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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE I. JOHNSON,

Plaintiff,

No. CIV S-07-1826 MCE KJM P

vs.

D.K. SISTO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prison inmate proceeding pro se with an action alleging a violation of his First Amendment right to practice his religion and his rights under the Religious Land Use and Institutionalized Person Act (RLUIPA). In the complaint, submitted under the penalty of perjury, plaintiff alleges that defendant Cruz violated plaintiff's religious dietary needs even though his file contained a number of chronos approving the provision of a religious diet. He also alleges that only Kosher and vegetarian diets are available for religious needs at CSP-Solano, yet the tenets of his Rastafarian faith require him to eat a vegan diet. Compl. (Docket No. 1-2) at 5.¹ Defendants Ward and Hunter interviewed plaintiff about his complaints and defendants Brown and Sisto denied his grievance about the matter. These events occurred during 2006 and 2007.

¹ Unless otherwise specified, the court refers to the page numbers assigned by its CM/ECF system.

1 Plaintiff also alleges that on November 9, 2006, defendant Boyden asked plaintiff
2 to remove his religious headwear. Defendant Singh denied plaintiff's request to be allowed to
3 wear his religious headwear, while defendant Sisto allowed him to wear it in certain areas of the
4 prison and at certain times. Id.

5 Defendants Cruz, Ward, Calvo (nee Hunter), Brown and Sisto have filed a motion
6 for summary judgment on the religious diet issue. Plaintiff has filed a cross-motion for summary
7 judgment on both claims.

8 I. Procedural Matters

9 Defendants object to plaintiff's cross-motion for summary judgment on several
10 grounds. One is dispositive. In the order resetting the schedule for the litigation, the court
11 directed that dispositive motions be filed by December 15, 2008. See Docket No. 30.

12 Defendants timely filed their motion. Plaintiff then requested and received three extensions of
13 time in which to file an opposition or objections to the motion. Docket Nos. 34, 36, 37, 38, 40,
14 41. He did not ask for additional time in which to file his own dispositive motion. Because the
15 motion is not timely, the court will recommend that it be denied. The court will, however,
16 construe the "motion" as an opposition to defendants' motion, given that it followed multiple
17 requests to file such an opposition.

18 II. Summary Judgment Standards

19 Summary judgment is appropriate when it is demonstrated that there exists "no
20 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
21 matter of law." Fed. R. Civ. P. 56(c).

22 Under summary judgment practice, the moving party

23 always bears the initial responsibility of informing the district court
24 of the basis for its motion, and identifying those portions of "the
25 pleadings, depositions, answers to interrogatories, and admissions
demonstrate the absence of a genuine issue of material fact.

26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the

1 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary
2 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers
3 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,
4 after adequate time for discovery and upon motion, against a party who fails to make a showing
5 sufficient to establish the existence of an element essential to that party’s case, and on which that
6 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof
7 concerning an essential element of the nonmoving party’s case necessarily renders all other facts
8 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as
9 whatever is before the district court demonstrates that the standard for entry of summary
10 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

11 If the moving party meets its initial responsibility, the burden then shifts to the
12 opposing party to establish that a genuine issue as to any material fact actually does exist. See
13 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
14 establish the existence of this factual dispute, the opposing party may not rely upon the
15 allegations or denials of its pleadings but is required to tender evidence of specific facts in the
16 form of affidavits, and/or admissible discovery material, in support of its contention that the
17 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party
18 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
19 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
20 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
21 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
22 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,
23 1436 (9th Cir. 1987).

24 In the endeavor to establish the existence of a factual dispute, the opposing party
25 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
26 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing

1 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
2 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
3 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
4 committee’s note on 1963 amendments).

5 In resolving the summary judgment motion, the court examines the pleadings,
6 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
7 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,
8 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the
9 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
10 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
11 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
12 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
13 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
14 show that there is some metaphysical doubt as to the material facts Where the record taken
15 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
16 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

17 On January 30, 2008, the court advised plaintiff of the requirements for opposing
18 a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154
19 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klinge v.
20 Eikenberry, 849 F.2d 409 (9th Cir. 1988).

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1 III. Facts

2 New regulations governing inmate participation in a religious diet program
3 became effective on April 24, 2006. Defendants' Motion For Summary Judgment (DMSJ),

4 Ex. 3. Under these provisions,

5 (a) Any inmate who claims to require a religious diet shall be
6 responsible for completing a CDCR Form 3030 . . . , Religious Diet
7 Request . . . , and submitting it to the appropriate institution's
8 Chaplain. . . .

9 (b) The Chaplain shall:

10 (1) Interview the inmate to explain the two religious diet options
11 (including what the meals consist of) and determine the inmate's
12 religious diet program eligibility.

13 (2) When religious diet program eligibility is determined, explain
14 the department's Religious Diet Program Agreement.

15 (3) When applicable, have the inmate sign the CDCR Form 3030-
16 A. . . , Religious Diet Program Agreement

17 (4) Complete and distribute the CDCR Form 3030, Religious Diet
18 Request and/or the CDCR Form 3030-A, Religious Diet Program
19 Agreement, within two working days.

20
21 (6) Enter pertinent information for each inmate approved to
22 participate in a religious diet program onto a religious diet
23 participant list within 24 hours of approval. Maintain, update the
24 list every 30 days, and provide the [Correctional Food Manager]
25 CFM with a copy of the list of those inmates who have been
26 determined eligible to receive a religious diet, and which diet they
will receive.

.....
.....
(9) Provide each approved inmate with a CDCR Form 3030-B,
Religious Diet Card. . . .

24 Id. (copy of 15 Cal. Code Regs. § 3054.3); see also DMSJ, Ex. 2 (Department Operations
25 Manual (DOM) § 54080.14 (providing that inmate is responsible for completing request for

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1 religious diet card and submitting it to the institution's chaplain; chaplain shall issue religious
2 diet card)); Opposition (Opp'n), Ex. A.

3 The California Department of Corrections and Rehabilitation (CDCR) currently
4 provides two religious diet choices: a Jewish Kosher diet and a religious vegetarian diet, which
5 includes dairy products, eggs and even fish, on occasion. DMSJ, Exs. 2 & 3.

6 In 2006, defendant Sisto, the Warden, began to implement the changes in the
7 religious diet program, referenced above. DMSJ, Declaration of D. Sisto (Sisto Decl.) ¶¶ 1, 5.
8 On September 14, 2006, he issued a memorandum outlining the process inmates had to follow to
9 receive religious diet cards. Id. ¶ 6 & Ex. B. Under this policy, an inmate would not be placed in
10 the religious diet program without signing a Religious Diet Program Agreement, CDCR 3030-A.
11 Id. Even those inmates who were already participating in the religious diet program were
12 required to reapply for a religious diet card under the new program. DMSJ, Declaration of N.
13 Calvo (Calvo Decl.) ¶ 3; Sisto Decl. ¶ 5. The issuance of new religious diet cards was scheduled
14 for the week of October 16-20, 2006. Sisto Decl., Ex. B.

15 On October 11, 2006, defendant Cruz was a supervising correctional cook at CSP-
16 Solano. Declaration of A. Cruz (Cruz Decl.) ¶ 1. On that day, he denied plaintiff his religious
17 diet, which had been approved in 2004. Compl. at 4. Cruz does not have the authority to
18 provide a religious diet to an inmate without a valid religious diet card, which must be approved
19 by the chaplain. Cruz Decl. ¶¶ 5, 7.

20 Defendant Calvo (nee Hunter) is a supervising correctional cook at CSP-Solano.
21 Calvo Decl. ¶ 1. On October 24, 2006, she interviewed plaintiff in connection with his grievance
22 about Cruz's refusal to provide plaintiff with his religious diet. Calvo Decl. ¶ 3 & Ex. A at 5-7²;
23 Opp'n, Ex. B at 16. Calvo told him she had contacted Imam Nasir on plaintiff's behalf, that the
24 Imam would meet with plaintiff for the purpose of issuing a new religious diet card, and the

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26 ² Once again, the court relies on the CM/ECF-assigned page numbers for pinpointing
internal pages of the exhibits.

1 culinary staff would not accommodate plaintiff until he received a new religious diet card.
2 Calvo Decl. ¶ 3. Under CDCR regulations, Calvo did not have the authority to grant a religious
3 diet request without the chaplain's approval. Calvo Decl. ¶¶ 4-6; 15 Cal. Code Regs. § 3054.3.

4 In 2006, defendant J. Ward was a correctional food manager at CSP-Solano and,
5 as part of his duties, reviewed inmate appeals related to the institution's food service. DMSJ,
6 Declaration of J. Ward (Ward Decl.) ¶¶ 1-3. In December 2006, Ward interviewed plaintiff in
7 connection with his appeal concerning his religious diet. Id. ¶ 4 & Ex. A at 9-10. He noted that,
8 at the time of the interview, plaintiff had not reapplied for his religious diet card under the new
9 regulations. Id. ¶ 7. Ward did not have the authority under these regulations to grant plaintiff's
10 request for a religious diet. Id. ¶¶ 7-8.

11 Based in part on defendant Ward's interview of plaintiff, defendant Brown, who
12 was then the Associate Warden of Business Services at CSP-Solano, provided the first level
13 response to plaintiff's grievance requesting that he be given a religious diet. DMSJ, Declaration
14 of C. Brown (Brown Decl.) ¶¶ 1, 4. Brown denied the appeal because plaintiff had not requested
15 the interview with the chaplain, which was a necessary prerequisite to his receiving a religious
16 diet card under the new program, even for those who had previously been approved for religious
17 diets. Brown Decl. ¶¶ 7, 9 & Ex. A at 9; 15 Cal. Code Regs. § 3054.3; DOM § 54080.14.
18 Under the regulations, Brown did not have the authority to grant plaintiff's request for a religious
19 diet. Brown Decl. ¶¶ 11-12.

20 In January 2007, defendant Sisto reviewed plaintiff's grievance concerning his
21 religious diet; at that time, plaintiff had not been issued a new religious diet card, which was
22 required for continued participation in the program. Sisto Decl. ¶ 8. Even as warden, Sisto did
23 not have the authority to circumvent the procedures put in place for the approval of religious
24 diets. Id. ¶ 9.

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1 Plaintiff received his religious diet card in March 2007. Compl. at 5.³ He is still
2 unable to receive the strict vegan diet required by his Rastafarian faith because the prison offers
3 only two religious diets: Kosher and ovo-lacto vegetarian. *Id.* None of the defendants in this
4 case, however, is involved in designing menus for inmates or has the authority to order
5 substitutions, except in cases of emergency. Brown Decl. ¶¶ 2, 11; Calvo Decl. ¶ 4; Cruz Decl.
6 ¶¶ 2, 4; Sisto Decl. ¶ 7; Ward Decl. ¶¶ 2, 9.

7 IV. Analysis

8 Although inmates' rights are restricted by the realities of incarceration, they do
9 retain the right to the free exercise of religion, tempered by legitimate penological concerns.
10 *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). A religious claim has two components:
11 the claimant's belief must be sincerely held and it must be based on religious belief, not on
12 secular philosophical concerns. *See, e.g., Callahan v. Woods*, 668 F.2d 679, 683 (9th Cir. 1981).
13 "Inmates also have the right to be provided with food sufficient to sustain them in good health
14 that satisfies the dietary laws of their religion." *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir.
15 1987).

16 In order to state a claim for relief under RLUIPA, a plaintiff must allege that the
17 exercise of his religion has been "substantially burdened." 42 U.S.C. § 2000cc-1. A "substantial
18 burden" on "religious exercise" must impose a significantly great restriction or onus upon such
19 exercise. *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005). Prison officials' refusal to
20 provide an inmate with a religious diet may constitute a substantial burden on the exercise of
21 religion. *Shakur v. Schriro*, 514 F.3d 878, 888-89 (9th Cir. 2008).

22 Defendants do not question the sincerity of plaintiff's religious belief nor do they
23 allege that his request for a vegan diet is based on secular rather than religious belief. Rather,
24 they allege they were not the cause of any harm to plaintiff because they lacked the authority to

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26 ³ Because the complaint is signed under the penalty of perjury, the court relies on it as a
declaration for summary judgment purposes. *See* Compl. at 4.

1 provide him with a religious diet in the absence of a valid religious diet card. DMSJ at 7-8.

2 They also allege they are entitled to qualified immunity.

3 A. Defendants' Ability To Order A Religious Diet

4 To be liable for a civil rights violation, a state actor must act or fail to act in a
5 manner that deprives another of a constitutional right. Leer v. Murphy, 844 F.2d 628, 632 (9th
6 Cir. 1988).

7 The Ninth Circuit explains:

8 A person deprives another of a constitutional right, within the
9 meaning of section 1983, if he does an affirmative act, participates
10 in another's affirmative acts, or omits to perform an act which he is
11 legally required to do that *causes* the deprivation of which [the
12 plaintiff complains]. The inquiry into causation must be
individualized and focus on the duties and responsibilities of each
individual defendant whose acts or omissions are alleged to have
caused a constitutional deprivation.

13 Id. at 633 (internal citation, quotation omitted; emphasis in original). Accordingly, when a
14 defendant follows a policy over which he has no control or has not promulgated, he may not be
15 the cause of any constitutional violation. See Estate of Brooks v. United States, 197 F.3d 1245,
16 1248 (9th Cir. 1999); see also Tinsley v. Pittari, 952 F.Supp. 384 (N.D. Tex. 1996) (prison
17 chaplain followed BOP policy on religious holidays; plaintiff failed to submit documentation for
18 religious exemption from policy; chaplain not liable).

19 Plaintiff has not challenged the requirement that he secure a new religious diet
20 card on either First Amendment or RLUIPA bases. Compare Koger v. Bryan, 523 F.3d 789, 799
21 (7th Cir. 2008). Nor has he presented any evidence suggesting that the defendants had the
22 discretion or ability to deviate from the requirements of the regulations and provide him a
23 religious diet in the absence of any effort on his part to secure a new diet card. Thus, when
24 defendants Calvo (Hunter), Ward, Brown and Sisto denied plaintiff's grievance and denied him a
25 religious diet, they were acting in accordance with the new regulations and defendant Sisto's
26 implementing memorandum.

1 Plaintiff fares no better if he alleges that these defendants are liable because of
2 their resolution of his grievance: Because inmates do not have a substantive right to prison
3 grievance procedures, the manner in which a grievance is processed does not give rise to a civil
4 rights claim. Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Defendants Calvo, Ward,
5 Brown and Sisto are entitled to summary judgment.

6 The situation is different, however, with respect to defendant Cruz. The evidence
7 is undisputed that Cruz denied plaintiff a religious-diet meal on October 11, 2006. The evidence
8 is similarly undisputed that the new religious diet policy did not take effect until October 16,
9 2006, and new religious diet cards were to be issued during the week beginning October 16,
10 2006. Plaintiff has averred that he had been approved to receive a religious diet before the
11 change in policy and that this refusal occurred before the new religious diet cards were to be
12 issued. Compl. at 4. Nothing in the new policies or in defendant Sisto's implementing
13 memorandum suggests that those who had been previously approved for religious diets could
14 have their approved meals withheld before the new cards were due to be issued.

15 B. Lack Of A Vegan Diet

16 In his opposition to the motion for summary judgment and tangentially in his
17 complaint, plaintiff contends that his Rastafarian religion requires him to eat a vegan diet and
18 that the religious vegetarian diet includes eggs and dairy products. Compl. at 5. Plaintiff has
19 presented no evidence disputing the defendants' averments that they do not create the menus and
20 cannot order substitutions of menu items, nor has he named as defendants those in CDCR
21 responsible for establishing the system-wide religious diet plans. Defendants are entitled to
22 summary judgment on this argument, to the extent it is deemed properly raised.

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1 C. Qualified Immunity⁴

2 Government officials performing discretionary functions generally are shielded
3 from liability for civil damages insofar as their conduct does not violate clearly established
4 statutory or constitutional rights of which a reasonable person would have known. Harlow v.
5 Fitzgerald, 457 U.S. 800, 818 (1982). In determining whether a governmental officer is immune
6 from suit based on the doctrine of qualified immunity, the court considers two questions. One is,
7 taken in the light most favorable to the party asserting the injury, do the facts alleged show the
8 officer's conduct violated a constitutional right? Saucier v. Katz, 533 U.S. 194, 201 (2001). A
9 negative answer ends the analysis, with qualified immunity protecting a defendant from liability.
10 Id. If a constitutional violation occurred, a court must also inquire “whether the right was clearly
11 established.” Id. “If the law did not put the [defendant] on notice that [his] conduct would be
12 clearly unlawful, summary judgment based on qualified immunity is appropriate.” Id. at 202.
13 The district court may decide the order of addressing these questions and answer only the second,
14 in accordance with fairness and efficiency and in light of the circumstances of a particular case.
15 Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808 (2009).

16 Given the particular circumstances of this case, this court sees no reason to depart
17 from the order of analysis originally presented in Saucier. As noted above, plaintiff has made a
18 sufficient showing that Cruz violated plaintiff’s constitutional and statutory rights by denying
19 him a religious diet meal on October 11, 2006.

20 Cruz relies on the fact that he could not approve plaintiff’s request for a religious
21 diet in the absence of the chaplain’s approval. DMSJ at 11. He does not argue he is entitled to
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23 ⁴ While no court in the Ninth Circuit has explicitly addressed whether qualified
24 immunity applies to RLUIPA cases, other courts have resolved RLUIPA claims on qualified
25 immunity grounds. See David v. Giurbino, 488 F.Supp. 2d 1048, 1057-59 (S.D. Cal. 2007);
26 Salahuddin v. Goord, 467 F.3d 263, 273 (2d Cir. 2006); Lovelace v. Lee, 472 F.3d 174, 196-97
(4th Cir. 2006) (all applying qualified immunity analysis to a RLUIPA claim). This court also
assumes the doctrine applies to this claim.

1 qualified immunity based on general uncertainty in the law over the necessity of providing
2 religious diets to prisoners.

3 As noted above, according to defendant Sisto’s memorandum, new religious diet
4 cards were to be issued during the week of October 16, yet Cruz refused plaintiff a religious
5 vegetarian meal on October 11. Cruz has pointed to nothing suggesting that those who had
6 previously been authorized to receive a religious diet would be removed from the program prior
7 to the implementation of the new procedures. He is not entitled to qualified immunity.

8 D. Punitive Damages

9 Defendant Cruz argues that plaintiff’s prayer for punitive damages should be
10 dismissed because there is no evidence that Cruz acted with an evil motive. DMSJ at 9.

11 Punitive damages may be appropriate when “defendant's conduct is shown to be
12 motivated by evil motive or intent, or when it involves reckless or callous indifference to the
13 federally protected rights of others.” Smith v. Wade, 461 U.S. 30, 56 (1983). Plaintiff alleges
14 Cruz denied him a religious meal despite the prior approval, at a time before the implementation
15 of the new religious diet program. On the current record, the court cannot say plaintiff will be
16 unable to prove his entitlement to punitive damages based on some form of indifference at least.

17 IT IS HEREBY RECOMMENDED that:

- 18 1. Plaintiff’s cross-motion for summary judgment (docket no. 42) be denied; and
19 2. Defendants’ motion for summary judgment (docket no. 32) be granted as to:

20 A. Defendants Hunter (Calvo), Ward, Brown and Sisto insofar as the
21 complaint alleges denial of a religious diet;

22 B. Defendants Hunter (Calvo), Ward, Brown, Sisto and Cruz to the
23 extent plaintiff alleges he does not receive a vegan diet; and

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1 3. Defendants' motion for summary judgment (docket no. 32) be denied as to:

2 A. Defendant Cruz, insofar as the complaint alleges he denied plaintiff a
3 religious meal on October 11, 2006; and

4 B. Defendants' request that the claim for punitive damages be stricken.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
7 days after being served with these findings and recommendations, any party may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
10 shall be served and filed within ten days after service of the objections. The parties are advised
11 that failure to file objections within the specified time may waive the right to appeal the District
12 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: September 1, 2009.

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17 U.S. MAGISTRATE JUDGE
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