

1 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
2 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 A complaint must contain “a short and plain statement of the claim showing that the pleader
4 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
6 do not suffice,” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.
7 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required to indulge
8 unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal
9 quotation marks and citation omitted). While factual allegations are accepted as true, legal
10 conclusions are not. Iqbal, 129 S.Ct. at 1949.

11 Under section 1983, Plaintiff must demonstrate that each defendant personally participated
12 in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This requires
13 the presentation of factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct.
14 at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility
15 of misconduct falls short of meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss,
16 572 F.3d at 969.

17 **II. Plaintiff’s Claims**

18 **A. Summary of Facts**²

19 Plaintiff, an inmate at Kern Valley State Prison, alleges that Lieutenant M. R. Phillips,
20 Warden Mike Knowles, Captain R. Fisher, Jr., and Chief Deputy Warden C. J. Chrones violated his
21 rights under the First Amendment and the Eighth Amendment of the United States Constitution.
22 Plaintiff also alleges conspiracy claims under section 1983 and 42 U.S.C. §§ 1985(3) and 1986.

23 On July 14, 2006, Plaintiff’s hand was shut in his cell door by Correctional Officer B. Clark.
24 (Doc. 12, 2nd Amend. Comp., court record p. 4 ¶3.) Plaintiff filed an inmate appeal grieving the
25 incident. (Id., ¶4.) The appeal was denied at the second level of review on October 4, 2006, by
26 Defendant Knowles. (Id., ¶5; Exhibits, pp.38-39.) The response stated that Plaintiff told Defendant
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28 ² In summarizing the facts, the Court relies on Plaintiff’s exhibits in addition to his allegations.

1 Phillips during an interview that he had been kicking his cell door because he was mad about
2 receiving a CDC 115 (rules violation) earlier in the day for masturbation. (Id.) Plaintiff alleges that
3 he was never interviewed by Defendant Phillips, and that the information regarding the sexual
4 misconduct was false and endangered his safety with the inmate population.

5 Officer Clark subsequently viewed the appeal response and stated that the incident as
6 described by Defendant Phillips never occurred. Officer Clark contacted Defendant Phillips and
7 Cranmer, a correctional counselor, and informed them of the error. Cranmer spoke with B.
8 Gricewich, an appeals coordinator, about the error, but they declined to correct the error, informing
9 Plaintiff that the appeal was a legal document.

10 Plaintiff filed another appeal grieving Defendant Phillips' false statement. (Id., Exs., pp. 30-
11 32.) On February 2, 2007, Defendant Chrones addressed that appeal at the second level of review
12 and denied Plaintiff's request to have the information removed from his record.³ (Id., Exs., pp. 33-
13 34.) The response acknowledged that an administrative error occurred and explained that Defendant
14 Phillips' response pertained to an appeal filed by another inmate and it was inadvertently attached
15 to Plaintiff's inmate appeal. (Id.) Plaintiff's request was denied on the ground that inmate appeal
16 forms are legal documents and cannot be removed from inmates' central files. (Id.) The earlier
17 appeal against Officer Clark for closing Plaintiff's hand in his cell door was reassigned for review
18 and response. (Id.)

19 Plaintiff alleges that Defendant Phillips retaliated against him for using the inmate appeals
20 process by making false statements that he interviewed Plaintiff and that Plaintiff told him he was
21 mad about receiving a rules violation report for masturbation. Plaintiff alleges that Defendants
22 Phillips, Knowles, Fisher, and Chrones were involved in a conspiracy to violate his rights and
23 endanger his safety.

24 **B. First Amendment Retaliation Claim**

25 "Within the prison context, a viable claim of First Amendment retaliation entails five basic
26 elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because
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28 ³ Defendant Fisher interviewed Plaintiff for that appeal.

1 of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his
2 First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional
3 goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). Retaliation against a prisoner’s
4 First Amendment right to file a prison grievance may support a claim under section 1983. Bruce v.
5 Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003).

6 Although Plaintiff asserts that Defendant Phillips made false statements in retaliation against
7 him for filing an inmate appeal, there are no specific facts supporting that conclusion and Plaintiff’s
8 exhibits evidence nothing more than an administrative error. Plaintiff’s hand was shut in his cell
9 door and he appealed the incident. The second level appeal response at issue addresses a “living
10 conditions” appeal in which the appellant repeatedly kicked his cell door, which led Officer Palombo
11 to pepper spray the appellant. (Exs., pp. 33-34.) The appellant claimed that excessive force was
12 used against him, and he sought placement of the appeal in Palombo’s file and disciplinary action
13 against Palombo. (Id.) Defendant Phillips interviewed the appellant and the appellant explained he
14 had been kicking his cell door because he was mad about having been issued a CDC 115 for
15 masturbation. (Id.)

16 Defendant Chrones addressed Plaintiff’s subsequent appeal complaining about the false
17 information. (Id.) Prison officials determined that an administrative error had occurred and the
18 written response to Plaintiff’s earlier appeal belonged with an appeal submitted by another inmate.
19 (Id.) However, Defendant Chrones declined to remove the erroneous appeal from Plaintiff’s central
20 file because it was a legal document.⁴ (Id.)

21 Although Plaintiff focuses on the section of the response in which it is represented that he
22 was interviewed and he told the interviewer he was mad about a rules violation report for
23 masturbation, it is plain that the *entire* second level response relates to a grievance about being
24 pepper sprayed for kicking a cell door and not to Plaintiff’s grievance about having his hand shut in
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27 ⁴ The third level response from the Inmate Appeals Branch in Sacramento states that the institution
28 represented that an amended response to Plaintiff’s appeal regarding his hand being shut in the cell door was in the
process of being prepared, reviewed, and signed, and a copy would be placed in Plaintiff’s central file. (Exs., pp. 28-
29.)

1 his cell door. As such, there is simply no support for Plaintiff's claim that Defendant Phillips made
2 up information in order to retaliate against Plaintiff for using the inmate appeals process.

3 Plaintiff's claim that Defendants conspired to retaliate against him also fails. Conspiracy
4 under section 1983 requires a showing of an agreement or a meeting of the minds to violate
5 Plaintiff's constitutional rights, and an actual deprivation of those constitutional rights. Avalos v.
6 Baca, 596 F.3d 583, 592 (9th Cir. 2010); Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001).
7 Plaintiff's conclusory allegations of a conspiracy between Defendants are not sufficient to support
8 a claim, and further, there is no underlying claim for retaliation upon which to base the conspiracy
9 claim. Iqbal, 129 S.Ct. at 1949-50; Avalos, 596 F.3d at 592.

10 **C. Eighth Amendment Failure-to-Protect Claim**

11 Plaintiff contends that the false accusation of masturbation in the appeal response caused a
12 threat to his safety, in violation of the Eighth Amendment, which protects prisoners from inhumane
13 conditions of confinement. Foster v. Runnels, 554 F.3d 807, 812 (9th Cir. 2009); Morgan v.
14 Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations are required to make out
15 a conditions of confinement claim, and only those deprivations denying the minimal civilized
16 measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment
17 violation. Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992) (citations and quotations
18 omitted). In order to state a claim for violation of the Eighth Amendment, the plaintiff must allege
19 facts sufficient to support a claim that prison officials knew of and disregarded a substantial risk of
20 serious harm to the plaintiff. Farmer v. Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994); Foster,
21 554 F.3d at 812.

22 It is questionable that referencing the issuance of a rules violation report for masturbation in
23 the course of addressing an administrative appeal could constitute an objectively serious deprivation
24 upon which an Eighth Amendment claim may be based. Regardless, there is no support for the claim
25 that Defendants knew of and disregarded an excessive risk of harm to Plaintiff's safety. Other than
26 Plaintiff's conclusory allegation of Defendant Phillips' motivation, which is contradicted by the
27 exhibits, there is no indication that Defendants intended to harm Plaintiff or that they turned a blind
28 eye to a substantial risk of harm.

1 Further, although Plaintiff alleges that he fears for his life because inmate Ray Ford circulated
2 copies of the appeal to the inmate population, it was Plaintiff who gave Ford the appeal and Ford
3 who initiated circulation of the information. (2nd Amend. Comp., p. 7.) Blame for Plaintiff's
4 decision to disclose the documents to Ford or for Ford's decision to broadcast the issue to other
5 inmates, as ill-conceived as they may have been in hindsight, may not be transferred onto
6 Defendants.

7 **D. Section 1985 and 1986 Claims**

8 In addition to alleging a conspiracy to retaliate against him under section 1983, Plaintiff
9 alleges violations of section 1985(3) and section 1986. A section 1985(3) requires "four elements:
10 (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class
11 of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;
12 and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person
13 or property or deprived of any right or privilege of a citizen of the United States." Sever v. Alaska
14 Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citation omitted). A racial, or perhaps otherwise
15 class-based, invidiously discriminatory animus is an indispensable element of a section 1985(3)
16 claim. Sprewell v. Golden State Warriors, 266 F.3d 979, 989 (9th Cir. 2001) (quotations and citation
17 omitted). "Section 1986 authorizes a remedy against state actors who have negligently failed to
18 prevent a conspiracy that would be actionable under § 1985." Cerrato v. San Francisco Cmty. Coll.
19 Dist., 26 F.3d 968, 971 n.7 (9th Cir. 1994).

20 Plaintiff's second amended complaint is devoid of any support for the existence of a section
21 1985(3) claim or a section 1986 claim.

22 **III. Conclusion and Recommendation**

23 Plaintiff's second amended complaint fails to state any claims upon which relief may be
24 granted under section 1983, 1985(3), or 1986. The deficiencies at issue are not capable of being
25 cured through amendment and therefore, the Court RECOMMENDS this action be DISMISSED,
26 with prejudice, for failure to state a claim.

27 These Findings and Recommendations will be submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**

1 **days** after being served with these Findings and Recommendations, Plaintiff may file written
2 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
3 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
4 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
5 1153 (9th Cir. 1991).

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7 IT IS SO ORDERED.

8 **Dated:** January 26, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE