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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ALFRED C. LOMBARDELLI,

Plaintiff,

v.

K. HALSEY, et al.,

Defendants.

CASE NO. 1:08-cv-00658-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANTS
CARTER, SANCHEZ, HALSEY, AND
VOGEL’S MOTION FOR SUMMARY
JUDGMENT BE GRANTED (DOC. 76)

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

Findings And Recommendations

I. Background

Plaintiff Alfred C. Lombardelli (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding against Defendants E. Ortiz, S. Smyth, I. Sanchez, K. Halsey, K. Carter, and R. Vogel. On January 13, 2012, Defendants Carter, Sanchez, Halsey, and Vogel filed a motion for summary judgment. Defs.’ Mot. Summ. J., Docs. 76, 77, 78.¹ Plaintiff filed an opposition on March 15,

¹ Defendant Smyth also moved for summary judgment. However, Defendant Smyth later withdrew his motion. Withdrawal of Mot., Doc. 91. Defendant Smyth’s arguments will thus not be addressed.

1 2012.² Docs. 85, 86. On March 26, 2012, Defendants filed a reply. Doc. 88. The matter is
2 submitted pursuant to Local Rule 230(l).

3 **II. Summary Judgment Standard**

4 Summary judgment is appropriate when it is demonstrated that there exists no genuine
5 dispute as to any material fact, and that the moving party is entitled to judgment as a matter of
6 law. Fed. R. Civ. P. 56(a). Under summary judgment practice, the moving party

7 always bears the initial responsibility of informing the district court of the basis
8 for its motion, and identifying those portions of “the pleadings, depositions,
9 answers to interrogatories, and admissions on file, together with the affidavits, if
any,” which it believes demonstrate the absence of a genuine issue of material
fact.

10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[W]here the nonmoving party will bear the
11 burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made
12 in reliance solely on the ‘pleadings, depositions, answers to interrogatories, and admissions on
13 file.’” *Id.* at 324. Indeed, summary judgment should be entered, after adequate time for
14 discovery and upon motion, against a party who fails to make a showing sufficient to establish
15 the existence of an element essential to that party's case, and on which that party will bear the
16 burden of proof at trial. *Id.* at 322. “[A] complete failure of proof concerning an essential
17 element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* In
18 such a circumstance, summary judgment should be granted, “so long as whatever is before the
19 district court demonstrates that the standard for entry of summary judgment, as set forth in Rule
20 56(c), is satisfied.” *Id.* at 323.

21 If the moving party meets its initial responsibility, the burden then shifts to the opposing
22 party to establish that a genuine dispute as to any material fact actually does exist. *Matsushita*
23 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

24 In attempting to establish the existence of this factual dispute, the opposing party may not
25 rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the
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27 ² Plaintiff was informed of the requirements for opposing a motion for summary judgment by a
28 Court order on January 10, 2012. Second Informational Order, Doc. 75; see *Rand v. Rowland*, 154 F.3d
952, 955-56 (9th Cir. 1998) (en banc).

1 form of affidavits, and/or admissible discovery material, in support of its contention that the
2 dispute exists. Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must
3 demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the
4 suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Thrifty*
5 *Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002); *T.W. Elec.*
6 *Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the
7 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the
8 nonmoving party, *Long v. County of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Wool v. Tandem*
9 *Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

10 In the endeavor to establish the existence of a factual dispute, the opposing party need not
11 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
12 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
13 trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce
14 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
15 *Matsushita*, 475 U.S. at 587 (quoting former Rule 56(e) advisory committee’s note on 1963
16 amendments).

17 In resolving a motion for summary judgment, the court examines the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
19 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477
20 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the
21 court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United*
22 *States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

23 Finally, to demonstrate a genuine dispute, the opposing party “must do more than simply
24 show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as
25 a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine
26 issue for trial.’” *Matsushita*, 475 U.S. at 586-87 (citations omitted).

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1 **III. Statement Of Facts**³

2 Plaintiff is a prisoner properly in the custody of the CDCR. Pl.’s Dep. 12:13-14, Sept. 22,
3 2011; Rose Decl. at 6-7. At all times relevant to this suit, Plaintiff was incarcerated at California
4 State Prison Corcoran, located in Corcoran, California. Rose Decl. at 6-7. Plaintiff is not a
5 doctor nor does he have any medical training. Pl.’s Dep. 98:9-15. Defendant Carter is a
6 Correctional Officer at California State Prison Corcoran. Carter Decl. ¶ 1. Defendant Halsey is a
7 Correctional Officer at California State Prison Corcoran. Halsey Decl. ¶ 1. At all times relevant
8 to this suit, Defendant Ortiz was a Correctional Counselor at California State Prison Corcoran.
9 Defendant Ortiz is retired. Ortiz Decl. ¶ 1. Defendant Sanchez is a Correctional Officer at
10 California State Prison Corcoran. Sanchez Decl. ¶ 1. Defendant Smyth is a Correctional Officer
11 at California State Prison Corcoran. Smyth Decl. ¶ 1. Defendant Vogel is a Correctional
12 Sergeant at California State Prison Corcoran. Vogel Decl. ¶ 1. Currently, Plaintiff is
13 incarcerated at the California Institution for Men in Chino, California. ECF No. 63. Defendants
14 do not have any authority or control over Plaintiff or California Institution for Men in Chino,
15 California. Carter Decl. ¶ 11; Halsey Decl. ¶ 14; Ortiz Decl. ¶ 10; Sanchez Decl. ¶ 11; Smyth
16 Decl. ¶ 2; Vogel Decl. ¶ 12.

17 **A. February 7, 2007 Incident**

18 On February 7, 2007, Plaintiff engaged in a verbal argument with Defendant Halsey.
19 Halsey Decl. ¶ 2; Ortiz Decl. ¶ 2; Pl.’s Dep. 73:16-18, 76:13-17.⁴ Defendant Ortiz heard and
20 observed the argument, and documented it in Rules Violation Report (“RVR”) number
21

22 ³ All facts are considered undisputed, unless otherwise noted. Pursuant to Local Rule 260(b) and
23 Federal Rule of Civil Procedure 56(c), all disputes with the movant’s statement of facts must be
24 supported with citation to evidence. *See* L. R. 260(b) (parties opposing Statement of Undisputed Facts
25 shall deny those that are disputed, “including with each denial a citation to the particular portions of any
26 pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon in support
27 of that denial”). Plaintiff has complied with Local Rule 260(b).

28 ⁴ Plaintiff contends that he did not engage in a verbal argument. Rather, the dispute occurred
because of Defendant Halsey’s persistent unprofessional conduct. Plaintiff’s objection is denied.
Plaintiff does not deny that he argued with Defendant Halsey, but contends that it was Defendant
Halsey’s conduct which initiated the argument. This does not dispute Defendants’ statement that
Plaintiff engaged in a verbal argument with Defendant Halsey.

1 3C-07-02-014, charging Plaintiff with “Behavior Which Could Lead to Force or Violence.”
2 Ortiz Decl. ¶ 2. As a correctional staff member, Defendant Ortiz was responsible for maintaining
3 the security and safety of inmates, correctional staff, and the prison. *Id.* ¶ 3.⁵ Based solely upon
4 her observations on February 7, 2007, Defendant Ortiz believed that Plaintiff’s conduct on
5 February 7, 2007, violated the California Code of Regulations, title 15, § 3005(a), which
6 prohibits behavior that might lead to disorder or violence. Accordingly, Defendant Ortiz
7 documented Plaintiff’s behavior on a RVR, and charged him with a violation of California Code
8 of Regulations, title 15, § 3005(a). Halsey Decl. ¶ 3; Ortiz Decl. ¶ 4. Plaintiff contends that
9 Defendant Ortiz falsified facts in the RVR in order to remove Plaintiff from his job assignment
10 as retaliation for Plaintiff exercising his right to Petition for Order to Compel Disclosure of
11 Public Records (“Petition”). Pl.’s Compl. ¶¶ 16, 22, 41; Pl.’s Dep. 61-64. Plaintiff was found
12 not guilty of RVR 3C-07-02-014. Pl.’s Decl., Ex. A. Plaintiff contends that Defendant Ortiz
13 formed an agreement with Defendant Halsey to falsify facts in the RVR, number 3C-02-02-014,
14 in order to remove him from his job assignment as retaliation for exercising his to file the
15 Petition. Pl.’s Compl. ¶¶ 16, 22, 41; Pl.’s Dep. 61-64.

16 Plaintiff did not seek medical attention after Halsey’s alleged statement “You’re a rat,”
17 and Plaintiff did not suffer a physical injury as a result of Halsey’s alleged statement.
18 Pl.’s Compl. 8:19-20, 8:25-28, Doc. 18; Pl.’s Dep. 120:7-20.⁶ On February 7, 2007, Defendant
19 Halsey placed Plaintiff in a holding cell. Pl.’s Compl. 8:6-7. Defendant Vogel falsified the
20 holding cell log book to shorten the amount of time that Plaintiff occupied the holding cell. Pl.’s
21 Compl. ¶ 20; Pl.’s Dep. 85-90; Pl.’s Decl. ¶ 7. Defendant Vogel formed an agreement with an
22 unknown officer to falsify a log book to shorten the amount of time that Plaintiff occupied the
23

24 ⁵ Plaintiff contends that the RVR was false. Plaintiff does not deny that Defendant Ortiz
25 observed and heard the argument. Plaintiff appears to dispute only the veracity of RVR 3C-07-02-014,
26 which is not the purpose of this fact. Plaintiff’s objections is denied.

27 ⁶ Plaintiff contends that he suffered headaches as result of Defendant Halsey’s alleged statement.
28 Plaintiff is not a medical professional and cannot proffer testimony that requires medical expertise as to
the cause of Plaintiff’s headaches. Fed. R. Evid. 701; Fed. R. Civ. P. 56(c)(4). Plaintiff’s objection is
denied.

1 holding cell. Pl.'s Compl. ¶ 20; Pl.'s Decl. ¶ 7.

2 On February 7, 2007, Plaintiff was transferred from Building 2 to Building 1. Pl.'s Dep.
3 80:17-18. Plaintiff does not have any personal knowledge regarding the identity of the
4 correctional staff member who approved his transfer. *Id.* at 82:17-83:15.⁷ Defendant Halsey did
5 not form an agreement with anyone to wrongfully change Plaintiff's housing assignment.⁸ Halsey
6 Decl. ¶ 5; Ortiz Decl. ¶ 8; Vogel Decl. ¶ 11. As a Correctional Officer, Defendant Halsey does
7 not have the authority to transfer an inmate to another building.⁹ Halsey Decl. ¶ 5; Pl.'s Dep.
8 81:21-82, 82:17-20, 83:9-15. Defendant Ortiz did not form an agreement with anyone to
9 wrongfully change Plaintiff's housing assignment. Ortiz Decl. ¶ 8. Defendant Vogel did not
10 form an agreement with anyone to wrongfully change Plaintiff's housing assignment. Vogel
11 Decl. ¶ 11. Defendant Halsey continued to tell inmates that Plaintiff was a rat or a snitch. Pl.'s
12 Compl. ¶¶ 24, 44; Pl.'s Dep.103, 104.

13 **B. March 27, 2007 Incident**

14 On March 27, 2007, Defendant Halsey was supervising inmates at California State
15 Prison- Corcoran as they were released to yard. Halsey Decl. ¶ 7. Except for religious materials,
16 inmates are not permitted to bring reading materials out to an exercise yard. The rule is designed
17 to prevent inmates from smuggling contraband or inmate-manufactured weapons onto the yard,
18 concealed in written materials.¹⁰ *Id.* ¶ 6. Defendant Halsey observed that Plaintiff was carrying a

19
20 ⁷ Plaintiff contends that the chronology of the events coupled with statements by Defendants
21 Halsey, Vogel, and Ortiz indicated that they formed an agreement to approve the building transfer.
22 However, Plaintiff may only dispute evidence from a declaration by personal knowledge. Plaintiff's
23 objection is denied. Plaintiff in his deposition stated that Defendant Vogel probably put his name on the
24 CDC 154 form, which authorized the move. That form was not produced with regards to this motion.

25 ⁸ Plaintiff contends that an agreement was formed, but there is no declaration that is based on
26 personal knowledge. Plaintiff's objection is denied.

27 ⁹ Plaintiff contends that Defendants Halsey, Ortiz, and Vogel do have the authority, based on an
28 alleged agreement. Again, there is no declaration that is based on personal knowledge of this agreement.
Plaintiff's objection is denied.

¹⁰ Plaintiff contends that written material are allowed on the exercise yard, as it is easy to search
books and magazines for inmate-manufactured weapons on the way out of the yard. Pl.'s Decl. ¶ 8.
Plaintiff provides no basis of knowledge for his objection. Nevertheless, whatever the rationale of the
rule, it appears that Defendant Halsey's actions were pursuant to Title 15, Section 3192 of the California

1 book out to the exercise yard. Accordingly, Defendant Halsey stopped Plaintiff and inspected the
2 book to determine whether it was religious material. *Id.* ¶ 8.

3 Under California Code of Regulations, title 15, section 3192, inmates cannot exchange,
4 borrow, loan, give away or convey personal property to or from other inmates. *Id.* ¶ 9.
5 California Code of Regulations, title 15, section 3192 is designed to prevent disputes amongst
6 the inmates over personal property. For example, a property dispute could arise if an inmate stole
7 a book from another inmate and claimed that he lawfully purchased or borrowed it from him.
8 Conversely, an inmate could sell a book to another inmate for food or services and later attempt
9 to repossess the book by reporting it as stolen. In order to prevent these types of disputes, all
10 inmates are prohibited from possessing property that belongs to other inmates.¹¹ *Id.*

11 Plaintiff borrowed the book from another inmate. Pl.'s Dep. 124:19-21. As he reviewed
12 the book that Plaintiff was carrying, Defendant Halsey determined the book did not belong to
13 Plaintiff. Specifically, Defendant Halsey observed that another inmate's name was written inside
14 the book. *Id.* ¶ 10. As a correctional staff member, Defendant Halsey is obligated to enforce all
15 of the prison rules and regulations, including California Code of Regulations, title 15, section
16 3192. *Id.* Accordingly, Halsey confiscated the book from Plaintiff in accordance with California
17 Code of Regulations, title 15, section 3192. Halsey Decl. ¶ 10; Rose Decl. at 5.¹²

18 **C. April 10, 2007 Incident**

19 On April 10, 2007, while on an exercise yard in California State Prison-Corcoran,
20 Plaintiff softly threw a pair of shoes to surrender them to correctional officer Lerma. Pl.'s Dep.

21
22 Code of Regulations, which prohibits borrowing of property from other inmates. Plaintiff's objection is
immaterial and will be denied.

23
24 ¹¹ Plaintiff contends that this rule is not enforced with regards to religious books, and that the
purpose of the book confiscation was to harass Plaintiff. Pl.'s Decl. ¶ 9. Again, Plaintiff provides no
25 basis of knowledge for his objection. There is no exception listed for religious books with regards to
Section 3192. Plaintiff does not dispute that the book was borrowed from another inmate. Plaintiff's
26 objection is denied.

27 ¹² Plaintiff contends the book was confiscated to harass Plaintiff. Pl.'s Decl. ¶ 9. Again,
Plaintiff fails to cite any regulation or other evidence that indicates Section 3192 contains an exception,
28 as claimed by Plaintiff. Without such exception, the plain language of the regulation requires
confiscation of property borrowed from another inmate.

1 188-89; Pl.’s Decl. ¶ 10. Because he was working inside building 3C01 when the shoes were
2 thrown, Defendant Vogel did not observe Plaintiff throw the shoes. Vogel Decl. ¶ 3. Officers
3 Halsey and Hebron escorted Plaintiff into the program office in handcuffs. *Id.* Defendant
4 Officer Halsey informed Defendant Vogel that Plaintiff threw a pair of shoes at him and one of
5 the shoes hit his ankle.¹³ *Id.*

6 Defendant Vogel spoke with Plaintiff. Plaintiff stated that his handcuffs were cutting off
7 his circulation. Defendant Vogel checked the handcuffs, loosened them, and found that he was
8 able to stick his finger between the handcuffs and both of Plaintiff’s wrists. In addition, Licensed
9 Vocational Nurse S. Reed examined Plaintiff’s wrists. Plaintiff was medically cleared to return to
10 his housing unit. Vogel Decl. ¶ 4; Pl.’s Decl. ¶ 11.

11 Defendant Halsey prepared a RVR, number 3C-07-04-009, charging Plaintiff with battery
12 for throwing a pair of shoes at him. Vogel Decl. ¶ 6. Under Department procedure, Defendant
13 Vogel prepared a staff report to document his interaction with Plaintiff regarding RVR number
14 3C-07-04-009. *Id.*

15 Plaintiff heard Defendant Vogel state to Defendant Halsey, “Fuck it, Halsey, just state the
16 shoes hit you so we can get rid of this litigator.” Pl.’s Decl. ¶ 10. He was fully aware of the
17 charge as he formed an agreement with Defendant Halsey to falsify the report. He did not review
18 the report to ensure it was procedurally correct or determine whether the charge was appropriate
19 because he already knew that Defendant Halsey was going to falsify the report. Pl.’s Compl. ¶¶
20 26, 46.

21 Defendant Vogel played no role in the processing of Officer Epstein’s investigative report
22 regarding RVR number 3C-07-04-009. Epstein Decl. ¶¶ 3, 5-7; Vogel Decl. ¶¶ 9-10; Pl.’s Dep.
23 190:4-6. Defendant Vogel was not part of an agreement to withhold Epstein’s investigative
24 report regarding RVR number 3C-07-04-009 from Plaintiff. Epstein Decl. ¶¶ 3, 5-7; Vogel Decl
25 ¶¶ 9-10; Pl.’s Dep. 190:4-6.

27 ¹³ Plaintiff objects that he did not throw a pair of shoes at Defendant Halsey. That is not the
28 statement of fact, however. The statement is whether Defendant Halsey told Defendant Vogel that
Plaintiff had thrown his shows at him, to which Plaintiff does not dispute. Plaintiff’s objection is denied.

1 **D. July 28, 2008 Incident**

2 As a correctional staff member, Defendant Carter is responsible for maintaining the
3 security and safety of inmates, correctional staff, and the prison. Carter Decl. ¶ 2. On July 28,
4 2008, Defendant Carter was working as a Floor Officer in building 3C02. *Id.* ¶ 3. As part of her
5 duties, Defendant Carter conducted a random search of cell 207, which was assigned to inmates
6 Plaintiff and Cobo. *Id.* During her search, Defendant Carter discovered a fan that was
7 disassembled. Specifically, the fan was missing its front cover. *Id.* ¶ 4. Inmates are permitted to
8 possess approved appliances, including fans, but they cannot disassemble them. The rule is
9 designed to prevent inmates from making inmate-manufactured weapons and to prevent hiding
10 inmate-manufactured weapons and other contraband. *Id.* However, Plaintiff was permitted to
11 disassemble the fan’s front cover, as it was designed, in order to clean the fan.¹⁴ Pl.’s Dep. 155;
12 Pl.’s Decl. ¶ 12. As Defendant Carter began to remove the fan from the wall, inmate Plaintiff
13 spoke to her from the bottom tier. Plaintiff continued to speak and ran up several stairs. Plaintiff
14 was stating, “What are you doing? That’s my cellie’s fan you can’t take that.” Carter Decl. ¶ 5.¹⁵

15 As Defendant Carter continued her search, Plaintiff did not argue or complain, or attract
16 the attention of other inmates. Pl.’s Decl. ¶ 12.¹⁶ When Cobo returned to the cell, Plaintiff stated
17 to Cobo that Defendant Carter had confiscated Cobo’s fan.¹⁷ *Id.* ¶ 13. Defendant Carter was
18 concerned that Plaintiff was inciting Cobo to become upset, and Defendant Carter was concerned

20
21 ¹⁴ Defendants contend that Plaintiff’s contention regarding the proper policy is unsubstantiated,
22 conclusory, and lacks foundation. The RVR cited by Plaintiff is not admissible as hearsay without an
23 exception. However, Plaintiff as a prisoner may be aware of a policy that permits such disassembly.
24 There is no regulation cited by any party regarding this fact. Plaintiff’s objection will be granted.

25 ¹⁵ Plaintiff declares that he was not yelling. Pl.’s Decl. ¶ 12. The Court will modify the
26 statement of facts to reflect that Plaintiff was speaking to Defendant Carter.

27 ¹⁶ Defendants contend that Plaintiff did attract the attention of other inmates because he was
28 arguing and complaining. Carter Decl. ¶ 6. However, when there is a dispute of fact between
parties, based on competent declarations and other evidence, such disputes are resolved in favor
of the non-moving party. Plaintiff’s objection is granted.

¹⁷ Defendant contends that Plaintiff stated to Cobo, “She can’t take that fan, don’t listen to her.”
Carter Decl. ¶ 7. Again, disputes of fact are resolved in the favor of the non-moving party.

1 the dispute might become physical.¹⁸ Carter Decl. ¶ 8. Because Defendant Carter feared the
2 situation was getting out of hand, she ordered Cobo to “lock up” in his cell. *Id.* Cobo refused
3 several orders to “lock up,” which further elevated the seriousness of the situation. Eventually,
4 Cobo complied and locked up.¹⁹ Carter Decl. ¶ 8. Defendant Carter believed that Plaintiff’s
5 conduct on July 28, 2008, was serious and needed to be documented. *Id.* ¶ 9. Defendant Carter
6 believed that Plaintiff’s conduct on July 28, 2008, violated California Code of Regulations, title
7 15, section 3005(c), which prohibits attempting to verbally incite to commit violence.

8 Accordingly, Defendant Carter documented Plaintiff’s behavior on a RVR, and charged
9 him with a violation of California Code of Regulations, title 15, § 3005(c) as a “Disruptive
10 Inmate with the Potential for Violence.” *Id.* Defendant Carter was not attempting to wrongfully
11 charge Plaintiff with a rules violation. *Id.*²⁰ Defendant Carter’s decision to prepare RVR number
12 3C-08-08-015 was not based upon any lawsuits, inmate grievances, staff complaints, or Men’s
13 Advisory Committee activities by Plaintiff. *Id.*; Pl.’s Dep. 147:13-18, 154:20-21.

14 **E. August 17, 2008 Incident**

15 On August 17, 2008, Correctional Officer Carter relieved Correctional Officer Sanchez.
16 Sanchez Decl. ¶ 3. As they were exchanging equipment, Defendant Sanchez commented that she
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20 ¹⁸ Plaintiff contends that he merely told Cobo to lock up and deal with the situation later. Pl.’s
21 Decl. ¶ 13. However, Plaintiff cannot testify as to Defendant Carter’s state of mind, as he lacks personal
22 knowledge of such information. Fed. R. Civ. P. 56(c)(4). Plaintiff’s objection is denied.

23 ¹⁹ Plaintiff contends that Cobo did not refuse several direct orders, because if he had, he would
24 have received a RVR. There are no facts which indicate that Cobo received a RVR for refusing a direct
25 order here. However, Plaintiff’s citation does not raise a dispute because it does not address the fact.
26 Plaintiff’s objection is denied.

27 ²⁰ Plaintiff contends that Defendant Carter, at the behest of Defendant Smyth, purposely wrote
28 the RVR because Plaintiff had named Defendant Smyth as a defendant in his civil rights complaint, and
because Plaintiff was a Men’s advisory council member. Pl.’s Decl. ¶ 14. Plaintiff declares that
Defendant Smyth had made it known to Plaintiff that he had “ghost wrote” the RVR. *Id.* However,
Plaintiff has no personal knowledge of Defendant Carter’s state of mind, and thus his declaration cannot
be used to raise a dispute as to this fact. Plaintiff also presents no evidence that raises a genuine dispute
of fact of an agreement between Defendants Carter and Smyth to charge Plaintiff with a rules violation
report. The objection is denied.

1 was concerned about Plaintiff because he seemed distant and quiet.²¹ *Id.* Defendant Carter
2 responded that Plaintiff had stated, “Speaking of Sanchez, I have it in for her. She’s going to get
3 her shit alright.”²² *Id.* Based upon Defendant Carter’s statement, Defendant Sanchez was
4 concerned for her safety. *Id.* ¶ 5. Defendant Sanchez did not believe, or have any reason to
5 believe, that Defendant Carter’s statement was false. *Id.* ¶ 4. On August 18, 2008, Defendant
6 Sanchez reported the incident to her supervisor, Sergeant M. Anderson, who instructed her to
7 document the incident. *Id.* ¶ 6. On August 18, 2008, Defendant Sanchez documented Plaintiff’s
8 statement of “Speaking of Sanchez, I have it in for her. She’s going to get her shit alright” in
9 RVR number 3C-08-08-065. *Id.* ¶ 7. Defendant Sanchez charged Plaintiff with threatening a
10 peace officer, because she believed it was the most appropriate charge for his statement. *Id.*
11 Defendant Sanchez was not part of an agreement to falsely charge Plaintiff with a RVR. Sanchez
12 *Id.* ¶ 9. Defendant Sanchez’s decision to prepare RVR number 3C-08-08-065 was not based
13 upon any lawsuits, inmate grievances, staff complaints, or Men’s Advisory Committee activities
14 by Plaintiff. *Id.* ¶ 8; Pl.’s Dep. 147:13-18.

15 **IV. Analysis**²³

16 **A. Retaliation**

18 ²¹ Plaintiff contends that Defendants Carter, Sanchez, and Smyth had formed an agreement to
19 falsify a report for threatening Sanchez in order to place Plaintiff in ad-seg because of his litigation and
20 Men’s advisory committee activities. Pl.’s Decl. ¶ 17; Matta Decl. ¶¶ 20-24. Plaintiff lacks personal
21 knowledge of this conversation between Defendants Carter and Sanchez, and his allegations of
22 conspiracy are unsupported. Inmate Matta’s declaration is based in part on hearsay, namely hearing from
23 another inmate Estrada that Defendant Sanchez said she was working to get Plaintiff. Inmate Estrada’s
24 statement to inmate Matta is hearsay without exception. Such hearsay is inadmissible, and cannot be
25 used to dispute Defendants’ facts here.

26 ²² Plaintiff contends that he never made that statement. Pl.’s Decl. ¶ 16. However, that is not
27 the fact presented. Rather, the fact presented was Defendant Carter stated to Defendant Sanchez this
28 statement. Plaintiff’s objection is denied.

29 ²³ Defendants have withdrawn their arguments concerning: 1) Plaintiff’s allegation against
30 Defendants Ortiz and Halsey regarding RVR 3C-07-02-014, and 2) Plaintiff’s allegation against
31 Defendant Vogel for falsely charging him with RVR 3C-07-04-009 on April 10, 2007. Defs.’ Reply
32 3:11-12, 4:24. Plaintiff has conceded that Defendant Vogel is entitled to summary judgment as to
33 Plaintiff’s allegation that Defendant Vogel withheld the investigative employee’s report for RVR 3C-07-
34 04-009. Pl.’s Opp’n 16. Plaintiff also concedes to Defendants’ arguments regarding declaratory relief.
35 *Id.* at 24. The Court need not discuss these arguments further.

1 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to
2 petition the government may support a § 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th
3 Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt v.*
4 *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First
5 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
6 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
7 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did
8 not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-
9 68 (9th Cir. 2005); *see Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing *Rhodes*
10 regarding elements of retaliation in prison context). At the summary judgment stage, Plaintiff is
11 required to demonstrate that there remains a genuine dispute of material fact as to each element
12 of the claim. *Brodheim v. Cry*, 584 F.3d 1262, 1269 n.3 (9th Cir. 2009). Pursuing civil rights
13 litigation in court and filing inmate grievances are protected activities. *Rhodes*, 408 F.3d at 567.

14 **B. Falsified Log Book On February 7, 2007**

15 Defendant Vogel contends that altering a log book would not chill the First Amendment
16 rights of the average inmate. Defs.’ Reply 2:23-3:8. Plaintiff contends only that the facts are in
17 dispute. However, construing the facts in the light most favorable to Plaintiff, falsification of a
18 log book by itself is not an adverse action sufficient for a retaliation claim. *See Brodheim*, 584
19 F.3d at 1269 (adverse action when person of ordinary firmness would have been chilled in
20 exercise of his First Amendment rights). Defendant Vogel is entitled to judgment as a matter of
21 law regarding this claim.

22 **C. Wrongful Transfer On February 7, 2007**

23 Defendant Halsey contends that he did not change Plaintiff’s housing assignment because
24 he lacks the authority to do so, and Plaintiff concedes that he does not know who authorized the
25 transfer. Defs.’ Mem. P. & A. 12:11-20; Defs.’ Reply 3:15-24. Plaintiff contends that
26 Defendants conspired to change Plaintiff’s housing assignment. Pl.’s Decl. ¶ 6. However, mere
27 allegations of conspiracy are not sufficient to raise a genuine dispute of material fact. *See Fed. R.*
28 *Civ. P. 56(c)(4)* (declarations require personal knowledge). Defendant Halsey is entitled to

1 judgment as a matter of law regarding this claim.

2 **D. Book Confiscation On March 27, 2007**

3 Defendant Halsey contends that the book was properly confiscated because Plaintiff had
4 borrowed it from another inmate, in violation of Title 15, section 3192 of the California Code of
5 Regulations. Defs.' Reply 3:27-4:15. Defendant contends that the confiscation of the book was
6 in furtherance of a legitimate penological goal. *Id.* Plaintiff contends that the confiscation was
7 motivated because Plaintiff had filed a grievance against him. Pl.'s Decl. ¶ 9. However, Plaintiff
8 raises no genuine dispute with regards to the enforcement of section 3192 being a legitimate
9 penological goal. The undisputed facts are that section 3192 is designed to prevent disputes
10 amongst inmates over personal property. Preventing disputes would further institutional security,
11 a legitimate penological goal. There is no evidence presented of an exception to section 3192.
12 Thus, Defendant Halsey's confiscation of the book on March 27, 2007 was in furtherance of a
13 legitimate penological goal. Actions taken in furtherance of a legitimate penological goal are not
14 retaliatory in the prison context. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). There is no
15 genuine dispute of material fact. Defendant Halsey is entitled to judgment as a matter of law
16 regarding this claim.

17 **E. Defendant Carter Falsely Issuing RVR 3C-08-08-015 On July 28, 2008**

18 Defendant Carter contends that 1) she issued the RVR for a legitimate penological goal
19 and 2) the issuance of the RVR was not because of Plaintiff engaging in protected conduct.
20 Defs.' Reply 6:10-28. Plaintiff contends that the RVR was embellished as retaliation for Plaintiff
21 engaging in First Amendment activities. Pl.'s Opp'n 17-18.

22 Based on the undisputed facts, there remains a genuine dispute of material fact with
23 regards to whether there was a legitimate penological goal for the issuance of the RVR for being
24 disruptive. There is a dispute concerning what actually occurred, namely whether Plaintiff yelled
25 obscenities at Defendant Carter, ran up the stairs, attracted the attention of other inmates, and
26 attempted to incite inmate Cobo. There remains a genuine dispute of material fact as to whether
27 the RVR was issued in furtherance of a legitimate penological goal. Thus, Defendant Carter is
28 not entitled to summary judgment on this ground.

1 However, there is no genuine dispute of material fact regarding retaliatory motive.
2 Plaintiff contends that Defendant Smyth had ghost-written the RVR for Defendant Carter, and
3 that Defendant Carter had an agreement Defendant Smyth to retaliate against Plaintiff. Pl.’s
4 Decl. ¶ 17.²⁴ Plaintiff must “put forth evidence of retaliatory motive, that, taken in the light most
5 favorable to him, presents a genuine issue of material fact as to [the defendant’s] intent.”
6 *Brodheim*, 584 F.3d at 1271. Plaintiff has not put forth sufficient evidence that presents a
7 genuine dispute of material fact that Defendant Carter had conspired with Defendant Smyth to
8 write a false RVR. Mere allegations of an agreement are insufficient. Defendant Carter is
9 entitled to judgment as a matter of law regarding this claim. Because this is the only claim
10 against Defendant Carter, she should be dismissed from this action.

11 **F. Defendant Sanchez Falsely Issuing RVR 3C-08-08-065²⁵ On August 18, 2008**

12 Defendant Sanchez contends that she issued the RVR for threatening a peace officer
13 because she was concerned for her safety based on Defendant Carter’s statement that Plaintiff
14 had said, “Speaking of Sanchez, I have it in for her. She’s going to get her shit alright.” Defs.’
15 Reply 7:3-8. Plaintiff contends that Defendant Carter made a false statement. However, that
16 does not raise a genuine dispute regarding Defendant Sanchez’s subjective belief in the
17 statement. Based on the undisputed facts, Defendant Sanchez’s issuance of the RVR served the
18 legitimate penological goal of furthering institutional security.

19 Plaintiff also contends that Defendants Sanchez and Carter made an agreement to retaliate
20 against Plaintiff. However, Plaintiff presents no evidence that would raise a genuine dispute of
21 material. Defendant Sanchez is entitled to summary judgment as a matter of law regarding this
22 claim. Because this is the only claim against Defendant Sanchez, she should be dismissed from
23 this action.

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25
26 ²⁴ Plaintiff lacks personal knowledge of an agreement or facts that could reasonably be inferred
27 as an agreement between Defendants Carter and Smyth to retaliate against Plaintiff. Fed. R. Civ. P.
28 56(c)(4).

²⁵ Defendants listed this RVR as “3C-07-04-009.” The Court presumes this is error and has
corrected the RVR listed.

1 **G. Eighth Amendment And Calling Plaintiff A Rat**

2 Defendant Halsey moves for partial summary judgment regarding Plaintiff's claim that
3 Defendant Halsey violated Plaintiff's Eighth Amendment rights by calling him a rat in front of
4 other inmates in March of 2007. Defs.' Reply 8:16-21. Defendant Halsey contends that the
5 damages should be limited to nominal damages because Plaintiff did not suffer a physical injury.
6 *Id.* Plaintiff contends that he should not be limited to nominal damages for this claim. *Id.*

7 “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other
8 correctional facility, for mental or emotional injury suffered while in custody without a prior
9 showing of physical injury.” 42 U.S.C. § 1997e(e). “[F]or all claims to which it applies, 42
10 U.S.C. § 1997e(e) requires a prior showing of physical injury that need not be significant but
11 must be more than *de minimis*.” *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002). In the Eighth
12 Amendment context, Defendants have conceded that Plaintiff has stated an Eighth Amendment
13 claim with regards to being called a rat in front of other inmates. However, there is no evidencen
14 presentedthat he suffered physical injury as a result of being called a rat. Plaintiff declares only
15 that he suffered headaches some unspecified time later, which is insufficient to make a showing
16 of physical injury. Thus, Plaintiff is not entitled to receive compensatory damages based on
17 mental or emotional injury without a showing of physical injury for his Eighth Amendment
18 claim.²⁶ Defendant Halsey is entitled to partial summary judgment here.

19 **H. Qualified Immunity**

20 The Court finds that Defendants' motion for summary judgment and partial summary
21 judgment should be granted as stated herein. Thus, the Court declines to discuss Defendants'
22 arguments for qualified immunity.

23 **V. Conclusion And Recommendation**

24 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 25 1. Defendants Carter, Sanchez, Halsey, and Vogel's motion for summary judgment

26
27 ²⁶ Plaintiff is not barred from seeking nominal or punitive damages regarding his Eighth
28 Amendment claim. *Oliver*, 289 F.3d at 630. The prior physical injury requirement is not applicable to
Plaintiff's other claims for violation of the First Amendment. *Id.* at 627 n.5 (citing *Canell v. Lightner*,
143 F.3d 1210 (9th Cir. 1998)).

1 and partial summary judgment, filed January 13, 2012, be granted as stated herein;

2 2. Summary judgment and partial summary judgment should be entered in favor of
3 Defendants and against Plaintiff as stated herein;

4 3. Defendants Carter and Sanchez should be dismissed from this action; and

5 4. This action proceed on the following claims: (1) the First and Eighth Amendment
6 claims that Defendant Halsey placed Plaintiff in handcuffs that were too tight on
7 February 7, 2007; (2) the First Amendment claim that Defendants Ortiz and
8 Halsey conspired to falsely charge Plaintiff with Rules Violation Report Number
9 3C-07-02- 014; (3) the First Amendment and nominal damages Eighth
10 Amendment claims that, on February 7, 2007, and March 2007, Defendant Halsey
11 called Plaintiff a “rat” in front of other inmates; (4) the First Amendment claim
12 that, on April 10, 2007, Defendants Halsey and Vogel falsely charged Plaintiff
13 with battery in Rules Violation Report number 3C-07-04-009; (5) the First
14 Amendment claim that, on March 4, 2008, Defendant Halsey threatened to shoot
15 Plaintiff; and (6) the First Amendment claim that on July 13, 2008, Defendant
16 Smyth falsely charged Plaintiff with Rules Violation Report number
17 3C-08-07-031 for refusing a direct order.

18 These Findings and Recommendations will be submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen**
20 **(14) days** after being served with these Findings and Recommendations, the parties may file
21 written objections with the Court. The document should be captioned “Objections to Magistrate

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1 Judge's Findings and Recommendations." A party may respond to another party's objections by
2 filing a response within **fourteen (14) days** after being served with a copy of that party's
3 objections. The parties are advised that failure to file objections within the specified time may
4 waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th
5 Cir. 1991).

6 IT IS SO ORDERED.

7 **Dated: June 29, 2012**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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