UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE CHACON, JR., **Plaintiff,** **v.** **RALPH DIAZ, et al,** **Defendant.**	**NO. EDCV 20-1898-JWH (KS)** **MEMORANDUM AND ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND**

I. INTRODUCTION

On September 8, 2020, Plaintiff, a California state prisoner who is proceeding *pro se* and *in forma pauperis*, filed a civil rights complaint ("Complaint") in the Eastern District of the California. (Dkt. No. 1; *see also* Dkt. No. 8 (granting request for leave to proceed without prepayment of filing fee).) On September 14, 2020, the Complaint was transferred to the Central District. (Dkt. No. 4.)

In civil rights actions brought by prisoners, Congress requires district courts to dismiss the complaint if the court determines that the complaint, or any portion thereof: (1) is frivolous

or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief.[1] *See* 28 U.S.C.A. § 1915A. In determining whether a complaint should be dismissed at screening, the Court applies the standard of Federal Rule of Civil Procedure 12(b)(6): "[a] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015). Thus, the plaintiff's factual allegations must be sufficient for the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation and internal quotation marks omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").

When a plaintiff appears *pro se* in a civil rights case, the court must construe the pleadings liberally and afford the plaintiff the benefit of any doubt. *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (citations and internal quotation marks omitted)). In giving liberal interpretation to a *pro se* complaint, however, the court may not supply essential elements of a claim that were not initially pled, *Byrd v. Maricopa County Sheriff's Dep't*, 629 F.3d 1135, 1140 (9th Cir. 2011), and the court need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

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[1] Even when a plaintiff is neither a prisoner nor proceeding *in forma pauperis*, Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a trial court to dismiss a claim *sua sponte* and without notice "where the claimant cannot possibly win relief." *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see also Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (same); *Baker v. Director, U.S. Parole Comm'n*, 916 F.2d 725, 726 (D.C. Cir. 1990) (*per curiam*) (adopting Ninth Circuit's position in *Omar* and noting that in such circumstances a *sua sponte* dismissal "is practical and fully consistent with plaintiffs' rights and the efficient use of judicial resources").

If the court finds that a *pro se* complaint fails to state a claim, the court must give the *pro se* litigant leave to amend the complaint unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Akhtar*, 698 F.3d at 1212 (internal quotation marks omitted); *Lira v. Herrera*, 427 F.3d 1164, 1176 (9th Cir. 2005). However, if amendment of the pleading would be futile, leave to amend may be denied. *See Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1116 (9th Cir. 2014) ("'Futility of amendment can, by itself, justify the denial of a motion for leave to amend,' *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995), [a]nd the district court's discretion in denying amendment is 'particularly broad' when it has previously given leave to amend.").

For the following reasons, the Court finds that the Complaint fails to state a cognizable claim for relief and must be dismissed.[2] However, leave to amend is granted.

II. ALLEGATIONS OF THE COMPLAINT

Plaintiff sues the following individuals: Ralph Diaz, Secretary of the California Department of Corrections and Rehabilitation ("CDCR"), in his individual and official capacity; Jeffrey Macomber, Undersecretary of the CDCR, in his individual capacity; Kenneth J. Pogue, Director of the CDCR, in his individual capacity; Anthony Carter, who is listed on CDCR documents as the contact for emergency regulations, in his individual capacity; Steven Escobar, attorney with CDCR's Office of Administrative Law, in his individual capacity; P. Birdsong, appeals coordinator at Ironwood State Prison ("ISP"), in his individual capacity; and Chelsea Armenta, Office Service Supervisor at ISP, in her individual capacity. (Complaint at 3-4.)[3]

[2] Magistrate judges may dismiss a complaint with leave to amend without approval of the district judge. *See McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

[3] For ease of reference, the Court cites to the Complaint and its attachments as though they formed a single consecutively paginated document.

The Complaint alleges that, on March 18, 2020, Plaintiff and several other inmates filed a group appeal challenging the adequacy of prisoners' access to the law library. (Complaint at 5.) Defendant Birdsong "arbitrarily rejected the appeal" and "has a habit and custom of arbitrarily rejecting group appeals no matter the topic to chill political expression." (Complaint at 5.) The Complaint alleges "[s]imilar group appeals were rejected on 06/25/19, 03/18/20, and 05/06/20." (Complaint at 5.) Plaintiff asserts "[t]here was no legitimate penological interest in the arbitrary rejections as they were contrary to regulations and the First Amendment." (Complaint at 5.) Elsewhere in the Complaint, Plaintiff asserts that between August and November 2019 five civil actions were filed challenging the arbitrary rejections of group appeals, and, "[i]n retaliation of filing these group appeals . . . officials enacted emergency regulations to ban all group appeals"—and, more specifically, Defendants Diaz, Macomber, Pogue, Carter, and Escobar "conspired to and did enact emergency regulations to ban group appeals . . . join[ing] the conspiracy began by [Defendants] Birdsong and Armenta to violate the right to expressive association." (Complaint at 6.) Based on these limited factual allegations, the Complaint asserts the following: violations of the First Amendment's right to petition the government (Complaint at 7), right to associate (Complaint at 7), and prohibition of retaliation for protected speech (Complaint at 6 (citing *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005))); violations of the Bane Act, California Civil Code § 52.1 (Complaint at 7-8, 14-15); and a claim for conspiracy (Complaint at 14). Plaintiff attached to the Complaint a copy of a CDCR 602 appeal filed by Jose Martinez and others, including Plaintiff, on March 18, 2020, which states, "On 02/14/20 appellant and other inmates filed a group appeal that challenged the racially motivated 2:45am searches" and requests "that appeals be processed according to regulations and the law." (Complaint at 17-21.)

For the claims asserted above, Plaintiff seeks declaratory relief, injunctive relief in the form of "proper training of CDCR staff," and monetary damages. (Complaint at 9.)

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III. DISCUSSION

A. The Complaint Fails to Allege that Defendant Armenta Personally Participated in the Alleged Harms.

"Liability . . . must be based on the personal involvement of the defendant." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998); *see also Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) ("[T]here must be a showing of personal participation in the alleged rights deprivation."). To demonstrate a civil rights violation against a government official, a plaintiff must show either direct, personal participation of the official in the harm or some sufficient causal connection between the official's conduct and the alleged constitutional violation. *See Starr v. Baca*, 652 F.3d 1202, 1205-06 (9th Cir. 2011). The inquiry into causation must be individualized and must focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Rather, to be held liable, a supervising officer has to personally take some action against the plaintiff or "set in motion a series of acts by others . . . which he knew or reasonably should have known, would cause others to inflict the constitutional injury" on the plaintiff. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal quotations omitted). "Supervisory liability [may be] imposed against a supervisory official in his individual capacity [only] for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." *Preschooler II v. Clark Cty. Bd. of Tr.*, 479 F.3d 1175, 1183 (9th Cir. 2007).

The factual allegations in the Complaint do not support a reasonable inference that Defendant Armenta personally participated in the alleged harm or took some action, or set in motion a series of acts by others, which she knew or reasonably should have known would cause others to inflict the constitutional injury. The Complaint asserts that between August and November 2019 five civil actions were filed challenging the arbitrary rejections of group appeals, and, "[i]n retaliation of filing these group appeals" Defendants Diaz, Macomber, Pogue, Carter, and Escobar "conspired to and did enact emergency regulations to ban group appeals . . . join[ing] the conspiracy began by [Defendants] Birdsong and Armenta to violate the right to expressive association." (Complaint at 6.) There are, however, no allegations about how Defendant Armenta was personally involved—either in concert with another Defendant or independently, and Plaintiff cannot hold Defendant Armenta liable merely because of her role as Office Service Supervisor at ISP.

Accordingly, Plaintiff's claims against Defendant Armenta must be dismissed. In the interests of justice, however, leave to amend is granted. If Plaintiff elects to file a First Amended Complaint, he shall either omit his claims against Defendant Armenta or articulate specific facts that support a reasonable inference that Defendant Armenta personally participated in and caused the constitutional deprivations alleged. Conclusory allegations and speculation are not sufficient.

B. The Complaint Fails to State a Claim Under the First Amendment.

The First Amendment guarantees a right to petition the government for redress of grievances, and, in the prison context, deliberate retaliation by a state actor against a prisoner's exercise of his First Amendment rights may be actionable under Section 1983. To state a claim for First Amendment retaliation, a prisoner must establish five elements: "(1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First

Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Vega v. United States*, 724 F. App'x 536, 539 (9th Cir. 2018) (applying *Rhodes* standard in a *Bivens* action). Adverse action taken against a prisoner "need not be an independent constitutional violation. The mere threat of harm can be an adverse action." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (internal citations omitted). Further, the plaintiff need not allege an explicit, specific threat to establish a plausible inference of adverse action. *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

A plaintiff must plead facts that suggest that retaliation for the exercise of protected conduct was the "substantial" or "motivating" factor behind the defendant's conduct. *Brodheim*, 584 F.3d at 1271; *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989); *see also Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) ("[P]laintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.'") (citation omitted). A causal connection between the adverse action and the protected conduct can be alleged by an allegation of a chronology of events from which retaliation can be inferred. *Watison*, 668 F.3d at 1114. The filing of grievances and the pursuit of civil rights litigation against prison officials are both protected activities. *Rhodes*, 408 F.3d at 567-68. The plaintiff must allege either a chilling effect on future First Amendment activities, or that he suffered some other harm that is "more than minimal." *Watison*, 668 F.3d at 1114. "[A]n objective standard governs the chilling inquiry; a plaintiff does not have to show that 'his speech was actually inhibited or suppressed,' but rather that the adverse action at issue 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" *Brodheim*, 584 F.3d at 1271 (quoting *Rhodes*, 408 F.3d at 568-69). Accordingly, the plaintiff need not allege an explicit, specific threat. *Id.* at 1270. A plaintiff successfully pleads that the action did not reasonably advance a legitimate correctional goal by alleging, in addition to a

retaliatory motive, that the defendant's actions were "arbitrary and capricious" or that they were "unnecessary to the maintenance of order in the institution." *Watison*, 668 F.3d at 1114.

With regards to the CDCR officials (Defendants Diaz, Macomber, Pogue, Carter, and Escobar), Plaintiff has not alleged sufficient factual detail to support a reasonable inference that there was a causal connection between their alleged adverse action (the enactment of new CDCR regulations governing group appeals) and Plaintiff's protected conduct (his participation in a group appeal at ISP). In particular, the Court cannot infer from the allegations in the Complaint that any of these CDCR officials *knew* about Plaintiff's participation in the group appeal at issue—much less acted in *response* to Plaintiff's actions.

With regards to Defendant Birdsong, the sole adverse action alleged—the denial of a grievance or appeal—"neither constitutes an adverse action that is more than *de minimis* nor is it sufficient to deter a prisoner of 'ordinary firmness' from further First Amendment activities." *Dicey v. Hanks*, No. 2:14-CV-2018 JAM AC, 2015 WL 4879627, at *5 (E.D. Cal. Aug. 14, 2015) (collecting cases and denying leave to amend because "denial of a grievance does not constitute an adverse action"), report and recommendation adopted, No. 214CV2018JAMACP, 2015 WL 6163444 (E.D. Cal. Oct. 15, 2015); *see also Allen v. Kernan*, No. 316CV01923CABJMA, 2018 WL 2018096, at *7 (S.D. Cal. Apr. 30, 2018) (same), aff'd, 771 F. App'x 407 (9th Cir. 2019); *Almy v. R. Bannister*, No. 313CV00645MMDVPC, 2016 WL 11448946, at *6 (D. Nev. May 23, 2016) ("courts have generally concluded that the denial of a grievance or a disciplinary appeal without more does not meet the requisite threshold of adversity"), report and recommendation adopted sub nom. *Almy v. Bannister*, No. 313CV00645MMDVPC, 2016 WL 5419416 (D. Nev. Sept. 27, 2016). Finally, as stated above, there are no allegations that Defendant Armenta took any adverse action against Plaintiff.

Plaintiff also fails to state a claim for a violation of any other right guaranteed by the First Amendment. There is no constitutional right for detainees to file group grievances. *Ramirez v. California Dep't of Corr. & Rehab.*, No. 219CV06910ODWJDE, 2019 WL 7821470, at *8 (C.D. Cal. Dec. 30, 2019) (citing, *inter alia*, *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) ("inmates lack a separate constitutional entitlement to a specific prison grievance procedure")), report and recommendation approved, No. 219CV06910ODWJDE, 2020 WL 509130 (C.D. Cal. Jan. 31, 2020). Further, Plaintiff has not alleged that Defendants' actions precluded him from petitioning the government for redress of his grievance about the law library or any other prison conditions or misconduct by prison staff. *Cf. Burciaga v. California Dep't of Corr. & Rehab.*, No. 519CV01436ODWJDE, 2019 WL 8634165, at *8 (C.D. Cal. Sept. 5, 2019) ("Plaintiff was not forced to abandon his First Amendment right; rather, he pursued it individually . . . [and] Plaintiff does not explain how [the defendant's] instruction to file his administrative grievance individually resulted in any loss of potential defendants").

Accordingly, Plaintiff's First Amendment claims all must be dismissed. However, in the interests of justice, leave to amend is granted. If Plaintiff elects to file a First Amended Complaint, he shall either omit his First Amendment claims or include sufficient factual detail to support a reasonable inference that: each Defendant he wishes to hold liable for retaliation (1) took some adverse action—beyond merely rejecting a grievance or appeal—against Plaintiff because of Plaintiff's protected conduct and (2) that adverse action both chilled Plaintiff's exercise of his First Amendment rights and did not reasonably advance a legitimate correctional goal. Alternatively, if Plaintiff wishes to challenge the emergency regulations alone, he shall articulate specific facts to support a reasonable inference that the regulations at issue are not "reasonably related to legitimate penological interests" within the meaning of *Turner v. Safley*, 482 U.S. 78 (1987). As stated above, labels and conclusory allegations are not sufficient.

C. The Complaint Fails to State a Claim for Conspiracy.

To state a conspiracy claim, a plaintiff must allege sufficient factual details to support a plausible inference that there existed "an agreement or meeting of the minds to violate constitutional rights." *See Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (citation and internal quotation marks omitted). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Id* at 440. Plaintiff, however, alleges no facts from which the Court can infer that any of the named defendants shared a common objective to violate his constitutional rights, *see id.*, and his naked assertion of conspiracy is insufficient to state a claim, *see Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988) ("[Plaintiff] must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specific is insufficient."); *see also Twombly*, 550 U.S. at 557 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"). Accordingly, Plaintiff's conspiracy claim, or claims, must be dismissed, but, in the interests of justice, leave to amend is granted. If Plaintiff elects to file a First Amended Complaint, he must either omit any reference to conspiracy or assert in support of his conspiracy claim(s) specific facts that support a reasonable inference that a specified group of Defendants had an agreement or meeting of the minds to violate Plaintiff's rights under the First Amendment.

IV. CONCLUSION

For the reasons stated above, the Complaint is dismissed with leave to amend. If Plaintiff still wishes to pursue this action, he is granted **twenty-one (21) days** from the date of this Memorandum and Order within which to file a First Amended Complaint. In any amended complaint, Plaintiff shall cure the defects described above.

Plaintiff shall not include new defendants or new allegations that are not reasonably related to the claims asserted in the original complaint. Further, the First Amended Complaint, if any, shall be complete in itself and shall bear both the designation "First Amended Complaint" and the case number assigned to this action. **It shall not refer to, or rely on, the Complaint or any other prior pleadings**, and claims and defendants that are not expressly included in the First Amended Complaint shall be deemed abandoned.

In any amended complaint, Plaintiff shall clearly identify the number of claims he is asserting and the legal theory and facts underpinning each one. He shall either omit his claims against Defendant Armenta or articulate specific facts that support a reasonable inference that Defendant Armenta personally participated in and caused the constitutional deprivations alleged. Plaintiff also shall either omit his First Amendment claims or include sufficient factual detail to support a reasonable inference that: each Defendant he wishes to hold liable for retaliation (1) took some adverse action—beyond merely rejecting a grievance or appeal—against Plaintiff because of Plaintiff's protected conduct and (2) that adverse action both chilled Plaintiff's exercise of his First Amendment rights and did not reasonably advance a legitimate correctional goal. Finally, in any amended complaint, Plaintiff shall either omit any reference to conspiracy or assert in support of his conspiracy claim(s) specific facts that support a reasonable inference that a specified group of Defendants had an agreement or meeting of the minds to violate Plaintiff's rights under the First Amendment. If Plaintiff's sole complaint is that the CDCR adopted regulations that infringe his constitutional rights, then he shall omit references to other legal theories and articulate specific facts to support a reasonable inference that the regulations at issue are not "reasonably related to legitimate penological interests" within the meaning of *Turner v. Safley*, 482 U.S. 78 (1987).

Plaintiff shall make clear the nature and grounds for each claim, specifically identify the defendants he maintains are liable for that claim, and clearly and concisely explain the factual and legal basis for their liability. **Plaintiff must provide sufficient factual allegations to**

support a plausible inference that all of the elements for each cause of action asserted are satisfied. Plaintiff may not rely on labels, conclusory allegations and formulaic recitations of applicable law, and/or speculation.

Plaintiff is strongly encouraged to utilize the Central District's standard civil rights complaint form when filing any amended complaint, to answer each of the questions on the civil rights complaint, and then to use additional pages only if necessary to articulate specific facts that support a plausible inference that the elements of each cause of action are satisfied.

Plaintiff's failure to timely comply with this Order may result in a recommendation of dismissal. If Plaintiff no longer wishes to pursue this action, in whole or in part, she may voluntarily dismiss it, or any portion of it, by filing a signed document entitled "Notice of Dismissal" in accordance with Federal Rule of Civil Procedure 41(a)(1).

DATE: September 28, 2020

Karen L. Stevenson

KAREN L. STEVENSON
UNITED STATES MAGISTRATE JUDGE

THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION NOR IS IT INTENDED TO BE INCLUDED IN OR SUBMITTED TO ANY ONLINE SERVICE SUCH AS WESTLAW OR LEXIS.