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7 **UNITED STATES DISTRICT COURT**

8 EASTERN DISTRICT OF CALIFORNIA
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10 QUINCY SIMS,

Case No. 1:12-cv-01904-LJO-SKO (PC)

11 Plaintiff,

ORDER DENYING MOTION TO EXCLUDE
REFERENCE TO DA VIEGA AND
DENYING MOTION RE QUALIFIED
IMMUNITY

12 v.

13 M. CABRERA,

(Doc. 28)

14 Defendant.
15 _____/

16 **I. Motion to Exclude Reference to Da Viega**

17 Plaintiff Quincy Sims (“Plaintiff”), a state prisoner proceeding pro se and in forma
18 pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on November 21, 2012. This
19 action for damages is proceeding against Defendant M. Cabrera (“Defendant”) for failing to
20 protect Plaintiff from the threat of harm by gang members or affiliates while he was at Kern
21 Valley State Prison, in violation of the Eighth Amendment of the United States Constitution.

22 On May 29, 2014, Plaintiff filed a “Motion Requesting that Appeals Coordinator B. Da
23 Viega Citings be Dismissed from Defendant.” (Doc. 28.) Defendant did not file a response and
24 the motion was submitted on the record without oral argument pursuant to Local Rule 230(l).

25 Plaintiff contends that Defendant used “supporting documentation” in moving for
26 judgment on the pleadings, and he seeks to preclude Defendant from citing to actions or omissions
27 by B. Da Viega in light of Da Viega’s dismissal from this action for failure to state a claim. As
28 discussed in the findings and recommendations issued concurrently with this order, Defendant

1 sought judgment on the pleadings based on Plaintiff's failure to exhaust the available
2 administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(c). Defendant appropriately
3 limited his argument to the four corners of Plaintiff's amended complaint and he did not attach
4 any "supporting documentation" to his motion. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.
5 2009). Plaintiff alleged in his amended complaint that Da Viegas failed to process his appeal, and
6 Defendant is entitled to rely on that allegation in moving for relief based on Plaintiff's failure to
7 exhaust. (Doc. 7, Amend. Comp., § II(C).)

8 Additionally, Plaintiff misunderstands the context in which Da Viegas's actions or
9 omissions may be used. Plaintiff's legal claim that Da Viegas violated his constitutional rights was
10 dismissed, with prejudice, for failure to state a claim, and Da Viegas is no longer a party to this
11 action. 28 U.S.C. § 1915A. (Doc. 8.) However, Da Viegas was an appeals coordinator, and his
12 actions or omissions in that capacity may be relevant in this case, including but not limited to
13 determining whether Plaintiff exhausted the administrative remedies. Fed. R. Evid. 401, 601, 602,
14 701, 702. (Amend. Comp., § II(C).) As a result, there exists no legal basis upon which Plaintiff
15 may seek to bar Defendant from mentioning Da Viegas, relying on documents involving Da Viegas,
16 or using Da Viegas as a witness.¹ Fed. R. Evid. 401, 601, 602, 701, 702. While Plaintiff may
17 object to evidence produced by Defendant, any objections must be based in law and the present
18 one is not.

19 **II. Motion to Deny Qualified Immunity**

20 Attached to the motion to exclude reference to Da Viegas but not separately docketed is
21 Plaintiff's motion seeking an order denying Defendant qualified immunity. In his answer,
22 Defendant pled qualified immunity as his fourth affirmative defense and it is on that basis Plaintiff
23 seeks an order denying qualified immunity. (Doc. 16, Answer, 3:10-11.) Plaintiff's motion is
24 misplaced procedurally, however, as he is not entitled to an order addressing qualified immunity.

25 As set forth in a separate order issued concurrently with this order, Plaintiff may not file a
26 reply to the answer as a matter of right, and the Court did not grant leave to file a reply in this

27 ¹ To the extent relevant and in compliance with any applicable procedural rules, Plaintiff is also entitled to support his
28 position by relying on actions or omissions attributable to Da Viegas.

1 case. Fed. R. Civ. P. 7(a)(7). Furthermore, while a party may seek to strike matter from a
2 pleading, disagreement with entitlement to qualified immunity is not a ground which will support
3 a motion to strike. Fed. R. Civ. P. 7(a)(2); Fed. R. Civ. P. 12(f). In the event that Defendant raises
4 the issue of qualified immunity in a motion, Plaintiff's opportunity to respond comes in the form
5 of his opposition to the motion. Local Rule 230(l).

6 **III. Order**

7 Based on the foregoing, Plaintiff's motion to exclude reference to Da Viegas is DENIED,
8 and Plaintiff's motion to deny Defendant qualified immunity is DENIED on procedural grounds.

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11 IT IS SO ORDERED.

12 Dated: December 8, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE