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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 FREDRICK LEE CHRISTOPHE,

9 Plaintiff,

10 v.

11 T. NUNN,

12 Defendant.

No. 2:19-CV-519-BJR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

13 This matter comes before the Court on a Report and Recommendation of the Honorable
14 Michelle L. Peterson, United States Magistrate Judge, on Defendant's motion for summary
15 judgment. Plaintiff has filed objections to the Report and Recommendation. The Court, having
16 reviewed the Report and Recommendation, Plaintiff's objections, and the remaining record,
17 hereby finds and ORDERS as follows:

18 (1) The Court adopts the Report and Recommendation (Dkt. No. 54).

19 (2) Defendant's Motion for Summary Judgment (Dkt. No. 34) is GRANTED and this
20 action is DISMISSED with prejudice.
21

22 The reasons for the Court's decision are set forth below.

23 **I. BACKGROUND**

24 Plaintiff Fredrick Lee Christophe has brought this action under 42 U.S.C. § 1983 against
25 Defendant Timothy Nunn, an officer of the City of Auburn Police Department. Plaintiff alleges
26 the use of excessive force by Defendant during an arrest and seeks \$1,000,000 in damages.

ORDER - 1

1 Plaintiff was arrested in the early morning hours on January 15, 2019, in Kent,
2 Washington, following a pursuit by law enforcement. Defendant was one of the officers at the
3 scene of the arrest and was accompanied by a K-9 partner (i.e., a police dog).

4 Plaintiff's amended complaint alleges that Defendant arrived at the scene of the arrest
5 with his K-9 partner while Plaintiff was "laying on the ground, face down, with his hands cuffed
6 behind his back." Dkt. No. 7 at 5. Plaintiff alleges that Defendant whispered in the ear of his K-
7 9 partner "let's show his black ass what we do to runners" and gave a command that caused the
8 dog to leap forward and bite Plaintiff on his leg. *Id.*

9 Defendant denies Plaintiff's allegations. After the close of discovery, Defendant moved
10 for summary judgment, arguing that Plaintiff's version of the facts is "physically impossible,
11 speculative, and only supported by his conclusory, self-serving statement." Dkt. No. 34 at 8. In
12 support of his motion, Defendant offered evidence that included:
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- 14 • Declarations from himself and three other police officers involved in the arrest in
15 which the officers deny that Plaintiff was bitten by Defendant's K-9 partner. Dkt.
16 Nos. 37-40.
- 17 • A photograph of Plaintiff's leg, which was taken at Plaintiff's deposition after he was
18 asked to show where he had been bitten. The photograph shows a scar on Plaintiff's
19 left upper thigh where he alleges that the bite occurred. Dkt. No. 35, Ex. 4.
- 20 • Plaintiff's deposition testimony indicating that he was certain Defendant and his K-9
21 partner were on Plaintiff's right side before the dog bit him. Dkt. No. 35, Ex. 1 at 81.
- 22 • Plaintiff's deposition testimony in which he acknowledged that if the K-9 was on
23 Plaintiff's right side while Plaintiff was lying face down, the dog could not have
24 bitten his left thigh where Plaintiff claimed the bite occurred. Dkt. No. 35, Ex. 1 at
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1 81-83. Plaintiff testified the dog “hit me when I was handcuffed, face down. I’m
2 trying to figure out now. If I’m faced down like this, he can’t hit me like that. So it
3 had to have been when they either rolled me over like this. How do you get to that
4 part of the leg. I just don’t remember.” *Id.* at 82.

- 5 • Plaintiff’s deposition testimony that the dog bite created tears or holes in his jeans and
6 resulted in a little blood on his pants. Dkt. No. 35, Ex. 1, at 63, 65-66
- 7 • A photograph of Plaintiff from the arrest scene taken after the bite allegedly occurred
8 that shows no visible tears, holes, or blood on Plaintiff’s pants in the area where he
9 alleges that the bite occurred. Dkt. No. 35, Ex. 5.
- 10 • Plaintiff’s deposition testimony indicating that he could not testify under penalty of
11 perjury that he was certain that Defendant made the statement “let’s show his black
12 ass what we do to runners.” Dkt. No. 35, Ex. 1, at 73-75.

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15 In response to Defendant’s motion for summary judgment, Plaintiff asserted that
16 evidence exists to support his claim that he was bitten. He claimed that this evidence includes
17 medical records from the Kent City Jail and St. Joseph Hospital in Tacoma, where he said he
18 received treatment for the dog bite. Dkt. No. 43 at 3-4. He also asserted that there is a video of
19 the arrest, which Plaintiff claimed was altered so that “the piece showing the dog bite was
20 deleted.” *Id.* at 3. In addition, he argued that police reports from the arrest indicate that the dog
21 “nosed” him, although Plaintiff also claimed these reports were falsified to omit mentioning that
22 the K-9 was released on Plaintiff. *Id.* at 2.

23
24 However, Plaintiff presented none of this evidence in his response to Defendant’s motion.
25 Instead, Plaintiff requested that the Court take steps to obtain and review evidence to support his
26 claims. Plaintiff asked the Court to review the video of his arrest, which he claimed “is running

1 report and recommendation to which written objection is made. *United States v. Reyna-Tapia*,
2 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

3 **B. Plaintiff's Objections**

4 Plaintiff has submitted numerous objections to the Report and Recommendation. Dkt.
5 No. 55. Generally speaking, Plaintiff's objections concern two central issues: (1) the lack of
6 evidence submitted by Plaintiff to support his claim; and (2) whether there is a genuine issue of
7 material fact that precludes summary judgment from being entered in favor of Defendant.
8

9 **1. Lack of Evidence to Support Plaintiff's Claim**

10 **a. Request for the Court to Obtain Evidence**

11 In his objections, Plaintiff suggests that it is the Court's duty to procure evidence in this
12 case. Dkt. No. 55 at 3. However, as the Report and Recommendation correctly notes, "[i]t is not
13 the Court's role or responsibility to procure the evidence necessary to support Plaintiff's claims,
14 it is Plaintiff's burden to do so, and to do so in a timely manner." Dkt. No. 54 at 11; *see also*
15 *Murphy v. Grochowski*, 3:18-CV-01404, 2021 WL 134205, at *4 (M.D. Pa. Jan. 14, 2021)
16 (noting that "the court does not obtain evidence for litigants"); *see generally Bias v. Moynihan*,
17 508 F.3d 1212, 1219 (9th Cir. 2007) ("A district court lacks the power to act as a party's lawyer,
18 even for *pro se* litigants."). In a civil action such as this case, Plaintiff is responsible for
19 obtaining and presenting evidence to support his claims. The Federal Rules of Civil Procedure
20 provide litigants with the opportunity to obtain evidence through discovery requests to the
21 opposing party, as well as through subpoenas to third parties.
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24 The record also indicates that Plaintiff was aware of his responsibility to obtain evidence
25 to support his claims. In January 2020, Plaintiff sent a letter to the Court stating that he had
26 "been diligently trying to obtain documents" concerning his case and apologizing for "not being

1 more prompt regarding this matter.” Dkt. No. 29. In February 2020, Plaintiff sent the Court
2 another letter, which was construed as a motion for an extension of time, requesting a “30 day
3 extension to better try to prepare for this matter” because he was “trying to obtain a few more
4 documents to prove my claim” Dkt. No. 30. As discussed below, Plaintiff was granted an
5 extension of the discovery deadline until May 25, 2020, based on this request. Dkt. Nos. 32 and
6 33. These communications make clear that Plaintiff understood that it was his duty, rather than
7 the Court’s, to obtain evidence to support his claims.
8

9 **b. Defendant’s Burden on Summary Judgment**

10 Plaintiff also argues that Defendant’s counsel, as lawyers who are defending a police
11 officer at taxpayer expense, have a “duty to produce unequivocal material to establish a
12 conclusive fact.” Dkt. No. 55 at 3. This argument misapprehends the requirements for
13 production of evidence at the summary judgment stage in civil cases. Defendant had the initial
14 burden of production in his motion for summary judgment to either (1) produce evidence
15 negating an essential element of Plaintiff’s claim; or (2) show that the Plaintiff does not have
16 enough evidence of an essential element of his claim to carry its ultimate burden of persuasion at
17 trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).
18 Defendant satisfied this initial burden of production in his summary judgment motion by
19 producing evidence to negate Plaintiff’s claim that he was bitten, as well as by showing that
20 Plaintiff does not have sufficient evidence to persuade a reasonable jury that he was bitten. The
21 burden then shifted to Plaintiff to produce evidence to support his claim. *Id.* at 1103. To defeat
22 Defendant’s motion for summary judgment, Plaintiff had to “produce enough evidence to create
23 a genuine issue of material fact.” *Id.*
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1 Plaintiff appears to suggest that Defendant was obliged to present video recordings of the
2 arrest to the Court to obtain summary judgment. However, as discussed above, it would be
3 Plaintiff's responsibility to present such recordings to the Court if Plaintiff believes such
4 recordings would create a genuine issue of material fact. Plaintiff had the opportunity through
5 the discovery process to obtain copies of any video recordings of his arrest. To meet his burden
6 of showing a genuine issue of material fact for trial, it is not sufficient for Plaintiff to allege in an
7 unsworn response to Defendant's summary judgment motion that video recordings of the arrest
8 exist and have been altered to delete evidence that Plaintiff was bitten.
9

10 **c. Request for More Time**

11 In his objections, Plaintiff generally requests "more time" in light of the COVID-19
12 pandemic. Dkt. No. 55 at 8. However, Plaintiff's initial complaint was filed in this Court in
13 April 2019 and Plaintiff had the opportunity to obtain evidence before the pandemic began in
14 Washington State in early 2020. Although the initial discovery deadline of March 16, 2020
15 occurred during the pandemic, as noted above the Court extended the discovery deadline to May
16 25, 2020 at Plaintiff's request. Dkt. Nos. 32 and 33.
17

18 Federal Rule of Civil Procedure 56(d) provides a mechanism for a party in a civil case to
19 seek more time to obtain evidence to respond to a summary judgment motion. This rule
20 provides:

21 If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot
22 present facts essential to justify its opposition, the court may:

- 23 (1) defer considering the motion or deny it;
24 (2) allow time to obtain affidavits or declarations or to take discovery; or
25 (3) issue any other appropriate order.

26 Here, Plaintiff has not offered an affidavit or declaration to support his assertions that he has
been unable to present facts essential to justify his opposition to Defendant's motion for

1 summary judgment. Nor has Plaintiff shown that he was diligent in seeking discovery before
2 Defendant moved for summary judgment, despite receiving an extension of the discovery
3 deadline. *See Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995) (district court does not abuse its
4 discretion by denying further discovery if the movant has failed diligently to pursue discovery in
5 the past).

6
7 The Court understands that it is challenging for an unrepresented person to litigate a civil
8 case. Nonetheless, “[p]ro se litigants must follow the same rules of procedure that govern other
9 litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled on other grounds*
10 *by Lacey v. Maricopa Cnty.*, 693 F.3d 896, 925 (9th Cir. 2012). Here, Plaintiff had the
11 opportunity to obtain evidence by using the tools for discovery provided by the Federal Rules of
12 Civil Procedure. In addition, the evidence that Plaintiff claims would support his case includes
13 his own medical records from St. Joseph Hospital in Tacoma, which Plaintiff should have been
14 able to obtain at any time through a request to the hospital.

15
16 The Court recognizes that unrepresented litigants who are incarcerated face added
17 challenges in obtaining evidence and conducting litigation. However, the record indicates that
18 Plaintiff was not incarcerated for much of this litigation. Although Plaintiff filed his complaint
19 in April 2019 while incarcerated (Dkt. 1-1 at 3), he later filed a number of address changes that
20 listed addresses that are not correctional facilities.¹ It appears from the record that Plaintiff was
21 not incarcerated for approximately a year between August 2019 to August 2020. Plaintiff
22 informed the Court that he was again incarcerated on August 21, 2020, when he was arrested in
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¹ *See* Dkt. No. 13 (August 2019 address change); Dkt. No. 20 (October 2019 address change); Dkt. No. 28 (January 2020 address change); Dkt. No. 41 (Defendant’s counsel represents in July 2020 that Plaintiff told him that Plaintiff’s new address was in Bellevue, Washington); Dkt. No. 43 (showing that Plaintiff’s response to Defendant’s summary judgment motion was filed in an envelope listing a return address in Bellevue).

1 Bellevue on an outstanding warrant. Dkt. No. 48 at 3-4. By that point, discovery had closed and
2 the briefing period for Defendant’s summary judgment motion had been completed.²

3 Therefore, the Court finds that no additional extensions of time are warranted.

4
5 **2. Whether a Genuine Issue of Material Fact Precludes Summary Judgment**

6 In his objections, Plaintiff argues that material facts are in dispute in this case. Under
7 Federal Rule of Civil Procedure 56(a), summary judgment is proper if the moving party shows
8 that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as
9 a matter of law.”

10 “A fact issue is genuine ‘if the evidence is such that a reasonable jury could return a
11 verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th
12 Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). As Magistrate
13 Judge Peterson noted in the Report and Recommendation, the United States Supreme Court has
14 also held that “[w]hen opposing parties tell two different stories, one of which is blatantly
15 contradicted by the record, so that no reasonable jury could believe it, a court should not adopt
16 that version of the facts for the purposes of ruling on a motion for summary judgment.” *Scott v.*
17 *Harris*, 550 U.S. 372, 380 (2007).

18
19 **a. Evidence Before the Court**

20 Here, the only evidence that Plaintiff has presented to support his claim that he was bitten
21 by Defendant’s K-9 partner are his own statements. Although Defendant characterizes
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24 ² Because Plaintiff was not incarcerated when Defendant filed his motion for summary judgment, Plaintiff was not
25 entitled to a notice pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), of summary judgment requirements.
26 See, e.g., *James v. Puga*, 585 Fed. Appx. 510, 511 (9th Cir. 2014) (*Rand* requirements do not apply when plaintiff is
no longer incarcerated by the time a summary judgment motion is filed); *Anderson v. Deleon*, No. C 12-6055, 2014
WL 3595020, at *4 (N.D. Cal. July 21, 2014) (same), *declined to follow on other grounds* by *Jackson v. Fong*, 870
F.3d 928, 935 n.4 (9th Cir. 2017). Nonetheless, Defendant provided Plaintiff with a *Rand* notice concurrently with
his motion for summary judgment. Dkt. No. 36.

1 Plaintiff's statements as self-serving, "the district court may not disregard a piece of evidence at
2 the summary judgment stage solely based on its self-serving nature." *Nigro v. Sears, Roebuck &*
3 *Co.*, 784 F.3d 495, 497 (9th Cir. 2015). Plaintiff's amended complaint was signed under penalty
4 of perjury (Dkt. No. 7), and therefore Plaintiff's contentions in his verified amended complaint
5 are evidence that the Court considers to the extent they are based on personal knowledge and set
6 forth facts that would be admissible in evidence.³ *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.
7 2004).

8
9 In Plaintiff's amended complaint, he alleged under penalty of perjury that:

10 Defendant Nunn, with his K-9 partner in tow and on leash, approached Plaintiff as
11 Plaintiff was laying on the ground, face down, with his hands cuffed behind his back. As
12 Plaintiff observed Defendant Nunn and his K-9 partner approaching, Defendant Nunn
13 suddenly bent down, whereupon Plaintiff could hear Defendant Nunn, bent down,
14 whisper into his K-9 partner[']s ear: "let's show his black ass what we do to runners,"
15 whereupon Defendant Nunn gave his K-9 partner a command, whereupon his K-9 partner
16 instantaneously leaped forward toward Plaintiff clamping his teeth into Plaintiff's leg,
17 biting Plaintiff.

18 Dkt. No. 7 at 5. However, as discussed above, Plaintiff subsequently testified in his deposition
19 that: (1) he could not testify under penalty of perjury that he was certain Defendant said "let's
20 show his black ass what we do to runners"; (2) he was certain the dog was on his right side while
21 Plaintiff was lying face down on the ground; and (3) he acknowledged that the dog could not
22 have bitten him where Plaintiff claimed the bite occurred on his upper left thigh if the dog was
23 on his right side while Plaintiff was lying face down on the ground.

24 Plaintiff asserts that during his deposition, he experienced such duress and pressure
25 reliving the event that an "emotional and mental breakdown occurred." Dkt. No. 55 at 2. He
26 also argues that most people cannot recall "every fleeting detail of traumatic events over a year

³ By contrast, Plaintiff's response to Defendant's motion for summary judgment and his objections to the Report and Recommendation are not signed under penalty of perjury. Dkt. Nos. 43, 55.

1 in passing.” *Id.* However, Plaintiff does not identify in his objections any specific testimony
2 from his deposition that he now contends is inaccurate, nor has he offered a statement under
3 penalty of perjury that disputes the accuracy of his sworn deposition testimony.

4 **b. Evidence of Settlement Offer**

5 Plaintiff asserts that during his deposition, the City of Auburn’s insurer made a settlement
6 offer of \$200 to him, which Plaintiff argues “is clearly some indication of liability.” *Id.*
7 However, Federal Rule of Evidence 408 provides that a settlement offer is not admissible to
8 prove or disprove a disputed claim. As a result, the Court may not consider the fact that Plaintiff
9 received a settlement offer.
10

11 **c. Assistance Plaintiff Received in Drafting Complaint**

12 Plaintiff objects to Defendant’s suggestion in the motion for summary judgment that
13 Plaintiff’s complaint is untrue because Plaintiff received assistance from an inmate named
14 “Hollywood” in drafting it. However, the Report and Recommendation does not rely on this
15 argument by Defendant to conclude that summary judgment should be granted, although it does
16 note the argument and Plaintiff’s objections to the argument.
17

18 **d. Offer of Medical Treatment During the Arrest**

19 Plaintiff disputes Defendant’s assertion that Plaintiff was offered but refused medical
20 treatment at the arrest scene. Plaintiff appears to be referring to a statement in Defendant’s
21 declaration asserting that Plaintiff “refused medical aid and confirmed [the dog] had not bitten
22 his leg nor his hand” at the arrest scene. Dkt. No. 39 at 3. Although the parties appear to dispute
23 whether Plaintiff was offered medical attention at the arrest scene, such a disagreement does not
24 create a genuine issue of material fact on the question of whether Plaintiff was bitten by the dog.
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1 Plaintiff also suggests Defendant's statement that Plaintiff was offered medical attention
2 at the arrest scene creates an issue of fact as to whether Plaintiff was injured during the arrest.
3 The Court disagrees. There is no evidence indicating that Defendant's reason for offering
4 medical attention to Plaintiff was due to a dog bite; instead, Defendant stated in his sworn
5 declaration that Plaintiff confirmed at the arrest scene that the dog had not bitten him. Dkt. No.
6 39 at 3.
7

8 **e. Photographs of Plaintiff**

9 Plaintiff also objects to Defendant's assertion that the photograph of Plaintiff after the
10 arrest does not show any damage to Plaintiff's clothing. This objection is not well taken because
11 Defendant is correct that the photograph shows no damage to Plaintiff's clothing. The Court
12 recognizes that the photograph is not of high quality, and the photograph by itself does not
13 establish that Plaintiff was not bitten. Nonetheless, the photograph is relevant evidence that adds
14 support to Defendant's summary judgment motion.
15

16 Plaintiff also suggests that Defendant's counsel admitted that Plaintiff sustained injuries
17 that were photographed. This argument appears to refer to the photograph that Defendant's
18 counsel took at Plaintiff's deposition of the scar on Plaintiff's leg, which Plaintiff alleged was
19 caused by the dog bite. However, Defendant denies the scar was caused by a bite from his K-9
20 partner. Dkt. No. 34 at 5-7.
21

22 **f. Declarations from Police Officers**

23 Plaintiff objects to declarations that Defendant offered from police officers in support of
24 the summary judgment motion, arguing that these officers were not under oath or "threat of
25 perjury," nor subjected to depositions. Dkt. No. 55 at 6. This argument fails to recognize that
26 the first paragraph of each officer's declaration indicates that their declarations are made under

1 penalty of perjury. Dkt. No. 37-40. The Federal Rules of Civil Procedure permit parties to
2 present evidence on summary judgment through declarations made under penalty of perjury, and
3 Defendant was not required to conduct depositions of his own witnesses.

4 Plaintiff also suggests that Defendant could not have observed the pursuit of Plaintiff by
5 police officers as described in Defendant's declaration because the pursuit took place on several
6 streets and ended in an alley. This objection overlooks the fact that Defendant indicated in his
7 declaration that he followed the pursuit of Plaintiff by radio, not by personal observation of the
8 entire pursuit. Dkt. No. 39 at 2.

10 Plaintiff also argues that Defendant's statements in his declaration regarding the actions
11 of his K-9 partner at the scene of the arrest are not credible because, according to Plaintiff, police
12 dogs are not trained to behave as Defendant described. This contention is unsupported by any
13 showing by Plaintiff of expertise or knowledge on his part of police dog training.

15 Finally, Plaintiff argues that the declarations of the police officers cannot be trusted
16 because "there is a "blue code of silence when it comes to law enforcement officers" in which
17 officers do not report or admit misconduct by other officers. Dkt. No. 55 at 5. In this case,
18 however, the officers' sworn declarations as well as the other evidence offered by Defendant to
19 support his summary judgment motion stand uncontradicted by any evidence produced by
20 Plaintiff in support of his claim, other than his own statements.

21 **g. Summary**

22 Plaintiff alleged under penalty of perjury in his amended complaint that he was bitten by
23 Defendant's K-9 partner while lying face down in handcuffs. Plaintiff also testified under
24 penalty of perjury at his deposition that the dog was on Plaintiff's right side, and identified a scar
25 on his upper left thigh that he claims was caused by the dog bite. As Defendant maintains, and
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1 as Plaintiff acknowledged at his deposition, it is not plausible that the dog could have bitten
2 Plaintiff on that part of his left thigh while Plaintiff was lying face down with the dog on his
3 right side.

4 Plaintiff also testified at his deposition that the dog bite caused tears or holes in his pants.
5 However, Defendant produced a photograph of Plaintiff at the scene of the arrest taken after the
6 alleged dog bite occurred that shows no visible tears or holes in Plaintiff's clothing in the area on
7 Plaintiff's upper left thigh where the bite allegedly occurred.
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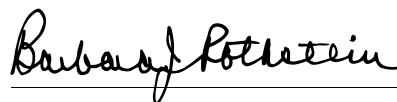
9 Plaintiff maintains that he sought and obtained medical treatment at both the Kent City
10 Jail and a private hospital for the alleged dog bite. However, Plaintiff has presented no medical
11 records to support his claim, despite being granted an extension of the discovery deadline to
12 obtain evidence. Nor has Plaintiff presented a copy of the video recording of his arrest that he
13 claims was altered to delete evidence of the dog bite.
14

15 Where Plaintiff alleges evidence exists to support his claim but fails to produce that
16 evidence despite sufficient time to do so, he leaves Defendant's evidence unrefuted. On the
17 record before the Court, no reasonable jury could conclude that Plaintiff was bitten by
18 Defendant's K-9 partner. Therefore, the Court agrees with Magistrate Judge Peterson's
19 recommendation that summary judgment should be granted in favor of Defendant.
20

21 **III. CONCLUSION**

22 The Court adopts the Report and Recommendation. Defendant's motion for summary
23 judgment is granted and this action is dismissed with prejudice.

24 DATED this 16th day of April, 2021.

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26

Barbara Jacobs Rothstein
U.S. District Court Judge