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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

DARRYL BURGHARDT,
Plaintiff,
v.
L. BORGES, et al.,
Defendants.

1:17-cv-01433-AWI-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF’S
CLAIMS AGAINST DEFENDANTS BORGES,
RENTERIA, MONTOYA, OSUNA, GOMEZ,
AND GONZALES BE DISMISSED FOR
FAILURE TO STATE A CLAIM, WITH LEAVE
TO AMEND; AND THAT ALL OTHER CLAIMS
AND DEFENDANTS BE DISMISSED
AS UNRELATED CLAIMS UNDER RULE 18(a),
WITHOUT PREJUDICE TO FILING NEW
CASES PERTAINING TO THE UNRELATED
CLAIMS
(ECF No. 13.)**

**OBJECTIONS, IF ANY, DUE WITHIN THIRTY
DAYS**

I. BACKGROUND

Darryl Burghardt (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On October 25, 2017, Plaintiff filed the Complaint commencing this action. (ECF No. 1.) On July 27, 2018, the court screened the Complaint and issued an order dismissing the Complaint for violation of Rules 8 and 18(a) of the Federal Rules of Civil Procedure, with leave to amend. (ECF No. 12.) On August 29, 2018,

1 Plaintiff filed the First Amended Complaint, which is now before the court for screening. (ECF
2 No. 13.)

3 **II. SCREENING REQUIREMENT**

4 The court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
7 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
8 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
9 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
10 dismiss the case at any time if the court determines that the action or appeal fails to state a claim
11 upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

12 A complaint is required to contain “a short and plain statement of the claim showing that
13 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
14 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken
17 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
18 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To state
19 a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
20 to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
21 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
22 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
23 plausibility standard. Id.

24 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

25 Plaintiff is currently incarcerated at Salinas Valley State Prison in Soledad, California.
26 The events at issue in the First Amended Complaint allegedly occurred at Corcoran State Prison
27 (CSP) in Corcoran, California, when Plaintiff was incarcerated there in the custody of the
28 California Department of Corrections and Rehabilitation (CDCR). Plaintiff names as defendants

1 Correctional Officer (C/O) L. Borges, C/O J. Renteria, C/O J. Guerrero, K. Cribbs (Appeals
2 Coordinator), D. Goree (CCII), Captain R. Broomfield, Sergeant F. Montoya, M. Sexton (Chief
3 Deputy Warden), Gonzales (LVN), D. Osuna (LVN), Lieutenant (Lt.) A.V. Johnson, Sergeant
4 T. Candia, Lt. A. Delacruz, J. C. Smith (Associate Warden), Sergeant D. B. Hernandez, C/O J.
5 Gomez, Lt. J. E. Silva, A. Pacillas (CCII), Captain R. Pimentel (Appeals Examiner), C.
6 Hammond (Appeals Examiner), and J. A. Zamora (Chief Appeals Coordinator). Plaintiff alleges
7 as follows:

8 On August 13, 2013, after Plaintiff submitted prison appeals against some prison officials
9 defendant D. Goree retaliated against Plaintiff in handling another of Plaintiff's appeals regarding
10 lost property by rejecting it for inapplicable reasons and discarding documents Plaintiff had
11 enclosed to support his claims. This was done to hinder Plaintiff in resolving his property claim.

12 On October 17, 2013, defendant K. Cribbs retaliated against Plaintiff because of appeals
13 that Plaintiff had filed. He did this by discarding certain documents Plaintiff had provided in one
14 of the appeals.

15 On October 20, 2013, at Plaintiff's cell, Plaintiff presented an institutional form to
16 defendant L. Borges for him to process through the institutional mailing system. Borges
17 threatened to use pepper spray on Plaintiff, made vulgar comments, and refused to process the
18 mail in retaliation for Plaintiff filing grievances. Borges departed Plaintiff's cell. Moments after
19 Plaintiff complained out loud about Borges refusing to process his mail, defendant J. Guerrero
20 came quickly to Plaintiff's cell and asked Plaintiff if he had broken one of the windows on
21 Plaintiff's cell door. Plaintiff knew that the window was already broken when Guerrero housed
22 Plaintiff in the cell the day before. Plaintiff started to respond. Guerrero began to process
23 Plaintiff's mail and then demanded that Plaintiff pay for the window. Plaintiff told Guerrero that
24 he wasn't going to pay for the window because he didn't damage it. Guerrero stormed off
25 unhappily.

26 On October 21, 2013, Plaintiff filed grievances about the broken window incident. On
27 the same day, defendant A. Delacruz acted in concert with Guerrero and Borges in retaliation
28

1 against Plaintiff for one of Plaintiff's appeals by restricting Plaintiff's access to an important state
2 utensil (a cup), resulting in Guerrero falsifying a Rules Violation Report (RVR) against Plaintiff.

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4 On October 23, 2013, defendants Broomfield, Smith, Guerrero, Candia, Silva, and
5 Delacruz conspired to silence the issue, retaliating against Plaintiff. Broomfield endorsed an
6 RVR that Guerrero falsified against Plaintiff in retaliation for Plaintiff grieving misconduct by
7 L. Borges. On the same date, defendant J. C. Smith retaliated against Plaintiff by endorsing the
8 RVR falsified by Guerrero, in concert with Guerrero. Defendant J. E. Silva acted in concert with
9 defendants Delacruz and Candia by classifying the falsified RVR against Plaintiff in retaliation
10 against Plaintiff to cover up Borges's unlawful acts.

11 On October 25, 2013, defendant T. Candia reviewed the RVR falsified against Plaintiff
12 by J. Guerrero and found it to be true in retaliation against Plaintiff for an administrative appeal.
13 This was in an attempt to help Delacruz cover up Guerrero's wrongdoing and acting in concert
14 with Delacruz, Guerrero, and Borges.

15 On October 26, 2013, Guerrero issued an RVR against Plaintiff out of retaliation to cover
16 up Guerrero's conduct on October 20, 2019.

17 On November 4, 2013, defendants Borges and Renteria worked together to batter Plaintiff
18 and assault him with pepper spray while they were escorting Plaintiff. Renteria falsified the
19 incident report against Plaintiff to try and cover up the acts against Plaintiff and in retaliation for
20 Plaintiff filing grievances. That same day, in the B-section shower cell, defendant F. Montoya
21 refused to allow Plaintiff to properly decontaminate from the pepper spray. Montoya also refused
22 to provide Plaintiff with medical treatment for his injuries. Defendant D. Osuna conducted a
23 medical evaluation of Plaintiff's injuries. Osuna acted in concert with Borges, Renteria, and
24 Montoya by refusing to treat Plaintiff, refusing to allow Plaintiff to fully decontaminate, refusing
25 to refer Plaintiff for medical treatment, and refusing to document rather than falsify what Plaintiff
26 told Osuna on a form 7362 Health Care Services Request about the incident. Sometime later,
27 Plaintiff began to experience complications from the injuries, but Osuna continued to deny him
28 adequate medical care. Plaintiff submitted a 7362 Health Care Services Request to Osuna, but

1 Osuna never processed or honored it. Defendant J. Gomez retaliated against Plaintiff by
2 falsifying part of an incident report against Plaintiff to assist Borges and Renteria to cover up
3 their attack on Plaintiff, for Plaintiff engaging in protected conduct. Gomez procrastinated in
4 providing Plaintiff with adequate health care for the injuries Plaintiff sustained in the attack, thus
5 inflicting more pain upon Plaintiff for requiring medical attention. Gomez had Plaintiff placed
6 under a regular food tray restriction (paper tray status).

7 On November 5, 2013, defendant Broomfield reviewed and approved an RVR which
8 Borges falsified against Plaintiff to cover up Borges and Renteria assaulting Plaintiff, other
9 officials' conspiracy to silence the issue, deprive Plaintiff of adequate medical care and further
10 punish him. Broomfield retaliated by falsifying a report he submitted for one of Plaintiff's
11 grievances and approving another report falsified by other officials in order to deny Plaintiff's
12 copy request for his legal documents. Plaintiff explained to defendant Gonzales that Osuna
13 deprived Plaintiff of adequate medical treatment and a chance to decontaminate from pepper
14 spray since the day before. Plaintiff showed Gonzales the injuries he sustained in the attack and
15 submitted a form 7362 Health Care Services Request to Gonzales, but she [Gonzales] refused to
16 treat Plaintiff, have Plaintiff treated, have Plaintiff's 7362 form processed, acting in concert with
17 D. Osuna against Plaintiff. Defendant J. C. Smith endorsed an RVR that Borges falsified against
18 Plaintiff to cover up Borges and Renteria assaulting Plaintiff, in concert with Delacruz and
19 Borges.

20 On November 9, 2013, Borges issued an RVR against Plaintiff as a cover-up, to justify
21 Borges's encounter with Plaintiff, and Delacruz and Montoya began to conspire to cover up
22 Borges's attack.

23 On November 11, 2013, Plaintiff complained in a grievance about defendant Bloomfield.
24 Between November 24 and December 3, 2013, Broomfield approved a report against Plaintiff
25 falsified by defendant D. B. Hernandez in order to deny another of Plaintiff's appeals.

26 On November 24, 2013, defendant D. B. Hernandez interviewed Plaintiff about Plaintiff's
27 appeal against defendant Borges. Sometime later, Hernandez retaliated against Plaintiff in
28 concert with Borges by refusing to conduct a thorough investigation on Plaintiff's behalf or

1 evaluate evidence Plaintiff provided so Hernandez could deny the appeal in a way that appeared
2 justified.

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4 On November 26, 2013, Plaintiff filed a grievance concerning the November 4, 2013
5 incident. Defendant K. Cribbs retaliated against Plaintiff by forging Plaintiff's name, or working
6 with D. Goree and/or A. Pacillas to forge Plaintiff's name, on a cover sheet to Plaintiff's 602
7 appeal against Borges, Renteria, and other officials, to cause the appeal to be cancelled. Plaintiff
8 submitted an appeal complaining about Goree's acts. That same day, Plaintiff submitted a
9 grievance against Montoya for his acts on November 4, 2013. Plaintiff also submitted a
10 grievance against Gonzales for refusing him medical care on November 5, 2013. Plaintiff also
11 submitted a grievance against Osuna for inadequate medical care. Plaintiff also submitted a
12 grievance against J. Gomez for placing Plaintiff on paper tray status.

13 On November 30, 2013, defendant A. V. Johnson acted as Senior Hearing Officer at a
14 hearing against Plaintiff on an RVR falsified by Guerrero. Guerrero testified against Plaintiff.
15 Johnson acted with Guerrero for Borges by refusing to let Plaintiff's favorable evidence be
16 presented, and admitted the RVR record so Johnson could render a conviction that appeared
17 justified.

18 On December 3, 2013, Plaintiff filed an appeal complaining about K. Cribbs's acts on
19 October 13, 2013.

20 On December 5, 2013, Plaintiff complained about defendant Broomfield in another
21 appeal. On the same day, Plaintiff complained in a grievance about the November 30, 2013 RVR
22 hearing. Plaintiff also complained about T. Candia in an appeal about Candia's conduct on
23 October 25, 2013. Plaintiff also complained about Delacruz in an appeal about Delacruz's
24 conduct on October 25, 2013. Plaintiff also complained about J. C. Smith in an appeal regarding
25 Smith's conduct on October 23, 2013. Plaintiff also complained about J. E. Silva in a grievance
26 about Silva's conduct on October 23, 2013.

27 On December 11, 2013, Plaintiff submitted an appeal to the CDCR's Chief Inmate
28 Appeals Branch. Defendant R. Pimentel examined the grievance regarding A. Pacillas and M.

1 Sexton approving of D. Goree deliberately misstating Plaintiff's grievance concerning Borges
2 and Renteria attacking Plaintiff.

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4 On December 16, 2013, defendant Johnson acted as Senior Hearing Officer at a hearing
5 on an RVR against Plaintiff that was falsified by Borges. Johnson acted with Borges, Montoya,
6 and Delacruz by refusing to let Plaintiff's favorable evidence to be presented and admitted the
7 RVR's record so Johnson could render a conviction that appeared justified.

8 On December 17, 2013, Plaintiff submitted another appeal complaining about K. Cribbs's
9 conduct on November 26, 2013. Plaintiff also submitted another appeal regarding D. Goree's
10 conduct on November 26, 2013.

11 On December 28, 2013, defendant M. Sexton retaliated against Plaintiff by approving a
12 false report by defendants Hernandez and Broomfield against Plaintiff concerning one of
13 Plaintiff's grievances, acting in concert with defendants Hernandez and Broomfield to keep
14 Plaintiff from seeking relief from the cruel and unusual conditions Plaintiff endured.

15 On January 7, 2014, defendant A. Pacillas interviewed Plaintiff about his grievance
16 concerning defendants Cribbs and Goree interfering with a grievance.

17 On January 8, 2014, defendant Sexton acted in concert with A. Pacillas concerning
18 another of Plaintiff's grievances by approving a report falsified by Pacillas. Pacillas retaliated
19 against Plaintiff by deliberately denying Plaintiff's requests in a grievance, mostly based on a
20 form with Plaintiff's forged signature. Forged either by Pacillas or by Cribbs, and/or Goree.

21 On January 9, 2014, acting in concert with defendant Broomfield, defendant Sexton
22 approved another report falsified by Broomfield for another grievance to cover up malicious
23 activity against Plaintiff by E. Bender [not a defendant].

24 On January 12, 2014, Plaintiff filed a grievance against defendant Sexton. Plaintiff also
25 filed an appeal against defendant Johnson concerning Johnson's conduct at the November 28,
26 2013 hearing. Plaintiff also submitted an appeal to the Inmate Appeals Branch concerning
27 defendants Guerrero's and Borges's retaliation against Plaintiff. The appeal was reviewed by J.
28 A. Zamora on April 8, 2014.

1 On January 22, 2014, in concert with D. Overley [not a defendant], Sexton furthered his
2 retaliation upon Plaintiff by approving a report falsified against Plaintiff by Overley.

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4 On January 26, 2014, Plaintiff complained about defendant Sexton's behavior in a
5 grievance. Plaintiff also complained about A. Pacillas in a grievance for his conduct on 1-7-14.
6 Plaintiff also submitted another grievance to the Inmate Appeals Branch which was reviewed by
7 defendant R. Pimentel. Acting in concert with other officials and in retaliation against Plaintiff,
8 Pimentel refused to conduct an investigation and as a result, Plaintiff's grievances were denied
9 by defendant J. A. Zamora.

10 On April 8, 2014, Plaintiff submitted a grievance to the Inmate Appeals Branch.
11 Defendant C. Hammond examined the grievance and in concert with some prison officials
12 refused to resolve the issues by failing to conduct an investigation or consider evidence favorable
13 to Plaintiff. Defendant J. A. Zamora also examined one of Plaintiff's appeals at the Inmate
14 Appeals Branch and retaliated against Plaintiff by refusing to resolve the issues in the grievance
15 and affirming the unlawful lower-level decision, acting in concert with Hammond, Sexton, and
16 Broomfield.

17 On April 15, April 24, and May 1, 2014, defendant Zamora again acted in concert with
18 defendant Sexton concerning another grievance, similar to how Zamora acted on January 12,
19 2014.

20 Plaintiff alleges that he was injured financially, mentally, and emotionally. Plaintiff
21 requests monetary damages (nominal, compensatory and punitive) and declaratory relief.

22 **IV. PLAINTIFF'S CLAIMS**

23 The Civil Rights Act under which this action was filed provides:

24 Every person who, under color of any statute, ordinance, regulation, custom, or
25 usage, of any State or Territory or the District of Columbia, subjects, or causes to
26 be subjected, any citizen of the United States or other person within the
27 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
28 secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

1 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
2 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
3 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v.
4 Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d
5 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v.
6 Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

7 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
8 under color of state law and (2) the defendant deprived him of rights secured by the Constitution
9 or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also
10 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
11 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
12 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act
13 which he is legally required to do that causes the deprivation of which complaint is made.’”
14 Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
15 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
16 established when an official sets in motion a ‘series of acts by others which the actor knows or
17 reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479
18 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles
19 the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp.,
20 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010,
21 1026 (9th Cir. 2008).

22 **A. Unrelated claims -- Violation of Rule 18(a)**

23 A plaintiff may not proceed in one action on a myriad of unrelated claims against different
24 defendants. “The controlling principle appears in Fed. R. Civ. P. 18(a): ‘A party asserting a claim
25 to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as
26 independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has
27 against an opposing party.’ Thus multiple claims against a single party are fine, but Claim A
28 against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated

1 claims against different defendants belong in different suits, not only to prevent the sort of morass
2 [a multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the
3 required filing fees-for the Prison Litigation Reform Act limits to 3 the number of frivolous suits
4 or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. §
5 1915(g).” George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

6 In the court’s prior screening order issued on July 27, 2018, the court advised Plaintiff
7 that his Complaint contained unrelated claims in violation of Rule 18(a) of the Federal Rules of
8 Civil Procedure. (ECF No. 12 at 6 ¶ A.) Plaintiff was informed that his claims are not related
9 simply because they arise from retaliatory acts, or the processing of Plaintiff’s appeals. (ECF
10 No. 12 at 6:21-22.) Plaintiff was cautioned not to bring unrelated claims in the First Amended
11 Complaint or the court would decide which claims shall proceed. (ECF No. 12 at 6:25-27.)

12 Plaintiff brings claims for excessive force, assault, and battery against defendants Borges
13 and Renteria, and for inadequate medical care against defendants Montoya, Osuna, Gomez, and
14 Gonzales. The court finds these claims to be related to each other as they all arise out of the same
15 occurrence in that Plaintiff’s need for medical care arose from the excessive force used against
16 him. For this reason, the court finds that all of the claims against defendants Borges, Renteria,
17 Montoya, Osuna, Gomez, and Gonzales are properly joined together in one suit. However, as
18 discussed below, none of the claims against these Defendants are cognizable under § 1983 and
19 they should be dismissed, with leave to amend.

20 Despite the court’s admonishment, Plaintiff again brings unrelated claims in the First
21 Amended Complaint. Plaintiff alleges claims against the remaining Defendants for retaliation,
22 conspiracy, improper processing of appeals, improper RVR hearings, adverse conditions of
23 confinement, cover-up and making false reports. The court finds these claims to be unrelated to
24 the claims against defendants Borges, Renteria, Montoya, Osuna, Gomez, and Gonzales, in
25 violation of Rule 18(a). These claims should be dismissed, without prejudice, giving Plaintiff
26 the opportunity to file new cases on the unrelated claims if he so chooses.

1 The court now addresses Plaintiff’s claims against defendants Borges, Renteria, Montoya,
2 Osuna, Gomez, and Gonzales (“Defendants”). Plaintiff shall be granted leave to file a Second
3 Amended Complaint to address the deficiencies found in these claims by the court.

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6 **B. Interference with Outgoing Mail**

7 Prisoners have “‘a First Amendment right to send and receive mail,’ but prison
8 regulations may curtail that right if the ‘regulations are reasonably related to legitimate
9 penological interests.’” Nordstrom v. Ryan, 856 F. 3d 1265, 1272 (9th Cir. 2017) (quoting
10 Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam)). However, a temporary delay
11 or isolated incident of delay or other mail interference without evidence of improper motive does
12 not violate a prisoner’s First Amendment rights. See Crofton v. Roe, 170 F.3d 957, 961 (9th Cir.
13 1999) (as amended); see Davis v. Goord, 320 F.3d 346, 351 (2d. Cir. 2003); Smith v. Maschner,
14 899 F.2d 940, 944 (10th Cir. 1990), affirmed in part by Parks v. Wren, 651 Fed.Appx. 597, 2016
15 WL 3079709 (9th Cir. June 1, 2016) (affirming dismissal of plaintiff’s access-to-courts claim);
16 Watkins v. Curry, 2011 WL 5079532, at *4 (N.D. Cal. Oct. 25, 2011) (finding that an isolated
17 incident of mail mishandling, without evidence that the delay was based on the content of the
18 letter or that the one-year delay was purposeful, fails to show First Amendment violation).

19 Plaintiff alleges that on one occasion, defendant Borges refused to process Plaintiff’s
20 institutional mail, but soon afterward defendant Guerrero processed the mail. Plaintiff does not
21 suggest that this delay was anything but an isolated incident and there is no evidence of improper
22 motive. Therefore, Plaintiff fails to state a claim for interference with his outgoing institutional
23 mail under the First Amendment.

24 **C. Conspiracy**

25 Conspiracy under § 1983 requires proof of “‘an agreement or meeting of the minds to
26 violate constitutional rights,” Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002) (internal
27 quotation marks omitted) (quoting United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d
28 1539, 1540-41 (9th Cir. 1989)), and that an “‘actual deprivation of his constitutional rights

1 resulted from the alleged conspiracy,” Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006)
2 (quoting Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989)). ““To be liable,
3 each participant in the conspiracy need not know the exact details of the plan, but each participant
4 must at least share the common objective of the conspiracy.”” Franklin, 312 F.3d at 441 (quoting
5 United Steelworkers, 865 F.2d at 1541). A plaintiff must allege facts with sufficient particularity
6 to show an agreement or a meeting of the minds to violate the plaintiff’s constitutional rights.
7 Miller v. Cal. Dep’t of Soc. Servs., 355 F.3d 1172, 1177 n.3 (9th Cir. 2004) (citing Woodrum,
8 866 F.2d at 1126). The mere statement that defendants “conspired” or acted “in retaliation” is
9 not sufficient to state a claim. “Threadbare recitals of the elements of a cause of action, supported
10 by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678 (citing Twombly, 550
11 U.S. at 555).

12 The Ninth Circuit requires a plaintiff alleging a conspiracy to violate civil rights to “state
13 specific facts to support the existence of the claimed conspiracy.” Olsen v. Idaho State Bd. of
14 Med., 363 F.3d 916, 929 (9th Cir. 2004) (citation and internal quotation marks omitted)
15 (discussing conspiracy claim under § 1985); Burns v. County of King, 883 F.2d 819, 821 (9th
16 Cir. 1989) (“To state a claim for conspiracy to violate one’s constitutional rights under section
17 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy.”
18 (citation omitted)).

19 Plaintiff’s allegations of conspiracy under § 1983 fail to state a claim because his
20 allegations are conclusory and merely speculative. Though he uses phrases like “acted in
21 concert,” “conspired,” “worked together,” and “acted with,” he does not provide any specific
22 facts that show that any of the Defendants had an agreement to retaliate against him or otherwise
23 violate his constitutional rights. There is absolutely no indication of any agreement between any
24 of the Defendants. Therefore, Plaintiff fails to state a claim for conspiracy.

25 **D. Cover-Up**

26 Plaintiff alleges that Defendants conspired to cover up their acts against Plaintiff. To the
27 extent that Plaintiff attempts to raise a cover-up claim, it is premature. Allegations that officials
28 engaged in a cover-up state a constitutional claim only if the cover-up deprived a plaintiff of his

1 right of access to courts by causing him to fail to obtain redress for the constitutional violation
2 that was the subject of the cover-up. Dell v. Espinoza, No. 116CV1769MJSPC, 2017 WL
3 531893, at *6–7 (E.D. Cal. Feb. 7, 2017) (citing see Karim-Panahi v. Los Angeles Police Dept.,
4 839 F.2d 621, 625 (9th Cir. 1988) (cover-up “allegations may state a federally cognizable claim
5 provided that defendants’ actions can be causally connected to a failure to succeed in the present
6 lawsuit.”)); Rose v. City of Los Angeles, 814 F. Supp. 878, 881 (C.D. Cal. 1993).

7 A cover-up claim is premature when, as here, Plaintiff’s action seeking redress for the
8 underlying constitutional violations remains pending. See Karim-Panahi, 839 F.2d at 625 (claim
9 alleging police cover-up of misconduct was premature when action challenging misconduct was
10 pending); Rose, 814 F. Supp. at 881 (“Because the ultimate resolution of the present suit remains
11 in doubt, [p]laintiff’s cover-up claim is not ripe for judicial consideration.”) Therefore, Plaintiff
12 fails to state a claim against any of the Defendants for covering up their wrongdoing against
13 Plaintiff.

14 **E. Retaliation**

15 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to
16 petition the government may support a 1983 claim. Rizzo v. Dawson, 778 F.2d 5527, 532 (9th
17 Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.
18 Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First
19 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
20 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
21 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
22 did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559,
23 567-68 (9th Cir. 2005); accord Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012);
24 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009).

25 An allegation of retaliation against a prisoner’s First Amendment right to file a prison
26 grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288
27 (9th Cir. 2003). The court must “‘afford appropriate deference and flexibility’ to prison officials
28 in the evaluation of proffered legitimate penological reasons for conduct alleged to be

1 retaliatory.” Pratt, 65 F.3d at 807 (9th Cir. 1995) (quoting Sandin v. Conner, 515 U.S. 472, 482
2 (1995)). The burden is on Plaintiff to demonstrate “that there were no legitimate correctional
3 purposes motivating the actions he complains of.” Pratt, 65 F.3d at 808.

4 ///

5 Here, Plaintiff alleges that Defendants retaliated against him because he filed prison
6 grievances or engaged in other protected conduct by rejecting his appeals, falsifying reports,
7 threatening him, and refusing to process his mail. While Plaintiff has shown that Defendants
8 took adverse actions against him, he has not shown a sufficient connection between the adverse
9 actions and his participation in the prison grievance process, or other conduct protected by the
10 First Amendment. Plaintiff has not alleged *facts* demonstrating that Defendants acted against
11 him *because* he filed grievances. Plaintiff has not established a causal connection between his
12 protected conduct and the claimed adverse actions. The mere statement that Defendants
13 “retaliated” against him or acted “in retaliation” is not sufficient to state a claim. Therefore,
14 Plaintiff fails to state a claim for retaliation against any of the Defendants.

15 **F. Verbal Threats or Harassment**

16 Plaintiff alleges that defendant Borges threatened to use pepper spray on him and made
17 vulgar comments against him. Verbal harassment or abuse alone is not sufficient to state a claim
18 under section 1983, Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987), and threats do
19 not rise to the level of a constitutional violation, Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987).
20 Therefore, Plaintiff fails to state a claim against defendant Borges for verbally threatening or
21 harassing him.

22 **G. Conditions of Confinement -- Eighth Amendment Claim**

23 The Eighth Amendment’s prohibition against cruel and unusual punishment protects
24 prisoners not only from inhumane methods of punishment but also from inhumane conditions of
25 confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer v.
26 Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994) and Rhodes v. Chapman, 452 U.S. 337, 347,
27 101 S.Ct. 2392 (1981)) (quotation marks omitted). While conditions of confinement may be, and
28 often are, restrictive and harsh, they must not involve the wanton and unnecessary infliction of

1 pain. Morgan, 465 F.3d at 1045 (citing Rhodes, 452 U.S. at 347) (quotation marks omitted).
2 Thus, conditions which are devoid of legitimate penological purpose or contrary to evolving
3 standards of decency that mark the progress of a maturing society violate the Eighth Amendment.
4 Morgan, 465 F.3d at 1045 (quotation marks and citations omitted); Hope v. Pelzer, 536 U.S. 730,
5 737, 122 S.Ct. 2508 (2002); Rhodes, 452 U.S. at 346. Prison officials have a duty to ensure that
6 prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal
7 safety, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000) (quotation marks and citations
8 omitted), but not every injury that a prisoner sustains while in prison represents a constitutional
9 violation, Morgan, 465 F.3d at 1045 (quotation marks omitted).

10 To maintain an Eighth Amendment claim, a prisoner must show that prison officials were
11 deliberately indifferent to a substantial risk of harm to his health or safety. E.g., Farmer, 511
12 U.S. at 847; Thomas v. Ponder, 611 F.3d 1144, 1150-51 (9th Cir. 2010); Foster v. Runnels, 554
13 F.3d 807, 812-14 (9th Cir. 2009); Morgan, 465 F.3d at 1045; Johnson, 217 F.3d at 731; Frost v.
14 Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). The deliberate indifference standard involves an
15 objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
16 “sufficiently serious” Farmer, 511 U.S. at 834. “[R]outine discomfort inherent in the prison
17 setting” does not rise to the level of a constitutional violation. Johnson, 217 F.3d at 731. Rather,
18 extreme deprivations are required to make out a conditions of confinement claim, and only those
19 deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to
20 form the basis of an Eighth Amendment violation. Farmer, 511 U.S. at 834; Hudson v.
21 McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992). The circumstances, nature, and duration of the
22 deprivations are critical in determining whether the conditions complained of are grave enough
23 to form the basis of a viable Eighth Amendment claim. Johnson, 217 F.3d at 731. Second, the
24 prison official must “know[] of and disregard[] an excessive risk to inmate health or safety”
25 Farmer, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth Amendment
26 for denying humane conditions of confinement only if he knows that inmates face a substantial
27 risk of harm and disregards that risk by failing to take reasonable measures to abate it. Id. at 837-

1 45. Mere negligence on the part of the prison official is not sufficient to establish liability, but
2 rather, the official's conduct must have been wanton. Id. at 835; Frost, 152 F.3d at 1128.

3 Plaintiff alleges that defendant Gomez placed him on regular food tray restriction (paper
4 tray status). This act against Plaintiff, without more, is not an extreme deprivation and does not
5 rise to the level of a violation of the Eighth Amendment. Plaintiff has not alleged facts showing
6 that defendant Gomez knew about a substantial risk of serious harm to Plaintiff and acted against
7 him while deliberately ignoring the risk, causing Plaintiff harm. Therefore, Plaintiff fails to state
8 a claim based on defendant Gomez placing him on paper tray status.

9 **H. Due Process**

10 The Due Process Clause protects prisoners from being deprived of life, liberty, and
11 property without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order
12 to state a cause of action for deprivation of procedural due process, a plaintiff must first establish
13 the existence of a liberty [or property] interest for which the protection is sought. Liberty
14 interests may arise from the Due Process Clause itself or from state law. Hewitt v. Helms, 459
15 U.S. 460, 466-68 (1983).

16 The existence of a liberty interest created by state law is determined by focusing on the
17 nature of the deprivation. Sandin, 515 U.S. at 481-84. Liberty interests created by state law are
18 generally limited to freedom from restraint which "imposes atypical and significant hardship on
19 the inmate in relation to the ordinary incidents of prison life." Id. at 484.

20 **(1) Prison Appeals Process**

21 Some of Plaintiff's allegations against Defendants pertain to their review and handling of
22 Plaintiff's inmate appeals. "[I]nmates lack a separate constitutional entitlement to a specific
23 prison grievance procedure." Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty
24 interest in processing of appeals because no entitlement to a specific grievance procedure), citing
25 Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). "[A prison] grievance procedure is a
26 procedural right only, it does not confer any substantive right upon the inmates." Azeez v.
27 DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982) accord Buckley v. Barlow, 997 F.2d 494, 495
28 (8th Cir. 1993); see also Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of

1 grievance procedure confers no liberty interest on prisoner). “Hence, it does not give rise to a
2 protected liberty interest requiring the procedural protections envisioned by the Fourteenth
3 Amendment.” Azeez, 568 F. Supp. at 10; Greeno v. Moore, 638 F. Supp. 315, 316 (E.D. Mo.
4 1986).

5 ///

6 Actions in reviewing a prisoner’s administrative appeal generally cannot serve as the
7 basis for liability in a section 1983 action. Buckley, 997 F.2d at 495. The argument that anyone
8 who knows about a violation of the Constitution, and fails to cure it, has violated the Constitution
9 himself is not correct. “Only persons who cause or participate in the violations are responsible.
10 Ruling against a prisoner on an administrative complaint does not cause or contribute to the
11 violation.” Greeno v. Daley, 414 F.3d 645, 656-57 (7th Cir. 2005) accord George, 507 F.3d at
12 609-10; Reed v. McBride, 178 F.3d 849, 851-52 (7th Cir. 1999); Vance v. Peters, 97 F.3d 987,
13 992-93 (7th Cir. 1996).; Haney v. Htay, No. 1:16-CV-00310-AWI-SKO-PC, 2017 WL 698318,
14 at *4–5 (E.D. Cal. Feb. 21, 2017).

15 Thus, Plaintiff’s allegations that Defendants failed to properly process Plaintiff’s appeals
16 fail to state a cognizable due process claim.

17 **(2) False Reports**

18 Plaintiff claims that some of the Defendants wrote false disciplinary reports against him.
19 This allegation, even if true, does not raise a constitutional claim because there is no due process
20 right to be free from false charges. The falsification of a disciplinary report does not state a
21 standalone constitutional claim. Canovas v. California Dept. of Corrections, 2:14-cv-2004 KJN
22 P, 2014 WL 5699750, n.2 (E.D. Cal. 2014); see e.g., Lee v. Whitten, 2:12-cv-2104 GEB KJN P,
23 2012 WL 4468420, *4 (E.D. Cal. 2012). There is no constitutionally guaranteed immunity from
24 being falsely or wrongly accused of conduct which may result in the deprivation of a protected
25 liberty interest. Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout,
26 808 F.2d 949, 951 (2d Cir. 1986)). “Specifically, the fact that a prisoner may have been innocent
27 of disciplinary charges brought against him and incorrectly held in administrative segregation
28 does not raise a due process issue. The Constitution demands due process, not error-free

1 decision-making.” Jones v. Woodward, 2015 WL 1014257, *2 (E.D. Cal. 2015) (citing Ricker v.
2 Leapley, 25 F.3d 1406, 1410 (8th Cir. 1994); McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir.
3 1983)). Therefore, Plaintiff fails to state a due process claim for false information being reported
4 against him.

5 ///

6 **I. Excessive Force**

7 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
8 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” Hudson,
9 503 U.S. at 8. “The objective component of an Eighth Amendment claim is . . . contextual and
10 responsive to contemporary standards of decency.” Id. (internal quotation marks and citations
11 omitted). The malicious and sadistic use of force to cause harm always violates contemporary
12 standards of decency, regardless of whether or not significant injury is evident. Id. at 9; see also
13 Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth Amendment excessive force standard
14 examines *de minimis* uses of force, not *de minimis* injuries)). However, not “every malevolent
15 touch by a prison guard gives rise to a federal cause of action.” Id. at 9. “The Eighth
16 Amendment’s prohibition of cruel and unusual punishments necessarily excludes from
17 constitutional recognition *de minimis* uses of physical force, provided that the use of force is not
18 of a sort ‘repugnant to the conscience of mankind.’” Id. at 9-10 (internal quotations marks and
19 citations omitted).

20 “[W]henver prison officials stand accused of using excessive physical force in violation
21 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was
22 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to
23 cause harm.” Id. at 7. “In determining whether the use of force was wanton and unnecessary, it
24 may also be proper to evaluate the need for application of force, the relationship between that
25 need and the amount of force used, the threat reasonably perceived by the responsible officials,
26 and any efforts made to temper the severity of a forceful response.” Id. (internal quotation marks
27 and citations omitted). “The absence of serious injury is . . . relevant to the Eighth Amendment
28 inquiry, but does not end it.” Id.

1 Plaintiff alleges that defendants Borges and Renteria assaulted and battered him and used
2 pepper spray against him while they were escorting him, causing injuries. Plaintiff's allegations
3 are not yet sufficient to state a claim for use of excessive force. Plaintiff has not alleged facts
4 explaining the circumstances of the escort, such as where and why it happened, how Plaintiff
5 acted, the extent of force used, and Plaintiff's injuries to him were caused by the force, and how
6 each of the named Defendants personally acted against Plaintiff to violate his rights. Therefore,
7 Plaintiff fails to state a cognizable claim under § 1983 for use of excessive force.

8 **J. Medical Claim - Eighth Amendment**

9 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
10 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
11 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part
12 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
13 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury
14 or the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s response to the need
15 was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050,
16 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133,
17 1136 (9th Cir. 1997) (*en banc*) (internal quotations omitted)). Deliberate indifference is shown
18 by “a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm
19 caused by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference
20 may be manifested “when prison officials deny, delay or intentionally interfere with medical
21 treatment, or it may be shown by the way in which prison physicians provide medical care.” Id.
22 Where a prisoner is alleging a delay in receiving medical treatment, the delay must have led to
23 further harm in order for the prisoner to make a claim of deliberate indifference to serious medical
24 needs. McGuckin at 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404,
25 407 (9th Cir. 1985)).

26 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
27 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
28 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but

1 that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer, 511 U.S. at 837). “‘If
2 a prison official should have been aware of the risk, but was not, then the official has not violated
3 the Eighth Amendment, no matter how severe the risk.’” Id. (quoting Gibson v. County of
4 Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A showing of medical malpractice or
5 negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment.”
6 Id. at 1060. “[E]ven gross negligence is insufficient to establish a constitutional violation.” Id.
7 (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

8 “A difference of opinion between a prisoner-patient and prison medical authorities
9 regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337,
10 1344 (9th Cir. 1981) (internal citation omitted). To prevail, a plaintiff “must show that the course
11 of treatment the doctors chose was medically unacceptable under the circumstances . . . and . . .
12 that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.”
13 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

14 In applying this standard, the Ninth Circuit has held that before it can be said that a
15 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
16 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
17 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980), citing
18 Estelle, 429 U.S. at 105-06. “[A] complaint that a physician has been negligent in diagnosing
19 or treating a medical condition does not state a valid claim of medical mistreatment under the
20 Eighth Amendment. Medical malpractice does not become a constitutional violation merely
21 because the victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County of Kern,
22 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin, 974 F.2d 1050, overruled on other grounds by
23 WMX Techs., Inc., 104 F.3d at 1136 (en banc) (internal quotations omitted)). In order to state a
24 claim for violation of the Eighth Amendment, Plaintiff must allege sufficient facts to support a
25 claim that the named defendants “[knew] of and disregard[ed] an excessive risk to [Plaintiff’s]
26 health” Farmer, 511 U.S. at 837.

27 Plaintiff alleges that defendant Sergeant F. Montoya refused to allow him to properly
28 decontaminate from pepper spray and also refused to provide Plaintiff with medical treatment

1 for his injuries. Plaintiff also alleges that defendant D. Osuna (LVN) conducted a medical
2 evaluation of Plaintiff's injuries but refused to allow Plaintiff to fully decontaminate, refused to
3 refer Plaintiff for medical treatment, and refused to document rather than falsify what Plaintiff
4 told him. Sometime later, when Plaintiff experienced complications, defendant Osuna continued
5 to deny him adequate medical care and never processed or honored Plaintiff's 7362 Health Care
6 Services Request. Plaintiff also alleges that defendant C/O J. Gomez procrastinated in providing
7 Plaintiff with adequate health care for the injuries Plaintiff sustained in the attack, thus inflicting
8 more pain upon Plaintiff. Finally, Plaintiff alleges that defendant Gonzales (LVN) refused to
9 treat Plaintiff, have Plaintiff treated, or have Plaintiff's 7362 form processed.

10 Plaintiff's allegations against these Defendants are vague and conclusory. Plaintiff fails
11 to allege *facts* showing that any of the Defendants knew Plaintiff was at serious risk of substantial
12 harm to his health. Plaintiff has not explained the extent of his injuries or how each named
13 defendant personally acted in violation of Plaintiff's rights. Plaintiff should provide more
14 information about his symptoms before decontamination, what measures he was allowed to take
15 to decontaminate, and why the decontamination was not sufficient. Plaintiff should also explain
16 how each of the defendants knew that Plaintiff needed medical care, and how they each
17 personally acted against him, causing him injury.

18 Accordingly, the court finds that Plaintiff fails to state a cognizable Eighth Amendment
19 medical claim against any of the Defendants.

20 **K. State Law Claims**

21 Plaintiff claims that defendants C/O Borges and C/O Renteria assaulted and battered him.
22 Assault and battery are state law claims. Plaintiff is informed that violation of state tort law or
23 other state law is not sufficient to state a claim for relief under § 1983. Section 1983 does not
24 provide a cause of action for violations of state law. See Galen v. Cnty. of Los Angeles, 477
25 F.3d 652, 662 (9th Cir. 2007). To state a claim under § 1983, there must be a deprivation of
26 federal constitutional or statutory rights. See Paul v. Davis, 424 U.S. 693 (1976); also see
27 Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995); Gonzaga University v. Doe, 536
28 U.S. 273, 279 (2002). Although the court may exercise supplemental jurisdiction over state law

1 claims, Plaintiff must first have a cognizable claim for relief under federal law. See 28 U.S.C. §
2 1367. In this instance, the court fails to find any cognizable federal claims in the First Amended
3 Complaint. Therefore, Plaintiff's claims for assault and battery fail.

4 Equally important here, Plaintiff has not demonstrated that he complied with the claim
5 presentation requirements of California's Government Claim Act. The Government Claims Act
6 requires that a tort claim for damages against a public entity or its employees be presented to the
7 California Victim Compensation and Government Claims Board ("the board") no more than six
8 months after the cause of action accrues. Cal. Gov't Code §§ 905, 910, 911.2, 950.2, 950.6. The
9 board has forty-five days to act on a claim, or an application for leave to file a late claim; and
10 absent an extension by agreement, if the board fails to act within forty-five days, the claim is
11 deemed rejected, or the application is deemed denied, on the last day of the prescribed period.
12 Cal. Gov't Code §§ 911.6, 912.4. Presentation of a written claim and action on or rejection of
13 the claim by the board are conditions precedent to suit. Cal. Gov't Code §§ 945.4, 950.6; Shirk
14 v. Vista Unified Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007); State v. Superior Court of Kings
15 Cnty. (Bodde), 32 Cal.4th 1234, 1239, 90 P.3d 116, 13 Cal.Rptr.3d 534 (Cal. 2004); Mabe v. San
16 Bernardino Cnty. Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001); Mangold v.
17 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995). Suit must be commenced
18 not later than six months after the date the written notice is deposited in the mail, Cal. Gov't Code
19 § 945.6(a)(1) (quotation marks omitted); Clarke v. Upton, 703 F.Supp.2d 1037, 1043 (E.D. Cal.
20 2010); Baines Pickwick Ltd. v. City of Los Angeles, 72 Cal.App.4th 298, 303 (Cal. Ct. App.
21 1999), and if written notice is not given, suit must be commenced within two years from accrual,
22 Cal. Gov't Code § 945.6; Baines Pickwick Ltd., 72 Cal.App.4th at 303.

23 Plaintiff has not indicated that he presented a written claim to the state VCGCB within
24 six months of accrual of the action. Cal. Gov't Code §§ 905, 911.2(a), 945.4 & 950.2; Mangold,
25 67 F.3d at 1477. Therefore, Plaintiff fails to state any cognizable state law claims. Plaintiff shall
26 be granted leave to amend to cure the deficiencies in his state law claims found by the court.

27 **L. Request for Declaratory Relief**

1 Besides monetary damages, Plaintiff requests declaratory relief. Such a request is
2 subsumed by Plaintiff's damages claim. See Rhodes, 408 F.3d at 565-66 n.8 (because claim for
3 damages entails determination of whether officers' alleged conduct violated plaintiff's rights, the
4 separate request for declaratory relief is subsumed by damages action); see also Fitzpatrick v.
5 Gates, No. CV 00-4191-GAF (AJWx), 2001 WL 630534, at *5 (C.D. Cal. Apr. 18, 2001)
6 ("Where a plaintiff seeks damages or relief for an alleged constitutional injury that has already
7 occurred declaratory relief generally is inappropriate[.]") Therefore, Plaintiff is not entitled to
8 declaratory relief in this case.

9 **M. No Monetary Damages Without Physical Injury**

10 Plaintiff requests monetary damages for mental and emotional distress. Plaintiff is
11 advised that the Prison Litigation Reform Act provides that "[n]o Federal civil action may be
12 brought by a prisoner confined in jail, prison, or other correctional facility, for mental and
13 emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C.
14 § 1997e(e). The physical injury "need not be significant but must be more than *de minimis*."
15 Oliver, 289 F.3d at 627 (back and leg pain and canker sore *de minimis*); see also Pierce v. County
16 of Orange, 526 F.3d 1190, 1211-13 (9th Cir. 2008) (bladder infections and bed sores, which pose
17 significant pain and health risks to paraplegics such as the plaintiff, were not *de minimis*). The
18 physical injury requirement applies only to claims for mental or emotional injuries and does not
19 bar claims for compensatory, nominal, or punitive damages. Id. at 630.

20 **V. CONCLUSION AND RECOMMENDATIONS**

21 For the reasons set forth above, the court finds that Plaintiff fails to state any cognizable
22 claims under § 1983 against defendants Borges, Renteria, Montoya, Osuna, Gomez, or Gonzales
23 in the First Amended Complaint; and Plaintiff's claims against the remaining defendants are
24 unrelated claims in violation of Rule 18(a) of the Federal Rules of Civil Procedure.

25 Accordingly, **IT IS HEREBY RECOMMENDED** that:

- 26 1. Plaintiff's claims against defendants C/O Borges, C/O Renteria, Sergeant F.
27 Montoya, D. Osuna (LVN), C/O J. Gomez, and Gonzales (LVN) be dismissed
28 from this action for failure to state a claim under § 1983, with leave to amend;

