

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 21 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSHUA NEIL HARRELL,

Plaintiff-Appellant,

v.

MICHELLE BELYEA; et al.,

Defendants-Appellees,

and

WALMART; et al.,

Defendants.

No. 19-16407

D.C. No.

2:15-cv-00576-JAM-AC

Eastern District of California,
Sacramento

ORDER

Before: WARDLAW, NGUYEN, and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 10) is denied. *See* 9th Cir. R. 27-10; *see also Bowles v. Russell*, 551 U.S. 205 (2007) (court lacks authority to create equitable exceptions to jurisdictional requirement of timely notice of appeal).

Appellant's opposition to appellees' motion to dismiss states that appellant did not receive the district court's May 17, 2019 judgment until the end of June. The court cannot treat this statement in appellant's opposition to appellees' motion to dismiss as a motion to reopen the time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6) because such a motion would be untimely. *See Fed.*

R. App. P. 4(a)(6)(B) (motion must be filed within 180 days after entry of the judgment or within 14 days after receiving notice of the entry of judgment, whichever is earlier); *see also* 28 U.S.C. § 2107(c).

No further filings will be entertained in this closed case.

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Eastern District of California,
Sacramento

ORDER

Before: WARDLAW, NGUYEN, and HURWITZ, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, served on July 10, 2019 and filed on July 15, 2019, was not filed or delivered to prison officials within 30 days after the district court's judgment entered on May 17, 2019. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED.

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

JUDGMENT IN A CIVIL CASE

JOSHUA NEIL HARRELL,

CASE NO: 2:15-CV-00576-JAM-AC

v.

MICHELLE BELYEA, ET AL.,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 5/17/2019**

Marianne Matherly
Clerk of Court

ENTERED: May 17, 2019

by: /s/ K. Zignago
Deputy Clerk

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JOSHUA NEIL HARRELL,

12 Plaintiff,

13 v.

14 MICHELLE BELYEA,

15 Defendant.
16

No. 2:15-cv-0576 JAM AC

ORDER

17 Plaintiff is proceeding in this action in pro per and in forma pauperis. The matter was
18 referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

19 On February 13, 2019, the magistrate judge filed findings and recommendations herein
20 which were served on all parties and which contained notice to all parties that any objections to
21 the findings and recommendations were to be filed within twenty-one days. On March 13, 2019
22 plaintiff filed a motion for extension of time to file objections (ECF No. 123) and objections to
23 the findings and recommendations (ECF No. 122).

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
25 court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
26 court finds the findings and recommendations to be supported by the record and by proper
27 analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for extension of time (ECF No. 123) is GRANTED.

1. The findings and recommendations filed February 13, 2019, are adopted in full; and

2. Defendant's motion for summary judgement, ECF No. 101, is GRANTED and this case is CLOSED.

DATED: May 17, 2019

/s/ John A. Mendez
UNITED STATES DISTRICT COURT JUDGE

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7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA
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10 JOSHUA NEIL HARRELL,

11 Plaintiff,

12 v.

13 MICHELLE BELYEA,

14 Defendant.
15

No. 2:15-cv-00576-JAM-AC

ORDER AND FINDINGS AND
RECOMMENDATIONS

16 Plaintiff is proceeding in this action pro se and in forma pauperis. The action is referred
17 to the undersigned for pretrial proceedings by E.D. Cal. R. ("Local Rule") 302(c)(21).¹ Three
18 matters are before the court: defendant Michelle Belyea's motion for summary judgment (ECF
19 No. 101); plaintiff's motion to strike the summary judgment motion (ECF No. 111); and
20 plaintiff's motion to strike the Declaration of Michelle Belyea (ECF No. 112). For the reasons
21 set forth below, plaintiff's motions are DENIED and it is recommended that defendant's motion
22 for summary judgment be GRANTED.

23 **I. Relevant Procedural Background**

24 The case arises out of plaintiff's arrest and prosecution for commercial burglary (Penal
25 Code § 459) and probation violation (Penal Code § 1203.2), following an alleged shoplifting
26

27 ¹ Although plaintiff indicates that he is in custody, this matter is proceeding under the authority
28 of Local Rule 302(c)(21), rather than Local Rule 302(c)(17), because plaintiff neither seeks
habeas Relief nor challenges the conditions of his confinement.

1 incident at Walmart on April 17, 2014. ECF No. 15 at 10-24. The criminal case was ultimately
2 dismissed. Id. at 11.

3 Plaintiff filed this civil action on March 13, 2015 against defendants Rashad Figaro,
4 Walmart, Fairfield Police Department, Solano County District Attorney's Office, Natasha
5 Jontulovich, and District Attorney Donald A. Du Bain. ECF No. 1 at 3. The original complaint
6 alleged that plaintiff's rights had been violated by unlawful arrest, false imprisonment, and
7 malicious prosecution. On screening pursuant to 28 U.S.C. § 1915(e)(2), the undersigned found
8 that the only viable claim was unlawful arrest against Fairfield Police Officer Michelle Belyea.
9 ECF No. 8 at 6. Plaintiff was granted leave to amend his claims against the other defendants. Id.
10 at 4, 6.

11 Plaintiff subsequently filed a first amended complaint ("FAC"), containing claims against
12 Belyea, Rashad Figaro, Garrison, and Judge Bowers. ECF No. 15. On screening, the court
13 determined that the complaint stated two viable claims, both against defendant Belyea only: (1)
14 unlawful arrest in violation of the Fourth Amendment, and (2) malicious prosecution in violation
15 of the Fourteenth Amendment, based exclusively upon the allegation that Belyea falsified a police
16 report. Defendants Rashid Figaro, Garrison, and Judge Bowers were dismissed with prejudice.
17 ECF No. 20 (Findings and Recommendations) at 4-7; ECF No. 24 (order adopting Findings and
18 Recommendations).

19 Defendant Belyea answered the complaint on April 18, 2017. ECF No. 40. She filed a
20 motion for summary judgment on July 9, 2018, which was the deadline for dispositive motions.
21 See ECF Nos. 76 (motion), 52 (scheduling order). The undersigned subsequently vacated the
22 motion without prejudice to re-filing, for procedural noncompliance. ECF No. 100. Defendant
23 re-filed her motion for summary judgment the next day. ECF No. 101. Plaintiff moves to strike
24 defendant's motion as untimely (ECF No. 111) and moves to strike defendant Michelle Belyea's
25 declaration (ECF No. 112) for lack of personal knowledge.

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II. Motions to Strike

Plaintiff's motion to strike defendant's motion for summary judgment, ECF No. 111, will be denied. Plaintiff contends that defendant's motion is untimely because filed after the dispositive motion deadline, but the court expressly granted defendant permission to re-file. ECF No. 100. Plaintiff has had abundant notice of the motion and ample time to prepare a response. The motion to strike is accordingly without merit.

Plaintiff also moves to strike the Declaration of Michelle Belyea filed in support of her motion for summary judgement.² ECF No. 112. Plaintiff argues first that the declaration contains multiple hearsay statements regarding what Belyea was told by "dispatch" and statements from other third parties such as plaintiff and Figaro. ECF No. 112 at 2. He argues second, in a variation of his hearsay objection, that Belyea's declaration was made without personal knowledge. *Id.* at 3-4.

Plaintiff's objections are not well-taken. The declaration itself is not hearsay, and statements regarding what others told the declarant are not hearsay unless and until they are used in an attempt to prove the truth of the matter asserted in a motion or at trial. *See, e.g., Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1124 (9th Cir. 2004). Belyea's declaration includes her testimony about what she heard, saw, and did; all topics appropriate for a personal declaration. The court will consider Belyea's account of other peoples' statements only for non-hearsay purposes, and not as evidence of the truth of the matters asserted in the statements. Accordingly, Plaintiff's motion to strike, ECF No. 112, will be DENIED.

III. Motion for Summary Judgment – Judicial Notice

The parties have separately requested that the court take judicial notice of various documents. ECF Nos. 101-4, 77 (defendant's request) and ECF No. 116 (plaintiff's request). This court must, upon request, take judicial notice of any "fact" that is "not subject to reasonable dispute." Fed. R. Evid. 201(b). Facts are indisputable, and thus subject to judicial notice, only if they are either "generally known," or "can be accurately and readily determined from sources

² The declaration is at ECF No. 101-2.

1 whose accuracy cannot be reasonably questioned.” Fed. R. Civ. P. 201(1), (2); United States v.
2 Ritchie, 342 F.3d 903, 909 (9th Cir. 2003).

3 Plaintiff’s request for judicial notice is denied. Plaintiff asks the court to take judicial
4 notice of Walmart’s hours of operation, policies, and what time the public dressing rooms are
5 closed and locked at the Walmart at issue in this case. ECF No. 85-1 at 2. These are not facts
6 properly subject to judicial notice. Although plaintiff is correct that the court may take judicial
7 notice of a corporation’s articles of incorporation and bylaws, he does not attach the articles of
8 incorporation or bylaws and provides no indication that a local store’s hours or dressing room
9 policies would be included in these documents. Coal. for a Sustainable Delta v. F.E.M.A., 711 F.
10 Supp. 2d 1152, 1170 (E.D. Cal. 2010). Plaintiff also asks the court to take judicial notice of
11 defendant Michelle Belyea’s testimony at the preliminary hearing on May 2, 2014 in Solano
12 County Court Case No. FCR306936, but does not attach any transcripts. ECF No. 116 at 1-2.
13 Because plaintiff’s request for judicial notice encompasses only information not properly subject
14 to judicial notice, his request is denied.

15 Defendant’s request for judicial notice is granted. Defendant asks the court to take
16 judicial notice of a certified copy of the incident-related criminal prosecution of plaintiff Joshua
17 Harrell, Solano County Court Case No. FCR306936, which she attached as an exhibit. ECF No.
18 77 at 1. The court make take judicial notice of “proceedings in other courts, both within and
19 without the federal judicial system, if those proceedings have a direct relation to matters at issue.”
20 Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir. 2007). Defendant’s request is therefore granted.

21 **IV. Motion for Summary Judgment – Undisputed Facts**

22 Unless otherwise specified, the following facts are either expressly undisputed by the
23 parties or have been determined by the court, upon a full review of the record, to be undisputed
24 by competent evidence. The defendant’s statement of undisputed facts is located at ECF No. 101-
25 3. Plaintiff’s responses are located at ECF No. 114.

26 At approximately 1:26 a.m. on April 17, 2014, Fairfield Police Officer Michelle Belyea
27 was dispatched to the local Walmart for a reported shoplifting. Declaration of Michelle Belyea at
28 ¶ 4. While en route, Belyea heard from dispatch that the suspect was on Alameda County

1 probation for Penal Code § 484 (theft) through November 6, 2014. Id. Dressed in a standard
2 police uniform, Belyea arrived at the Walmart and went to the security office. Belyea Decl. at ¶
3 5. There, Belyea encountered Walmart employee Rashad Figaro and plaintiff Joshua Neil
4 Harrell. Id. Figaro described the incident to Belyea, telling her that he saw the plaintiff enter the
5 store around 7:00 p.m. on April 16, 2017. Id. Figaro told Belyea that he recognized Harrell from
6 prior theft cases. Id. Figaro told Belyea that Harrell eventually left the store, but returned about
7 five hours later. Id. Figaro told Belyea that when Harrell returned, Figaro noticed Harrell walk
8 over to the men's clothing section, take a belt off the shelf, put it around his waist, and then pick
9 up a pair of pants and walk into a dressing room with them. Id. Figaro told Belyea that when
10 Harrell left the dressing room, Figaro saw him wearing the belt and pants he picked up from the
11 shelf. Id. Figaro told Belyea that Harrell proceeded to walk around the store for a few minutes
12 before leaving from the front entrance. Id. Figaro told Belyea that, at that time, he contacted
13 Harrell outside the front of the store and detained him for suspected shoplifting. Id. Figaro told
14 Belyea that Harrell walked past the checkout stands without making any attempt to pay for the
15 pants or belt. Id.

16 Figaro told Belyea that he valued the items in question at \$32 (\$20 for the pants, and \$12
17 for the belt). Belyea Decl. at ¶ 6. Figaro told Belyea that the pants Harrell originally wore into
18 the store were recovered in the men's dressing room. Id. Upon finishing her conversation with
19 Figaro, Officer Belyea advised Harrell he was under arrest and advised him of his Miranda rights,
20 reading from her department-issued Miranda card. Belyea Decl. at ¶ 8. Upon booking Harrell
21 into jail, Belyea returned the pants and belt to Figaro. Id. at ¶ 9.

22 Plaintiff was arrested for two crimes: Penal Code § 459 (burglary) (felony) and Penal
23 Code § 1203.2 (probation violation) (felony). Belyea Decl. at ¶ 10. Plaintiff was subsequently
24 prosecuted by the Solano County District Attorney's Office for the alleged § 459 violation, but
25 the prosecution was later reduced to a § 459.5(a). ECF No. 77 at 11-13 (Amended Information).
26 The District Attorney dismissed all charges on February 4, 2015, providing no reasoning for the
27 dismissal. ECF No. 77 at 9.

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V. Motion for Summary Judgment – Legal Standard

Summary judgment is appropriate when the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Under summary judgment practice, “[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact.” In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party may accomplish this by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or by showing that such materials “do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

“Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party’s case.” Oracle Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. at 323. In such a circumstance, summary judgment should “be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.” Id.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or

1 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.
2 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a
3 fact “that might affect the outcome of the suit under the governing law,” Anderson v. Liberty
4 Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809
5 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., “the evidence is such that a
6 reasonable jury could return a verdict for the nonmoving party,” Anderson, 477 U.S. at 248.
7 In the endeavor to establish the existence of a factual dispute, the opposing party need not
8 establish a material issue of fact conclusively in its favor. It is sufficient that “‘the claimed
9 factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the
10 truth at trial.’” T.W. Elec. Serv., 809 F.2d at 630 (quoting First Nat’l Bank of Ariz. v. Cities
11 Serv. Co., 391 U.S. 253, 288-89 (1968)). Thus, the “purpose of summary judgment is to pierce
12 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.”
13 Matsushita, 475 U.S. at 587 (citation and internal quotation marks omitted).

14 “In evaluating the evidence to determine whether there is a genuine issue of fact, [the
15 court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” Walls
16 v. Cent. Costa County Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is
17 the opposing party’s obligation to produce a factual predicate from which the inference may be
18 drawn. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
19 demonstrate a genuine issue, the opposing party “must do more than simply show that there is
20 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586 (citations
21 omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the
22 non-moving party, there is no ‘genuine issue for trial.’” Id. at 587 (quoting First Nat’l Bank, 391
23 U.S. at 289).

24 VI. Motion for Summary Judgment – Analysis

25 Plaintiff’s two remaining causes of action, malicious prosecution and false arrest, are both
26 premised on the same allegation: that defendant Belyea submitted a false police report stating that
27 defendant made confessions upon his arrest, which he claims were never made. ECF No. 15 at
28 10; ECF No. 20 at 4, 6. Defendant moves for summary judgment on both causes of action, and

1 regarding the availability of punitive damages. ECF No. 101-1 at 3. Upon review of the
2 undisputed facts in this case, the undersigned finds summary judgment appropriate and
3 recommends that defendant's motion be GRANTED.

4 A. False Arrest Claim and Qualified Immunity

5 "A plaintiff may bring an action under 42 U.S.C. § 1983 to redress violations of his
6 'rights, privileges, or immunities secured by the Constitution and [federal] laws' by a person or
7 entity, including a municipality, acting under the color of state law." Awabdy v. City of
8 Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004) (citing Monell v. Dep't of Social Servs., 436 U.S.
9 658, 690-95 (1978)). "To state a claim under § 1983, a plaintiff must allege two essential
10 elements: (1) that a right secured by the Constitution or laws of the United States was violated,
11 and (2) that the alleged violation was committed by a person acting under the color of State law."
12 Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

13 "A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth
14 Amendment, provided the arrest was without probable cause or other justification." Dubner v.
15 City & County of S.F., 266 F.3d 959, 964 (9th Cir. 2001). However, an officer who makes an
16 arrest without probable cause may be shielded from liability by qualified immunity if she
17 reasonably believed there to have been probable cause. See Ramirez v. City of Buena Park, 560
18 F.3d 1012, 1024 (9th Cir. 2009). "In the context of an unlawful arrest . . . the two prongs of the
19 qualified immunity analysis can be summarized as: (1) whether there was probable cause for the
20 arrest; and (2) whether it is reasonably arguable that there was probable cause for arrest—that is,
21 whether reasonable officers could disagree as to the legality of the arrest such that the arresting
22 officer is entitled to qualified immunity." Rosenbaum v. Washoe City, 663 F.3d 1071, 1076 (9th
23 Cir. 2011)

24 1. Probable Cause

25 "An officer has probable cause to make a warrantless arrest when the facts and
26 circumstances within his knowledge are sufficient for a reasonably prudent person to believe that
27 the suspect has committed a crime. The analysis involves both facts and law. The facts are those
28 that were known to the officer at the time of the arrest. The law is the criminal statute to which

1 those facts apply.” Rosenbaum, 663 F.3d at 1076 (internal citations omitted). “The information
2 on which officers rely in forming their conclusions regarding probable cause must be ‘reasonably
3 trustworthy.’ Arresting officers are entitled to rely on the probable cause developed by other
4 officers.” United States v. Sims, 504 F. App’x 614, 615 (9th Cir. 2013). It is well established
5 that an officer may act on an eyewitness’s report of a crime, including the report of security
6 personnel, as probable cause to execute an arrest. United States v. Rodriguez, 92 F.3d 1195 (9th
7 Cir. 1996) (“The officers were under no legal duty to corroborate the security guard’s tip before
8 acting because the eyewitness report of a crime was self-corroborating.”)

9 Here, plaintiff was arrested for a violation of Penal Code § 495, which states that “[e]very
10 person who enters any house, room, apartment, tenement, [or] shop, . . . with intent to commit
11 grand or petit larceny or any felony is guilty of burglary.” Cal. Penal Code § 459 (West).
12 Plaintiff was also arrested for a violation of Cal. Penal Code § 1203.2, which allows any peace
13 officer with probable cause to believe that a person on supervised parole is violating any term or
14 condition of his or her supervision to re-arrest the supervised person and bring him or her before
15 the court. Defendant had probable cause to arrest plaintiff for each of these crimes. As discussed
16 in detail above, defendant heard from dispatch that plaintiff was on Alameda County probation
17 for a prior theft conviction. Belyea Decl. at ¶ 4. Though plaintiff disputes that he was in fact on
18 probation, the truth of the fact of probation is not material to Officer Belyea’s reasonable belief
19 when she encountered the plaintiff. Officer Belyea further testifies extensively to her
20 conversation with Rashad Figaro, who described the circumstances of plaintiff’s detention in the
21 Walmart. Belyea Decl. at 5. Plaintiff objects only that Belyea’s testimony as to what Figaro told
22 her is hearsay and is based on a lack of personal knowledge. ECF No. 85 at 35-37. Defendant
23 testified as to what she heard from Figaro, not in an attempt to prove the truth of his statements
24 but to demonstrate her state of mind upon plaintiff’s arrest. Officer Belyea has personal
25 knowledge as to what she heard; she properly testified as to what she heard from dispatch and
26 from Figaro, and these pieces of information weigh directly on whether Belyea had probable
27 cause to arrest Harrell for violations of Cal. Penal Code §§ 459 and 1203.2.

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1 A key point in plaintiff's argument is that Belyea wrote in her police report that plaintiff
2 made several spontaneous admissions to her, which he vehemently denies. Indeed, Officer
3 Belyea testified to these spontaneous remarks in her declaration, and plaintiff again disputes
4 having made any such remarks. See ECF No. 85 at 37. Even assuming that plaintiff never made
5 any spontaneous admissions, however, the Belyea's testimony as to what she heard from Figaro
6 and dispatch are sufficient to establish probable cause for plaintiff's arrest. In light of the
7 undisputed facts, it is clear that Officer Belyea executed plaintiff's arrest with appropriate
8 probable cause, and no constitutional violation occurred.

9 2. Reasonable Belief of Probable Cause

10 "Even if the arrest was made without a warrant and without probable cause, however, the
11 officer may still be immune from suit if it was objectively reasonable for [her] to believe that
12 [she] had probable cause." Rosenbaum, 663 F.3d at 1078. As discussed above, well established
13 law holds that an officer can rely on information obtained from eye-witness accounts such as
14 those of a security officer, Rodriguez, 92 F.3d at 1195, as well as officer-developed reports such
15 as those from dispatch, Sims, 504 F. App'x at 615, in determining whether probable cause exists
16 for an arrest. The undisputed facts regarding what Officer Belyea heard from dispatch and from
17 Figaro demonstrate that she had a reasonable belief in the existence of probable cause to arrest
18 plaintiff for the crimes discussed above. Accordingly, she would be entitled to qualified
19 immunity even if probable cause did not actually exist.

20 B. Malicious Prosecution Claim

21 To claim malicious prosecution, a petitioner must allege "that the
22 defendants prosecuted [him or] her with malice and without probable
23 cause, and that they did so for the purpose of denying [him or] her
24 equal protection or another specific constitutional right." Freeman v.
25 City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir. 1995); see also
26 Blaxland v. Commonwealth Dir. of Pub. Prosecutions, 323 F.3d
1198, 1204 (9th Cir. 2003) (stating that malicious prosecution
"concern[s] the wrongful use of legal process"). It requires "the
institution of criminal proceedings against another who is not guilty
of the offense charged" and that "the proceedings have terminated in
favor of the accused." Restatement (Second) of Torts § 653 (1977).

27 Lacey v. Maricopa County, 693 F.3d 896, 919 (9th Cir. 2012).

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1 In general, “[f]iling of a criminal complaint immunizes investigating officers . . . from
2 damages suffered thereafter because it is presumed that the prosecutor filing the complaint
3 exercised independent judgment in determining that probable cause for an accused’s arrest exists
4 at that time. This presumption may be rebutted, however. For example, . . . the presentation by
5 the officers to the district attorney of information known by them to be false will rebut the
6 presumption.” Smiddy v. Varney, 665 F.2d 261, 266–67 (9th Cir. 1981), overruled in part on
7 other grounds by Beck v. City of Upland (9th Cir.2008) 527 F.3d 853, 865). However, to survive
8 summary judgment there must be evidence of actual fabrication in the police report at issue; it is
9 not enough that the report is inconsistent with plaintiff’s own account of the arrest. Sloman v.
10 Tadlock, 21 F.3d 1462, 1474 (9th Cir. 1994) (“Sloman did not and does not point to any evidence
11 of such fabrication, other than the fact that the officers’ reports were inconsistent with Sloman’s
12 own account of the incidents leading to his arrest. Such conclusory allegations, standing alone,
13 are insufficient to prevent summary judgment.”); see also, Myers v. City of Hermosa Beach, 299
14 F. App’x 744, 746 (9th Cir. 2008) (presumption rebuttal “may be accomplished by showing facts
15 that suggest fabrication of police reports: for example, contradictory police reports or
16 contradiction of the police by independent witnesses . . . However, merely showing that the
17 plaintiff’s version differs from that of the defendant’s is not enough.”).

18 Additionally, “[a]n individual seeking to bring a malicious prosecution claim must
19 generally establish that the prior proceedings terminated in such a manner as to indicate his
20 innocence. Similar to other terminations short of a complete trial on the merits, a dismissal in the
21 interests of justice satisfies this requirement if it reflects the opinion of the prosecuting party or
22 the court that the action lacked merit or would result in a decision in favor of the defendant.”
23 Awabdy v. City of Adelanto, 368 F.3d 1062, 1068 (9th Cir. 2004) (internal citations omitted). “A
24 termination is not necessarily favorable simply because the party prevailed in the prior
25 proceeding; the termination must relate to the merits of the action by reflecting either on the
26 innocence of or lack of responsibility for the misconduct alleged against [the accused]. If the
27 resolution of the underlying action leaves some doubt concerning plaintiff’s innocence or
28 liability, it is not a favorable termination sufficient to allow a cause of action for malicious

1 prosecution.” Womack v. County of Amador, 551 F. Supp. 2d 1017, 1031–32 (E.D. Cal. 2008)
2 (Beistline, J.) (internal citations omitted).

3 Plaintiff’s malicious prosecution claim cannot succeed. First, as discussed above,
4 plaintiff’s arrest was executed with probable cause and thus the elements of a malicious
5 prosecution claim are not met. Lacey, 693 F.3d at 919. Plaintiff’s malicious prosecution claim
6 also fails because he cannot rebut the presumption that Officer Belyea is immune in light of the
7 presumption that the prosecutors exercised independent discretion in his prosecution, and because
8 he has not shown that the criminal case terminated in his favor. The district attorney in plaintiff’s
9 criminal case dismissed all charges on February 4, 2015, and gave no reason on the record. ECF
10 No. 77 at 9. A nonspecific dismissal such as this does not constitute a favorable termination in
11 the context of a malicious prosecution claim, because it does “leave some doubt concerning
12 plaintiff’s innocence or liability.” Womack, 551 F. Supp. 2d at 1032. With respect to Officer
13 Belyea’s presumption of immunity, plaintiff’s only argument regarding the falsity of Belyea’s
14 report is that it documented admissions that he did not make. ECF No. 85 at 18, 24, 27. As
15 discussed above, plaintiff’s differing account of what occurred at the time of his arrest, without
16 additional evidence, is insufficient to prevent summary judgment in favor of defendant on a
17 malicious prosecution claim. Sloman, 21 F.3d at 1474. For each of these reasons, summary
18 judgment should be entered in favor of Officer Belyea.

19 C. Punitive Damages

20 Because the court finds summary judgment in favor of defendant is appropriate on all
21 claims, the court need not address the issue of punitive damages.

22 VII. Conclusion

23 For the reasons discussed above, it is hereby ORDERED that:

- 24 1. Plaintiff’s motion to strike defendant’s motion (ECF No. 111) is DENIED;
- 25 2. Plaintiff’s motion to strike the declaration of Michelle Belyea (ECF No. 112) is
26 DENIED;

27 Further, IT IS HEREBY RECOMMENDED that defendant’s motion for summary
28 judgment, ECF No. 101, be GRANTED and this case be CLOSED.

1 These findings and recommendations are submitted to the United States District Judge
2 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
3 (21) days after being served with these findings and recommendations, plaintiff may file written
4 objections with the court. Such document should be captioned "Objections to Magistrate Judge's
5 Findings and Recommendations." Local Rule 304(d). Plaintiff is advised that failure to file
6 objections within the specified time may waive the right to appeal the District Court's order.
7 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

8 DATED: February 13, 2019

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10 ALLISON CLAIRE
11 UNITED STATES MAGISTRATE JUDGE
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JOSHUA NEIL HARRELL,

12 Plaintiff,

13 v.

14 MICHELLE BELYEA,

15 Defendant.
16

No. 2:15-cv-00576-JAM-AC

ORDER

17 Plaintiff is proceeding in this action pro se. The action was accordingly referred to this
18 court for pretrial proceedings by E.D. Cal. R. ("Local Rule") 302(c)(21).¹ On June 23, 2016, the
19 district judge presiding over this case authorized plaintiff, who is also proceeding in forma
20 pauperis, to proceed with his first amended complaint against defendant Michelle Belyea. ECF
21 No. 24. Now pending before the court are plaintiff's motion to compel (ECF No. 66),
22 defendant's motion for summary judgment (ECF No. 76), plaintiff's motion to strike (ECF No.
23 86), plaintiff's motion for an extension of time to reply to defendant's opposition to plaintiff's
24 motion to strike (ECF No. 93), and plaintiff's motion to protect due process (ECF No. 99).

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27 ¹ Although plaintiff indicates that he is in custody, this matter is proceeding under the authority
28 of Local Rule 302(c)(21), rather than Local Rule 302(c)(17), because plaintiff does not seek
habeas relief, nor does he challenge the conditions of his confinement.

1 I. Relevant Procedural Background

2 The case arises out of plaintiff's arrest and prosecution for commercial burglary (Penal
3 Code § 459) and probation violation (Penal Code § 1203.2). Plaintiff was arrested for these
4 crimes on April 17, 2014. ECF No. 15 at 10-24. The criminal case was ultimately dismissed. Id.
5 at 11. Plaintiff filed this civil case on March 13, 2015 against defendants Rashad Figaro,
6 Walmart, Fairfield Police Department, Solano County District Attorney's Office, Natasha
7 Jontulovich, and District Attorney Donald A. Du Bain. ECF No. 1 at 3.

8 Upon screening pursuant to 28 U.S.C. § 1915(e)(2), the court found plaintiff alleged facts
9 to potentially support three claims: Fourth Amendment unlawful arrest; Fourth Amendment Due
10 Process (based upon false imprisonment); and Fourteenth Amendment Due Process (based upon
11 malicious prosecution). ECF No. 8 at 3. However, the court found that complaint stated a claim
12 against defendant Michelle Belyea only. ECF No. 8 at 6. The court permitted the unlawful arrest
13 claim to go forward against Belyea, while dismissing the false imprisonment and malicious
14 prosecution claims against her, with leave to amend. Id. at 4. Plaintiff was given 30 days to
15 amend his complaint to state a cognizable claim against the remaining defendants, should he wish
16 to do so. Id. at 6.

17 Following an extension of time, plaintiff timely filed a first amended complaint ("FAC")
18 alleging claims against Belyea, as well as Rashad Figaro, Garrison, and Judge Bowers. ECF No.
19 15. Upon screening of the FAC, the court found that plaintiff alleged facts that could potentially
20 support three claims: Fourth Amendment unlawful arrest; Fourth Amendment Due Process (based
21 upon false imprisonment); and Fourteenth Amendment Due Process (based upon malicious
22 prosecution). ECF No. 20 at 3. The court dismissed defendants Rashid Figaro, Garrison, and
23 Judge Bowers with prejudice and ordered plaintiff's FAC served with respect to defendant Belyea
24 on two grounds: (1) Fourth Amendment unlawful arrest; and (2) Fourteenth Amendment
25 malicious prosecution (only based upon the limited allegation that Belyea falsified a police
26 report). ECF No. 20 at 4-7, ECF No. 24.

27 Plaintiff's FAC was served upon Belyea (ECF No. 39), who filed an answer on April 18,
28 2017. ECF No. 40. On January 18, 2019, the court issued a revised scheduling order setting a

1 discovery deadline of May 9, 2018. ECF No. 52. A dispositive motions deadline was set for July
2 9, 2018. Id.

3 **II. Plaintiff's Motion to Protect Due Process**

4 Plaintiff filed a motion notifying the court that through studying his own genealogy, he
5 recently discovered that he has a relative that was in North America before the United States was
6 formed and that his eighth-great grandfather is "Sir Bathwater" of Wales, England. ECF No. 99 at
7 1. Plaintiff asks the court to provide him with more information regarding his family genealogy
8 to protect his rights to due process. Id. at 2. Plaintiff's memorandum indicates he believes he is
9 entitled to some financial inheritance from his relatives' estates. Id. at 3-11. Because plaintiff's
10 motion is entirely irrelevant to this case and does not seek any relief with respect to the remaining
11 defendant, it is DENIED.

12 **III. Motion to Compel**

13 Plaintiff moves to compel responses to his requests for production numbered 3, 4, and 5.
14 ECF No. 66 at 2. Plaintiff's RFP No. 3 asks defendant to produce two document affidavits from
15 management persons at Walmart located on N. Texas St., Fairfield, CA, stating facts about the
16 operations, rules, and policies about dressing rooms for customers. ECF No. 66 at 2. Plaintiff's
17 RFP No. 4 requests all documents, pleadings, orders, materials, records and files filed in this case.
18 Id. Plaintiff's RFP No. 5 seeks defendant's personnel file at the Fairfield Police Department to
19 include pleadings and materials about defendant that may contain Brady material. Id.

20 Plaintiff's motion to compel is DENIED because defendant has served adequate
21 responses. With respect to RFPs 3 and 4, defendant served a response stating she had no
22 responsive documents; defendant does not have access to Walmart's internal documents, and
23 there are no Brady related materials in defendant's personnel file. ECF No. 70 at 3. In the
24 absence of evidence to the contrary, plaintiff is required to accept defendant's responses to these
25 requests that, despite a diligent search, no responsive documents exist. See e.g., Mootry v. Flores,
26 2014 WL 3587839, *2 (E.D. Cal. 2014) ("Defendants cannot be required to produce documents
27 that do not exist. Absent evidence to the contrary, which has not been presented, Plaintiff is
28 required to accept Defendants' response no such documents exist."); accord, Holt v. Nicholas,

1 2014 WL 250340, *4 (E.D. Cal. 2014) (“Absent evidence to the contrary, which has not been
2 presented, Plaintiff is required to accept Defendant’s amended response that no such documents
3 responsive to his request exist.”).

4 With respect to RFP No. 5, defendant asserts she responded to the request by providing a
5 complete copy of the record of the court’s file, inclusive of approximately 275 pages. ECF No.
6 70 at 3. While plaintiff now contends that he is entitled to a copy of his own deposition
7 transcript, defendant correctly responds that she is not under any obligation to produce the
8 transcript, which is equally available to the plaintiff, albeit at cost. See, Rodgers v. Martin, No.
9 1:12-CV-01686-AWI, 2014 WL 4344499, at *7 (E.D. Cal. Aug. 29, 2014) (Seng, J.). Plaintiff
10 may not use the discovery process to obtain free copies of documents that are equally available to
11 him. The Federal Rules of Civil Procedure direct deposition officers to provide a copy of a
12 deposition transcript to the deponent or any party upon payment of reasonable charges. Fed. R.
13 Civ. P. 30(f)(3). Thus, defendant has adequately responded to plaintiff’s RFP No. 5 and need not
14 provide plaintiff with a copy of his deposition transcript.

15 For the above reasons, plaintiff’s motion to compel (ECF No. 66) is DENIED.

16 **IV. Motion to Strike and Motion for Extension of Time**

17 Plaintiff moves to strike the declaration of Michelle Belyea filed in support of her motion
18 for summary judgment. ECF No. 86. He also seeks additional time to respond to defendant’s
19 opposition to this request. ECF No. 93. These motions are DENIED without prejudice as
20 MOOT, because the summary judgment is being vacated for the reasons now explained.

21 **V. Motion for Summary Judgment**

22 Defendant’s motion for summary judgment (ECF No. 76) must be VACATED because
23 defendant failed to file a Rand Notice with their motion. As defendant was warned in the Order
24 Directing Service in this case, in the event “defendant moves for summary judgment, defendant
25 must contemporaneously serve with the motion, but in a separate document, a copy of the
26 attached Rand Notice. See Woods v. Carey, 684 F.3d 934, 935 (9th Cir. 2012); Rand v. Rowland,
27 154 F.3d 952, 957 (9th Cir. 1998).” ECF No. 35 at 4. Because defendant did not file a Rand
28 Notice, her motion for summary judgment cannot be considered at this time. Accordingly, it will

1 be VACATED without prejudice to re-filing in compliance with defendant's obligations under
2 Rand. Defendant may file the same motion for summary judgment, exhibits, and declaration, but
3 she must do so contemporaneously with a Rand Notice.

4 **VI. Conclusion**

5 For the reasons discussed above, it is hereby ORDERED that:

- 6 1. Plaintiff's motion to protect due process (ECF No. 99) is DENIED;
- 7 2. Plaintiff's motion to compel (ECF No. 66) is DENIED;
- 8 3. Plaintiff's motion for an extension of time (ECF No. 93) is DENIED as MOOT;
- 9 4. Plaintiff's motion to strike (ECF No. 86) is DENIED as MOOT;
- 10 5. Defendant's motion for summary judgment, ECF No. 76, is VACATED without
11 prejudice to re-filing and service together with a Rand notice.

12 DATED: November 6, 2018

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14 ALLISON CLAIRE
15 UNITED STATES MAGISTRATE JUDGE
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