

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

EASTERN DISTRICT OF CALIFORNIA

MATTHEW JAMES GRIFFIN,

 Plaintiff,

 v.

A. JOHNSON, et al.,

 Defendants.

Case No. 1:13-cv-01599-LJO-BAM (PC)

FINDINGS AND RECOMMENDATIONS
REGARDING DEFENDANT DENNIS
BUSCH’S MOTION FOR SUMMARY
JUDGMENT OR PARTIAL SUMMARY
JUDGMENT

(ECF No. 142)

Fourteen (14) Day Deadline

Findings and Recommendations

I. Introduction

Plaintiff Matthew James Griffin (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s claims of excessive force and deliberate indifference to serious medical needs in violation of the Eighth Amendment against Defendants Johnson, Gonzales, Valdez, Munoz, Sexton, Ross, Thor, Doe, Kul, Busch, Bell, and Smith.

Currently before the Court is Defendant Dennis Busch’s motion for summary judgment, filed on December 12, 2016, pursuant to Federal Rule of Civil Procedure 56.¹ By this motion,

¹ Concurrent with the motion, Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment. (ECF No. 142.) See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1988); Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

1 Defendant Busch argues he cannot be found liable for excessive force or deliberate indifference
2 because he did not engage in any of the conduct claimed by Plaintiff. (ECF No. 141.) Plaintiff
3 filed an opposition on February 27, 2017, which included a request for deferral of the motion for
4 summary judgment pursuant to Federal Rule of Civil Procedure 56(d). (ECF Nos. 147, 148, 149.)
5 Defendant Busch replied on March 20, 2017. (ECF No. 154.) Defendant Busch’s motion is
6 deemed submitted. Local Rule 230(l).

7 Having considered the moving, opposition and reply papers, the Court recommends that
8 Plaintiff’s request for deferral pursuant to Rule 56(d) be denied and that Defendant Busch’s
9 motion for summary judgment be granted in part and denied in part.

10 **II. Plaintiff’s Request for Rule 56(d) Deferral**

11 In his opposition, Plaintiff requests that the Court defer ruling on Defendant’s motion for
12 summary judgment pursuant to Federal Rule of Civil Procedure 56(d)(1). As the basis of his
13 motion, Plaintiff asserts that Defendants are resisting discovery and he filed a motion to compel
14 discovery, citing ECF No. 114. Plaintiff requests that the Court defer ruling on the motion for
15 summary judgment until after resolution of his pending motion to compel. (ECF No. 147 at pp.
16 1-5.)

17 Pursuant to Rule 56(d), “[i]f a nonmovant shows by affidavit or declaration that, for
18 specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer
19 considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take
20 discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). Plaintiff bears the
21 burden under Rule 56(d) of specifically identifying relevant information, and demonstrating that
22 the evidence sought actually exists and that it would prevent summary judgment. Blough v.
23 Holland Realty, Inc., 574 F.3d 1084, 1091 n. 5 (9th Cir. 2009) (citation omitted); Tatum v. City
24 and County of San Francisco, 441 F.3d 1090, 1100–01 (9th Cir. 2006). Additionally, Plaintiff
25 must make some showing of diligence, that he sought the requested information during the
26 discovery period, or that there is good reason he has not been able to obtain the information
27 before now. See Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 372–73 (9th Cir. 1985).

28 The Court will recommend that Plaintiff’s request for deferral under Rule 56(d) be denied

1 for several reasons. First, Plaintiff's motion to compel discovery is not directed to Defendant
2 Busch. Instead, Plaintiff's motion seeks to compel further discovery responses from Defendant
3 Sexton. (ECF No. 114.) Second, the Court finds that Plaintiff has not met his burden under Rule
4 56(d) to identify any relevant information that exists and that would prevent summary judgment.
5 Plaintiff merely identifies the categories of discovery sought and contends that "these items are
6 calculated to lead to the discovery of admissible evidence." (ECF No. 147 at pp. 4-5). However,
7 Plaintiff has not shown that additional discovery would reveal specific facts precluding summary
8 judgment. Tatum, 441 F.3d at 1101. Third, and finally, Plaintiff has not made the requisite
9 showing of diligence. After Defendant Busch filed the instant motion for summary judgment,
10 Plaintiff requested an extension of time to oppose the motion, which was granted by the Court.
11 (ECF Nos. 143, 145.) Nowhere in that motion did Plaintiff indicate that additional time was
12 needed to respond to the motion for summary judgment because the Court had not yet ruled on
13 his motion to compel or that the documents sought by that motion were critical to his ability to
14 defend against the motion for summary judgment.

15 For these reasons, the Court will recommend that Plaintiff's motion to delay or otherwise
16 continue the motion for summary judgment pursuant to Rule 56(d) be denied.

17 **III. Defendant Busch's Motion for Summary Judgment**

18 **A. Evidentiary Objections**

19 Defendant Busch raises multiple objections to Plaintiff's evidence, which the Court has
20 carefully reviewed. (ECF No. 156.) Generally, it is not the practice of the Court to rule on
21 evidentiary matters individually in the context of summary judgment. However, given the
22 extensive nature of these objections, the Court will address several evidentiary issues raised by
23 Defendant Busch.

24 As an initial matter, Defendant Busch objects to portions of Plaintiff's declaration as
25 lacking in foundation and irrelevant. These objections are without merit and are overruled. In
26 relevant part, Plaintiff's declaration, signed under penalty of perjury, describes what he observed
27 on May 23, 2012, including what he saw Defendant Busch do and conversations he had with
28 Defendant Busch. (ECF No. 147, Declaration of Plaintiff ("Plaintiff's Declaration") at ¶¶ 16, 19,

1 20, 21.) This information is neither irrelevant nor lacking in foundation.

2 Defendant Busch also objects to Plaintiff's citation to his own answers to interrogatories
3 as evidence. A plaintiff's discovery responses generally are not proper "evidence" to establish a
4 genuine dispute of material fact. See Carter v. Clark County, 459 Fed.Appx. 635, 636 (9th Cir.
5 2011) (unpublished) (refusing to find a genuine issue where plaintiff "submitted only his vague,
6 conclusory answers" to defendant's interrogatories); S & S Logging Co. v. Baker, 366 F.2d 617,
7 624 n.7 (9th Cir. 1966) (finding plaintiff's responses to interrogatories to be insufficient to
8 challenge defendant's assertions of fact on summary judgment, because the responses were self-
9 serving, inadmissible as evidence, and not based on personal knowledge). Here, however,
10 Plaintiff's responses are verified, signed under penalty of perjury and based in part on his
11 personal knowledge. (ECF No. 147, Ex. 4.) Accordingly, the Court will consider Plaintiff's
12 discovery responses as a form of declaration, where the responses are based on his personal
13 knowledge, for purposes of summary judgment. Fed. R. Civ. P. 56(c)(1).

14 Finally, Defendant Busch objects to Plaintiff's citation to certain unauthenticated
15 documents, including Attachment E to the opposition. Attachment E purports to be the 4A-4R
16 Log Book for May 23, 2012 through May 24, 2012, which was produced in discovery. Any
17 objections to official prison records for lack of authentication are overruled. Fed. R. Evid.
18 901(b)(7); Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 532-33 (9th Cir. 2011). The records
19 are subject to authentication under Rule 901(b)(7), and the Court notes the absence of any
20 evidence or argument suggesting the existence of a legitimate challenge to the records on
21 authentication grounds. See Chamberlain v. Les Schwab Tire Center of California, Inc., No.
22 2:11-cv-03105-JAM-DAD, 2012 WL 6020103, at *2 (E.D. Cal. Dec. 3, 2012) (citing Burch v.
23 Regents of Univ. of California, 433 F. Supp. 2d 1110, 1120 (E.D. Cal. 2006)) (rejecting "purely
24 procedural" authentication objection).

25 **B. Defendant Busch's Separate Statement of Facts (DSF)²**

26 1. Plaintiff's First Cause of Action for alleged excessive force against defendant

27 _____
28 ² These facts are derived from Defendant Busch's "Separate Statement of Undisputed Material Facts." (ECF No. 142-2.)

1 Dennis Busch (“Busch”) is based on the allegation that, on or about May 23, 2012, Busch and the
2 other defendants planned to use pepper spray to extract an inmate in a cell near the cell where
3 plaintiff was housed in a manner intended to harm other inmates who were housed nearby,
4 including plaintiff. (ECF No. 23, First Amended Complaint (“FAC”) ¶¶ 22, 27, 46, 47, 49-51,
5 54, 75 and 77.)

6 2. Plaintiff’s First Cause of Action for alleged excessive force against defendant
7 Busch is based on the allegation that, on or about May 23, 2012, Busch actually used pepper
8 spray for the extraction in a manner that harmed plaintiff. FAC ¶¶ 22, 28, 42, 46, 47, 49-51, 54,
9 75 - 77.

10 3. Plaintiff’s First Cause of Action for alleged excessive force against defendant
11 Busch is based on the allegation that, prior to the extraction on or about May 23, 2012, plaintiff
12 asked Busch to move him from his cell because of his concern about being exposed to pepper
13 spray, but he refused. FAC ¶¶ 31, 32, 75 and 77.

14 4. Plaintiff’s Second Cause of Action for alleged deliberate indifference to plaintiff’s
15 claimed medical need against defendant Busch is based on the allegation that, after the extraction
16 on or about May 23, 2012, plaintiff asked Busch to arrange for him to receive medical treatment
17 and a decontamination shower because of the symptoms from which plaintiff claims he was
18 suffering due to the pepper spray, but he refused. FAC ¶¶ 59, 83, 87, 88 and 90.

19 5. On May 23, 2012, Busch suited up to be part of the team that carried out the
20 extraction, but he never actually participated in the extraction. (ECF No. 142-3, Declaration of
21 Dennis Busch (“Busch Decl.”) at ¶ 4.

22 6. During the extraction, Busch left the building where it took place and went to
23 another building to provide assistance to feed and count the inmates housed there. (Id.)

24 7. Busch stayed in that other building until the end of his shift on May 23, 2012.
25 (Id.)

26 8. As a correctional officer, Busch did not have any input in the planning of cell
27 extractions, including but not limited to determining the level of force and/or amount of pepper
28 spray to be used as these decisions would be made by others. (Id. at ¶ 5.)

1 9. With respect to the cell extraction that took place on May 23, 2012, Busch did not
2 have any input in the planning of it, including but not limited to determining the level of force
3 and/or amount of pepper spray to be used. (Id. at ¶ 5.)

4 10. On the day of May 23, 2012, prior to the extraction, Busch did not feed plaintiff or
5 have any occasion to communicate with him in his cell or be near his cell because of the planned
6 extraction. (Id. at ¶ 6.)

7 11. Busch was not responsible for, nor did he, check with inmates who were housed
8 near the cell where the extraction was to take place in order to find out whether they wanted to be
9 moved away from the site of the extraction. (Id.)

10 12. Starting on May 24, 2012, Busch was off duty for the next four days. (Id.)

11 13. Busch did not speak with plaintiff after the extraction as he claims in his First
12 Amended Complaint. (Id.)

13 14. At no time did Busch act with a malicious and/or sadistic intent towards plaintiff
14 for the purpose of causing him harm. (Id. at ¶ 7.)

15 15. Busch never was deliberately indifferent to plaintiff's claimed medical needs in
16 connection with a claimed serious injury or medical condition allegedly suffered by him. (Id.)

17 **B. Plaintiff's Statement of Material Facts ("PSF")³**

18 1. On May 23, 2012, two (2) other prisoners (other than Plaintiff) were evacuated
19 from their cells prior to the use of chemical of weapons. (Plaintiff's Decl. at ¶ 11.)

20 2. On May 23, 2012, Defendant Busch suited up to be part of the team that carried
21 out a use of chemical weapons (agents) and cell extraction within B-Section of Building 4A-4R at
22 the California State Prison Corcoran. Defendant Busch was present before the use of chemical
23 agents, at the commencement of the use of chemical agents and later after the completion of the
24 cell extraction of inmate Ramirez from cell 4A-4R #25. (Id. at ¶ 16.)

25 3. On May 23, 2012, Plaintiff's assigned cell was 4A-4R-28 which has a view across
26 B-Section and out into the 4A-4R Rotunda. (Id. at ¶ 18.)

27 _____
28 ³ These facts are derived from Plaintiff's Fourth Declaration in Support of His Motions,
Inter Alia ("Plaintiff's Decl."). (ECF No. 147.) Immaterial and irrelevant facts are not included.

1 4. On May 23, 2012, Plaintiff observed Defendant Busch and other Defendants take
2 steps normally used in the preparation and planning of a controlled use of force with chemical
3 agents that included but were not limited to the following activities in the 4A-4R Rotunda and B
4 Section: donning protective clothing, donning gas masks with chemical agent filters, donning
5 filters masks, checking equipment, preparing an Order of Battle, rehearsing movement, preparing
6 equipment, conducting a pre-assault walk through and performing reconnaissance. All of which
7 are steps in the planning of a use of chemical weapons. Defendant Busch was an active
8 participant in these activity's [sic] which constitute the planning of a tactical operation. (Id. at ¶
9 19.)

10 5. On May 23, 2012, the chemical weapons [MK-9 pepper spray, MK-46 Oleo-resin
11 Capsicum (OC) pepper spray, tactical T-16 O.C grenades, x-10 Barricade Removal Device
12 (BRD) with O.C. pepper spray, and OC-V Aerosol Grenade] were assembled, checked and
13 prepared for use in the presence of Defendant Busch. (Id. at ¶ 20.)

14 6. On May 23, 2012, Defendant Busch personally denied Plaintiff's request to be
15 evacuated to a safe prior to the use of chemical weapons in B-Section of Building 4A-4R at the
16 California State Prison at Corcoran. (Id. at ¶ 21.)

17 **D. Legal Standard**

18 Summary judgment is appropriate when the pleadings, disclosure materials, discovery,
19 and any affidavits provided establish that "there is no genuine dispute as to any material fact and
20 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is
21 one that may affect the outcome of the case under the applicable law. See Anderson v. Liberty
22 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a
23 reasonable [trier of fact] could return a verdict for the nonmoving party." Id.

24 The party seeking summary judgment "always bears the initial responsibility of informing
25 the district court of the basis for its motion, and identifying those portions of the pleadings,
26 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
27 which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v.
28 Catrett, 477 U.S. 317, 323 (1986). The exact nature of this responsibility, however, varies

1 depending on whether the issue on which summary judgment is sought is one in which the
2 movant or the nonmoving party carries the ultimate burden of proof. See Soremekun v. Thrifty
3 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of proof at
4 trial, it must “affirmatively demonstrate that no reasonable trier of fact could find other than for
5 the moving party.” Id. (citing Celotex, 477 U.S. at 323). In contrast, if the nonmoving party will
6 have the burden of proof at trial, “the movant can prevail merely by pointing out that there is an
7 absence of evidence to support the nonmoving party’s case.” Id.

8 If the movant satisfies its initial burden, the nonmoving party must go beyond the
9 allegations in its pleadings to “show a genuine issue of material fact by presenting affirmative
10 evidence from which a jury could find in [its] favor.” F.T.C. v. Stefanchik, 559 F.3d 924, 929 (9th
11 Cir. 2009) (emphasis omitted). “[B]ald assertions or a mere scintilla of evidence” will not suffice
12 in this regard. Id. at 929; see also Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475
13 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56[], its
14 opponent must do more than simply show that there is some metaphysical doubt as to the material
15 facts.”) (citation omitted). “Where the record taken as a whole could not lead a rational trier of
16 fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S.
17 at 587 (quoting First Nat’l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

18 In resolving a summary judgment motion, “the court does not make credibility
19 determinations or weigh conflicting evidence.” Soremekun, 509 F.3d at 984. Instead, “[t]he
20 evidence of the [nonmoving party] is to be believed, and all justifiable inferences are to be drawn
21 in [its] favor.” Anderson, 477 U.S. at 255. Inferences, however, are not drawn out of the air; the
22 nonmoving party must produce a factual predicate from which the inference may reasonably be
23 drawn. See Richards v. Nielsen Freight Lines, 602 F.Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d,
24 810 F.2d 898 (9th Cir. 1987).

25 In arriving at these findings and recommendations, the Court carefully reviewed and
26 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed
27 facts and responses thereto, if any, objections, and other papers filed by the parties. Omission of
28 reference to an argument, document, paper, or objection is not to be construed to the effect that

1 this court did not consider the argument, document, paper, or objection. This Court thoroughly
2 reviewed and considered the evidence it deemed admissible, material, and appropriate.

3 **E. Discussion**

4 **1. Excessive Force**

5 The unnecessary and wanton infliction of pain violates the Cruel and Unusual
6 Punishments Clause of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 5 (1992)
7 (citations omitted). For claims arising out of the use of excessive physical force, the issue is
8 “whether force was applied in a good faith effort to maintain or restore discipline, or maliciously
9 and sadistically to cause harm.” Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam) (citing
10 Hudson, 503 U.S. at 7) (internal quotation marks omitted); Furnace v. Sullivan, 705 F.3d 1021,
11 1028 (9th Cir. 2013).

12 Defendant Busch declares that he was not present during the cell extraction at issue. (DSF
13 5, 6.) Plaintiff attempts to raise a genuine dispute of material fact by asserting that Defendant
14 Busch “was present before the use of chemical agents, at the commencement of the use of
15 chemical agents and later after the completion of the cell extraction of inmate Ramirez.” (PSF
16 2.) However, nothing in Plaintiff’s conclusory statement provides affirmative evidence that
17 Defendant Busch participated in the extraction or was even present during its execution.

18 Defendant Busch further declares that he was not involved in the planning of the cell
19 extraction that took place on May 23, 2012. (DSF 8, 9.) Plaintiff attempts to raise a genuine
20 dispute of material fact by asserting that Defendant Busch participated in the planning of the May
21 23, 2012 use of chemical weapons (agents) within B-Section of Building 4A-4R. (PSF 3, 4, 5.)
22 As supporting evidence, Plaintiff cites his observations of Defendant Busch and other Defendants
23 prior to the extraction on May 23, 2012. (PSF 4, 5.) However, the activities identified in
24 Plaintiff’s declaration do not provide affirmative evidence that Defendant Busch was involved in
25 the determination of the level of force or amount of pepper spray to be used in the cell extraction
26 that took place on May 23, 2012.

27 Plaintiff also appears to argue that Defendant Busch failed to intervene to protect Plaintiff
28 from the harm of the chemical agents by refusing to move Plaintiff to a safe area. However, the

1 cell extraction at issue involved Inmate Ramirez, and Plaintiff has presented no evidence that
2 Defendant Busch was involved in any plan to use chemical agents or force against Plaintiff.

3 Based on the above, the undisputed evidence therefore shows that Defendant Busch was
4 not present during the cell extraction and that he was not involved in the determination of the
5 level of force or amount of pepper spray to be used in the cell extraction. In the absence of a
6 genuine dispute of material facts, the Court finds that Defendant Busch is entitled to summary
7 judgment on Plaintiff's claim of excessive force.

8 **2. Deliberate Indifference to Medical Needs**

9 A prisoner's claim of inadequate medical care does not constitute cruel and unusual
10 punishment in violation of the Eighth Amendment unless the mistreatment rises to the level of
11 "deliberate indifference to serious medical needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
12 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). The
13 two part test for deliberate indifference requires the plaintiff to show (1) "a 'serious medical need'
14 by demonstrating that failure to treat a prisoner's condition could result in further significant
15 injury or the 'unnecessary and wanton infliction of pain,' " and (2) "the defendant's response to
16 the need was deliberately indifferent." Jett, 439 F.3d at 1096. A defendant does not act in a
17 deliberately indifferent manner unless the defendant "knows of and disregards an excessive risk
18 to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d
19 811 (1994). "Deliberate indifference is a high legal standard," Simmons v. Navajo Cty. Ariz., 609
20 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is
21 shown where there was "a purposeful act or failure to respond to a prisoner's pain or possible
22 medical need" and the indifference caused harm, Jett, 439 F.3d at 1096.

23 Defendant Busch presents evidence that he was not in the building during the cell
24 extraction, he stayed in that other building until the end of his shift, he was off duty for the next
25 four days and he did not speak with plaintiff after the extraction as claimed in the First Amended
26 Complaint. (DSF 5-7, 13.)

27 Plaintiff counters that Defendant Busch was present after completion of the cell
28 extraction, he spoke with Defendant Busch after the cell extraction, informing Defendant Busch

1 of his injuries and requesting medical care and a decontamination shower, which Defendant
2 Busch refused to provide on May 23, 2012. (ECF No. 147 Ex. 4, Answers to Interrogatories Nos.
3 6, 8, 10.) In his verified First Amended Complaint, Plaintiff alleged that after the use of chemical
4 weapons on May 23, 2012, he “personally asked” Defendant Busch “for medical treatment and a
5 decontamination shower,” but Defendant “refused to provide medical care or a decontamination
6 shower to Plaintiff.” (ECF No. 23, FAC at ¶ 59.) “A Plaintiff’s verified complaint may be
7 considered as an affidavit in opposition to summary judgment if it is based on personal
8 knowledge and sets forth specific facts admissible in evidence.” Lopez v. Smith, 203 F.3d 1122,
9 1132 n.14 (9th Cir. 2000) (en banc).

10 The Court finds that Plaintiff has raised a genuine dispute regarding whether Defendant
11 Busch was deliberately indifferent to his medical needs following the cell extraction. This
12 dispute is based on the parties’ conflicting statements of events, the credibility of which cannot be
13 determined by the Court on summary judgment. McGinest v. GTE Serv. Corp., 360 F.3d 1103,
14 1115 n. 5 (9th Cir. 2004) (“[W]hen ruling on a summary judgment motion, the district court is not
15 empowered to make credibility determinations or weigh conflicting evidence.”) (citations
16 omitted). Accordingly, the Court will recommend that Defendant Busch’s motion for summary
17 judgment on Plaintiff’s deliberate indifference claim be denied.

18 **V. Conclusion and Recommendations**

19 Based on the foregoing, IT IS HEREBY RECOMMENDED as follows:

- 20 1. Defendant Busch’s motion for summary judgment be GRANTED IN PART and
21 DENIED IN PART;
- 22 2. Defendant Busch’s motion for summary judgment on Plaintiff’s claim of excessive
23 force be GRANTED; and
- 24 3. Defendant Busch’s motion for summary judgment on Plaintiff’s claim of
25 deliberate indifference to medical needs be DENIED.

26 These Findings and Recommendations will be submitted to the United States District
27 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
28 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may

1 file written objections with the Court. The document should be captioned “Objections to
2 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file
3 objections within the specified time may result in the waiver of the “right to challenge the
4 magistrate’s factual findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
5 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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

IT IS SO ORDERED.

Dated: September 11, 2017

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE