

1 contained notice that any objections thereto were to be filed within fourteen (14) days after service.
2 (Id.)

3 Following extensions of time, on May 22, 2019, Plaintiff timely filed written objections to
4 the F&R. (ECF No. 32.)

5 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a
6 de novo review of this case.

7 **Discussion**

8 **A. First Amendment Retaliation**

9 “Within the prison context, a viable claim of First Amendment retaliation entails five basic
10 elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because
11 of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his
12 First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional
13 goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005); accord Watison v. Carter, 668
14 F.3d 1108, 1114-15 (9th Cir. 2012); Silva, 658 at 1104; Brodheim v. Cry, 584 F.3d 1262, 1269 (9th
15 Cir. 2009).

16 Plaintiff argues that the F&R erroneously failed to find that Plaintiff’s “Claim No. 8”
17 alleged a cognizable claim for retaliation against Defendants Beam, Goree, Diaz, Cribbs, Pacillas,
18 and Jarvis. After reviewing the allegations in the second amended complaint, the Court finds that,
19 liberally construed, Plaintiff has alleged a cognizable claim for retaliation against Defendants
20 Beam, Cribbs, Diaz, Goree, Jarvis, and Pacillas. With regards to Defendant Beam, Plaintiff alleges
21 that, on February 18, 2015, Defendant Beam threatened to trash all of Plaintiff’s legal work stored
22 in several boxes in the 4B library if Plaintiff filed a lawsuit against Defendant Beam. Cf. Brodheim,
23 584 F.3d at 1270 (holding that a “mere threat of harm can be an adverse action.”). Plaintiff’s
24 allegations are sufficient to state a claim for retaliation in violation of the First Amendment against
25 Defendant Beam. With regard to Defendants Cribbs, Diaz, Goree, Jarvis, and Pacillas, Plaintiff
26 has alleged that each Defendant responded to one or more of Plaintiff’s submitted administrative
27 appeals by threatening Plaintiff with disciplinary action for filing appeals and staff complaints.
28 Therefore, Plaintiff’s first objection is sustained.

1 **B. Bane Act**

2 Plaintiff argues that the Magistrate Judge erred by failing to find that Plaintiff’s “Claim No.
3 13” alleged a cognizable claim for a violation of the California Civil Code § 52.1. Plaintiff asserts
4 that Defendants Cribbs, Diaz, Goree, Jarvis, and Pacillas interfered or attempted to interfere with
5 his First Amendment rights by threatening him with disciplinary action for filing appeals and staff
6 complaints. Additionally, the F&R found cognizable § 52.1 claims against the other defendants.
7 The F&R found viable claims based in part on: (1) verbal threats by a nurse to make Plaintiffs life
8 miserable, (2) placing Plaintiff in a redlined cell (i.e. a cell that is not to be used to house inmates)
9 and depriving him of property, (3) telling Plaintiff that his property would be trashed and he would
10 be retaliated against if he did not withdraw his complaints, (4) dumping Plaintiff’s damaged
11 property on the floor and being told that was a result of his complaints, and (5) mishandling
12 Plaintiff’s property and falsifying Plaintiff’s records to prevent him from filing staff complaints.

13 The Bane Act (California Civil Code § 52.1) makes it unlawful for any person to “interfere[]
14 by threats, intimidation, or coercion, or attempt[] to interfere by threats, intimidation, or coercion,
15 with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution
16 or laws of the United States, or of the rights secured by the Constitution or laws of this state.” Cal.
17 Civ. Code § 52.1. However, for conduct to be actionable under § 52.1, the conduct must involve
18 violence or the threat of violence. See Julian v. Mission Community Hosp., 11 Cal.App.5th 360,
19 395 (2017); Gabrielle A. v. County of Orange, 10 Cal.App.5th 1268, 1290 (2017); Austin B. v.
20 Escondido Union Sch. Dist., 149 Cal.App.4th 860, 882 (2007); Cabesuela v. Browning-Ferris
21 Indus., 68 Cal.App.4th 101, 111 (1998); Judicial Council of Cal., Civil Jury Instructions, No. 3066
22 (2019 ed.). Speech alone does not violate § 52.1 unless the speech itself threatens violence, the
23 plaintiff has a reasonable belief that violence against himself or his property will occur, and the
24 person making the threat appears to have the ability to carry out the threat. See Cal. Civ. Code §
25 52.1 (k); In re M.S., 10 Cal.4th 698, 715 (1995); Allen v. City of Sacramento, 234 Cal.App.4th 41,
26 66 (2015).

27 Here, the Court concludes that the conduct identified by Plaintiff in his objections does not
28 involve violence or the threat of violence. Being threatened with disciplinary action, or the

1 institution of prison disciplinary proceedings, may involve the possible loss of privileges or time
2 credits, or being assigned to a different cell or a different type of confinement, but it is not a threat
3 of violence. Therefore, Plaintiff's objections are overruled and no § 52.1 claim will be permitted
4 against Defendants Cribbs, Diaz, Goree, Jarvis, and Pacillas.

5 Additionally, upon further review, the Court respectfully disagrees with part of the F&R's
6 analysis of the remainder of Plaintiff's § 52.1 claim. Liberally construed, the Court finds that the
7 alleged conduct of Sgt. Beam involves a threat of violence. Sgt. Beam is alleged to have threatened
8 to "trash" Plaintiff's property if Plaintiff did not withdraw his staff complaints. Since Sgt. Beam
9 would have access to Plaintiff's cell and property, "trash" clearly means "to damage," and some of
10 Plaintiff's property was damaged by other defendants, the Court finds that the amended complaint
11 adequately alleges a threat of violence by Sgt. Beam. See Cal. Civ. Code § 52.1(k). The Court also
12 concludes that the allegations against Officers Huerta and Benavides involve acts of violence
13 because those officers allegedly dumped Plaintiff's damaged property on the floor and indicated
14 that the property was damaged because Plaintiff filed staff complaints. Cf. id. (noting that speech
15 that threatens violence against property, when combined with a plaintiff's reasonable fear and the
16 defendant's ability to carry out the threat, is actionable). However, none of the acts alleged against
17 the remaining defendants are sufficient to show either violence or the threat of violence. Because
18 the conduct identified by Plaintiff against Vasquez, Vogel, Caldwell, and Cervantes does not
19 involve violence or the threat of violence, the Court respectfully declines to adopt the portion of
20 the F&R that finds a plausible § 52.1 claim against those Defendants.

21 **C. Remainder of the F&R**

22 With the two exceptions above relating to retaliation and § 52.1, the Court concludes that
23 the F&R's analysis is correct. Therefore, the Court will adopt the remainder of the F&R.

24
25 **ORDER**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. The Findings and Recommendations issued on April 2, 2019, (Doc. No. 29), are
28 adopted in part, consistent with the above analysis;

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- 2. This action shall proceed on Plaintiff's second amended complaint as follows:
 - a. Against Defendants Vogel, Caldwell, and Cervantes for deliberate indifference in violation of the Eighth Amendment;
 - b. Against Defendants Vasquez, Vogel, Beam, Cuevas, Caldwell, Cervantes, Huerta, Benevidas, Goree, Cribbs, Diaz, Jarvis, and Pacillas for retaliation in violation of the First Amendment;
 - c. Against Defendants Vasquez, Vogel, Beam, Cuevas, Caldwell, Cervantes, Huerta, and Benevidas for conspiracy;
 - d. Against Defendants Vogel, Beam, Cuevas, Caldwell, Cervantes, Huerta, and Benevidas for denial of access to the courts in violation of the First and Fourteenth Amendments;
 - e. Against Defendants Vogel, Beam, Cuevas, Caldwell, Cervantes, Huerta, and Benevidas for a state law claim for property deprivation under California law;
 - f. Against Defendants Beam, Huerta, and Benevidas for violation of California Civil Code 52.1;
 - g. Against Defendant Vogel for a state law claim for intentional infliction of emotional distress; and
 - h. Against Defendants Vogel, Caldwell, and Cervantes for a state law claim for negligent infliction of emotional distress;
- 3. All other claims and defendants are dismissed based on Plaintiff's failure to state claims upon which relief may be granted; and
- 4. This action is referred back to the assigned Magistrate Judge for further proceedings consistent with this order.

IT IS SO ORDERED.

Dated: June 10, 2019



SENIOR DISTRICT JUDGE