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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ETUATE SEKONA,

Plaintiff,

v.

R. PEREZ, et al.,

Defendants.

1:19-cv-00400-NONE-GSA-PC

**ORDER DISMISSING FIRST AMENDED
COMPLAINT FOR FAILURE TO STATE A
CLAIM, WITH LEAVE TO AMEND
(ECF No. 21.)**

**THIRTY-DAY DEADLINE TO FILE
SECOND AMENDED COMPLAINT NOT
EXCEEDING 25 PAGES**

I. BACKGROUND

Etuate Sekona (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On March 28, 2019, Plaintiff filed the Complaint commencing this action. (ECF No. 1.) On May 13, 2020, the court dismissed the Complaint for failure to state a claim, with leave to amend. (ECF No. 15.) On August 31, 2020, Plaintiff filed the First Amended Complaint which is now before the court for screening. 28 U.S.C. § 1915. (ECF No. 21.)

II. SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek

1 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
2 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
3 dismiss the case at any time if the court determines that the action or appeal fails to state a claim
4 upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

5 A complaint is required to contain “a short and plain statement of the claim showing that
6 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
7 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
8 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
9 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken
10 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
11 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To state
12 a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
13 to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
14 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
15 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
16 plausibility standard. Id.

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

18 Plaintiff is presently incarcerated at Kern Valley State Prison (KVSP) in Delano,
19 California, in the custody of the California Department of Corrections and Rehabilitation, where
20 the events at issue in the First Amended Complaint allegedly occurred. Plaintiff names as
21 defendants Correctional Officer (C/O) R. Perez, C/O L. Munoz, C/O C. Sims, and C/O
22 Maldonado (collectively, “Defendants”). Plaintiff’s allegations follow:

23 Plaintiff is a 70-year-old man in poor health who uses a wheelchair. He is a Pacific South
24 Islander from Tonga and speaks English as a second language. Plaintiff came to KVSP in
25 November 2016. He was housed in Building D8 where Defendants C/O Perez and C/O Munoz
26 worked. He had been on single-cell status, but the ICC Committee changed that. Plaintiff told
27 Defendants Perez and Munoz that before coming to KVSP he was attacked in his cell by his prior
28 cellmate and seriously injured.

1 In July 2018, Plaintiff wrote to the supervisor, Sgt. Delima [not a defendant], about
2 defendant Perez placing cellmates with Plaintiff without Plaintiff's consent. Sgt. Delima ordered
3 Defendants Perez and Munoz to allow Plaintiff to choose his own cellmate. Plaintiff made
4 several requests to Defendants Perez and Munoz for particular cellmates, but they denied the
5 requests out of retaliation. Plaintiff let the Sergeant know.

6 Plaintiff let Defendant Perez know that prior cellmates had threatened him. For two years,
7 she (Perez) took care of Plaintiff in Building D8. Plaintiff wrote multiple requests concerning
8 his safety and spoke with Defendant Perez at the office during the first or second week of
9 November 2018. One of his cellmates had a live mouse and made wine in the cell. Plaintiff's
10 life was in danger. Defendant Perez hated Plaintiff because in October 2018, she overheard
11 Plaintiff's phone call with an A.G. lawyer to settle Plaintiff's case from another prison, MCSP
12 (Mule Creek State Prison). Defendant Perez went to Building D3 and hand-picked a young,
13 strong inmate named Nguyen, who intended to harass and harm Plaintiff. Defendant Perez told
14 Plaintiff he had no right to refuse the cellmate. Nguyen stole Plaintiff's food and property and
15 gave it away. Plaintiff told Defendant Perez. On November 17, 2018, Plaintiff was attacked by
16 Nguyen, causing Plaintiff to suffer brain damage. Plaintiff was hospitalized and is lucky to be
17 alive. Defendant Munoz saw the attack and filed a false report that resulted in a guilty finding
18 against Plaintiff, and nine painful months on C-status. Plaintiff's pot, TV, fan, and canteen rights
19 were taken away.

20 Plaintiff contends that maybe the November 17, 2018 assault would have been prevented
21 if Defendants Perez and Munoz had followed their Sergeant's order. "But they [*sic*] 'adverse
22 action' for my protection order and retaliation because of my grievances and filed litigation on
23 them; because failure to protected [*sic*] conduct, and that such action; because Perez and Munoz
24 knew my legal in the other prison from heard [*sic*] my phoned [*sic*] and lots of legal mails. And
25 they took retaliation because of my protected conduct chilled exercise of 1st Amendment rights."
26 (ECF No. 21 at 6:21-28.)

27 On December 10, 2018, Defendant Perez ordered Plaintiff moved to Building D3, where
28 Defendants Sims and Maldonado worked. They all conspired in this action. Defendants Sims

1 and Maldonado ordered inmate Bowden to be Plaintiff’s cellmate. Bowden threatened Plaintiff
2 with a knife to force Plaintiff to give Bowden his legal paperwork. Plaintiff filed 602 appeals
3 and told Defendants Sims and Maldonado, but they told Plaintiff to go back and fight with him.
4 They wheeled Plaintiff back to the cell. Plaintiff said he could not fight. They acted with
5 deliberate indifference. They knew if Plaintiff went back to the cell there was a risk that Bowden
6 would use the knife on Plaintiff. Plaintiff had already been assaulted twice before. Defendants
7 Sims and Maldonado failed to protect Plaintiff and wanted Plaintiff to suffer and be punished
8 because of his grievance and litigation. When Plaintiff failed to follow their order, Defendants
9 Sims and Maldonado wrote Plaintiff up with a 115 form charging him with refusing to accept
10 Bowden as a cellmate. Defendant Sims placed Plaintiff in the shower room so Bowden had time
11 to take Plaintiff’s legal documents and other property. Defendant Sims brought back Plaintiff’s
12 fan and other property, but not his legal documents. The 115 they filed was false, meant to put
13 Plaintiff away for a long time, for six months at the worst place on C-status.

14 As relief, Plaintiff requests monetary damages and a declaration that his federal rights
15 were violated.

16 **IV. PLAINTIFF’S CLAIMS**

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

18 Every person who, under color of any statute, ordinance, regulation, custom, or
19 usage, of any State or Territory or the District of Columbia, subjects, or causes to
20 be subjected, any citizen of the United States or other person within the
21 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

22 42 U.S.C. § 1983.

23 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
24 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
25 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v.
26 Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d
27 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v.
28 Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of a state law

1 amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the
2 federal Constitution, Section 1983 offers no redress.” Id.

3 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
4 color of state law and (2) the defendant deprived him or her of rights secured by the Constitution
5 or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also
6 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
7 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
8 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act
9 which he is legally required to do that causes the deprivation of which complaint is made.’”
10 Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
11 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
12 established when an official sets in motion a ‘series of acts by others which the actor knows or
13 reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479
14 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles
15 the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp.,
16 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010,
17 1026 (9th Cir. 2008).

18 **A. Eighth Amendment - Failure to Protect**

19 Prison officials have a duty under the Eighth Amendment to protect prisoners from
20 violence at the hands of other prisoners because being violently assaulted in prison is simply not
21 part of the penalty that criminal offenders pay for their offenses against society. Farmer v.
22 Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 28 L.Ed.2d 811 (1994); Clem v. Lomeli, 566 F.3d
23 1177, 1181 (9th Cir. 2009); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). However,
24 prison officials are liable under the Eighth Amendment only if they demonstrate deliberate
25 indifference to conditions posing a substantial risk of serious harm to an inmate; and it is well
26 settled that deliberate indifference occurs when an official acted or failed to act despite his
27 knowledge of a substantial risk of serious harm. Farmer, 511 U.S. at 834, 841; Clem, 566 F.3d
28 at 1181; Hearns, 413 F.3d at 1040.

1 “While the Eighth Amendment requires prison officials to provide prisoners with the
2 basic human needs, including reasonable safety, it does not require that the prisoners be
3 comfortable and provided with every amenity.” Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir.
4 1982)), overruled on other grounds by Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132
5 L.Ed.2d 418 (1995). A housing assignment may be “restrictive and even harsh,” but will not
6 violate the Eighth Amendment unless it “either inflicts unnecessary or wanton pain or is grossly
7 disproportionate to the severity of crimes warranting imprisonment.” Rhodes v. Chapman, 452
8 U.S. 337, 348–49 (1981) (finding inmates had no constitutional right to be housed in single cells).
9 Only where prison officials knew that a housing assignment posed an excessive risk to an
10 inmate’s safety will placement with a particular inmate have constitutional implications. Estate
11 of Ford v. Ramirez–Palmer, 301 F.3d 1043, 1050 (9th Cir. 2002).

12 An inmate has no constitutional right to a particular security classification or housing.
13 See Meachum v. Fano, 427 U.S. 215, 224–25 (1976) (no liberty interest protected by the Due
14 Process Clause is implicated in a prison’s reclassification and transfer decisions); see also Myron
15 v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007). Neither the Eighth nor the Fourteenth Amendment
16 endows prisoners with a right to be housed in a particular part of the prison or with a particular
17 inmate. See Meachum v. Fano, 427 U.S. at 224–25 (no liberty interest in placement in particular
18 facility); Allen v. Purkett, 5 F.3d 1151, 1153 (8th Cir. 1993) (no Due Process right to be housed
19 with compatible inmate); Bjorlin v. Hubbard, No. CIV S–09–1793 2010 WL 457685, *1 (E.D.
20 Cal. Feb. 4, 2010) (same).

21 Plaintiff claims that Defendant Perez failed to protect him from an attack by Plaintiff’s
22 cellmate Nguyen, but there are no facts showing that Defendant Perez knew of a substantial risk
23 of serious harm to Plaintiff from Nguyen. Plaintiff alleges that Defendant Perez knew that
24 Plaintiff had been attacked by cellmates in the past, but that does not show that she (Perez) was
25 aware of any risk of physical harm to Plaintiff by his cellmate Nguyen. Plaintiff blames
26 Defendant Perez because Perez chose Nguyen as Plaintiff’s cellmate. Plaintiff alleges that before
27 Nguyen attacked him, Plaintiff told Perez that Nguyen had taken his property, but this does not
28 show that Perez knew of an excessive risk that Nguyen would attack and harm Plaintiff.

1 Therefore, Plaintiff fails to state a claim against Defendant Perez for failing to protect him from
2 the attack by Nguyen.

3 In addition, Plaintiff finds fault with Defendants Perez and Munoz for not complying with
4 the Sergeant's order to allow Plaintiff to choose his own cellmate, but Plaintiff has not done more
5 than speculate that he (Plaintiff) would have chosen better cellmates. Thus, the mere fact that
6 Defendants Perez and Munoz chose not to allow Plaintiff to choose his own cellmates does not
7 make them liable for failing to protect Plaintiff.

8 On the other hand, Plaintiff may be able to state a claim against Defendants Sims and
9 Maldonado for taking Plaintiff back to his cell and telling him to fight with inmate Bowdon.
10 Plaintiff's allegations do not state sufficient facts about the knife Bowden threatened Plaintiff
11 with. How did Plaintiff know Bowden had a knife? When and how did Defendants find out
12 about the knife, and how did Plaintiff know they knew about it? Were Defendants aware that
13 Bowden still had the knife when they told Plaintiff to go back and fight with Bowden? What
14 happened to the knife? Also, Plaintiff alleges that Defendants Sims and Maldonado conspired
15 with Defendant Munoz and Perez to cause harm to Plaintiff, but there are no facts supporting this
16 conclusory allegation. Plaintiff shall be granted leave to file an amended complaint to add facts
17 about the knife, Defendants' knowledge about the knife, and how Plaintiff knew that Defendants
18 conspired with each other.

19 Based on the foregoing, the court finds that Plaintiff fails to state a claim against any of
20 the Defendants for failing to protect him or for conspiring together to violate his rights.

21 **B. Retaliation**

22 "Prisoners have a First Amendment right to file grievances against prison officials and to
23 be free from retaliation for doing so." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012)
24 (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). "Within the prison context, a
25 viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a
26 state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected
27 conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and
28 (5) the action did not reasonably advance a legitimate correctional goal." Rhodes v. Robinson,

1 408 F.3d 559, 567–68 (9th Cir. 2005). To state a cognizable retaliation claim, Plaintiff must
2 establish a nexus between the retaliatory act and the protected activity. Grenning v. Klemme, 34
3 F.Supp.3d 1144, 1153 (E.D. Wash. 2014).

4 Plaintiff fails to state a retaliation claim because he fails to make the required connection
5 between adverse actions by Defendants Perez and Munoz and Plaintiff’s protected First
6 Amendment activities. Plaintiff alleges that Defendants Perez and Munoz overheard Plaintiff
7 discussing a settlement in one of Plaintiff’s cases, causing Perez to hate Plaintiff. Plaintiff also
8 filed grievances and lawsuits. Plaintiff claims that out of retaliation for these protected First
9 Amendment activities, Defendants Perez and Munoz refused to assign cellmates for Plaintiff that
10 Plaintiff asked for, and that Defendant Perez assigned inmate Nguyen as Plaintiff’s cellmate.
11 Plaintiff has not shown that adverse actions were taken against him *because* of his activities.
12 Moreover, Plaintiff has failed to allege facts for all of the five elements of a claim for retaliation.
13 Therefore, Plaintiff fails to state a claim for retaliation.

14 **C. False Reports/Accusations**

15 The creation of false evidence, standing alone, is not actionable under § 1983. See
16 Hernandez v. Johnston, 833 F.2d 1316, 1319 (9th Cir. 1987) (independent right to accurate prison
17 record has not been recognized); Johnson v. Felker, No. 1:12–cv–02719 GEB KJN (PC), 2013
18 WL 6243280, at *6 (E.D. Cal. Dec. 3, 2013) (“Prisoners have no constitutionally guaranteed
19 right to be free from false accusations of misconduct, so the mere falsification of a report does
20 not give rise to a claim under section 1983.”) (citations omitted). Moreover, “plaintiff cannot
21 state a cognizable Eighth Amendment violation based on an allegation that defendant[] issued a
22 false rule violation against plaintiff.” Jones v. Prater, No. 2:10-cv-01381 JAM KJN P, 2012 WL
23 1979225, at *2 (E.D. Cal. Jun. 1, 2012); see also Youngs v. Barretto, No. 2:16-cv-0276 JAM AC
24 P, 2018 WL 2198707, at *3 (E.D. Cal. May 14, 2019) (noting that issuance of false rules violation
25 report does not rise to the level of cruel and unusual punishment) (citations omitted).

26 Therefore, Plaintiff fails to state a claim for falsely being accused of a Rules Violation or
27 for false reports by any of the Defendants about Plaintiff’s circumstances or conduct.

28 ///

1 **D. Declaratory Relief**

2 Besides monetary damages, Plaintiff requests a declaration that his federal rights were
3 violated. Declaratory relief should be denied because it is subsumed by Plaintiff’s damages
4 claim. See Rhodes, 408 F.3d at 565-66 n.8 (because claim for damages entails determination of
5 whether officers’ alleged conduct violated plaintiff’s rights, the separate request for declaratory
6 relief is subsumed by damages action); see also Fitzpatrick v. Gates, No. CV 00-4191-GAF
7 (AJWx), 2001 WL 630534, at *5 (C.D. Cal. Apr. 18, 2001) (“Where a plaintiff seeks damages
8 or relief for an alleged constitutional injury that has already occurred declaratory relief generally
9 is inappropriate[.]”)

10 **V. CONCLUSION AND RECOMMENDATIONS**

11 For the reasons set forth above, the court finds that Plaintiff fails to state any cognizable
12 claims in the First Amended Complaint against any of the Defendants for violating his
13 constitutional or other federal rights. Under Rule 15(a) of the Federal Rules of Civil Procedure,
14 “[t]he court should freely give leave to amend when justice so requires.” Therefore, Plaintiff
15 shall be granted leave to amend the complaint. The court will provide Plaintiff with thirty days
16 to file a Second Amended Complaint curing the deficiencies identified above. Noll v. Carlson,
17 809 F.2d 1446, 1448-49 (9th Cir. 1987). **The amended complaint may not exceed 25 pages.**

18 The amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each
19 named defendant did that led to the deprivation of Plaintiff’s constitutional or other federal rights.
20 Iqbal, 556 U.S. at 678; Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff must set
21 forth “sufficient factual matter . . . to ‘state a claim that is plausible on its face.’” Iqbal at 678
22 (quoting Twombly, 550 U.S. at 555).

23 Plaintiff must demonstrate in his amended complaint how the conditions complained of
24 have resulted in a deprivation of his constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th
25 Cir. 1980). The amended complaint must allege in specific terms how each named defendant is
26 involved.

27 Plaintiff may not change the nature of this suit by adding unrelated claims in his amended
28 complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

1 Also, Plaintiff is not granted leave to add allegations to the amended complaint of events that
2 occurred after March 28, 2019, the date the original Complaint was filed.

3 As a general rule, an amended complaint supersedes the original complaint. See Loux v.
4 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an amended complaint is filed, the original
5 complaint no longer serves any function in the case. Therefore, in an amended complaint, as in
6 an original complaint, each claim and the involvement of each defendant must be sufficiently
7 alleged.

8 The Second Amended Complaint should be clearly and boldly titled “SECOND
9 AMENDED COMPLAINT,” refer to the appropriate case number, and be an original signed
10 under penalty of perjury.

11 Accordingly, **IT IS HEREBY ORDERED** that:

- 12 1. Plaintiff’s First Amended Complaint, filed on August 31, 2020, is dismissed for
13 Plaintiff’s failure to state a claim upon which relief may be granted, with leave to
14 amend;
- 15 2. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 16 3. Within thirty days from the date of service of this order, Plaintiff shall file a
17 Second Amended Complaint curing the deficiencies in the First Amended
18 Complaint identified by the court;
- 19 4. Plaintiff shall caption the amended complaint “Second Amended Complaint” and
20 refer to the case number 1:19-cv-00400-NONE-GSA-PC; and
- 21 5. Plaintiff’s failure to comply with this order shall result in a recommendation that
22 this action be dismissed for failure to state a claim.

23
24 IT IS SO ORDERED.

25 Dated: September 8, 2020

26 /s/ Gary S. Austin
27 UNITED STATES MAGISTRATE JUDGE
28