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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BRIAN DEVERICK LEWIS,

Plaintiff,

v.

M. WAGNER, Correctional Officer,

Defendant.

CASE NO. 14cv2264-WQH-BGS

ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation filed by United States Magistrate Judge Bernard G. Skomal. (ECF No. 30).

I. Background

On September 23, 2014, Plaintiff Brian Deverick Lewis, a state prisoner proceeding pro se, initiated this action by filing a Complaint pursuant to 42 U.S.C. § 1983 against Defendant M. Wagner. (ECF No. 1). The Complaint alleges that Defendant violated Plaintiff's right to be free from retaliatory punishment for engaging in conduct protected by the First Amendment. Plaintiff alleges that Defendant violated his First Amendment, Eighth Amendment, and Fourteenth Amendment rights. Plaintiff alleges that "Defendant disciplined [Plaintiff] in a retaliatory manner by searching his cell and confiscating his personal property for exercising his First Amendment right of submitting a CDCR 602 against Defendant." (ECF No. 30 at 3). On January 5, 2015, Defendant filed an answer. (ECF No. 5).

On October 13, 2015, Defendant filed a motion for summary judgment. (ECF

1 No. 15). On February 17, 2016, Plaintiff filed an opposition and cross motion for
2 summary judgment. (ECF No. 28). On March 16, 2016, Defendant filed a reply in
3 support of Defendant’s motion for summary judgment. (ECF No. 29).

4 On June 7, 2016, the Magistrate Judge issued the Report and Recommendation,
5 recommending that the Court grant the motion for summary judgment filed by
6 Defendant. (ECF No. 30). With regard to Plaintiff’s First Amendment claim, the
7 Report and Recommendation states, “Plaintiff has not submitted evidence of opposition
8 to his protected speech,” and “Defendant has presented evidence that . . . Defendant
9 Wagner had a legitimate correctional purpose for searching Plaintiff’s cell.” *Id.* at 15.
10 The Report and Recommendation states “[I]t does not appear that Plaintiff’s exercise
11 of his First Amendment rights were chilled by the threat of the search or the search
12 itself.” *Id.* With regard to Plaintiff’s Eighth Amendment claim, the Report and
13 Recommendation states, “Defendant’s actions do not demonstrate knowledge and
14 disregard of excessive medical risk” and “[n]o triable issue of material fact exists as to
15 the objective or subjective components of Plaintiff’s claim.” *Id.* at 18. With regard to
16 Plaintiff’s Fourteenth Amendment claim, the Report and Recommendation states,
17 “There is no evidence that Plaintiff pursued the state law remedy available to him under
18 California Government Code §§ 810 et seq. before asserting his constitutional claim.
19 Therefore, as a matter of law, Defendant is entitled to summary judgment on Plaintiff’s
20 Fourteenth Amendment Claim.” *Id.* at 20.

21 The Court granted Plaintiff two extensions of time to file objections to the Report
22 and Recommendation. (ECF Nos. 33, 36). The final Order issued by the Court stated,
23 “Plaintiff shall file any objections to the Report and Recommendation on or before
24 September 1, 2016. Defendants shall file any reply on or before September 12, 2016.”
25 (ECF No. 36). The docket reflects that no objections have been filed.

26 **II. Discussion**

27 The duties of the district court in connection with a report and recommendation
28 of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28


1 U.S.C. § 636(b). The district judge must “make a de novo determination of those
2 portions of the report . . . to which objection is made,” and “may accept, reject, or
3 modify, in whole or in part, the findings or recommendations made by the magistrate.”
4 28 U.S.C. § 636(b). The district court need not review de novo those portions of a
5 Report and Recommendation to which neither party objects. *See Wang v. Masaitis*, 416
6 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
7 (9th Cir. 2003) (en banc) (“Neither the Constitution nor the [Federal Magistrates Act]
8 requires a district judge to review, de novo, findings and recommendations that the
9 parties themselves accept as correct.”).

10 The Court has reviewed the Report and Recommendation, the record, and the
11 submissions of the parties. The Court concludes that the Magistrate Judge correctly
12 recommended that Defendant’s motion for summary judgment be granted. The Report
13 and Recommendation is adopted in its entirety. Plaintiff’s cross motion for summary
14 judgment (ECF No. 28) is denied.

15 **III. Conclusion**

16 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 30)
17 is ADOPTED in its entirety. Defendants’s motion for summary judgment (ECF No.
18 15) is GRANTED and Plaintiff’s cross motion for summary judgment (ECF No. 28)
19 is DENIED.

20 DATED: September 13, 2016

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22 **WILLIAM Q. HAYES**
23 United States District Judge
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