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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELVIN JOHN CABRERA,
Plaintiff,
v.
THOMAS M. MADDOCK, et al.,
Defendants.

CASE NO. 1:10-cv-00611-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATIONS
(1) FOR SERVICE OF COGNIZABLE
CLAIMS AGAINST DEFENDANTS
GENTRY, SANCHEZ, SIGSTEN,
BUECHNER, JAKABUSKY, AND
KINGSTON IN FIRST AMENDED
COMPLAINT, AND (2) TO DISMISS ALL
OTHER CLAIMS AND DEFENDANTS
WITH PREJUDICE**

(ECF NO. 15)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983.

The Court screened Plaintiff's complaint (ECF No. 1), and dismissed it for failure to state a claim, but gave leave to amend. (ECF No. 10.) Plaintiff's first amended complaint (ECF No. 15) is now before the Court for screening.

I. SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.

1 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has
2 raised claims that are legally “frivolous, malicious,” or that fail to state a claim upon which
3 relief may be granted, or that seek monetary relief from a defendant who is immune from
4 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion
5 thereof, that may have been paid, the court shall dismiss the case at any time if the court
6 determines that . . . the action or appeal . . . fails to state a claim upon which relief may
7 be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

8 **II. PLEADING STANDARD**

9 Section 1983 “provides a cause of action for the deprivation of any rights,
10 privileges, or immunities secured by the Constitution and laws of the United States.”
11 Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
12 Section 1983 is not itself a source of substantive rights, but merely provides a method for
13 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94
14 (1989).

15 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)
16 that a right secured by the Constitution or laws of the United States was violated and (2)
17 that the alleged violation was committed by a person acting under the color of state law.
18 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,
19 1245 (9th Cir. 1987).

20 A complaint must contain “a short and plain statement of the claim showing that
21 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
22 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
23 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
24 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
25 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief
26 that is plausible on its face.” Id. Facial plausibility demands more than the mere
27 possibility that a defendant committed misconduct and, while factual allegations are
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1 accepted as true, legal conclusions are not. Id. at 677-78.

2 **III. PLAINTIFF'S ALLEGATIONS**

3 Plaintiff is incarcerated at California Correction Institution ("CCI") in Tehachapi,
4 California, where the acts giving rise to his complaint occurred. He names the following
5 Defendants in their individual and official capacities: (1) Matthew Cate, Secretary of the
6 California Department of Corrections and Rehabilitation ("CDCR"); (2) CCI Warden
7 Fernando Gonzalez; (3) Lt. J. Gentry, CCI Gang Investigator; (4) Sgt. E. Sanchez, CCI
8 Gang Investigator; (5) Sigsten, CCI Institutional Gang Investigator; (6) M. Buechner,
9 Special Service Agent, Office of Correctional Safety ("OCS"); (7) D. Jakabusky, Special
10 Service Agent, OCS; and (8) B. Kingston, Special Service Agent, OCS.

11 Plaintiff's allegations may be summarized essentially as follows:

12 On April 3, 2008, prison guards on Plaintiff's yard were assaulted. Plaintiff was in
13 his cell during the attack and was not involved. The prison immediately was placed on
14 lockdown.

15 On April 8, 2008, Defendants Gonzalez and Cate dispatched gang investigators
16 to conduct an operation targeting Hispanic inmates on Plaintiff's yard. All Hispanic
17 inmates were removed from their cells, their tattoos were photographed, and their
18 property was confiscated.

19 Defendant Sanchez confiscated four photocopied drawings from Plaintiff's art
20 collection and, based on these items, assembled Plaintiff's gang validation package. The
21 package contained false information. It also did not comply with applicable provisions of
22 the California Code of Regulations because it did not document and disclose an
23 articulable factual basis for validating Plaintiff as a gang member, was assembled from a
24 single source (Plaintiff's art supplies), and contained no evidence linking Plaintiff to
25 illegal conduct or gang affiliates. The symbols used in Plaintiff's gang validation are
26 common to Meso-American cultures such as the Aztec, Mayan, Olmec, and Toltec
27 civilizations. One of the drawings was a photocopy from "Low Rider" magazine, a
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1 publication not prohibited at any institution. Validating Plaintiff based on this artwork
2 constitutes an unconstitutionally overbroad application of the applicable regulations.

3 On April 11, 2008, Plaintiff and approximately thirty other Hispanic inmates were
4 removed from the general population and placed into Administrative Segregation.

5 On April 14, 2008, Defendant Sigsten conducted a pre-validation interview with
6 Plaintiff. During the interview, they discussed the four drawings found among Plaintiff's
7 belongings. Plaintiff informed Defendant Sigsten that the drawings were possessed for
8 artistic purposes in relation to Plaintiff's participation in the hobby craft program. Plaintiff
9 was unaware the drawings contained gang symbolism. Plaintiff did not know the original
10 artists, and one of the drawings was taken from a magazine permitted within the
11 institution. Plaintiff informed Defendant Sigsten that he had never been a gang member
12 or involved in gang activity. Defendant Sigsten recorded Plaintiff's statement but failed to
13 document Plaintiff's statement as to each source item. Defendants Gentry, Sanchez, and
14 Sigsten failed to timely provide Plaintiff with a copy of the "recorded opinions," and failed
15 to "properly" forward Plaintiff's statement to the Office of Correctional Safety.

16 On April 16, 2008, Plaintiff appeared before an Institutional Classification
17 Committee ("ICC") for Administrative Segregation placement. Plaintiff does not state
18 which Defendants, if any, participated in the Classification Committee. Plaintiff contested
19 the source items that were being used to validate him and the accusation that he posed
20 a threat to institutional security.

21 On April 18, 2008, Defendant Gentry submitted Plaintiff's gang validation package
22 to OCS. A copy of the gang validation package was not sent to Plaintiff. Defendants
23 Gentry and Sanchez later created a fake document stating Sanchez, rather than
24 Sigsten, interviewed Plaintiff and recorded his statements.

25 Defendants Buechner, Jakabusky, and Kingston failed to conduct a "quality
26 review" of the gang validation package. On May 13, 2008, Plaintiff was validated as an
27 associate of the Mexican Mafia Prison Gang.

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1 On June 5, 2008, Plaintiff appeared before another ICC for program review.
2 Plaintiff submitted an emergency appeal stating that the improper gang validation had
3 effectively forced him to be an associate of a prison gang and jeopardized his life.
4 Plaintiff was told to submit an autobiography and was rehoused.

5 On June 12, 2008, Plaintiff submitted a second inmate appeal.

6 On August 14, 2008, Plaintiff appeared before another ICC for Security Housing
7 Unit ("SHU") placement. Plaintiff requested a polygraph but it was denied.

8 On September 1, 2008, Plaintiff submitted an inmate appeal regarding his request
9 for a polygraph, and his claims of retaliation and racial discrimination.

10 On September 11, 2008, Plaintiff submitted an inmate appeal regarding due
11 process violations.

12 On November 3, 2008, Plaintiff was interviewed by IGIs Crouch and Hutchins,
13 who are not named as Defendants in this action. Plaintiff brought with him
14 Mexican/Aztec drawings and informed Crouch and Hutchins that he was not aware that
15 this type of art is considered gang related because it is allowed in the institution without
16 warnings or restrictions. Crouch and Hutchins informed Plaintiff he could get into further
17 trouble for the art he brought to the interview. Plaintiff informed them that he had never
18 been involved with gangs. Crouch and Hutchins stated that they did not believe Plaintiff
19 was a gang member or associate, and that Plaintiff would not have been validated if
20 investigators had not been sent down from Sacramento. They informed Plaintiff that all
21 of the Hispanic inmates removed from general population were going to be validated and
22 that Sacramento "wanted it done fast." They also explained that gang investigators do
23 not specify what art is prohibited so they can catch individuals who choose to possess it.
24 Plaintiff informed them he did not receive a copy of his pre-validation statement and all of
25 his documents had been discarded during a cell search. He informed them his views
26 were not properly presented to the Office of Correctional Safety. He requested a
27 polygraph. His request was denied.

1 The Due Process Clause protects prisoners from being deprived of liberty without
2 due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a
3 cause of action for deprivation of procedural due process, a plaintiff must first establish
4 the existence of a liberty interest for which the protection is sought. Liberty interests may
5 arise from the Due Process Clause itself or from state law. Hewitt v. Helms, 459 U.S.
6 460, 466 (1983). The Due Process Clause itself does not confer on inmates a liberty
7 interest in being confined in the general prison population instead of segregation. See id.
8 at 466-68. Liberty interests created by state law are limited to freedom from restraint
9 which “imposes atypical and significant hardship on the inmate in relation to the ordinary
10 incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995).

11 Assignment to the SHU is an administrative measure rather than a disciplinary
12 measure and is “essentially a matter of administrative discretion.” Bruce v. Ylst, 351 F.3d
13 1283, 1287 (9th Cir. 2003) (quoting Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir.
14 1997)). To satisfy due process, the administrative segregation process must include an
15 informal non-adversary hearing within a reasonable time after being segregated, notice
16 of the charges or the reasons segregation is being considered, and an opportunity for
17 the inmate to present his views. Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th
18 Cir.1986), overruled on other grounds by Sandin v. Connor, 515 U.S. 472, 481 (1995).

19 The administrative determination also must meet the “some evidence” standard of
20 Superintendent v. Hill, 472 U.S. 445, 455 (1985). Bruce, 351 F.3d at 1287-88. Because
21 the standard for “some evidence” is not high, a court need only decide whether there is
22 any evidence at all that could support the prison officials' administrative decisions. Id. at
23 1287-88. A reviewing court does not “examine the entire record, independently assess
24 witness credibility, or reweigh the evidence.” Id. at 1287. However, the evidence
25 supporting the administrative determination must bear “some indicia of reliability.” Cato
26 v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987) (citations omitted). California regulations
27 requiring three source items for gang validation do not dictate the outcome of the federal
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1 due process analysis. A single piece of evidence that has sufficient indicia of reliability
2 can be sufficient to meet the “some evidence” standard. Bruce, 351 F.3d at 1288.

3 As an initial matter, Plaintiff was given notice of the charges and multiple
4 opportunities to be heard regarding the validation decision. Thus, his allegation that
5 certain procedural protections were not afforded to him fails to state a Due Process
6 claim. Plaintiff also argues that various procedural and substantive aspects of the
7 California Code of Regulations were violated. As stated, however, California regulations
8 do not dictate the outcome of the federal due process analysis. Nor do the Title 15
9 regulations governing the conduct of prison officials entitle an inmate to sue civilly for
10 their violation. See e.g., Vasquez v. Tate, No. 1:10-cv-1876-JLT (PC), 2012 WL
11 6738167, at *9 (E.D. Cal. Dec. 28, 2012); Davis v. Powell, 901 F. Supp. 2d 1196, 1211
12 (S.D. Cal. 2012). Accordingly, Plaintiff’s allegation that regulations were not followed,
13 standing alone, fails to state a claim.

14 However, the Court is satisfied that Plaintiff has alleged sufficient facts to call into
15 question whether there was “some evidence” to support his gang validation. Plaintiff was
16 validated based on four pieces of artwork. In overturning Plaintiff’s gang validation, the
17 California Court of Appeals concluded that two of these items – drawings made by
18 validated members of the gang – were insufficient to directly link Plaintiff to the gang as
19 required under the California Code of Regulations. Although not based on federal law,
20 the Court finds the California court’s analysis sufficient at the pleading stage to call into
21 question whether these two items bore any reasonable indicia of reliability and thus
22 whether they were sufficient under the federal “some evidence” standard.

23 The remaining two items used in Plaintiff’s validation were pieces of art containing
24 alleged gang imagery or symbols. According to Plaintiff, at least one of these images
25 was taken from a magazine permitted within the institution. There is nothing in the
26 pleading to indicate that these images would have been sufficient to support an
27 administrative official’s decision to validate Plaintiff as a gang associate, absent the other
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1 artwork found insufficient by the California Court of Appeals. Nor can this Court make
2 such a conclusion without reweighing the evidence.

3 Accordingly, the Court finds that Plaintiff's allegations are sufficient at the pleading
4 stage to state a Due Process claim on the ground his gang validation was not based on
5 "some evidence." The Court will recommend that Plaintiff be permitted to proceed
6 against Defendants Gentry, Sanchez, Sigsten, Buecher, Jakabusky, and Kingston on his
7 due process claim.

8 **B. Equal Protection**

9 Plaintiff attempts to allege an Equal Protection claim on the ground that he was
10 validated during a campaign targeting Hispanic inmates.

11 The Equal Protection Clause requires that persons who are similarly situated be
12 treated alike. City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439
13 (1985). An equal protection claim may be established by showing that the defendant
14 intentionally discriminated against the plaintiff based on the plaintiff's membership in a
15 protected class, Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003), Lee v. City of
16 Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals were
17 intentionally treated differently without a rational relationship to a legitimate state
18 purpose, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); see also Lazy Y
19 Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008); North Pacifica LLC v. City of
20 Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

21 The facts alleged by Plaintiff indicate that he and other inmates were targeted for
22 gang validation in response to an attack on correctional staff. Although all of the inmates
23 subjected to the investigation were Hispanic, the facts alleged do not indicate that they
24 were discriminated against based on their membership in this protected class. Serrano,
25 345 F.3d at 1082 ("Intentional discrimination means that a defendant acted at least in
26 part because of a plaintiff's protected status.") (quoting Maynard v. City of San Jose, 37
27 F.3d 1396, 1404 (9th Cir. 1994)). To the contrary, the facts suggest that correctional
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1 officers were concerned with the conduct of a particular Hispanic gang (the Mexican
2 Mafia) and targeted inmates for investigation based on this concern. Accordingly,
3 Plaintiff's allegations fail to state an equal protection claim.

4 Plaintiff previously was advised of this defect and failed to cure it. This failure is
5 reasonably construed as reflecting his inability to do so. Leave to amend this claim
6 appears futile and should be denied.

7 **C. Retaliation**

8 Plaintiff alleges that he was validated in retaliation for the attack on correctional
9 staff.

10 "Within the prison context, a viable claim of First Amendment retaliation entails
11 five basic elements: (1) An assertion that a state actor took some adverse action against
12 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)
13 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
14 reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,
15 567-68 (9th Cir. 2005).

16 An attack on correctional staff is not protected conduct, and adverse action taken
17 against Plaintiff in response to such conduct therefore does not state a claim for
18 retaliation. Furthermore, the institution's attempt to identify gang members in response to
19 such an attack indisputably advances legitimate correctional goals. Accordingly,
20 Plaintiff's allegations fail to state a claim for retaliation.

21 Leave to amend this claim appears to be futile and should be denied.

22 **D. Cruel and Unusual Punishment**

23 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects
24 prisoners from inhumane conditions of confinement. Farmer v. Brennan, 511 U.S. 825,
25 832 (1994). A conditions of confinement claim has both an objective and a subjective
26 component. See Farmer, 511 U.S. at 834. "First, the deprivation alleged must be . . .
27 sufficiently serious," and must "result in the denial of the minimal civilized measure of
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1 life's necessities." Id. "[E]xtreme deprivations are required to make out a conditions-of-
2 confinement claim." Hudson, 503 U.S. at 9. Second, the prison official must have acted
3 with "deliberate indifference" to a substantial risk of serious harm to the inmate. Farmer,
4 511 U.S. at 834. "Mere negligence is not sufficient to establish liability." Frost v. Agnos,
5 152 F.3d 1124, 1128 (9th Cir. 1998). Rather, a plaintiff must set forth facts to show that a
6 defendant knew of, but disregarded, an excessive risk to inmate safety. Farmer, 511
7 U.S. at 837. That is, "the official must both be aware of facts from which the inference
8 could be drawn that a substantial risk of serious harm exists, and he must also draw the
9 inference." Id.

10 Plaintiff alleges that the Defendants knowingly disregarded serious risks of harm
11 to Plaintiff caused by his validation. Once validated, Plaintiff inherited the gang's
12 enemies. Moreover, because he refused to assimilate in the gang, he is now at odds
13 with its members as well as its rival gangs. A failure to keep gangs and their enemies
14 separate can create a substantial risk of serious harm. See, e.g., Noll v. Carlson, 809
15 F.2d 1446, 1449 n. 4 (9th Cir. 1987) (placing prisoner in prison with known enemies);
16 Berg v. Kincheloe, 794 F.2d 457, 460-61 (9th Cir. 1986) (exposing prisoner to possibility
17 of attack by other prisoners). However, Plaintiff alleges that he was rehoused following
18 his complaints to prison officials regarding his safety. He does not state any other facts
19 that would support a conclusion that he was subject to a risk of harm.

20 Accordingly, Plaintiff's allegations fail to state a cognizable Eighth Amendment
21 claim. Plaintiff previously was advised of the legal standards applicable to this claim and
22 given an opportunity to cure these deficiencies. He failed to do so. Leave to amend
23 reasonably appears futile and should be denied.

24 **E. Conspiracy**

25 Plaintiff claims that Defendants conspired to validate him in violation of his
26 constitutional rights.

1 To state a claim for conspiracy under section 1983, Plaintiff must show the
2 existence of an agreement or a meeting of the minds to violate his constitutional rights,
3 and an actual deprivation of those constitutional rights. Avalos v. Baca, 596 F.3d 583,
4 592 (9th Cir. 2010); Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001). Although
5 accepted as true, the factual allegations of the complaint must be sufficient to raise a
6 right to relief above the speculative level. Twombly, 550 U.S. at 555. A plaintiff must set
7 forth “the grounds of his entitlement to relief,” which “requires more than labels and
8 conclusions, and a formulaic recitation of the elements of a cause of action” Id. As
9 such, a bare allegation that defendants conspired to violate plaintiff's constitutional rights
10 will not suffice to give rise to a conspiracy claim under section 1983.

11 Plaintiff has not alleged sufficient facts to raise his conspiracy claim beyond the
12 speculative level. Accordingly, his conspiracy claim is not cognizable.

13 **F. Supervisory Liability**

14 Plaintiff claims that Defendants Cate, Gonzalez, and Gentry had actual
15 knowledge of the violations of Plaintiff's rights and failed to act to correct them. He also
16 alleges that these Defendants, as well as Defendant Buechner, failed to properly train
17 subordinates.

18 Under § 1983, Plaintiff must demonstrate that each named defendant personally
19 participated in the deprivation of his rights. Iqbal, 556 U.S. 662, 676-77 (2009); Simmons
20 v. Navajo Cnty., Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton,
21 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
22 2002). “A person subjects another to the deprivation of a constitutional right, within the
23 meaning of § 1983, if he does an affirmative act, participates in another's affirmative
24 acts, or omits to perform an act which he is legally required to do that causes the
25 deprivation of which complaint is made. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.
26 1978).

1 Liability may not be imposed on supervisory personnel under the theory of
2 respondeat superior, as each defendant is only liable for his or her own misconduct.
3 Iqbal, 556 U.S. at 676-77; Ewing, 588 F.3d at 1235. Supervisors may only be held liable
4 if they “participated in or directed the violations, or knew of the violations and failed to act
5 to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v.
6 Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570
7 (9th Cir. 2009); Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th
8 Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997).

9 Plaintiff alleges no facts to support a conclusion that Defendants Cate and
10 Gonzalez were aware of any deficiencies in Plaintiff’s gang validation process. Nor does
11 he allege facts to indicate that Defendant Gentry was aware of any violations in the gang
12 validation process, other than, perhaps, his own. No facts are alleged to indicate that
13 any of these Defendants were responsible for training others in gang validation
14 procedures. Accordingly, Plaintiff has failed to state a claim against these Defendants in
15 their supervisory capacities.

16 **G. Vague and Overbroad Regulations**

17 Plaintiff alleges, generally, that the regulations governing gang validation issues –
18 and particularly key terms in the gang validation process – are vague and overly broad.
19 Although not entirely clear, Plaintiff appears to challenge the regulations defining “gang
20 activity,” “gang,” “direct link,” “symbol,” and “association,” as not providing him with
21 adequate notice of the conduct that was prohibited.

22 In Castro v. Terhune, 712 F.3d 1304, 1311-13 (9th Cir. 2013), the Ninth Circuit
23 upheld against a challenge for definiteness the regulations governing the use of source
24 items to validate inmates as gang associates. The Ninth Circuit concluded that the
25 regulations “would have clearly indicated to [the inmate] that his conduct could be used
26 as evidence in support of validation.” Id. at 1311. As in this case, the inmate in Castro
27 also possessed artwork containing symbols and imagery associated with the Mexican
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1 Mafia. In essence, the Ninth Circuit concluded that such artwork was prohibited by the
2 regulations with sufficient definiteness to preclude a vagueness challenge. Additionally,
3 there is extensive case law on the use of Mayan symbols, including the symbols at issue
4 here, as they relate to gangs. E.g., Treglia v. Dir. of California Dep't of Corr., No. 2:09–
5 cv–352 KJN P., 2010 WL 4905741, at *5 (E.D. Cal. Nov. 24, 2010); Ruiz v. Fischer, No.
6 C 07–326 MHP, 2010 WL 4807052, at *2 (N.D. Cal. Nov. 18, 2010); Castro v. Horel, No.
7 C 09–04902 WHA, 2010 WL 1486470, at *1 (N.D. Cal. April 13, 2010); Aquillon v.
8 Evans, No. CV 08–1748–SJO (OP), 2010 WL 2384861, at *26 (C.D. Cal. March 15,
9 2010); Hernandez v. Horel, Nos. CV 08–2737–SJO (OP), CV 07–6507–SJO (OP), 2010
10 WL 1438936, at *7 (C.D. Cal. Mar. 2, 2010). Accordingly, Plaintiff's vagueness challenge
11 fails.

12 Overbreadth involves

13 the constitutional principle that “a governmental purpose to
14 control or prevent activities constitutionally subject to state
15 regulation may not be achieved by means which sweep
16 unnecessarily broadly and thereby invade the area of
17 protected freedoms.” A vague statute may be overbroad if its
18 uncertain boundaries leave open the possibility of
19 punishment for protected conduct and thus lead citizens to
avoid such protected activity in order to steer clear of the
uncertain proscriptions. A statute is also overbroad, however,
if, even though it is clear and precise, it prohibits
constitutionally protected conduct.

20 Karlan v. Cincinnati, 416 U.S. 924, 925 (1974); see also Aptheker v. Secretary of State,
21 378 U.S. 500, 508 (1964) (noting that, “[e]ven though the governmental purpose be
22 legitimate and substantial, that purpose cannot be pursued by means that broadly stifle
23 fundamental personal liberties when the end can be more narrowly achieved”).

24 Plaintiff does not identify which protected freedoms he believes are infringed by
25 the allegedly overbroad regulations. His claims that the regulations failed to provide him
26 adequate notice and therefore violate due process are properly construed as a
27 vagueness challenge, rather than overbreadth. Although not precisely stated, he may be
28 attempting to allege that his free speech rights are implicated by broad prohibitions on

1 the possession of Meso-American symbols. However, he does not propose how
2 legitimate penological objectives may be achieved by more narrow prohibitions when
3 such symbols have been appropriated by known prison gangs.

4 Accordingly, Plaintiff's allegations of vagueness and overbreadth fail to state a
5 claim.

6 **H. Injunctive Relief**

7 In light of the decision voiding Plaintiff's gang validation in In re Cabrera, 158 Cal.
8 Rptr. 3d at 135, Plaintiff's claims for injunctive relief are moot.

9 **I. Declaratory Relief**

10 In addition to damages, Plaintiff seeks declaratory relief, but because his claims
11 for damages necessarily entail a determination whether his rights were violated, his
12 separate request for declaratory relief is subsumed by those claims. Rhodes v.
13 Robinson, 408 F.3d 559, 566 n.8 (9th Cir. 2005). Therefore, this action properly
14 proceeds as one for damages only.

15 **J. Official capacity**

16 Plaintiff names each of the Defendants in their individual and official capacities.

17 Plaintiff cannot recover money damages from state officials in their official
18 capacities. Aholelei v. Dept. of Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007)
19 (citations omitted). Official capacity suits may seek only prospective relief. See Wolfson
20 v. Brammer, 616 F.3d 1045, 1065-66 (9th Cir. 2010). As stated above, Plaintiff's claims
21 for prospective relief are not moot.

22 Accordingly, Plaintiff cannot proceed against Defendants in their official
23 capacities. Leave to amend official capacity claims would be futile and should be denied.

24 **K. Castillo v. Alameida Settlement Agreement**

25 Plaintiff claims that his gang validation violated the provision of the settlement
26 agreement in Castillo. The Court takes judicial notice of the settlement agreement. The
27 agreement called for the California Department of Corrections and Rehabilitation to
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1 make changes to policies and procedures used to validate inmates as gang members or
2 associates. It did not vest any rights in Plaintiff, who was not a party to that action.
3 Finally, even if Plaintiff was a party to Castillo, a settlement agreement does not provide
4 a right secured by the Constitution or laws of the United States, and thus does not
5 provide a basis for a section 1983 claim.

6 Leave to amend this claim would be futile and should be denied.

7 **V. CONCLUSION AND RECOMMENDATION**

8 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 9 1. Plaintiff proceed on his Fourteenth Amendment Due Process claim for
10 money damages against Defendants Gentry, Sanchez, Sigsten, Buechner,
11 Jakabusky, and Kingston, in their individual capacities;
- 12 2. All other claims asserted in the first amended complaint and all other
13 named Defendants be dismissed with prejudice,
- 14 3. Service be initiated on the following Defendants:
15 **LT. J. GENTRY** – CCI Gang Investigator,
16 **SGT. E. SANCHEZ** – CCI Gang Investigator,
17 **SIGSTEN** – CCI Gang Investigator,
18 **M. BUECHNER** – Special Service Agent, OCS,
19 **D. JAKABUSKY** – Special Service Agent, OCS, and
20 **B. KINGSTON** – Special Service Agent, OCS.
- 21 4. The Clerk of the Court should send Plaintiff six (6) USM-285 forms, six (6)
22 summons, a Notice of Submission of Documents form, an instruction sheet
23 and a copy of the first amended complaint filed November 15, 2012;
- 24 5. Within thirty (30) days from the date of adoption of these findings and
25 recommendations, Plaintiff should complete and return to the Court the
26 notice of submission of documents along with the following documents:
 - 27 a. Completed summons,

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- b. One completed USM-285 form for each Defendant listed above,
- c. Seven (7) copies of the endorsed first amended complaint filed November 15, 2012; and

6. Upon receipt of the above-described documents, the Court should direct the United States Marshal to serve the above-named Defendants pursuant to Federal Rule of Civil Procedure 4 without payment of costs.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with the findings and recommendations, the parties may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." A party may respond to another party's objections by filing a response within fourteen (14) days after being served with a copy of that party's objections. The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: June 1, 2015

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE