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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 BENJAMIN K. TOSCANO,

10 Plaintiff,

11 vs.

12 SCOTT KERNAN,

13 Defendant.
14

1:16-cv-01554-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS
THAT THIS ACTION BE DISMISSED
WITH PREJUDICE FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED

(ECF No. 32)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

15
16 **I. BACKGROUND**

17 Benjamin K. Toscano (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma*
18 *pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the
19 Complaint commencing this action on September 23, 2016. (ECF No. 1). On November 4,
20 2016, Plaintiff consented to magistrate judge jurisdiction. (ECF No. 10).

21 On December 28, 2016, the Court issued a screening order, dismissing Plaintiff’s
22 complaint for failure to state a claim with leave to amend. (ECF No. 22.) The Court explained
23 that Plaintiff failed to raise a valid constitutional challenge to a specific policy or regulation and
24 did not attempt to explain why any such program or policy was unconstitutional. Plaintiff
25 indicated in his original complaint that his current custody status is unsafe, but failed to name
26 individuals or give specific details regarding deliberate indifference to Plaintiff’s safety. The
27 Court noted that relevant legal analysis for an Eighth Amendment claim requires Plaintiff to
28 name specific individuals and describe how they were deliberately indifferent to his safety.

1 Plaintiff filed his Second Amended Complaint (“SAC”) on March 16, 2017 (ECF No.
2 32.). Plaintiff generally challenges regulations regarding security threat groups, implemented
3 in 2012, which purports to “monitor affiliates and assist with transition for return to a general
4 population setting.” Plaintiff previously was confined to the Security Housing Unit (“SHU”),
5 but since the passage of 15 U.S.C. § 3378.3, he has been transferred to a different housing unit.
6 Plaintiff appears to wish to be in the SHU indefinitely.

7 On April 17, 2017, relying on Plaintiff’s consent, the magistrate judge issued a
8 screening order pursuant to 28 U.S.C. § 1915A dismissing the action with prejudice for failure
9 to state a claim. (ECF No. 34).

10 Plaintiff appealed. (ECF No. 36). The United States Court of Appeals for the Ninth
11 Circuit vacated and remanded on the ground that the magistrate judge did not have jurisdiction
12 to dismiss Plaintiff’s complaint because not all parties had consented to magistrate judge
13 jurisdiction. (ECF No. 41).

14 The Ninth Circuit did not reach the merits of the Court’s April 17, 2017 order, (ECF
15 No. 34). As the Court finds that Plaintiff’s SAC fails to state a claim upon which relief can be
16 granted, the Court will recommend that that this action be dismissed with prejudice.

17 **II. SCREENING REQUIREMENT**

18 The Court is required to screen complaints brought by prisoners seeking relief against a
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
20 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
21 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
22 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
23 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
24 paid, the court shall dismiss the case at any time if the court determines that the action or
25 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

26 A complaint is required to contain “a short and plain statement of the claim showing
27 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
28 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere

1 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
2 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are
3 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
4 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
5 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that
6 is plausible on its face.’” Iqbal, 556 U.S. at 678. The mere possibility of misconduct falls short
7 of meeting this plausibility standard. Id. While factual allegations are accepted as true, legal
8 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
9 plausibility standard. Id.

10 **III. PLAINTIFF’S SECOND AMENDED COMPLAINT**

11 **A. Plaintiff’s General Allegations**

12 In Plaintiff’s second amended complaint, he names Scott Kernan, Director of CDC and
13 M. Lujan, Correctional Lieutenant as defendants. Plaintiff requests relief in the form of a
14 declaratory judgment finding that he is in imminent danger and injunctive relief directing the
15 CDCR Director to abandon the STG/SDP programs and remove it from the Title 15, to be
16 returned to non-disciplinary segregation (SHU), criminal and federal investigations,
17 compensatory, punitive and nominal damages, a trial by jury, to be transferred to Corcoran
18 State Prison or New Folsom State Prison SHU, and to have his request for out-of-state transfer
19 to Las Vegas State Prison processed by Defendants. (ECF No. 32.)

20 Plaintiff states that his complaint challenges Title 15 § 3378.3, a California law
21 regarding the Security Threat Group (STG)/Step Down Program (SDP), which California
22 Department of Corrections (CDC) implemented on October 18, 2012. This regulation affords
23 validated inmates housed in the SHU a way to transfer from SHU back to the General
24 Population (GP).

25 Plaintiff alleges that on January 26, 2016, the United States Northern District Court
26 approved the preliminary agreement in the Ashker v. Governor of the State of California case,
27 in which inmates can no longer be validated (by which he presumably means validated as gang
28 members subject to SHU). Because inmates can no longer be validated indefinitely, Plaintiff

1 alleges that the SDP is obsolete and should be removed from the California regulations.

2 Plaintiff alleges that the Departmental Review Board (DRB) did not meet regarding
3 Plaintiff until after the complaint was filed. After the complaint was filed, the DRB met and
4 ultimately sent Plaintiff to the restricted custody general population (RCGP) modified step
5 down program. Plaintiff claims that the Ashker case does not apply to him.

6 Plaintiff claims he is “simply challenging a law that is obsolete and having it removed
7 from the Title 15 etc. . . . The CDCR Title 15 § 3378.3 is a law that is now obsolete and Scott
8 Kernan was named to remove it from the Title 15, since he is the CDC director.”

9 Plaintiff also alleges that the RCGP continues to put him in danger. The RCGP is
10 designed to release inmates back to the GP. Plaintiff alleges “Officials here at Pelican Bay
11 State Prison will continue to fabricate statements and documents in an attempt to set me up
12 again for assault/murder.” Plaintiff alleges he can never go to GP nor a sensitive needs yard.

13 Plaintiff attaches a declaration from himself as an exhibit. Plaintiff described how he
14 has reported on the RCGP to the warden and institutional gang investor. He summarized such
15 a report, including how various inmates made another inmate quit his porter/food service job
16 because Plaintiff exposed him on a 602 appeal for copying Plaintiff’s 602 appeals. He writes
17 that other inmates claim to be special needs, but it’s an act. Plaintiff believes most of these
18 individuals may have been allowed to claim they have safety issues in an attempt to go to
19 special needs yard to carry out sanctioned hits.

20 Plaintiff also includes a declaration of David Estrada, which was apparently submitted
21 in connection with another issue. Plaintiff writes “I really don’t have much need for the
22 affidavit at this time but enclosed is a copy of you.” The affidavit concerns claims of not
23 receiving forms upon request.

24 **B. Allegations Against Magistrate Judge Erica P. Grosjean**

25 Plaintiff also includes allegations against the undersigned judge, alleging that an
26 amended complaint was requested to avoid imposing sanctions upon Byron Miller, Scott
27 Kernan, and Lieutenant Lujan for committing fraud upon the court and “to aid them in their
28 attempt to commit assault/murder upon Plaintiff.” (ECF No. 32, p. 5.) The Court notes that on

1 March 2, 2017, Plaintiff filed another case, bearing case number 1:17-cv-00292, naming the
2 undersigned as a defendant. That case was originally assigned to Magistrate Judge Erica P.
3 Grosjean. On March 6, 2017, the undersigned recused herself and the case was reassigned to
4 Magistrate Judge Michael J. Seng. The Court does not address those allegations to the extent
5 they are repeated in this case.

6 **IV. LEGAL STANDARD**

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

8 Every person who, under color of any statute, ordinance, regulation, custom, or
9 usage, of any State or Territory or the District of Columbia, subjects, or causes
10 to be subjected, any citizen of the United States or other person within the
11 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
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

12 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely
13 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,
14 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see
15 also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los
16 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.
17 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

18 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
19 under color of state law and (2) the defendant deprived him of rights secured by the
20 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
21 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
22 “under color of state law”). A person deprives another of a constitutional right, “within the
23 meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or
24 omits to perform an act which he is legally required to do that causes the deprivation of which
25 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
26 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
27 causal connection may be established when an official sets in motion a ‘series of acts by others
28 which the actor knows or reasonably should know would cause others to inflict’ constitutional

1 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
2 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
3 Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
4 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

5 To establish standing under Article III, a plaintiff must show that “(1) it has suffered an
6 ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural
7 or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and
8 (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable
9 decision.” Kaahumanu v. Hawaii, 682 F.3d 789, 796 (9th Cir. 2012).

10 **A. Failure to Protect**

11 The Eighth Amendment protects prisoners from inhumane methods of punishment and
12 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
13 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must
14 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.
15 Farmer v. Brennan, 511 U.S. 825, 832-33 (1994) (internal citations and quotations omitted).
16 Prison officials have a duty to take reasonable steps to protect inmates from physical abuse. Id.
17 at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials
18 to protect inmates from attacks by other inmates may rise to the level of an Eighth Amendment
19 violation where prison officials know of and disregard a substantial risk of serious harm to the
20 plaintiff. E.g., Farmer, 511 U.S. at 847; Hearns, 413 F.3d at 1040.

21 To establish a violation of this duty, the prisoner must establish that prison officials
22 were “deliberately indifferent to a serious threat to the inmate’s safety.” Farmer, 511 U.S. at
23 834. The question under the Eighth Amendment is whether prison officials, acting with
24 deliberate indifference, exposed a prisoner to a sufficiently “substantial risk of serious harm” to
25 his future health. Id. at 843 (citing Helling v. McKinney, 509 U.S. 25, 35 (1993)). The
26 Supreme Court has explained that “deliberate indifference entails something more than mere
27 negligence . . . [but] something less than acts or omissions for the very purpose of causing harm
28 or with the knowledge that harm will result.” Farmer, 511 U.S. at 835. The Court defined this

1 “deliberate indifference” standard as equal to “recklessness,” in which “a person disregards a
2 risk of harm of which he is aware.” Id. at 836-37.

3 The deliberate indifference standard involves both an objective and a subjective prong.
4 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” Id. at 834.
5 Second, subjectively, the prison official must “know of and disregard an excessive risk to
6 inmate health or safety.” Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.
7 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial
8 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.
9 Farmer, 511 U.S. at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

10 **B. Supervisor Liability**

11 A Plaintiff asserting a claim pursuant to § 1983 must identify each defendant personally
12 participated in the deprivation of his rights. Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009). In
13 other words, there must be an actual connection or link between the actions of the Defendants
14 and the deprivation alleged to have been suffered by Plaintiff. See Monell v. Dep't of Soc.
15 Servs., 436 U.S. 658, 691, 695 (1978).

16 Supervisors may only be held liable if they “participated in or directed the violations, or
17 knew of the violations and failed to act to prevent them.” Lemire v. Cal. Dept. of Corrections
18 & Rehabilitation, 726 F.3d 1062, 1074-75 (9th Cir. 2013) (“A prison official in a supervisory
19 position may be held liable under § 1983... ‘if he or she was personally involved in the
20 constitutional deprivation or a sufficient causal connection exists between the supervisor's
21 unlawful conduct and the constitutional violation.’”) (quoting Lolli v. Cty. of Orange, 351 F.3d
22 410, 418 (9th Cir. 2003)). Plaintiff may not attribute liability to a group of defendants, but
23 must “set forth specific facts as to each individual defendant's” deprivation of his rights. Leer
24 v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

25 Supervisory personnel are generally not liable under section 1983 for the actions of
26 their employees under a theory of *respondeat superior* and, therefore, when a named defendant
27 holds a supervisory position, the causal link between him and the claimed constitutional
28 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);

1 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). To
2 state a claim for relief under section 1983 based on a theory of supervisory liability, Plaintiff
3 must allege some facts that would support a claim that the supervisory defendants either:
4 personally participated in the alleged deprivation of constitutional rights; knew of the violations
5 and failed to act to prevent them; or promulgated or “implemented a policy so deficient that the
6 policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the
7 constitutional violation.’” Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal
8 citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). ¶ Threadbare recitals of
9 the elements of a cause of action, supported by mere conclusory statements, do not suffice.¶
10 Id. at 678 (citing Twombly, 550 U.S. at 555). ¶ [A] plaintiff’s obligation to provide the
11 grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic
12 recitation of the elements of a cause of action will not do.¶ Twombly, 550 U.S. at 555
13 (citations and quotation marks omitted).

14 **V. ANALYSIS OF PLAINTIFF’S FIRST AMENDED COMPLAINT**

15 Plaintiff’s First Amended Complaint fails to state a claim under these legal standards.

16 Regarding Plaintiff’s challenge to 15 U.S.C. § 3378.3, Plaintiff does not state a
17 constitutional challenge to this law. Indeed, Plaintiff claims it should be struck because it is
18 obsolete—not because it is unconstitutional. Plaintiff does not point to specific language of §
19 3378.30 that would indicate its lack of constitutionality. There is not a constitutional right to
20 have obsolete laws stricken from the books. Plaintiff also does not explain his own standing to
21 make such a challenge.

22 Plaintiff also does not allege facts indicating that any specific defendant was
23 deliberately indifferent to his safety. In the initial screening order, the Court instructed Plaintiff
24 file an amended complaint, naming each defendant that led to the deprivation of Plaintiff’s
25 constitutional or other federal rights. Plaintiff must demonstrate that each defendant personally
26 participated in the deprivation of his rights, and he must, in his own words, describe what
27 happened and how each defendant’s actions violated the particular right described by Plaintiff.
28 (ECF No. 22, p. 14.)

1 Although Plaintiff added M. Lujan as a defendant in the SAC, he has failed to indicate
2 that either defendant Lujan or Kernan are the individuals responsible for making the decision to
3 release him into his current housing. Plaintiff provides no facts describing why or how the
4 individuals were deliberately indifferent to his safety. Plaintiff does not allege what these
5 individuals knew that would have shown Plaintiff's safety was threatened, nor how they acted
6 with deliberate indifference to his safety. Plaintiff's allegations that he should never be in the
7 general population are insufficient to establish that any specific person acted with deliberate
8 indifference. It is not this Court's role to independently review Plaintiff's classification or
9 prison assignment. Instead, this Court looks to whether a specific individual violated Plaintiff's
10 constitutional rights by acting with deliberate indifference to his safety as described above.

11 In short, Plaintiff's complaint fails to indicate that any statute is unconstitutional or that
12 any person acted with deliberate indifference to Plaintiff's safety in a way that violated the
13 Eighth Amendment's cruel and unusual punishment prohibition.

14 **VI. CONCLUSION AND RECOMMENDATIONS**

15 The Court finds that Plaintiff's Complaint fails to state cognizable claims against any
16 Defendant. Plaintiff was previously notified of the deficiencies in his claims and granted leave
17 to amend, but he was unable to cure the deficiencies. Lopez v. Smith, 203 F.3d 1122, 1130-31
18 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Based on the record
19 in this case, the Court finds that further leave to amend is not warranted.

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

- 21 1. Pursuant to 28 U.S.C. §§ 1915A and 1915(e), that the action be DISMISSED, with
22 prejudice, based on Plaintiff's failure to state any claims upon which relief may be
23 granted under § 1983.
- 24 2. That the Clerk of the Court be directed to CLOSE this case.

25 These findings and recommendations will be submitted to the United States district
26 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
27 twenty-one (21) days after being served with these findings and recommendations, Plaintiff
28

1 may file written objections with the Court. The document should be captioned “Objections to
2 Magistrate Judge’s Findings and Recommendations.”

3 Plaintiff is advised that failure to file objections within the specified time may result in
4 the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
5 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8
9 Dated: April 23, 2018

/s/ Eric P. Grogan
10 UNITED STATES MAGISTRATE JUDGE