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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 DANNY JAMES COHEA,
10 Plaintiff,

11 v.

12 J. COLVIN, D. McCARGAR, S.L.
13 BAUGHMAN, M.A. MICHEELS, R
14 YAMAMOTO, SD AKIN, D. ADAMS,
and A GOLD,

15 Defendants.
16

No. 2:00-cv-02799-GEB-EFB

**SECOND SUPPLEMENT TO PRETRIAL
ORDER**

17 Defendants' Supplemental Pretrial Statements filed June
18 5, 2015, (ECF Nos. 277, 279), indicate the following second
19 supplement to the February 20, 2015 Pretrial Order ("PO") should
20 issue.

21 **AFFIRMATIVE DEFENSES**

22 The following affirmative defenses are preserved for
23 trial:

24 1) Statute of limitations concerning Plaintiff's
25 claims against Defendants McCargar, Baughman, and Micheels
26 concerning the September 27, 1997 Rules Violation Report ("RVR"),
27 and

28 2) Qualified immunity alleged by each Defendant.

1 As the Ninth Circuit states in Act Up!/Portland v.
2 Bagley, 988 F.2d 868, 873 (9th Cir. 1993):

3 [T]he determination of what conduct underlies
4 the alleged violation-what the officer and
5 claimant did or failed to do-is a
6 determination of fact [to be decided by a
7 jury;] however, . . . the determination
8 whether those facts support an objective
9 belief that [the officer reasonably believed
10 he was not violating Plaintiff's right to be
11 free from excessive force] is ordinarily a
12 question for the court.

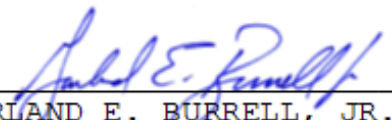
13 Since the jury will not decide the question of law
14 involved in determining whether any Defendant is entitled to
15 qualified immunity, the proposed jury instructions need not
16 include instruction on this affirmative defense. The jury will
17 resolve the discrete issues of fact, if any, and all assertions
18 made by the parties regarding the defense of qualified immunity
19 shall be confined to those issues of fact.

20 Accordingly, a special verdict or interrogatories shall
21 be filed by each party for all factual disputes to be resolved by
22 the jury concerning the qualified immunity affirmative defense no
23 later than July 21, 2015. Further, no later than July 21, 2015,
24 each party shall file proposed prevailing party findings of fact
25 and conclusions of law concerning this affirmative defense.

26 Defendants also assert their position that "[t]he
27 Federal Civil Rights Act provides liability only against those
28 who, through their personal involvement or failure to perform
legally required duties, caused the deprivation of another's
constitutionally protected rights[,] and they did not
"personally cause Plaintiff any harm." (Defs. Adams, Akins,
Baughman, Colvin, Gold, McCargar, Micheels, and Yamamoto's Supp.

1 Pretrial Stmt. 2:2-4, 2:12, ECF No. 277; Def. Scarsella's Supp.
2 Pretrial Stmt. 1:26-28, 2:8-9, ECF No. 279.) However, argument
3 that "merely negates . . . element[s]" of a claim is not an
4 affirmative defense. Zivkovic v. S. Cal. Edison Co., 302 F.3d
5 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that
6 plaintiff has not met its burden of proof is not an affirmative
7 defense.").

8 Dated: June 8, 2015

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13 GARIAND E. BURRELL, JR.
14 Senior United States District Judge
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