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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEWART MANAGO,

Plaintiff,

v.

DAVEY, et al.,

Defendants.

Case No. 1:16-cv-00399 LJO DLB PC

FINDINGS AND RECOMMENDATIONS
FINDING COGNIZABLE CLAIMS AND
DISMISSING REMAINING CLAIMS

TWENTY-ONE DAY DEADLINE

Plaintiff Stewart Manago (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis,¹ filed this civil rights action on March 24, 2016. He filed a First Amended Complaint on April 18, 2016. Plaintiff names D. Davey, M.V. Sexton, J. Vander Poel, A. Maxfield, A. Valdez, J. Aceveo and E. Razo as Defendants.

On April 27, 2016, the Court screened Plaintiff’s First Amended Complaint and found that it stated a First Amendment retaliation claim against Defendants Davey, Sexton, Vander Poel, Maxfield, Valdez, Acevedo and Razo. It did not state any other claims, and Plaintiff was ordered to file an amended complaint, or notify the Court of his willingness to go forward only on the cognizable claims.

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¹ Plaintiff is subject to 28 U.S.C. § 1915(g), but the Court determined that the allegations in his complaint met the imminent danger exception and permitted him to proceed in forma pauperis.

1 On May 5, 2016, Plaintiff notified the Court that he wished to go forward only on the First
2 Amendment retaliation claim. The Court now issues these Findings and Recommendations based on
3 Plaintiff's decision.

4 **A. SCREENING STANDARD**

5 The Court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
7 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
8 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
9 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
10 "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
11 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
12 claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

13 A complaint must contain "a short and plain statement of the claim showing that the pleader
14 is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
15 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
16 do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly,
17 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to
18 'state a claim that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 555). While factual
19 allegations are accepted as true, legal conclusions are not. Id.

20 Section 1983 provides a cause of action for the violation of Plaintiff's constitutional or other
21 federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092
22 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v.
23 Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff's allegations must link the actions or
24 omissions of each named defendant to a violation of his rights; there is no respondeat superior
25 liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County, Ariz., 609 F.3d
26 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009);
27 Jones, 297 F.3d at 934. Plaintiff must present factual allegations sufficient to state a plausible claim
28 for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

1 The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 556 U.S.
2 at 678; Moss, 572 F.3d at 969.

3 **B. ALLEGATIONS IN FIRST AMENDED COMPLAINT**

4 Plaintiff is currently incarcerated at California State Prison- Sacramento. The events at issue
5 occurred while he was housed at Corcoran State Prison (“Corcoran”). Plaintiff is a member of the
6 “Crips” street gang, and he has admitted his membership to prison officials since 1989.

7 Plaintiff alleges that he has been retained in the Secured Housing Unit (“SHU”) at Corcoran
8 in retaliation for reporting officers’ (1) sex crimes with inmates and patients; and (2) smuggling
9 contraband into California prisons. Plaintiff believes that Defendants use influential inmates, whom
10 Plaintiff labels as the “Inmate Task Force (‘ITF’), to attempt to discipline other inmates in
11 exchange for illegal favors and preferential treatment.

12 Plaintiff contends that Defendants Davey and Sexton conspired with the ITF to “perpetuate
13 the use of inmate task force through various acts of retaliation, intimidation, cover-up, tampering and
14 hampering investigations. . .” ECF No. 13, at 2.

15 On October 11, 2012, the California Department of Corrections and Rehabilitation set forth
16 new procedures for validating gang members and determined that validated inmates would no longer
17 be considered for Administrative Segregation in the SHU unless there were also behavioral issues.

18 On December 26, 2013, Plaintiff arrived at the Corcoran SHU to serve an indeterminate SHU
19 term for allegedly being an associate of the Black Guerilla Family (“BGF”) prison gang. Prison
20 officials decided to retain Plaintiff in the SHU in January 2014 and April 2014.

21 From December 26, 2013, through July 28, 2015, Defendants had no evidence that Plaintiff
22 was promoting BGF gang activities, and that they knew that he was not a BGF member based on
23 documents in his C-File.

24 On July 28, 2015, Defendants retained Plaintiff in the SHU in part based on a false prison
25 gang validation as a BGF member. Plaintiff contends that this was done in retaliation for his civil
26 action Manago v. Williams, of which Defendants knew, and because of his willingness to report staff
27 criminal activity, file grievances and assist the Office of Internal Affairs with criminal
28 investigations. Plaintiff contends that Defendants knew that he did not pose a threat to the safety and

1 security of the institution, and knew that he has stopped various “major security threats.” ECF No.
2 13, at 9. He also alleges that they knew that he assisted in preventing staff sex crimes and other
3 criminal activities.

4 Plaintiff contends that in March 2016, an officer prepared a confidential report indicating that
5 Plaintiff was being targeted for assault/murder, substantiating his safety concerns. He alleges that
6 Defendants knew of his safety concerns as early as December 2013, but failed to inform Plaintiff of
7 the threats against him and failed to protect him from potential attacks. Plaintiff had been assaulted
8 previously because he was labeled as a “snitch.”

9 Defendant Maxfield told Plaintiff of inmates’ alleged plan to assault him on March 16, 2016.

10 From January 7, 2014, through July 16, 2014, Defendant Davey was responsible for allowing
11 staff to change Plaintiff’s single cell status to double cell status, with the intent of housing Plaintiff
12 with a known gang rival. However, the rival gang members refused to come into Plaintiff’s cell.

13 Plaintiff also alleges that Defendant Davey failed to supervise Corcoran staff to ensure that
14 rules, policies and procedures were enforced on July 28, 2015.

15 **C. DISCUSSION**

16 1. First Amendment Retaliation

17 “Prisoners have a First Amendment right to file grievances against prison officials and to be
18 free from retaliation for doing so.” Watson v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing
19 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). Also protected by the First Amendment is
20 the right to pursue civil rights litigation in federal court without retaliation. Silva v. Di Vittorio, 658
21 F.3d 1090, 1104 (9th Cir. 2011). “Within the prison context, a viable claim of First Amendment
22 retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action
23 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4)
24 chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
25 advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

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1 Here, Plaintiff alleges that Defendants retaliated against him by retaining him in the SHU
2 because of his grievances and civil litigation. The Court finds that this states a retaliation claim
3 against Defendants Davey, Sexton, Vander Poel, Maxfield, Valdez, Acevedo and Razo.²

4 2. Conspiracy

5 a. *Section 1983*

6 To state a claim for conspiracy under section 1983, Plaintiff must show the existence of an
7 agreement or a meeting of the minds to violate his constitutional rights, and an actual deprivation of
8 those constitutional rights. Avalos v. Baca, 596 F.3d 583, 592 (9th Cir. 2010); Franklin v. Fox, 312
9 F.3d 423, 441 (9th Cir. 2001).

10 Plaintiff alleges that on July 28, 2015, Defendants conspired to violate his constitutional
11 rights. His conspiracy theory, however, is not supported by anything other than his speculation. As
12 explained above, “[f]actual allegations must be [sufficient] to raise a right to relief above the
13 speculative level” Twombly, 127 S.Ct. at 1965. Therefore, a bare allegation that Defendants
14 conspired to violate Plaintiff’s constitutional rights will not suffice to give rise to a conspiracy claim
15 under section 1983.

16 b. *Section 1985*

17 A claim brought for violation of section 1985(3) requires “four elements: (1) a conspiracy;
18 (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the
19 equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in
20 furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or
21 deprived of any right or privilege of a citizen of the United States.” Sever v. Alaska Pulp Corp., 978
22 F.2d 1529, 1536 (9th Cir. 1992) (citation omitted). A racial, or perhaps otherwise class-based,
23 invidiously discriminatory animus is an indispensable element of a section 1985(3) claim. Sprowell
24 v. Golden State Warriors, 266 F.3d 979, 989 (9th Cir. 2001) (quotations and citation omitted).

25 Plaintiff’s section 1985(3) conspiracy claim fails for two reasons. First, as in his section
26 1983 conspiracy claim, he has failed to allege specific acts in furtherance of the conspiracy.
27 Plaintiff’s allegations are conclusory and speculative at best. See Sanchez v. City of Santa Ana, 936
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² Plaintiff will be instructed on service when these Findings and Recommendations are adopted.

1 F.2d 1027, 1039 (9th Cir. 1990) (“A mere allegation of conspiracy without factual specificity is
2 insufficient to support a claim.”). Second, Plaintiff fails to allege any kind of racial, or otherwise
3 class-based, invidious discriminatory animus, which is an indispensable element of a section 1985(3)
4 claim. Sprewell, 266 F.3d at 989 (quotations and citation omitted).

5 Plaintiff therefore fails to state a conspiracy claim under section 1985(3).

6 3. RICO

7 The Racketeer Influenced and Corrupt Organizations Act (“RICO”) authorizes a private right
8 of action by “[a]ny person injured in his business or property by reason of a violation of section
9 1962.” 18 U.S.C. § 1964(c). In order to state a civil RICO claim, a plaintiff must sufficiently allege
10 “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury
11 to plaintiffs’ business or property.” Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir.2001).

12 Plaintiff alleges that Defendants Davey and Sexton violated RICO “for multiple RICO
13 predicate acts, including obstruction of justice. . .” ECF No. 13, at 23. However, civil rights
14 violations do not fall within the statutory definition of “racketeering activity.” Bowen v. Oistead,
15 125 F.3d 800, 806 (9th Cir.1997). Moreover, Plaintiff fails to show that he suffered any injury to his
16 business or property due to actions that would be defined as racketeering activity under section 1961.
17 See Oscar v. Univ. Students Co-op. Ass’n, 965 F.2d 783, 785 (9th Cir.1992) (en banc) (“injuries to
18 property are not actionable under RICO unless they result in tangible financial loss to the plaintiff”
19 and “personal injuries are not compensable under RICO”).

20 Plaintiff therefore fails to state a claim under RICO and this cannot be cured by amendment.

21 4. Eighth Amendment

22 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
23 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
24 Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with
25 food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v. Brennan, 511 U.S.
26 825, 832-33, 114 S.Ct. 1970 (1994) (quotations omitted). Prison officials have a duty under the
27 Eighth Amendment to protect prisoners from violence at the hands of other prisoners because being
28 violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their

1 offenses against society. Farmer, 511 U.S. at 833-34 (quotation marks omitted); Clem v. Lomeli,
2 566 F.3d 1177, 1181 (9th Cir. 2009); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005).
3 However, prison officials are liable under the Eighth Amendment only if they demonstrate deliberate
4 indifference to conditions posing a substantial risk of serious harm to an inmate; and it is well settled
5 that deliberate indifference occurs when an official acted or failed to act despite his knowledge of a
6 substantial risk of serious harm. Farmer, 511 U.S. at 834, 841 (quotations omitted); Clem, 566 F.3d
7 at 1181; Hearns, 413 F.3d at 1040.

8 Plaintiff alleges that Defendants knew of his safety concerns in December 2013, but failed to
9 inform him of the threats against him and failed to protect him from potential attacks. Plaintiff was
10 also changed from single cell to double cell status in January 2014, though he states that rival gang
11 members would not enter his cell.

12 Plaintiff's allegations, however, do not rise to the level of an Eighth Amendment violation.
13 While he cites prior attacks and potential danger, he does not sufficiently allege that Defendants
14 were aware of a substantial risk of harm and failed to take action. For example, Plaintiff states that
15 no assault occurred based on the cell status change. See Berg v. Kincheloe, 794 F.2d 457, 459 (9th
16 Cir. 1986) ("a mere suspicion that an attack will occur" is not enough to support a cognizable Eighth
17 Amendment claim); Williams v. Wood, 223 Fed. App'x 670, 671 (9th Cir. 2007) ("speculative and
18 generalized fears of harm at the hands of other prisoners do not rise to a sufficiently substantial risk
19 of serious harm to [plaintiff's] future health").

20 For these reasons, Plaintiff fails to state a claim under the Eighth Amendment.

21 5. Failure to Train and Supervise

22 Supervisory personnel may not be held liable under section 1983 for the actions of
23 subordinate employees based on *respondeat superior*, or vicarious liability. Crowley v. Bannister,
24 734 F.3d 967, 977 (9th Cir. 2013); accord Lemire v. California Dep't of Corr. and Rehab., 726 F.3d
25 1062, 1074-75 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en
26 banc).

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1 Rather, “[a] supervisor may be liable only if (1) he or she is personally involved in the
2 constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor’s
3 wrongful conduct and the constitutional violation.” Crowley, 734 F.3d at 977 (citing Snow, 681
4 F.3d at 989) (internal quotation marks omitted); accord Lemire, 726 F.3d at 1074-75; Lacey, 693
5 F.3d at 915-16. “Under the latter theory, supervisory liability exists even without overt personal
6 participation in the offensive act if supervisory officials implement a policy so deficient that the
7 policy itself is a repudiation of constitutional rights and is the moving force of a constitutional
8 violation.” Crowley, 734 F.3d at 977 (citing Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989))
9 (internal quotation marks omitted).

10 Plaintiff contends that Defendants Davey, Sexton and Vander Poel failed to train, supervise
11 or control their subordinates, or enacted policies that were the moving force behind the alleged
12 violations. As explained above, Plaintiff states a claim against all Defendants for violation of the
13 First Amendment based on their individual participation. He does not, however, state any kind of
14 supervisory claim. Other than the First Amendment claim, he does not specifically allege a causal
15 link between the supervisory defendants and his claimed constitutional violations, and he has not
16 sufficiently described any policy that would support liability.

17 Plaintiff therefore fails to state a claim based on supervisory liability.

18 **D. FINDINGS AND RECOMMENDATIONS**

19 Plaintiff’s First Amended Complaint states a cognizable claim against Defendants Davey,
20 Sexton, Vander Poel, Maxfield, Valdez, Acevedo and Razo for retaliation in violation of the First
21 Amendment, and it SHALL GO FORWARD on this basis. It does not state any other claims, and
22 the remaining claims are DISMISSED FOR FAILURE TO STATE A CLAIM.

23 These Findings and Recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one
25 (21) days after being served with these Findings and Recommendations, Plaintiff may file written
26 objections with the Court. Such a document should be captioned “Objections to Magistrate Judge’s
27 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the

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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir.1991).

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4 IT IS SO ORDERED.

5 Dated: May 11, 2016

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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