims against Defendants F. Aviles, G. Mendoza, and C.  
20 Osgood.

21 3. As a final matter, Plaintiff has submitted a renewed motion for  
22 appointment of counsel. The Court advises Plaintiff that an order on his renewed  
23 motion is forthcoming. All remaining pre-trial and trial dates **REMAIN**  
24 **VACATED** until further order.

25 **IT IS SO ORDERED.**

26 **DATED: July 26, 2019**

27   
28 **Hon. Cynthia Bashant**  
**United States District Judge**