

1 On March 5, 2018, plaintiff filed objections to the findings and recommendations. (Doc. No. 25.)

2 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this
3 court has conducted a *de novo* review of this case. Having carefully reviewed the entire file,
4 including plaintiff's objections, the court declines to adopt the findings and recommendations.

5 In his FAC, plaintiff alleges as follows. On February 1, 2015, plaintiff was placed in
6 administrative segregation by defendant Esmond after plaintiff stated that he did not have
7 information to provide concerning prison officials' investigation into an assault. (*See* Doc. No.
8 24 at 3.) To justify plaintiff's placement in administrative segregation, which was actually
9 motivated by plaintiff's failure to provide information helpful to prison official's investigation of
10 an assault, defendant Esmond directed defendant Maciejewski to falsify a CDCR 115 disciplinary
11 charge alleging that plaintiff was discovered with a cut on his hand. (*Id.*) Plaintiff submitted a
12 Form 22 inmate request notifying prison authorities that the CDCR 115 disciplinary charge was
13 false. (*Id.*) Plaintiff contacted CDCR ombudsman Karin Ritcher, who confirmed that the
14 documents were falsified and so notified the prison administration. (*Id.*) Defendant Hunley then
15 served plaintiff with a second CDCR 115 disciplinary charge and threatened him with prosecution
16 if plaintiff went forward with his complaint regarding the false disciplinary charge. (*Id.*) A third
17 CDCR 115 disciplinary charge was issued to plaintiff, again under false pretext. (*Id.*) Plaintiff
18 alleges that defendants knew that the disciplinary charges leveled against him were based upon
19 false allegations. (*Id.*)

20 The findings and recommendations pending before the court concluded that: 1) plaintiff
21 did not state a cognizable due process claim concerning his placement in administrative
22 segregation; 2) plaintiff did not state a cognizable due process claim in connection with the
23 allegedly false prison disciplinary charges; 3) defendants' threats of prosecution if he pursued his
24 complaints did not rise to the level of a constitutional violation; 4) plaintiff did not state a
25 cognizable conspiracy claim of under § 1983; and 5) given that plaintiff had failed to state any
26 cognizable claim under § 1983, the court should decline to exercise supplemental jurisdiction
27 over plaintiff's Bane Act (California Civil Code § 52.1) claim. (*See* Doc. No. 24.)

28 However, neither the pending findings and recommendations (Doc. No. 24) nor the prior

1 screening order (Doc. No. 13), addressed whether plaintiff had alleged a cognizable First
2 Amendment retaliation claim. “Within the prison context, a viable claim of First Amendment
3 retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action
4 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4)
5 chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
6 advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir.
7 2005). *Accord Watison v. Carter*, 668 F.3d 1108, 1114–15 (9th Cir. 2012); *Brodheim v. Cry*, 584
8 F.3d 1262, 1269 (9th Cir. 2009). The adverse action need not be an independent constitutional
9 harm, and the “mere *threat* of harm can be an adverse action.” *Watison*, 668 F.3d at 1114.

10 In a case where the plaintiff is proceeding *pro se*, the court has an obligation to construe
11 the pleadings liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A document filed *pro se* is
12 to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less
13 stringent standards than formal pleadings drafted by lawyers.”) (internal quotation marks and
14 citation omitted); *Entler v. Gregoire*, 872 F.3d 1031, 1038 (9th Cir. 2017). However, the court’s
15 liberal interpretation of a *pro se* complaint may not supply essential elements of a claim that are
16 not pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of*
17 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

18 Here, plaintiff alleges in his FAC that he was served with additional CDCR 115 prison
19 disciplinary charges after he complained about being placed in administrative segregation without
20 justification. (Doc. No. 24 at 4.) Additionally, in his objections to the pending findings and
21 recommendations, plaintiff again contends that defendants threatened him with criminal
22 prosecution if he persisted with his complaints. (Doc. No. 25 at 3.) Such threats would appear to
23 be of a type that “would have chilled or silenced a person of ordinary firmness by alleging more
24 than minimal harms . . .” *Watison*, 668 F.3d at 1115. Further, plaintiff alleged in his FAC that
25 the allegations in the prison disciplinary charges issued against him were false. (Doc. No. 20 at
26 4–6.) It is reasonable to infer from those allegations, if proven, that the bringing of the
27 disciplinary charges against plaintiff did not serve a legitimate penological purpose.

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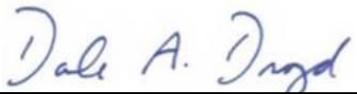
The undersigned will refer the matter back to the magistrate judge for further screening of the FAC to assess whether plaintiff has states a cognizable claim for retaliation in violation of the First Amendment and, if not, whether plaintiff should be granted further leave to amend to attempt to state such a claim.

Accordingly,

1. The undersigned declines to adopt the February 12, 2018 findings and recommendations (Doc. No. 24); and
2. This action is referred back to the magistrate judge for further screening in accordance with this order.

IT IS SO ORDERED.

Dated: November 7, 2018


UNITED STATES DISTRICT JUDGE