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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BRIAN C. DUBRIN,  
Plaintiff,  
v.  
COUNTY OF SAN BERNARDINO,  
et al.,  
Defendant.

Case No. EDCV 15-589 CJC(JC)

ORDER ACCEPTING FINDINGS,  
CONCLUSIONS, AND  
RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE  
JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative First Amended Complaint, all documents submitted by the parties in connection with the Motion for Summary Judgment filed by defendants County of San Bernardino and San Bernardino County Sheriff's Department Sergeant Martinez, and all of the records in the case including the September 7, 2017 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation" or "R&R") and defendants' objections to the Report and Recommendation ("Objections" or "Obj."). The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made.<sup>1</sup> The Court concurs

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<sup>1</sup>Unless otherwise indicated, this Court declines to consider new arguments raised and new evidence presented for the first time in Objections to the Report and Recommendation and, in any event, finds that such new arguments are meritless and that such new evidence would not alter the outcome. See generally United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001).

1 with and accepts the findings, conclusions, and recommendations of the United  
2 States Magistrate Judge and overrules the Objections. The Objections largely  
3 mischaracterize the Report and Recommendation and much of the evidence in the  
4 record and/or present conclusory arguments that are either immaterial to the issues  
5 on summary judgment or essentially assert the same arguments plaintiff previously  
6 raised, and which the Report and Recommendation properly concludes have no  
7 merit. This Court more specifically addresses certain portions of the Objections  
8 below.<sup>2</sup>

9 Defendants object that “the R&R discounted and refused to rule on any of  
10 defendants’ [evidentiary] objections. . . .” (Obj. at 5). To the extent the Report and  
11 Recommendation relied at all on evidence that was the subject of an evidentiary  
12 objection, it actually recommended that “the [Evidentiary] Objections should be  
13 overruled either on the merits or because consideration of the evidence in issue  
14 does not alter the outcome, rendering the Objections moot.” (R&R at 3 n.4).

15 Defendants object “the R&R adopted plaintiff’s allegations concerning the  
16 sole cause of his Hepatitis C infection, utterly ignoring [other conflicting  
17 evidence]. . . .” (Obj. at 7-8) (citing R&R at “9:12-9 [sic] and 44:15-16”). This  
18 objection – like so many of defendants’ others – both mischaracterizes the Report  
19 and Recommendation and the record and reflects a fundamental misunderstanding  
20 of the Court’s role on summary judgment. For example, the Report and  
21 Recommendation did not “adopt[.]” plaintiff’s allegations, as defendants assert.  
22 Instead, the Report and Recommendation sections cited by defendants simply  
23 provided a discussion of certain controverted facts identified by plaintiff and  
24 explained how a reasonable jury *could* draw certain material inferences therefrom  
25 that were favorable to plaintiff’s case (*i.e.*, “that Pimentel . . . could have been  
26 infected with Hepatitis C and shared a common razor with plaintiff during the  
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28 <sup>2</sup>The Court uses the same abbreviations for individuals and record citations that were defined in the Report and Recommendation. (See R&R at 2-3 nn.2-4).

1 Pertinent Time Period”) when such facts were viewed in the light most favorable to  
2 plaintiff (the non-moving party) – as the Court must do on summary judgment. See  
3 Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014). In any event, this objection  
4 essentially raises a genuine dispute of material fact which must be resolved at trial,  
5 and/or asks that the court weigh or assess the credibility of conflicting evidence,  
6 which the Court may not do on summary judgment. See Porter v. California  
7 Department of Corrections, 419 F.3d 885, 891 (9th Cir. 2005) (court does not  
8 evaluate credibility or weigh conflicting evidence on summary judgment) (citation  
9 omitted).

10 Defendants object to “the R&R’s reliance on the new inmate declarations  
11 not served in discovery and filed only in an attempt to create a ‘sham issue of fact’  
12 was contrary to law.” (Obj. at 21, 29, 30). For example, defendants appear to  
13 argue that declarations from inmates Pimentel, Cruz, and Taylor do not raise a  
14 genuine dispute of material fact as to whether defendant Martinez was, in fact,  
15 present in Unit 5 at any relevant time essentially because such declarations  
16 purportedly “contain statements that were proven absolutely false” and improperly  
17 attempt to establish “[defendant] Martinez’s position, role, location, or authority  
18 within the Sheriff’s Department” not based on personal knowledge. (Obj. at 21-22,  
19 29). Nonetheless, defendants cite no persuasive legal authority for their apparent  
20 proposition that such declarations should not be considered simply because they  
21 were prepared in opposition to a motion for summary judgment. Moreover, such  
22 declarations are not, as defendants also appear to argue, improper for opposing  
23 summary judgment simply because they contain witness statements that are  
24 contradicted by other evidence in the record. To the contrary, a non-moving party  
25 cannot defeat summary judgment *without* presenting evidence that contradicts the  
26 moving party’s facts – such as “[a]n affidavit or declaration used to . . . oppose a  
27 motion. . . .” Fed. R. Civ. P. 56(c)(1); Anderson v. Liberty Lobby, Inc., 477 U.S.  
28 242, 256 (1986). Such declarations are also not objectionable under the “sham

1 affidavit” rule. In general, a party may not generate a declaration with “helpful  
2 facts” that directly contradict prior harmful evidence in *the same party’s own*  
3 interrogatory responses or deposition testimony “solely in order to create a genuine  
4 issue of material fact” to avoid summary judgment. School District No. 1J,  
5 Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1264 (9th Cir. 1993)  
6 (citations omitted), cert. denied, 512 U.S. 1236 (1994); see id. (noting sham  
7 affidavit rule “should be applied with caution”) (citing Kennedy v. Allied Mutual  
8 Insurance Co., 952 F.2d 262, 266 (9th Cir. 1991)). The cases cited in the  
9 Objections do not support defendants’ assertion that “the ‘sham issue of fact’  
10 doctrine . . . precludes a party from creating an issue of fact with an affidavit that  
11 contradicts prior discovery” (Obj. at 21), where, as here, no showing has been  
12 made that the affidavits contradict prior discovery responses of the proffering  
13 party.

14 Similarly, defendants appear to challenge the Report and Recommendation  
15 determination that a reasonable jury could infer that WVDC officials maintained a  
16 custom or practice of failing properly to process inmate grievances and/or  
17 retaliating against grieving inmates, asserting that the inmate declarations the  
18 Report and Recommendation cited in support “cannot be based on [such inmates’]  
19 personal knowledge of seeing plaintiff attempt to grieve any issues because none of  
20 these inmates were [sic] housed in the same cell or even the same housing segment  
21 to be able to see each other.” (Obj. at 22-23, 30) (citing MSJ Exs. 3, 14-16)  
22 (emphasis added). Defendants’ argument is not supported by the exhibits  
23 defendants cite, which reflect the housing assignments for only three of the six  
24 inmates who provided the declarations referenced in the Report and  
25 Recommendation. (See R&R at 61-62) (citing Opp. Decl. 1 at 2; Opp. Decl. 4 ¶¶  
26 8-9; Opp. Decl. 10 at 1-2; Opp. Decl. 13 ¶¶ 8-9; Opp. Decl. 15 ¶ 4; Opp. Decl. 16;  
27 Opp. Decl. 17 ¶ 4; Opp. Decl. 18 ¶ 2). In any event, at most defendants raise a  
28 dispute of fact for trial and/or essentially challenge the weight and/or the

1 credibility of conflicting evidence testimony such inmates could provide at trial,  
2 which again is improper on summary judgment.

3 Defendants argue that the Report and Recommendation improperly  
4 “establish[ed] the scope of [defendant] Martinez’[s] role [at WVDC]” based on  
5 allegations in the verified First Amended Complaint which contained  
6 “impermissible hearsay.” (Obj. at 10-11) (citing R&R at 6:24-27). The excerpt  
7 from the Report and Recommendation cited by defendants, however, does not  
8 “establish” anything about defendant Martinez’s role at WVDC, and merely  
9 describes certain facts “[p]laintiff allege[d]” to provide context in the Report and  
10 Recommendation’s statement of facts. (See R&R at 6) (citing FAC ¶ 20). To the  
11 extent defendants intended to argue that the Report and Recommendation  
12 improperly relied on the alleged hearsay statements when finding that “a  
13 reasonable jury could infer that defendant Martinez took ‘adverse action’ against  
14 plaintiff for repeatedly complaining to WVDC deputies about the Unit 5 Razor  
15 Policy[,]” such an argument also lacks merit since, as the Report and  
16 Recommendation essentially reflects, the record contains sufficient evidence to  
17 support such an inference even without the challenged statements. (R&R at 51)  
18 (citing, in part, SUF ¶ 13; FAC ¶ 19; MSJ Ex. 3).

19 Defendant Martinez objects that “the R&R concluded that [defendant]  
20 Martinez specifically housed or approved of the housing of an HIV-positive  
21 inmate, McClain, with plaintiff for retaliatory purposes based on impermissible  
22 double-hearsay and ‘circumstantial’ evidence.” (Obj. at 11, 34, 36) (citing R&R at  
23 8:25-9:1, 51:27-52:3). In the verified First Amended Complaint, plaintiff attests  
24 that one of the deputies who escorted McClain to Unit 1 Ad-Seg affirmatively told  
25 plaintiff that McClain “was HIV/AIDS positive” and that “[defendant] Martinez”  
26 wanted the deputy to tell plaintiff to “have fun with the razor now[.]” (FAC ¶ 26).  
27 Nonetheless, the objections to plaintiff’s evidence submitted with defendants’  
28 Reply in support of the instant summary judgment motion did not challenge any

1 allegations in the verified First Amended Complaint on hearsay grounds, and thus  
2 such an evidentiary challenge has now been waived. See Fireguard Sprinkler  
3 Systems, Inc. v. Scottsdale Insurance Co., 864 F.2d 648, 651 n.2 (9th Cir.1988)  
4 (failure to object to allegedly defective evidence waives the objection for purposes  
5 of summary judgment); Skillsky v. Lucky Stores, Inc., 893 F.2d 1088, 1094 (9th  
6 Cir. 1990) (“For purposes of summary judgment, the court had to consider [certain]  
7 testimony, even if it was hearsay, because [the defendant] failed to object.”) (citing  
8 id.). In any event, the record reflects that, to the extent the evidence is hearsay at  
9 all and/or is not subject to an exception, it may be considered on summary  
10 judgment where, like here, such evidence could be presented in an admissible *form*  
11 at trial. See JL Beverage Co., LLC v. Jim Beam Brands Co., 828 F.3d 1098, 1110  
12 (9th Cir. 2016) (“[A]t summary judgment a district court may consider hearsay  
13 evidence submitted in an inadmissible form, so long as the underlying evidence  
14 could be provided in an admissible form at trial, such as by live testimony.”)  
15 (citing Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003), cert. denied,  
16 541 U.S. 937 (2004)).

17 Defendants appear to object to the Report and Recommendation’s finding  
18 that a reasonable jury could conclude that the Unit 5 Shaving Post Orders  
19 “effectively ensured that the communal razors provided in Unit 5 would not be  
20 properly disinfected[,]” in part, based on evidence which suggests that individual  
21 inmates were never told about – and thus never used – the State Barbering Method  
22 to disinfect a shared razor. (Obj. at 12; see R&R at 40 (citing MSJ Ex. 9 at 2)).  
23 Defendants assert “[t]he R&R [] states that inmates have no knowledge of the  
24 grooming standards other than what is included in the Inmate Rules and Regulation  
25 provided during orientation[,]” and request leave to submit additional evidence  
26 (*i.e.*, “the Inmate Orientation Video) and ask the Court to take judicial notice of  
27 other evidence which reflects that inmates were, in fact, aware of what was  
28 required of them under the applicable regulations and policies regarding inmate

1 grooming. (Obj. at 12-13) (citing R&R at 12:19-21) (emphasis added).<sup>3</sup>  
2 Nonetheless, the actual language in the Report and Recommendation cited by  
3 defendants merely states that the *SBSD Brochure* does not address inmate facial  
4 hair grooming beyond a very limited description, not that inmates were necessarily  
5 otherwise generally unaware of WVDC grooming standards. (R&R at 12) (citing  
6 MSJ Ex. 9 at 2). In any event, at most defendants raise a dispute of fact for trial  
7 and/or challenge the weight and/or the credibility of conflicting evidence

8 Defendants object that “the R&R inaccurately concluded that 36 inmates  
9 share 90 minutes of tier time during which all 36 inmates vie for a single  
10 communal razor[,]” and seek leave to “submit additional documentation” which  
11 purportedly reflects that “there is sufficient time for Ad-Seg inmates to disinfect  
12 and use [communal] razors during their unfettered tier time . . . .” (Obj. at 14-15)  
13 (citing R&R at 37:8-38:18). To the extent defendants have not mischaracterized  
14 the Report and Recommendation, they appear to take issue with the Report and  
15 Recommendation’s finding that “there is also sufficient evidence to support a  
16 reasonable inference that inmates had very little time to shave” and thus may not  
17 have been able and/or willing to disinfect a communal razor after each use, despite  
18 the Unit 5 Shaving Post Orders which required as much. (Obj. at 13-15; see R&R  
19 at 38 (citing MSJ Ex. 5 at 38, 44; MSJ Supp. Ex. 1b; MSJ Supp. Ex. 4 at 20-21)).  
20 Nonetheless, the evidence defendants proffer is largely duplicative of other  
21 uncontroverted evidence already in the record (*i.e.*, that plaintiff was required to  
22 shave with a single, communal razor in Unit 5), and at best, raises a dispute of  
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24 <sup>3</sup>Defendants represent that they had not previously addressed the issue of “inmate[]  
25 knowledge of the rules, grooming standards, and availability of [related regulations or other  
26 information]” because the issue “was not raised by plaintiff in the pleadings or Opposition.”  
27 (Obj. at 12). Such assertion is puzzling, however, since defendants’ statement of uncontroverted  
28 facts describes MSJ Ex. 9 as “Inmate Rules and Regulations and Orientation Video,” and  
defendants’ attorney attested that such exhibit contained “true and correct copies of the  
documents provided to inmates upon their entry at [WVDC].” (SUF ¶ 34; Ivcevic Decl. ¶ 9).

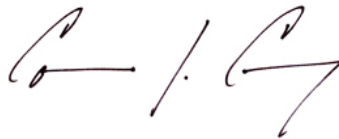
1 material fact for trial as to the issue.

2 Defendants object that “the R&R incorrectly took judicial notice [of  
3 information on the CDC web site] that Hepatitis C can be transmitted via an  
4 **electric** razor,” and essentially point to other information on the CDC web site  
5 which purportedly reflects that sharing electric razors is actually unlikely to  
6 transmit Hepatitis C. (Objections at 15-16, 25-26) (emphasis in original). Taking  
7 judicial notice of the additional information identified by defendants would not  
8 alter the outcome of this matter. Defendants’ objection simply highlights  
9 conflicting evidence on a material fact in dispute (*i.e.* whether a reasonable jury  
10 could infer that plaintiff contracted Hepatitis C by sharing a communal razor at  
11 WVDC), and thus fails to satisfy defendants’ burden on summary judgment to  
12 demonstrate the *absence* of a genuine dispute of material fact.

13 IT IS HEREBY ORDERED that the Motion for Summary Judgment is  
14 denied and that the Clerk serve copies of this Order on plaintiff and counsel for  
15 defendants.

16 IT IS SO ORDERED

17 DATED: September 29, 2017

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21 HONORABLE CORMAC J. CARNEY  
22 UNITED STATES DISTRICT JUDGE  
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