

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONFESSOR MONTALVO,
Plaintiff,
VS.
CDCR PERSONNEL,
Defendants.

1:16-cv-01078-GSA-PC

SCREENING ORDER

ORDER DISMISSING FIRST AMENDED
COMPLAINT FOR FAILURE TO STATE
A CLAIM, WITH LEAVE TO AMEND
(ECF No. 11.)

**THIRTY-DAY DEADLINE TO FILE
SECOND AMENDED COMPLAINT**

I. BACKGROUND

Confessor Montalvo (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on July 26, 2016. (ECF No. 1.)

On August 15, 2016, Plaintiff consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c), and no other parties have made an appearance. (ECF No. 6.) Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall conduct any and all proceedings in the case until such time as reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

1 The court screened the Complaint under 28 U.S.C. § 1915A and issued an order
2 severing some of Plaintiff's claims for lack of venue, (ECF No. 9), and an order dismissing the
3 Complaint for violation of Rule 8(a), with leave to amend, (ECF No. 10.) On April 17, 2017,
4 Plaintiff filed the First Amended Complaint, which is now before the court for screening. (ECF
5 No. 11.)

6 **II. SCREENING REQUIREMENT**

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

15 A complaint is required to contain “a short and plain statement of the claim showing
16 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
17 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
18 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
19 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff's allegations are
20 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
21 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
22 To state a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to
23 ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S.
24 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as
25 true, legal conclusions are not. Id. The mere possibility of misconduct falls short of meeting
26 this plausibility standard. Id.

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1 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

2 Plaintiff is presently incarcerated at Kern Valley State Prison in Delano, California.
3 The events at issue in the First Amended Complaint allegedly occurred at Corcoran State
4 Prison (CSP) in Corcoran, California, when Plaintiff was incarcerated there in the custody of
5 the California Department of Corrections and Rehabilitation (CDCR). Plaintiff names as
6 defendants J. D. Smith (Chief Deputy Warden), Captain R. Chavez, Captain R. Broomfield,
7 Lieutenant S. Pina, Sergeant N. Holland, CCII (Correctional Counselor II) C. Villarrial, CCII
8 T. Campbell, CCI T. Galaviz, and D. Prince (Social Worker) (collectively, “Defendants”).
9 Defendants were employed by the CDCR at CSP at the time of the events at issue.

10 The gravamen of Plaintiff’s First Amended Complaint is that he was validated as an
11 associate of the Mexican Mafia prison gang and retained in the Security Housing Unit (SHU)
12 by Defendants at CSP, who knowingly used false information to validate him in retaliation for
13 assaults on staff during a disturbance at High Desert State Prison (HDSP) on August 20, 2012.

14 Plaintiff alleges as follows.¹ On August 20, 2012, when Plaintiff was incarcerated at
15 HDSP, Plaintiff was issued a Rules Violation Report (RVR) for his participation in a mass
16 disturbance involving forty-nine inmates who committed battery on correctional staff. (See
17 Exh. B to First Amended Complaint, ECF No. 11.) Plaintiff was found guilty of battery on a
18 peace officer and assessed a term in the SHU at HDSP. (*Id.*, Exh. F.)

19 Subsequently, Plaintiff was transferred to CSP. On February 20, 2014, Plaintiff was
20 validated at CSP as a Mexican Mafia prison gang associate by members of the Security Threat
21 Group Unit Classification Committee (STGUCC), including defendants Broomfield, Pina,
22 Campbell, and Galaviz. (*Id.*, Exh. C.) Defendant Villarrial did an assessment on March 10,
23 2014, and recommended that Plaintiff be retained in the SHU at CSP to participate in the Step
24 Down program. (*Id.*, Exh. F.) On March 11, 2014, Plaintiff was retained in the SHU by
25 members of the STGUCC, including defendants Smith, Holland, Prince, Pina, Galaviz, and
26 Chavez. (*Id.*, Exh. G.) Plaintiff alleges that Defendants knowingly used false information to

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28 ¹ For clarification, the court refers to Plaintiff’s exhibits to the First Amended Complaint, which
 include copies of the RVR and other documents from Plaintiff’s prison file.

1 determine that he should be validated and housed in the SHU.

2 Plaintiff alleges that the Step Down program forces an inmate to inform on criminal
3 organizations, knowing in advance that informing on these organizations places the inmate at
4 risk of physical assault or even death.

5 Subsequently, Plaintiff was transferred to Pelican Bay State Prison (PBSP). On April
6 17, 2015, the Departmental Review Board at PBSP cleared Plaintiff of gang activity and
7 released him from the SHU. (Id., Exh. A.)

8 Plaintiff requests monetary damages and attorney's fees.

9 **IV. PLAINTIFF'S CLAIMS**

10 The Civil Rights Act under which this action was filed provides:

11 Every person who, under color of any statute, ordinance, regulation, custom, or
12 usage, of any State or Territory or the District of Columbia, subjects, or causes
13 to be subjected, any citizen of the United States or other person within the
jurisdiction thereof to the deprivation of any rights, privileges, or immunities
14 secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress

15 42 U.S.C. § 1983.

16 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
17 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
18 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman
19 v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697
20 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012);
21 Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

22 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
23 under color of state law, and (2) the defendant deprived him of rights secured by the
24 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
25 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
26 “under color of state law”). A person deprives another of a constitutional right, “within the
27 meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or
28 omits to perform an act which he is legally required to do that causes the deprivation of which

1 complaint is made.”” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
2 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
3 causal connection may be established when an official sets in motion a ‘series of acts by others
4 which the actor knows or reasonably should know would cause others to inflict’ constitutional
5 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
6 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
7 Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
8 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

9 **A. Equal Protection**

10 Plaintiff claims that his rights to equal protection were violated because of Defendants’
11 malicious intent to use false information against him to validate him as a Mexican Mafia gang
12 associate.

13 The Equal Protection Clause requires that persons who are similarly situated be treated
14 alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249
15 (1985); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). An equal protection claim may
16 be established by showing that Defendants intentionally discriminated against Plaintiff based
17 on his membership in a protected class, Comm. Concerning Cmtly. Improvement v. City of
18 Modesto, 583 F.3d 690, 702-03 (9th Cir. 2009); Serrano v. Francis, 345 F.3d 1071,1082 (9th
19 Cir. 2003), Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly
20 situated individuals were intentionally treated differently without a rational relationship to a
21 legitimate state purpose, Engquist v. Oregon Department of Agr., 553 U.S. 591, 601-02, 128
22 S.Ct. 2146 (2008); Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073
23 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008); North Pacifica LLC
24 v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

25 Plaintiff has not alleged any facts demonstrating that he was intentionally discriminated
26 against on the basis of his membership in a protected class, or that he was intentionally treated
27 differently than other similarly situated inmates without a rational relationship to a legitimate
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1 state purpose. Therefore, Plaintiff fails to state a claim for relief for violation of his right to
2 equal protection.

3 **B. Eighth Amendment – Deliberate Indifference**

4 Plaintiff claims that Defendants acted with deliberate indifference when they knowingly
5 used false information to validate him. Plaintiff also appears to allege that he was placed at risk
6 of harm as a participant in the Step Down program.

7 The Eighth Amendment's prohibition against cruel and unusual punishment protects
8 prisoners not only from inhumane methods of punishment but also from inhumane conditions
9 of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer v.
10 Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994) and Rhodes v. Chapman, 452 U.S. 337,
11 347, 101 S.Ct. 2392 (1981)) (quotation marks omitted). While conditions of confinement may
12 be, and often are, restrictive and harsh, they must not involve the wanton and unnecessary
13 infliction of pain. Morgan, 465 F.3d at 1045 (citing Rhodes, 452 U.S. at 347) (quotation marks
14 omitted). Thus, conditions which are devoid of legitimate penological purpose or contrary to
15 evolving standards of decency that mark the progress of a maturing society violate the Eighth
16 Amendment. Morgan, 465 F.3d at 1045 (quotation marks and citations omitted); Hope v.
17 Pelzer, 536 U.S. 730, 737, 122 S.Ct. 2508 (2002); Rhodes, 452 U.S. at 346. Prison officials
18 have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation,
19 medical care, and personal safety, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)
20 (quotation marks and citations omitted), but not every injury that a prisoner sustains while in
21 prison represents a constitutional violation, Morgan, 465 F.3d at 1045 (quotation marks
22 omitted).

23 To maintain an Eighth Amendment claim, a prisoner must show that prison officials
24 were deliberately indifferent to a substantial risk of harm to his health or safety. E.g., Farmer,
25 511 U.S. at 847; Thomas v. Ponder, 611 F.3d 1144, 1150-51 (9th Cir. 2010); Foster v. Runnels,
26 554 F.3d 807, 812-14 (9th Cir. 2009); Morgan, 465 F.3d at 1045; Johnson, 217 F.3d at 731;
27 Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). The deliberate indifference standard
28 involves an objective and a subjective prong. First, the alleged deprivation must be, in

1 objective terms, “sufficiently serious” Farmer, 511 U.S. at 834. “[R]outine discomfort

2 inherent in the prison setting” does not rise to the level of a constitutional violation. Johnson,

3 217 F.3d at 731. Rather, extreme deprivations are required to make out a conditions of

4 confinement claim, and only those deprivations denying the minimal civilized measure of life’s

5 necessities are sufficiently grave to form the basis of an Eighth Amendment violation. Farmer,

6 511 U.S. at 834; Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992). The

7 circumstances, nature, and duration of the deprivations are critical in determining whether the

8 conditions complained of are grave enough to form the basis of a viable Eighth Amendment

9 claim. Johnson, 217 F.3d at 731. Second, the prison official must “know[] of and disregard[]

10 an excessive risk to inmate health or safety” Farmer, 511 U.S. at 837. Thus, a prison

11 official may be held liable under the Eighth Amendment for denying humane conditions of

12 confinement only if he knows that inmates face a substantial risk of harm and disregards that

13 risk by failing to take reasonable measures to abate it. Id. at 837-45. Mere negligence on the

14 part of the prison official is not sufficient to establish liability, but rather, the official’s conduct

15 must have been wanton. Farmer, 511 U.S. at 835; Frost, 152 F.3d at 1128.

16 Plaintiff alleges that he was wrongly validated as a gang associate, detained in the SHU,

17 and required to participate in the Step Down program, a program in which inmates inform on

18 criminal organizations, which places inmates at risk of harm. This is not enough to state an

19 Eighth Amendment claim. The conditions alleged by Plaintiff are not grave enough to rise to

20 the level of an Eighth Amendment violation. Plaintiff has not shown how he was placed at

21 substantial risk of specific, serious harm and what harm, if any, he suffered. Nor has Plaintiff

22 alleged that any named Defendant knew about the substantial risk of harm to Plaintiff but

23 deliberately ignored the risk, acting unreasonably or failing to act. Therefore, Plaintiff fails to

24 state a claim under the Eighth Amendment. Plaintiff shall be granted time to file an amended

25 complaint addressing this claim.

26 **C. Due Process – Gang Validation and Detention in the SHU**

27 To invoke the protections of the Due Process Clause, a party must first establish that a

28 protected liberty interest is at stake. E.g., Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. at

1 2393 (2005). The Due Process Clause does not itself create a liberty interest in being free from
2 administrative segregation. Hewitt v. Helms, 459 U.S. 460, 468, 103 S.Ct. 864, 74 L.Ed.2d
3 675 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1091–92 (9th Cir. 1986) (“Toussaint IV”).
4 Accordingly, any liberty interest in being free from administrative segregation must be the
5 creation of state law. Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993). Liberty interests
6 created by state law will generally be limited to freedom from restraint that “imposes atypical
7 and significant hardship on the inmate in relation to the ordinary incidents of prison life.”
8 Sandin v. Conner, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Technically,
9 “Sandin requires a factual comparison between conditions in general population or
10 administrative segregation (whichever is applicable) and disciplinary segregation, examining
11 the hardship caused by the prisoner’s challenged action in relation to the basic conditions of life
12 as a prisoner.” Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003). A plaintiff must assert a
13 “dramatic departure” from the standard conditions of confinement before due process concerns
14 are implicated. Sandin, 515 U.S. at 485–86; see also Keenan v. Hall, 83 F.3d 1083, 1088–89
15 (9th Cir. 1996).

16 Plaintiff alleges that he was held in the SHU at CSP for approximately a year on false
17 charges that he was a gang associate. The fact that he was later cleared of gang activity and
18 released from segregation does not diminish the conditions under which he was held.
19 However, Plaintiff has not alleged facts showing that his detention in the SHU was a dramatic
20 departure from the conditions of normal prison life, showing that he has a liberty interest in
21 avoiding detention of the SHU.

22 If Plaintiff is able to establish a liberty interest in avoiding his SHU detention, then he is
23 entitled to minimal due process procedures. The assignment of validated gang members to the
24 SHU is an administrative measure rather than a disciplinary measure, and is “essentially a
25 matter of administrative segregation.” Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003)
26 (quoting Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir. 1997)). As such, Plaintiff is
27 entitled to the minimal procedural protections set forth in Toussaint, such as notice, an
28 opportunity to be heard, and periodic review. Bruce, 351 F.3d at 1287 (citing Toussaint, 801

1 F.2d at 1100). Due process also requires that there be an evidentiary basis for the prison
2 officials' decision to place an inmate in segregation for administrative reasons. Superintendent
3 v. Hill, 472 U.S. 445, 455 (1985); Toussaint, 801 F.2d at 1104-05. This standard is met if there
4 is "some evidence" from which the conclusion of the administrative tribunal could be deduced.
5 Id. at 1105. The standard is only "minimally stringent" and the relevant inquiry is whether
6 there is any evidence in the record that could support the conclusion reached by the prison
7 decision-makers. Cato v. Rushen, 824 F.2d 703, 705 (9th Cir.1987). The "some evidence"
8 standard applies to an inmate's placement in the SHU for gang affiliation. See Bruce, 351 F.3d
9 at 1287-88.

10 When a prisoner is placed in administrative segregation, prison officials must, within a
11 reasonable time after the prisoner's placement, conduct an informal, non-adversary review of
12 the evidence justifying the decision to segregate the prisoner. See Hewitt, 459 U.S. at 476,
13 abrogated in part on other grounds by Sandin, 515 U.S. 472 (1995); Mendoza v. Blodgett, 960
14 F.2d 1425, 1430 (9th Cir. 1992), abrogated in part on other grounds by Sandin, 515 U.S. 472;
15 Toussaint, 801 F.2d at 1100, abrogated in part on other grounds by Sandin, 515 U.S. 472. The
16 Supreme Court has stated that five days is a reasonable time for the post-placement review.
17 See Hewitt, 459 U.S. at 477. Before the review, the prisoner must receive some notice of the
18 charges and be given an opportunity to respond to the charges. See id. at 476; Mendoza, 960
19 F.2d at 1430-31; Toussaint, 801 F.2d at 1100. The prisoner, however, is not entitled to
20 "detailed written notice of charges, representation of counsel or counsel-substitute, an
21 opportunity to present witnesses, or a written decision describing the reasons for placing the
22 prisoner in administrative segregation." Toussaint, 801 F.2d at 1100-01 (citations omitted).
23 After the prisoner has been placed in administrative segregation, prison officials must
24 periodically review the initial placement. See Hewitt, 459 U.S. at 477 n.9; Toussaint, 801 F.2d
25 at 1101. Annual review of the placement is insufficient. See Toussaint, 801 F.2d at 1101.

26 There is no due process right to be free from false disciplinary charges. The
27 falsification of a disciplinary report does not state a standalone constitutional claim. Canovas
28 v. California Dept. of Corrections, 2:14-cv-2004 KJN P, 2014 WL 5699750, n.2 (E.D. Cal.

1 2014); see e.g., Lee v. Whitten, 2:12-cv-2104 GEB KJN P, 2012 WL 4468420, *4 (E.D. Cal.
2 2012). There is no constitutionally guaranteed immunity from being falsely or wrongly
3 accused of conduct which may result in the deprivation of a protected liberty interest. Sprouse
4 v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir.
5 1986)). “Specifically, the fact that a prisoner may have been innocent of disciplinary charges
6 brought against him and incorrectly held in administrative segregation does not raise a due
7 process issue. The Constitution demands due process, not error-free decision-making.” Jones
8 v. Woodward, 2015 WL 1014257, *2 (E.D. Cal. 2015) (citing Ricker v. Leapley, 25 F.3d 1406,
9 1410 (8th Cir. 1994); McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir. 1983)). Therefore,
10 Plaintiff has no protected liberty interest against false information being used against him.

11 In sum, Plaintiff has not demonstrated that he had a liberty interest in not being detained
12 in the SHU as he has not shown that his SHU detention was a “dramatic departure” from
13 ordinary prison conditions. If Plaintiff can show he had a liberty interest, he would then be
14 entitled to minimal due process procedures before being placed in the SHU. But here, Plaintiff
15 has not alleged that he was not given the minimal due process to which he was entitled. Nor
16 has Plaintiff alleged that there was no evidence supporting the decision to place him in the SHU
17 for gang validation. Therefore, Plaintiff’s allegations are insufficient to state a cognizable
18 claim against any of the Defendants for violation of Plaintiff’s rights to due process.

19 **D. Retaliation**

20 Allegations of retaliation against a prisoner’s First Amendment rights to speech or to
21 petition the government may support a 1983 claim. Rizzo v. Dawson, 778 F.2d 5527, 532 (9th
22 Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.
23 Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable claim of First
24 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
25 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
26 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
27 did not reasonably advance a legitimate correctional goal.” Rhodes, 408 F.3d at 567-68; accord

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1 Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012); Brodheim v. Cry, 584 F.3d 1262,
2 1269 (9th Cir. 2009).

3 Plaintiff satisfies the first element of a retaliation claim because he alleges that he was
4 detained in the SHU, which is unquestionably an adverse action. However, Plaintiff fails to
5 show that he was detained in the SHU *because* he exercised a right protected under the First
6 Amendment, such as using the prison appeals process or filing a court case. Participating in an
7 assault on staff members at HDSP is not protected conduct under the First Amendment.
8 Moreover, Plaintiff has not alleged that the action against him chilled his exercise of First
9 Amendment rights or did not reasonably advance a legitimate correctional goal. Thus,
10 Plaintiff's allegations are insufficient to state a claim for retaliation.

11 **E. Request for Attorney's Fees**

12 Besides monetary damages, Plaintiff requests attorney's fees. With regard to attorney's
13 fees, "[i]n any action or proceeding to enforce a provision of section[] 1983 . . . , the court, in
14 its discretion, may allow the prevailing party . . . reasonable attorney's fees" 42 U.S.C. §
15 1988(b). Plaintiff's contention that he is entitled to attorney's fees if he prevails is without
16 merit. Plaintiff is representing himself in this action. Because Plaintiff is not represented by an
17 attorney, he is not entitled to recover attorney's fees if he prevails. See Friedman v. Arizona,
18 912 F.2d 328, 333 n.2 (9th Cir. 1990), superseded by statute as state in Warsoldier v.
19 Woodford, 418 F.3d 989 (9th Cir. 2005); Gonzalez v. Kangas, 814 F.2d 1411, 1412 (9th Cir.
20 1987); see also Rickley v. Cnty. of Los Angeles, 654 F.3d 950, 954 (9th Cir. 2011) ("The Court
21 accordingly adopted a per se rule, categorically precluding an award of attorney's fees under §
22 1988 to a pro se attorney-plaintiff.") Therefore, Plaintiff is not entitled to recover attorney's
23 fees if he prevails in this action.

24 **V. CONCLUSION AND ORDER**

25 The court finds that Plaintiff's First Amended Complaint fails to state any claim upon
26 which relief may be granted under § 1983. The court will dismiss the First Amended
27 Complaint for failure to state a claim and give Plaintiff leave to file an amended complaint
28 addressing the issues described above.

1 Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he court should freely
2 give leave to amend when justice so requires.” Accordingly, the court will provide Plaintiff an
3 opportunity to file a Second Amended Complaint curing the deficiencies identified above.
4 Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file the
5 Second Amended Complaint within thirty days.

6 The Second Amended Complaint must allege facts showing what each named defendant
7 did that led to the deprivation of Plaintiff’s constitutional rights. Fed. R. Civ. P. 8(a); Iqbal,
8 556 U.S. at 678; Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff must
9 demonstrate that each defendant *personally* participated in the deprivation of his rights by his
10 or her actions. Id. at 676-77 (emphasis added).

11 Plaintiff should note that although he has been given the opportunity to amend, it is not
12 for the purpose of changing the nature of this suit or adding unrelated claims. George v. Smith,
13 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints). Plaintiff is not granted leave to
14 add allegations of events occurring after the date he filed the Complaint, July 26, 2016.

15 Plaintiff is advised that an amended complaint supercedes the original complaint,
16 Lacey, 693 F.3d. at 907 n.1, and it must be complete in itself without reference to the prior or
17 superceded pleading, Local Rule 220. Therefore, in an amended complaint, as in an original
18 complaint, each claim and the involvement of each defendant must be sufficiently alleged. The
19 amended complaint should be clearly and boldly titled “Second Amended Complaint,” refer to
20 the appropriate case number, and be an original signed under penalty of perjury.

21 Based on the foregoing, it is **HEREBY ORDERED** that:

- 22 1. Plaintiff’s First Amended Complaint is dismissed for failure to state a claim,
23 with leave to amend;
- 24 2. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 25 3. Plaintiff is granted leave to file a Second Amended Complaint curing the
26 deficiencies identified by the court in this order, within **thirty (30) days** from
27 the date of service of this order;

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4. Plaintiff shall caption the amended complaint "Second Amended Complaint" and refer to the case number 1:16-cv-01078-GSA-PC; and
5. If Plaintiff fails to file a Second Amended Complaint within thirty days, this case shall be dismissed for failure to state a claim.

IT IS SO ORDERED.

Dated: October 5, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE