

1 “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or that “seek[]
2 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).
3 A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled
4 to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare
5 recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
6 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
7 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated in the
8 deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

9 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally
10 construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121
11 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible,
12 which requires sufficient factual detail to allow the Court to reasonably infer that each named
13 defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
14 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not
15 sufficient, and “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying
16 the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

17 II.

18 COMPLAINT ALLEGATIONS

19 Plaintiff names Ms. Pullings and A. Lozano as Defendants.

20 On February 15, 2018, Ms. Pullings issued a false disciplinary charge against Plaintiff for
21 assault and/or insolence towards staff. At the disciplinary hearing, Plaintiff was exonerated of the
22 charges and the rules violation was expunged.

23 Defendants Lozano and Pullings, placed Plaintiff back in the security housing unit (SHU) for
24 an investigation after the rules violation was dismissed. Plaintiff contends that Lozano and Pullings
25 were angry because the rules violation was expunged. Plaintiff seeks damages for the alleged
26 retaliatory actions by Defendants.

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1 **III.**

2 **DISCUSSION**

3 **A. Signature Under Penalty of Perjury**

4 A review of Plaintiff's complaint reveals that Plaintiff did not sign the complaint under penalty
5 of perjury. All filings submitted to the Court must bear the signature of the filing party. Local Rule
6 131; Fed. R. Civ. P. 11(a). In such instance, the Court would generally strike the complaint from the
7 record and direct that an amended complaint with an original signature under penalty of perjury be
8 filed; however, in this case such amendment would be futile because for the reasons explained below
9 Plaintiff has not and cannot state a cognizable Bivens claim.

10 **B. Retaliation Claim/Application of Supreme Court's decision in Ziglar v. Abbasi**

11 In Ziglar, the Supreme Court clearly stated that "expanding the Bivens remedy is now a
12 disfavored judicial activity," and the Court has "consistently refused to extend Bivens to any new context
13 or new category of defendants." Ziglar v. Abbasi, 137 S.Ct. 1843, 1857 (2017) (citations omitted). The
14 Court set forth a two-part test to determine whether a Bivens claim may proceed. The district court must
15 first determine whether the claim presents a new context from previously established Bivens remedies.
16 If so, the Court must then apply a "special factors" analysis to determine whether "special factors
17 counsel hesitation" in expanding Bivens absent affirmative action by Congress. Id. at 1857, 1875.

18 "Since Bivens, the Supreme Court has recognized implied causes of action for damages against
19 federal employees for only three types of constitutional violations: (1) police search and seizure in
20 violation of the Fourth Amendment, see Bivens, 403 U.S. 388; (2) gender discrimination by a
21 congressman in violation of the Fifth Amendment for an employee not covered by Title VII, see Davis
22 v. Passman, 442 U.S. 228 (1978); and (3) deliberate indifference toward a prisoner in violation of the
23 Eighth Amendment, see Carlson v. Green, 446 U.S. 14 (1980)." Adralan v. McHugh, No. 1:13-CV-
24 01138-LHK, 2013 WL 6212710, at *10 (N.D. Cal. Nov. 27, 2013).

25 In this case, Plaintiff claims that Defendants Pullings and Lozano retaliated against him by
26 placing him in the SHU because he succeeded in having the disciplinary rules violation expunged from
27 his record. This First Amendment retaliation claim presents a new context in Bivens, and the Court
28 must proceed to consideration of the special factors.

1 If the claim presents a new context in Bivens, the Court must consider whether there are special
2 factors counseling against extension of Bivens into the area. “[T]he inquiry must concentrate on whether
3 the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs
4 and benefits of allowing a damages action to proceed.” Ziglar, 137 S. Ct. at 1857-58. The Court should
5 assess the impact on governmental operations system-wise, including the burdens on government
6 employees who are sued personally, as well as the projected costs and consequences to the government
7 itself. Id. at 1858. In addition, “if there is an alternative remedial structure present in a certain case,
8 that alone may limit the power of the Judiciary to infer a new Bivens cause of action.” Id.

9 The Supreme Court has never implied a Bivens action under any clause of the First Amendment.
10 See Reichie v. Howards, 566 U.S. 658 n.4 (2012) (“We have never held that Bivens extends to First
11 Amendment claims.”); Ashcroft v. Iqbal, 556 U.S. at 675 (assuming without deciding that Bivens
12 extended to First Amendment claim). In addition, the Supreme Court declined to extend Bivens to a
13 First Amendment free speech claim relating to federal employment noting “that Congress is in a better
14 position to decide” the issue. Bush v. Lucas, 462 U.S. 367, 390 (1983).¹

15 Also, Plaintiff has alternative remedies available to him, including the Bureau of Prisons
16 administrative grievance process, which Plaintiff alleges that he utilized in this case. (See Compl at 12,
17 14-20.) See Wilkie v. Robbins, 551 U.S. 537, 550 (2007). see also Correctional Services Corp. v.
18 Malesko, 534 U.S. 61, 69 (2001) (“So long as the plaintiff had an avenue for some redress, bedrock
19 principles of separation of powers foreclosed judicial imposition of a new substantive liability.”)
20 (citation omitted). In addition, the fact that Congress has not extended Bivens to claims under the First
21 Amendment is itself a factor counseling hesitation. Ziglar, 137 S. Ct. at 1865.

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25 ¹ Although the Ninth Circuit has previously found that Bivens may be extended to First Amendment claims, Gibson v.
26 United States, 781 F.2d 1334, 1342 (9th Cir. 1986) (permitting First Amendment retaliation claim under Bivens); Moss v.
27 U.S. Secret Serv., 572 F.3d 962, 967 n.4 (9th Cir. 2009) (noting Bivens extends to First Amendment damages claims), it
28 has recently addressed the issue in light of Ziglar, see Vega v. United States, 881 F.3d 1146, 1153 (9th Cir. 2018)
(declining to extend Bivens remedy to First Amendment access to courts and Fifth Amendment procedural due process
claims against private employees of residential reentry center). Therefore, the Ninth Circuit’s pre-Ziglar opinions are not
controlling.

1 Based on the foregoing, the Court finds that under the analysis set forth in Ziglar, there is no
2 implied right of a Bivens action for a retaliation claim, and this action should be dismissed.² See, e.g.,
3 Free v. Peikar, Case No. 1:17-cv-00159-AWI-MSJ (PC), 2018 WL 1569030, at *2 (E.D. Cal. Mar. 30,
4 2018) (noting that nationwide, district courts seem to be in agreement that, post-Ziglar, prisoners have
5 no right to bring a Bivens action for violation of the First Amendment).

6 **IV.**

7 **CONCLUSION**

8 Accordingly, the Clerk of the Court is HEREBY DIRECTED to randomly assign a District
9 Judge to this action.

10 Further, for the reasons explained above, it is HEREBY RECOMMENDED that the instant
11 action be dismissed for failure to state a cognizable claim under Bivens.

12 This Findings and Recommendation will be submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days**
14 after being served with this Findings and Recommendation, Plaintiff may file written objections with
15 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and

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20 ² To the extent, Plaintiff alleges that Defendant Putting falsely charged him with assault, such claim does not give rise to
21 an independent constitutional violation. The issuance of a false rules violation does not, in and of itself, support a claim
22 under section 1983. See, e.g., Ellis v. Foulk, No. 14-cv-0802 AC P, 2014 WL 4676530, at *2 (E.D. Cal. Sept. 18, 2014)
23 (“Plaintiff’s protection from the arbitrary action of prison officials lies in ‘the procedural due process requirements as set
24 forth in Wolff v. McDonnell.’”) (citing Hanrahan v. Lane, 747 F.2d 1137, 1140 (7th Cir. 1984)); Solomon v. Meyer, No.
25 11-cv-02827-JST (PR), 2014 WL 294576, at *2 (N.D. Cal. Jan. 27, 2014) (“[T]here is no constitutionally protected right to
26 be free from false disciplinary charges.”) (citing Chavira v. Rankin, No. C 11-5730 CW (PR), 2012 WL 5914913, at *1
27 (N.D. Cal. Nov. 26, 2012) (“The Constitution demands due process, not error-free decision-making.”)); Johnson v. Felker,
28 No. 1:12-cv-02719 GEB KJN (PC), 2013 WL 6243280, at *6 (E.D. Cal. Dec. 3, 2013) (“Prisoners have no constitutionally
guaranteed right to be free from false accusations of misconduct, so the mere falsification of a [rules violation] report does
not give rise to a claim under section 1983.”) (citing Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989) and Freeman
v. Rideout, 808 F.2d 949, 951-53 (2d. Cir. 1986)). While Plaintiff may not be deprived of a protected liberty interest
without the protections he is due under federal law, he was afforded the process he was due with respect to his disciplinary
hearing, as he indicates he was found not guilty of the rules violation report. To the extent Plaintiff seeks to present a
separate claim based on Defendant Pullings charging him with an alleged false rules violation report does not give rise to
an independent due process claim.

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

IT IS SO ORDERED.

Dated: September 6, 2018


UNITED STATES MAGISTRATE JUDGE