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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN EDWARD MITCHELL,
Plaintiff,
v.
H. BAEZA, et al.,
Defendants.

Case No. 1:20-cv-00857-NODJ-HBK (PC)
FINDINGS AND RECOMMENDATIONS TO
PERMIT PLAINTIFF TO PROCEED ON
COGNIZABLE CLAIMS AND DISMISS
REMAINING CLAIMS AND DEFENDANT¹
(Doc. Nos. 30, 33)
14-DAY OBJECTION PERIOD²

Plaintiff John Edward Mitchell is a state prisoner proceeding pro se and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. Plaintiff proceeds on his Second Amended Complaint. (Doc. No. 30). As more fully set forth below, the undersigned finds the Second Amended Complaint states cognizable First Amendment retaliation claims against Defendants Baeza and Gutierrez, Eighth Amendment Failure to Protect claims against Defendants Baeza, Gutierrez, Valencia-Mendoza, John Doe #1, Parra, and Vang, and conspiracy claims against

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).
² On December 1, 2023, this case was assigned to the No District Judge (“NODJ”) docket due to the elevation of District Judge Ana I. de Alba to the Ninth Circuit Court of Appeals. This case will remain pending until a new district judge is appointed or until another district judge considers these Findings and Recommendations. Despite this anticipated delay, the objection period remains fourteen (14) days, absent leave for an extension of time being granted.

1 Defendants Baeza and Gutierrez, but fails to state any other cognizable claims. Therefore, the
2 undersigned recommends that Plaintiff be allowed to proceed only on the claims deemed
3 cognizable and the remaining claims and defendants be dismissed without prejudice.

4 **BACKGROUND AND SUMMARY OF OPERATIVE PLEADING**

5 **A. Procedural History**

6 Plaintiff initiated this action by filing a Complaint under 42 U.S.C. § 1983 on June 22,
7 2020. (Doc. No. 1). Prior to the Court screening the Complaint, Plaintiff filed a First Amended
8 Complaint. (Doc. No. 10). Because it appeared from the face of the Complaint that this action
9 was not timely filed, the undersigned issued an Order to Show Cause (“OSC”) why the action
10 should not be dismissed for failure to comply with the applicable statute of limitations. (Doc. No.
11 14). Plaintiff filed a response asserting, *inter alia*, that he is entitled to 1281 days of tolling
12 because he was either exhausting his administrative remedies or was unable to access his legal
13 documents during that time. (Doc. No. 18 at 5). On July 9, 2021, the undersigned ordered that no
14 further action be taken on the order to show cause. (Doc. No. 20).³ The Court then screened
15 Plaintiff’s FAC and found that it failed to state any cognizable claim. (*See* Doc. No. 29). Plaintiff
16 timely filed his operative Second Amended Complaint. (Doc. No. 30, “SAC”).

17 The Court screened Plaintiff’s SAC and found that it stated cognizable First Amendment
18 retaliation claims against Defendants Baeza and Gutierrez, Eighth Amendment Failure to Protect
19 claims against Defendants Baeza, Gutierrez, Valencia-Mendoza, John Doe #1, Parra, and Vang,
20 and conspiracy claims against Defendants Baeza and Gutierrez, but failed to state any other
21 cognizable claims. (*See* Doc. No. 31). Plaintiff was afforded the option to either (1) voluntarily

22 ³ For actions brought under 42 U.S.C. § 1983, the statute of limitations is dictated “by the forum state’s
23 statute of limitations for personal injury actions,” which is two years in California. *Whiting v. City of*
24 *Cathedral City*, 735 F. App’x 927, 928 (9th Cir. 2018); Cal. Civ. Proc. Code § 335.1. California Code of
25 Civil Procedure § 352.1(a) provides an additional two years for those imprisoned “for a term less than for
26 life” when the cause of action accrues. This limitations period is tolled while an inmate exhausts
27 administrative remedies. *Gilmore v. Silva*, 812 F. App’x 689, 690 (9th Cir. 2020). If a complaint is
28 untimely, it may still proceed if subject to equitable tolling. *Fink v. Shedler*, 192 F.3d 911, 916–17 (9th
Cir.1999). At this stage, the Court will not rule on the timeliness of Plaintiff’s SAC. Taking the assertions
in Plaintiff’s Response to the Court’s OSC as true, (Doc. No. 18), he might be entitled to equitable tolling
that would make his SAC timely. If appropriate, Defendants may challenge those assertions at a later
stage of these proceedings. The Court’s decision to permit this case to proceed should not be construed as
a finding that the case was timely filed.

1 dismiss Defendant McDuffy and the remaining claims not deemed cognizable, or (2) stand on his
2 SAC subject to the undersigned filing a Findings and Recommendation to dismiss Defendant
3 McDuffy and the claims deemed not cognizable. (*Id.* at 24-25). On December 14, 2023, Plaintiff
4 filed a Notice indicating he intends to stand on his SAC. (Doc. No. 33).

5 **B. Summary of the SAC**

6 Plaintiff's SAC is based on a series of incidents that occurred at California State Prison,
7 Corcoran ("COR") from September 2015 to February 2016. (*See generally id.*). The SAC names
8 as Defendants the following COR staff: (1) Correctional Officer H. Baeza, (2) Correctional
9 Officer C.M. Gutierrez, (3) Correctional Officer J. Valencia-Mendoza, (4) Correctional Officer A.
10 Parra, (5) Correctional Officer Vang, and (6) John Doe #1. (*Id.* at 2). The SAC also names as a
11 Defendant (7) FNU McDuffy, CDCR Inmate # AR 9722. (*Id.*).

12 Liberally construed, the SAC alleges First Amendment retaliation claims against
13 Defendants Baeza, Gutierrez, Valencia-Mendoza, John Doe #1, Parra, Vang, and McDuffy (*id.* at
14 9-13), Eighth Amendment failure to protect claims against Defendants Baeza, Gutierrez,
15 Valencia-Mendoza, Parra, John Doe #1, and Vang (*id.* at 13-14); state tort negligence claims
16 against Defendants Parra, Valencia-Mendoza, John Doe #1, and Vang (*id.* at 15-16); conspiracy
17 claims against Defendants Baeza, Gutierrez, Vang, Parra, Valencia-Mendoza, John Doe #1, and
18 McDuffy (*id.* at 16-17); Bane Act claims against Defendants Baeza, Gutierrez, Parra, Valencia-
19 Mendoza, Vang, John Doe #1, and McDuffy (*id.* at 17-18); and Intentional Infliction of
20 Emotional Distress claims against Defendants Baeza and Gutierrez (*id.* at 18). The following
21 facts are presumed true at this stage of the screening process.

22 On June 14, 2015, Plaintiff filed a grievance against unspecified COR employees for
23 violating his religious rights. (*Id.* at 5 ¶ 1). Three months later, on September 24, 2015,
24 Defendant Baeza told Plaintiff "get back in there before I slap the **** out of you" while
25 attempting to provoke Plaintiff by making jerking movements at him and kicking Plaintiff's
26 property into his cell. (*Id.* ¶ 2). At the time, Plaintiff was awaiting transfer to CSP-Sacramento
27 ("CSP-SAC") to attend a pretrial matter in *Mitchell v. Haviland*, 2:09-cv-03012 (E.D. Cal. 2009),
28 another prisoner civil rights case alleging excessive force claims against CDCR officers. (*Id.*).

1 On October 29, 2015, while being housed at CSP-SAC Plaintiff told his mental health
2 clinician that he was having anxiety attacks and nightmares about being returned to COR because
3 Defendants Baeza and Gutierrez were constantly threatening and harassing him and were
4 attempting to find someone to attack him. (*Id.* at 5-6 ¶ 4). During a classification committee
5 hearing, the clinician advised the committee of Plaintiff's concerns, completed a CDC 128
6 Informational Chrono and sent it to COR. (*Id.* at 6 ¶ 4). On or about November 9, 2015,
7 Counselors Moreno and Bass (not Defendants in this action) told Plaintiff, "We received the 128
8 from CSP-Sac, you won't leave until you deserve it." (*Id.* ¶ 5). As Plaintiff was crossing the
9 yard with Moreno and Bass that day, Defendant Gutierrez was manning the tower. (*Id.*).
10 Gutierrez shook his head at Plaintiff and called him "staff complaint Mitchell." (*Id.*).

11 On December 1, 2015, while Plaintiff was speaking with another correctional officer in
12 the dayroom about sending out his legal mail, Defendant Gutierrez yelled down from the tower
13 into the dayroom full of inmates, "We know you drop dimes thats [sic] all you do, youre [sic] not
14 wanted on this yard!" (*Id.* ¶ 6). Defendant McDuffy was present and asked Defendant Gutierrez
15 if he could go into another inmate's cell to give him a tattoo, and Gutierrez yelled down "No,
16 Mitchell is 602ing and snitching on our program so until you guys get him out of here theres [sic]
17 no more of that." (*Id.*). In the days following this incident, Baeza and Gutierrez repeatedly
18 searched the cells of other inmates, took their TVs and other appliances. (*Id.* at 6-7 ¶ 6). Other
19 inmates told Plaintiff that Defendant Baeza was telling the inmates that the searches were because
20 of Plaintiff. (*Id.* at 7 ¶ 6).

21 On or about December 2, 2015, Defendant Baeza said to Plaintiff, "you filed a Complaint
22 on me huh, you want to move back to five bldg., hey your [sic] my buddy, we're friends, you
23 need a[n] escort to medical you got safety concerns." (*Id.* ¶ 7). Later that day, Baeza said to
24 Plaintiff, "that[']s a fine hot mess you got yourself into." (*Id.*). Plaintiff infers these statements
25 were "a warning to get off the yard" and that he "suffered more fear and confusion" and told his
26 mental health clinician that "he believed his life was in danger." (*Id.*).

27 On January 2, 2016, Defendant Valencia-Mendoza allowed Defendant McDuffy out of his
28 cell during PM med-line. (*Id.* ¶ 9). The SAC asserts upon information and belief that McDuffy

1 does not receive medication at PM med-line. (*Id.*). Defendants Parra and Doe #1 allowed
2 McDuffy to exit the building without checking his I.D. card to verify whether he received
3 medication. (*Id.*). Plaintiff was also released from his cell and upon exiting the building
4 encountered Defendant McDuffy who stated, “you still snitchin Mitchell” while attacking
5 Plaintiff. (*Id.*). No yard or tower officer intervened to stop the attack. (*Id.*). After Plaintiff
6 entered the building, McDuffy attacked him again. (*Id.* at 8 ¶ 9). Defendants Parra, Doe #1, and
7 Valencia-Mendoza watched but did not intervene. (*Id.*). After about two minutes, Officers
8 Billings and Vang arrived. (*Id.*). Officer Billings repeatedly shouted “stop” to no avail. (*Id.*).
9 Officer Vang stood on the perimeter watching. (*Id.*). Finally, Defendant Valencia-Mendoza
10 shouted “stop” and McDuffy stopped attacking Plaintiff. (*Id.*). During the attack, Plaintiff’s left
11 eyelid was sliced down the middle and Plaintiff later received reconstructive surgery to repair the
12 injury. (*Id.*). A few days after the incident, Defendant McDuffy told Plaintiff, “They lied to me.”
13 (*Id.*).

14 On January 4, 2016, Defendant Baeza came to Plaintiff’s cell door and laughed about the
15 attack, saying, “[I] heard they had fun without me.” (*Id.* ¶ 10). On January 20, 2016, Baeza again
16 came to Plaintiff’s cell and threatened to cut off Plaintiff’s hair, calling it a “dirty hot mess.” (*Id.*
17 ¶ 11).

18 Plaintiff was found not guilty of a Rule Violation Report for fighting related to the
19 January 2, 2016 incident, while McDuffy was found guilty. (*Id.* ¶ 12).

20 1. Retaliation

21 The SAC asserts a retaliation claim against Defendant Baeza based on: (1) his threat to
22 “slap the **** out of” Plaintiff on September 24, 2015, (2) his comments to Plaintiff on
23 December 2, 2015, which Plaintiff interpreted as a “veiled threat”; (3) Baeza’s cell searches of
24 Plaintiff’s neighbors, coupled with Baeza blaming the searches on Mitchell; (4) Baeza threatening
25 on January 20, 2016 to cut off Plaintiff’s hair; (5) Baeza conspiring with Gutierrez and McDuffy
26 to have McDuffy attack Plaintiff in retaliation for Plaintiff’s filing of various grievances; and (6)
27 Baeza’s making various threats against Plaintiff which provoked Plaintiff to file more grievances,
28 thereby triggering further retaliation against him. (*Id.* at 10 ¶ 23)

1 The SAC asserts a retaliation claim against Defendant Gutierrez based on: (1) Gutierrez
2 calling Plaintiff “staff complaint Mitchell” on November 9, 2015; (2) Gutierrez yelling to
3 Plaintiff on December 1, 2015, loud enough for all the inmates in the dayroom to hear, “we know
4 you drop dimes that[']s all you do your [sic] not wanted on this yard” then telling McDuffy that
5 he could not give other inmates tattoos until other inmates “get [Plaintiff] out of here”; and (3)
6 Gutierrez conspiring with Defendants Baeza and McDuffy to have McDuffy attack Plaintiff in
7 retaliation for his filing of various grievances. (*Id.* at 11). The SAC asserts that because of “his
8 negative interactions with CDCR officers” Plaintiff was diagnosed with Post-Traumatic Stress
9 Disorder. (*Id.* at 12 ¶ 24).

10 The SAC asserts a retaliation claim against Defendant Valencia-Mendoza based on: (1)
11 Valencia-Mendoza releasing McDuffy from his cell; and (2) failing to intervene when McDuffy
12 attacked Plaintiff. (*Id.* ¶ 25). The SAC contends that Valencia-Mendoza took those “adverse
13 actions” because Plaintiff filed staff complaints against Defendants Baeza and Gutierrez, and that
14 a causal connection between these events “is shown by the timeline of events and or his actions or
15 inactions did not reasonably advance a legitimate correctional nor penological purpose. (*Id.*).

16 The SAC asserts a retaliation claim against Defendants Parra, Doe #1, and Vang based on:
17 (1) these Defendants allowing McDuffy to exit the building for PM med line so that he could
18 attack Plaintiff on the yard; and (2) allowing the attack to continue inside of the building, where
19 Parra and Doe #1 were assigned as floor officers. (*Id.* ¶ 26). The SAC alleges the actions of
20 Defendants Parra, Doe #1, and Vang caused him depression, fear, and serious bodily injury, and
21 asserts a causal connection is demonstrated by the timeline of events. (*Id.*).

22 Finally, the SAC asserts a retaliation claim against Defendant McDuffy based on
23 McDuffy attacking Plaintiff on January 2, 2016, which the SAC alleges was done “because
24 [Plaintiff] filed CDCR 602s and Complaints against C/Os Baeza and Gutierrez.” (*Id.* at 13 ¶ 27).
25 The SAC alleges the attack has made Plaintiff reluctant to submit grievances “because of fear of
26 not knowing who’s going to attack him next.” (*Id.*). To establish a causal connection with
27 Plaintiff’s First Amendment conduct, the SAC points to McDuffy’s declaration, attached to the
28 SAC. (*Id.*).

1 2. Failure to Protect

2 The SAC asserts an Eighth Amendment Failure to Protect claim against Defendants Baeza
3 and Gutierrez based on: (1) Gutierrez and Baeza telling other inmates that Plaintiff was a “child
4 molester” and a “rat” that was “602ing the program,” and searching the cells and confiscating the
5 property of other inmates, knowing this would expose Plaintiff to a substantial risk of being
6 attacked; (2) paying McDuffy to attack Plaintiff. (*Id.* at 13 ¶ 30).

7 The SAC asserts a Failure to Protect claim against Defendant Valencia-Mendoza based
8 on: (1) Valencia-Mendoza opening McDuffy’s cell door at PM medication call on January 2,
9 2016, despite McDuffy not receiving medication in the evening; (2) Valencia-Mendoza having a
10 reasonably opportunity to prevent or end McDuffy’s attack on Plaintiff in the dayroom on
11 January 2, 2016, but failing to do so. (*Id.* ¶ 31).

12 The SAC asserts a Failure to Protect claim against Defendant Parra based on (1) Parra
13 allowing Defendant McDuffy to exit his building into the yard, where he attacked Plaintiff,
14 without checking that McDuffy was receiving medication at PM med-line; and (2) failing to
15 intervene when McDuffy attacked Plaintiff inside the building. (*Id.* ¶ 32).

16 The SAC asserts a Failure to Protect claim against Defendants Vang and John Doe #1
17 based on their failure to intervene when Defendant McDuffy attacked Plaintiff inside the building
18 on January 2, 2016 despite having a realistic opportunity to do so. (*Id.*).

19 3. Negligence

20 The SAC asserts a negligence claim against Defendants Baeza and Gutierrez based on
21 their referring to Plaintiff as a “snitch” and “child molester,” soliciting another inmate to attack
22 Plaintiff, and interfering with Plaintiff’s grievances. (*Id.* at 15 ¶ 35). The SAC contends that
23 these actions breached Defendants’ duty to Plaintiff and were the proximate cause of physical and
24 emotional harm to Plaintiff, including PTSD. (*Id.*).

25 The SAC asserts a negligence claim against Defendants Valencia-Mendoza, Parra, Doe
26 #1, and Vang based on their failure to restrict Defendant McDuffy’s movement, which was the
27 proximate cause of McDuffy’s attack on Plaintiff and the resulting injuries. (*Id.* at 15-16 ¶ 36).

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4. Other State Claims

Plaintiff asserts against all Defendants, based on unspecified conduct, a California Tort Claims Act claim, Bane Act claim, and violations of California Penal Code §§ 2600 and 2601. (*Id.* ¶ 37).

5. Conspiracy

The SAC asserts that Defendants Baeza, Gutierrez, Vang, Parra, Valencia-Mendoza, Doe #1 and McDuffy “conspired together, acted individually or jointly in concert to physically assault the Plaintiff in violation of” his constitutional rights. (*Id.* at 16 ¶ 40).

Specifically, the SAC alleges that Defendant Baeza, Gutierrez and McDuffy conspired to plan the attack, (*id.* at 16-17 ¶ 41), and Defendants Valencia-Mendoza, Parra, Doe #1 and McDuffy conspired to release McDuffy from his cell during med-line and to not intervene when McDuffy attacked Plaintiff (*id.* at 17 ¶ 42).

6. Bane Act Claims

The SAC asserts that based on the foregoing allegations, all Defendants interfered with Plaintiff’s state and federal rights to file grievances without fear of being attacked in retaliation and or the right to be protected from attack. (*Id.* at 18 ¶ 47).

7. Intentional Infliction of Emotional Distress

The SAC asserts that unspecified conduct by Defendants Baeza and Gutierrez was intended to harm Plaintiff, was “outrageous” and so “extreme” as to exceed all bounds of what is usually tolerated in a “civilized community.” (*Id.* at 18 ¶¶ 48-50). Their conduct caused PTSD to Plaintiff, and thus Defendants Baeza and Gutierrez are liable for intentional infliction of emotional distress. (*Id.* ¶ 50).

8. Relief Sought

As relief for all of the above claims, Plaintiff seeks an unspecified order be issued to the Director of CDCR, that he be awarded \$150,000 in compensatory and punitive damages for each of the claims in the SAC, and that he be granted various other relief. (*Id.* at 19).

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1 If an otherwise deficient pleading could be cured by the allegation of other facts, the pro
2 se litigant is entitled to an opportunity to amend their complaint before dismissal of the action.
3 See *Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc); *Lucas v. Department of*
4 *Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). However, it is not the role of the Court to advise a pro se
5 litigant on how to cure the defects. Such advice “would undermine district judges’ role as
6 impartial decisionmakers.” *Pliler v. Ford*, 542 U.S. 225, 231 (2004); see also *Lopez*, 203 F.3d at
7 1131 n.13.

8 **B. Color of State Law**

9 Section 1983 allows a private citizen to sue for the deprivation of a right secured by
10 federal law. See 42 U.S.C. § 1983; *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916 (2017). “To
11 establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by the
12 Constitution and laws of the United States, and (2) that the deprivation was committed by a
13 person acting under color of state law.” *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143,
14 1149 (9th Cir. 2011) (citing *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)); *Soo Park v.*
15 *Thompson*, 851 F.3d 910, 921 (9th Cir. 2017). “The ‘under color of law’ requirement under
16 § 1983 is the same as the Fourteenth Amendment’s ‘state action’ requirement.” *Chudacoff* at 1149
17 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928 (1982)).

18 Courts have consistently rejected attempts by prisoner plaintiffs to sue fellow inmates
19 under § 1983. See, e.g., *Jackson v. Foster*, 372 F. App’x 770, 771 (9th Cir. 2010) (concluding
20 that “the district court properly dismissed Jackson’s excessive force claim because [fellow]
21 inmate . . . did not act under color of state law under any formulation of the governmental actor
22 tests”); see also *Gettimier v. Burse*, 2015 WL 75224, at *5 n.3 (E.D. Mo. Jan. 6, 2015) (“The fact
23 that a fellow inmate is not a ‘state actor’ for purposes of § 1983 litigation is so fundamental as to
24 not require citation.”); *Rigano v. Cty. of Sullivan*, 486 F. Supp. 2d 244, 256 n.15 (S.D.N.Y. 2007)
25 (“It is well-established that a § 1983 claim is only cognizable against a state actor and not a
26 fellow inmate.”); cf. *Williams v. Calidonna*, 2007 WL 432773, at *1-2 (N.D.N.Y. Feb. 2, 2007)
27 (dismissing § 1983 action against inmates despite allegation they were working as state
28 informants). It is uncontested that at all times relevant, Defendant McDuffy was an inmate in the

1 custody of CDCR. Accordingly, Plaintiff cannot proceed on his federal claims against Defendant
2 McDuffy in this § 1983 action. And as set forth below, because Plaintiff's state law claims are
3 barred for failure to comply with the Government Claims Act, Plaintiff's state law claims against
4 McDuffy also fail. Thus, the undersigned finds the SAC fails to state any claim against inmate
5 McDuffy.

6 **C. Doe Defendant**

7 The SAC does not provide a name or other identifying information for one of the officers
8 who was allegedly present for the January 4, 2015 attack on Plaintiff. (*See* Doc. No. 30 at 8 ¶ 9).
9 Rule 10(a) of the Federal Rules of Civil Procedure requires a plaintiff to include the names of the
10 parties sued in the action. Fed. R. Civ. P. 10(a). The use of Doe defendants is generally
11 disfavored in federal court because the United States Marshal cannot serve a summons and
12 complaint on an anonymous defendant. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
13 1980). Plaintiff provides the date and location of the incident and the names of other officers who
14 were present; however, this is insufficient by itself to serve the officers in question. "A plaintiff
15 may refer to unknown defendants as Defendant John Doe 1, John Doe 2, and so on, but he must
16 allege sufficient facts to show how each doe defendant individually violated his constitutional
17 rights. If the plaintiff does so, he may be given leave to obtain the names of doe defendants
18 during discovery and seek leave to amend to name those defendants." *Finefeuiaki v. Maui Police*
19 *Dep't*, 2018 WL 4839001, at *3 (D. Haw. Oct. 4, 2018), *citing Wakefield v. Thompson*, 177 F.3d
20 1160, 1163 (9th Cir. 1999). Here, because as set forth below Plaintiff has alleged facts sufficient
21 to state a cognizable Eighth Amendment claim as to Defendant John Doe #1, the undersigned
22 recommends that the SAC proceed on the claim against Defendant Doe #1 and that Plaintiff be
23 permitted to engage in discovery for the limited purpose of identifying Defendant Doe #1 and
24 amend the SAC accordingly.

25 **D. First Amendment Retaliation**

26 It is clear prisoners have First Amendment rights to file a grievance or civil rights
27 complaint against correctional officials. *Brodheim v. Cry*, 584 F. 3d 1262, 1269 (9th Cir. 2009).
28 To state a claim for First Amendment retaliation, a plaintiff must allege five elements: (1) he

1 engaged in protected activity; (2) the state actor took an adverse action against the plaintiff; (3) a
2 causal connection between the adverse action and the protected conduct; (4) the defendant's
3 actions would chill or silence a person of ordinary fitness from protected activities; and (5) the
4 retaliatory action did not advance a legitimate correctional goal. *Chavez v. Robinson*, 12 F.4th
5 978, 1001 (9th Cir. 2021) (quoting *Rhodes*, 408 F.3d at 567–68). A retaliatory motive may be
6 shown by the timing of the allegedly retaliatory act or other circumstantial evidence, as well as
7 direct evidence. *Bruce v. Ylst*, 351 F.3d 1283, 1288–89 (9th Cir.2003); *McCullum v. Ca. Dep't of*
8 *Corr. And Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011). Mere speculation that a defendant acted
9 out of retaliation is not sufficient. *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014) (citing
10 cases).

11 The undersigned addresses Plaintiff's claims as to the six remaining Defendants⁴ in
12 seriatim.

13 1. Officer Baeza

14 The SAC's retaliation claims against Baeza are based, first, on three instances of verbal
15 threats or statements Baeza made to Plaintiff. On one occasion, Baeza told Plaintiff "get back in
16 there before I slap the **** out of you." (Doc. No. 30 at 5 ¶ 1). "[V]erbal harassment or abuse
17 . . . is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983." *Oltarzewski v.*
18 *Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (internal citations omitted). Defendant Baeza's
19 threat to slap Plaintiff if he didn't comply with an order, without more, does not rise to the level
20 of a constitutional violation. Moreover, the SAC does not allege any facts linking Baeza's
21 statement to Plaintiff's First Amendment conduct. Plaintiff's speculation that Baeza's comments
22 on September 24, 2015 were motivated by Plaintiff's filing of a grievance against unspecified
23 COR officers more than three months earlier, is insufficient to support an inference of such a
24 connection. (See Doc. No. 30 at 5). Finally, from the minimal factual context in Plaintiff's claim,
25 it appears Defendant Baeza was ordering Plaintiff to get back into his cell, and thus his command
26 had the legitimate correctional objective of preserving or maintaining institutional order. Thus,

27 _____
28 ⁴ Because, as set forth above, the SAC cannot bring a section 1983 claim against McDuffy, the Court does not analyze the individual claims alleged against McDuffy.

1 the SAC fails to state a retaliation claim based on September 24, 2015 incident.

2 Next, the SAC alleges that on December 2, 2015, Defendant Baeza told Plaintiff, “you
3 filed a Complaint on me huh, you want to move back to five bldg., hey your [sic] my buddy,
4 we’re friends, you need a[n] escort to medical you got safety concerns.” (*Id.* ¶ 7). Plaintiff
5 himself notes that “at first it made no sense” what Defendant Baeza meant by these comments.
6 (*Id.*). Later that day, Baeza said to Plaintiff, “thats a fine hot mess you got yourself into.” (*Id.*).
7 Plaintiff eventually interpreted these comments together as a warning for Plaintiff to get off the
8 yard. (*Id.*). The Court does not find that these comments warrant an exception to the general rule
9 that verbal harassment does not rise to the level of a constitutional violation. *See Oltarzewski*,
10 830 F.2d at 139. While the “mere threat of harm can be an adverse action,” *Watison v. Carter*,
11 668 F.3d 1108, 1114 (9th Cir. 2012), Defendant Baeza did not make any discernible threat of
12 harm against Plaintiff based on him continuing to exercise his First Amendment rights.
13 Accordingly, the SAC fails to state a retaliation claim based on these comments.

14 Third, the SAC asserts that Defendant Baeza retaliated against Plaintiff by initiating cell
15 searches of Plaintiff’s neighbors, confiscating thousands of dollars of inmates’ property, and
16 blaming Plaintiff for the searches to foster animosity against him among other inmates. (Doc.
17 No. 30 at 10 ¶ 23). This claim is supported by the assertion that “Baeza also took the ‘adverse
18 actions’ to do cell searches taking inmate appliances and contraband . . . and incite them by
19 blameing [sic] his actions on the plaintiff . . .” (*Id.*). Plaintiff also cites the declaration of inmate
20 Cesar Pizana, in which Pizana states that Defendant Baeza and Officer Alvarez searched his cell
21 on an unspecified date in December 2015, confiscated a cell phone, and told Pizana “Inmate
22 Mitchell aka Yaya was snitching on inmates on the yard.” (Doc. No. 30 at 23). Pizana also
23 alleges that Baeza “would tell inmates that were STG to assault Mitchell aka Yaya to get him off
24 the yard because he was snitching on the yard.” (*Id.*). The Court finds these factual allegations
25 sufficient to support a retaliation claim. Labeling an inmate a “snitch” in response to his filing of
26 grievances in order to subject him to retaliation by fellow inmates can state a cognizable federal
27 claim. *See Valandingham v. Borquez*, 866 F.2d 1135, 1138 (9th Cir. 1989); *see also Sutton v.*
28 *Wash. State Dep’t of Corr.*, 2015 WL 4748233, at *7 (E.D. Wash. Aug. 11, 2015) (“It is well

1 established that being revealed as a snitch may be sufficient to [establish a substantial risk of
2 serious harm].”) According to Pizana’s declaration, Baeza invited other inmates to attack
3 Plaintiff because he was “snitching on the yard[,]” which appears to be a reference to Plaintiff
4 filing grievances and/or complaints. (Doc. No. 30 at 23). Thus, Baeza’s adverse action of
5 labeling Plaintiff a “snitch” was motivated by Plaintiff’s protected First Amendment conduct.
6 Plaintiff alleges these actions had a chilling effect on his filing of further grievances and caused
7 him psychological harm. (*Id.* at 11 ¶ 23). And the undersigned can discern no legitimate
8 penological purpose for inviting other inmates to attack Plaintiff. Thus, the SAC adequately
9 alleges a First Amendment retaliation claim against Defendant Baeza based on his labeling
10 Plaintiff a snitch.

11 Fourth, the SAC asserts that Defendant Baeza retaliated against Plaintiff by telling him
12 that he would cut off Plaintiff’s hair, because it was “a hot mess.” (*Id.* at 8 ¶ 11). First, the Court
13 is not persuaded that Baeza’s comments can be construed as an “adverse action.” In context,
14 Baeza’s remark was at most verbal harassment, which as noted above is insufficient to establish a
15 constitutional violation. *See Oltarzewski*, 830 F.2d at 139. Moreover, the SAC is devoid of any
16 facts linking the comment to Plaintiff’s protected First Amended conduct. Plaintiff’s mere
17 speculation that the remark was made in response to Plaintiff’s filing of a grievance or complaint
18 is insufficient to state a claim. *See Wood*, 753 F.3d at 905.

19 Fifth, the SAC alleges that Baeza retaliated against Plaintiff by conspiring with
20 Defendants Gutierrez and McDuffy to have McDuffy attack Plaintiff. (*Id.* at 10 ¶ 23). This claim
21 is supported by the attached declaration of Defendant McDuffy.⁵ In it, McDuffy asserts that
22 Defendants Gutierrez and Baeza solicited him to attack Plaintiff because he was a “snitch” and
23 was “complaining via 602s about the way the building was running.” (*Id.* at 26). Thus, liberally

24 ⁵ While McDuffy’s declaration is unsigned, at the screening stage this does not warrant disregarding the
25 allegations therein. The Court liberally construes the detailed allegations in the declaration to be part of
26 the SAC and thus presumes the factual assertions true at this stage of the screening process. *See Jenkins*,
27 395 U.S. at 421; *Bernhardt*, 339 F.3d at 925. While the declaration appears to describe a quid pro quo
28 between McDuffy and Plaintiff in exchange for preparation of the declaration, because the Court does not
engage in credibility determinations at the screening stage, this is also not a basis for disregarding the
allegations set forth in the declaration.

1 construed, the SAC alleges that Defendants Baeza and Gutierrez directed McDuffy to attack
2 Plaintiff in response to his filing of prison grievances. As a result, Plaintiff suffered a physical
3 assault, which is adequate to establish a chilling effect. *See Rhodes v. Robinson*, 408 F.3d 559,
4 568 (9th Cir. 2005) (Plaintiff sufficiently alleges a chilling effect by demonstrating harm from
5 retaliatory actions that is “more than minimal.”). Because having inmates attack one another
6 clearly does not constitute a legitimate penological objective, these facts adequately allege a First
7 Amendment retaliation claim against Defendant Baeza.

8 Finally, the SAC alleges that by harassing Plaintiff repeatedly and prompting him to file
9 grievances, Baeza set up Plaintiff for further retaliation. This tenuous argument—essentially
10 alleging that Baeza is responsible for future unspecified retaliation by unknown parties, is
11 unpersuasive. Accordingly, it does not establish a retaliation claim.

12 2. Officer Gutierrez

13 The SAC asserts a retaliation claim against Defendant Gutierrez first based on Gutierrez
14 calling Plaintiff “staff complaint Mitchell” on November 9, 2015. As noted above, however,
15 mere verbal harassment is insufficient to state a claim. *Oltarzewski*, 830 F.2d at 139.

16 Next, the SAC alleges that Gutierrez retaliated by yelling to Plaintiff on December 1,
17 2015, loud enough for all the inmates in the dayroom to hear, “we know you drop dimes that[']s
18 all you do your [sic] not wanted on this yard” then telling McDuffy that he could not give other
19 inmates tattoos until other inmates “get [Plaintiff] out of here.” (Doc. No. 30 at 6 ¶ 6). The
20 undersigned finds that this conduct is sufficient to establish a retaliation claim. As noted above,
21 labeling an inmate a “snitch” in response to his filing of grievances in order to subject him to
22 retaliation by fellow inmates can state a cognizable federal claim. *See Valandingham*, 866 F.2d at
23 1138; *see also Sutton*, 2015 WL 4748233 at 7.

24 Here, Gutierrez announced to a large group of Plaintiff’s fellow inmates that he “drop[s]
25 dimes that’s all you do[,]” effectively labeling Plaintiff a “snitch,” and openly encouraged the
26 inmates to “get [Plaintiff] out of here.” (Doc. No. 30 at 6 ¶ 6). These statements can reasonably
27 be interpreted as inviting harm on Plaintiff and encouraging other inmates to retaliate against
28 Plaintiff for his protected First Amendment conduct. *See Valandingham*, 866 F.2d at 1138.

1 Accordingly, Defendant Gutierrez’s actions violated Plaintiff’s First Amendment rights.

2 As to Plaintiff’s claim that Gutierrez retaliated against him by conspiring with Defendant
3 Baeza to have McDuffy attack Plaintiff, as noted above, Defendant McDuffy’s declaration
4 supports this claim. The declaration alleges that Baeza and Gutierrez specifically directed
5 McDuffy to harm Plaintiff and take his property in response to his filing of “602s” and his
6 “snitching.” (Doc. No. 30 at 26). Thus, the SAC adequately alleges a First Amendment claim
7 against Gutierrez based on this allegation as well.

8 3. Officer Valencia-Mendoza

9 The SAC alleges a retaliation claim against Defendant Valencia-Mendoza based on
10 Valencia-Mendoza releasing McDuffy from his cell and failing to intervene when McDuffy
11 attacked Plaintiff. (Doc. No. 30 at 12 ¶ 25). The SAC contends that Valencia-Mendoza took
12 those “adverse actions” because Plaintiff filed staff complaints against Defendants Baeza and
13 Gutierrez, and that a causal connection between these events “is shown by the timeline of events
14 and or his actions or inactions did not reasonably advance a legitimate correctional nor
15 penological purpose. (*Id.*).

16 Because Plaintiff does not specify which protected First Amendment conduct prompted
17 Valencia-Mendoza’s alleged retaliatory acts, however, the Court is unable to infer a causal
18 connection based on “the timeline of events.” Nor is there any other evidence supporting the
19 inference that Valencia-Mendoza’s actions were motivated by Plaintiff’s First Amendment
20 conduct. Thus, Plaintiff retaliation claim as to Valencia-Mendoza amounts to mere speculation,
21 which is insufficient to state a claim. *See Wood*, 753 F.3d at 905.

22 4. Officers Parra, Doe #1 and Vang

23 The SAC asserts a retaliation claim against Defendants Parra, Doe #1, and Vang based on
24 the three Defendants allowing McDuffy to exit the building for PM med line and allowing the
25 attack on Plaintiff to continue inside of the building, where Parra and Doe #1 were assigned as
26 floor officers. (Doc. No. 30 at 12 ¶ 26). Plaintiff asserts that “the ‘Causal Connection’ is
27 apparent when the timeline and events are reviewed.” (*Id.*). The mere assertion that a causal
28 connection can be inferred from an unspecified timeline is insufficient to show such a connection.

1 Indeed, beyond this conclusory statement, the SAC fails to allege any facts showing that
2 Defendants Parra, Doe #1, and Vang’s actions and inactions were motivated by Plaintiff’s First
3 Amendment conduct. Accordingly, Plaintiff’s retaliation claim as to these three Defendants
4 amounts to mere speculation, which is insufficient to state a First Amendment retaliation claim.
5 *See Wood*, 753 F.3d at 905.

6 **E. Eighth Amendment Failure to Protect Claim**

7 “[T]he treatment a prisoner receives in prison and the conditions under which he is
8 confined are subject to scrutiny under the Eighth Amendment,” which prohibits “cruel and
9 unusual punishment.” *Helling v. McKinney*, 509 U.S. 25, 31 (1993); *Morgan v. Morgensen*, 465
10 F.3d 1041, 1045 (9th Cir. 2006); U.S. Const. Amend. VIII. “[P]rison officials have a duty . . . to
11 protect prisoners from violence at the hands of other prisoners.” *Farmer v. Brennan*, 511 U.S.
12 825, 833 (1994) (quoting *Cortes-Quinones v. Jimenez Nettleship*, 842 F.2d 556, 558 (1st Cir.
13 1988)). “The failure of prison officials to protect inmates from attacks by other inmates may rise
14 to the level of an Eighth Amendment violation if prison officials know of and disregard a
15 substantial risk of serious harm to the plaintiff.” *Thomas v. Hernandez*, 2022 WL 1173339, at *4
16 (E.D. Cal. Apr. 20, 2022) (citing *Farmer*, 511 U.S. at 847, *Hearns v. Terhune*, 413 F.3d 1036 (9th
17 Cir. 2005). “Whether a prison official had the requisite knowledge of a substantial risk is a
18 question of fact subject to demonstration in the usual ways, including inference from
19 circumstantial evidence . . . and, a factfinder may conclude that a prison official knew of a
20 substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842. To state a
21 failure to protect claim, the prisoner must establish that the prison official was deliberately
22 indifferent to a serious threat to the plaintiff’s safety. *Id.* at 834 (citing *Helling v. McKinney*, 509
23 U.S. 35, 35 (1993)). Thus, a showing of deliberate indifference rests on facts clearly evincing
24 “obduracy and wantonness, not inadvertence or error in good faith.” *Whitley v. Albers*, 475 U.S.
25 312, 319 (1986). “Liability may follow only if a prison official ‘knows that inmates face a
26 substantial risk of serious harm and disregards that risk by failing to take reasonable measures to
27 abate it.’” *Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1160 (9th Cir. 2013) (quoting *Farmer*,
28 511 U.S. at 847). To satisfy the objective prong, it is enough for the inmate to demonstrate that

1 he was exposed to a substantial risk of some range of serious harms; the harm he actually suffered
2 need not have been the most likely result among this range of outcomes. *Lemire v. California*
3 *Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1076 (9th Cir. 2013). “[I]t does not matter whether the
4 risk comes from a single source or multiple sources, any more than it matters whether a prisoner
5 faces an excessive risk . . . for reasons personal to him or because all prisoners in his situation
6 face such a risk.” *Farmer*, 511 U.S. at 843.

7 1. Officer Baeza and Officer Gutierrez

8 The SAC alleges Defendants Baeza and Gutierrez violated Plaintiff’s Eighth Amendment
9 rights by telling other inmates that Plaintiff was a “child molester” and a “rat” that was “602ing
10 the program,” and searching the cells and confiscating the property of other inmates, knowing this
11 would expose Plaintiff to a substantial risk of being attacked. The Court does not accept as true
12 that Gutierrez and Baeza specifically labeled Plaintiff a “child molester” or “rat” to other inmates
13 because these claims are supported only by Plaintiff’s conclusory statements. The SAC does,
14 however, contain sufficient factual allegations establishing that Baeza and Gutierrez made
15 disparaging remarks about Plaintiff to other inmates that exposed Plaintiff to a substantial risk of
16 serious harm.

17 As to Defendant Gutierrez, on December 1, 2015, he yelled to the entire dayroom at COR
18 that Plaintiff “drop[s] dimes” and openly invited other inmates to “get [Plaintiff] out of here.”
19 (Doc. No. 30 at 6 ¶ 6). Labeling an inmate a “snitch,” as Defendant Gutierrez effectively did, is
20 well-established as exposing that inmate to a substantial risk of serious harm. *See Sutton*, 2015
21 WL 4748233 at *7. Moreover, the inmate who ultimately attacked Plaintiff, Inmate McDuffy,
22 was present for this incident. (Doc. No. 30 at 6 ¶ 6). And when McDuffy asked Gutierrez if he
23 could tattoo an inmate in his cell, Gutierrez specifically blamed Plaintiff for not allowing
24 McDuffy to do so. (*Id.*). When McDuffy attacked Plaintiff roughly a month later, he stated “you
25 still snitchin Mitchell” (*Id.* at 7 ¶ 9). These facts support an inference that the attack was
26 motivated at least in part by Defendant Gutierrez’s comments, which exposed Plaintiff to a
27 substantial risk of serious harm. Thus, the FAC alleges a cognizable Eighth Amendment failure
28 to protect claim against Defendant Gutierrez.

1 As to Defendant Baeza, the Court accepts as true the declaration of Cesar Pizana, who
2 attests that in December 2015, Defendant Baeza specifically labeled Plaintiff a snitch to him and
3 other “STG”⁶ inmates when conducting cell searches and confiscating inmate property, and
4 invited them to get rid of Plaintiff. While it is unclear whether Baeza’s comments specifically
5 prompted Inmate McDuffy to attack Plaintiff, the fact that Baeza labeled Plaintiff a “snitch” to
6 other inmates and invited them to attack Plaintiff is sufficient to establish that he exposed Plaintiff
7 to a substantial risk of serious harm. And the injury that Plaintiff ultimately suffered—physical
8 and psychological injuries resulting from McDuffy’s attack—were clearly within the range of
9 harms expected to result from Baeza’s actions. Thus, the SAC adequately alleges an Eighth
10 Amendment failure to protect claim against Baeza due to his labeling Plaintiff a snitch and
11 inviting other inmates to attack Plaintiff.

12 The undersigned also finds the SAC adequately alleges that Baeza and Gutierrez are liable
13 for failure to protect based on their alleged hiring of Inmate McDuffy to attack Plaintiff. In his
14 declaration, Defendant McDuffy states that in December 2015, Defendant Gutierrez summoned
15 him to the rotunda, where Defendant Baeza handed McDuffy a set of documents about Plaintiff
16 and told him to “get rid of this snitch.” (Doc. No. 30 at 25-26). The documents purported to
17 show that Plaintiff was a child molester who had been filing various complaints and grievances
18 while at COR. (*Id.* at 26). Defendant Baeza told McDuffy “I want him hurt.” (*Id.*). Gutierrez
19 told McDuffy to “bag up” Plaintiff, which meant to take all of his property. (*Id.*). “A day or two
20 later” McDuffy waited for an opportunity to attack Plaintiff, assaulted him on the yard and took a
21 chain off Plaintiff’s neck. (*Id.*). These factual allegations, liberally construed, establish that
22 Defendants Baeza and Gutierrez deliberately exposed Plaintiff to a serious risk of harm by
23 inciting violence against him by another inmate and that Plaintiff was attacked as a result. These
24 allegations are sufficient to set forth an Eighth Amendment failure to protect claim.

25 2. Officer Valencia-Mendoza

26 The SAC asserts a Failure to Protect claim against Defendant Valencia-Mendoza based
27

28 ⁶ The Court infers this refers to inmates who were members of a Security Threat Group, i.e. a prison gang.

1 on: (1) Valencia-Mendoza opening McDuffy's cell door at PM medication call on January 2,
2 2016, despite McDuffy not receiving medication in the evening; (2) Valencia-Mendoza having a
3 reasonably opportunity to prevent or end McDuffy's attack on Plaintiff in the dayroom on
4 January 2, 2016, but failing to do so. (*Id.* ¶ 31).

5 The Court finds that Valencia-Mendoza releasing McDuffy from his cell on January 2,
6 2016 is sufficient to establish deliberate indifference to a serious risk of substantial harm. The
7 unsigned declaration of Inmate McDuffy supports the inference that Defendant Valencia-
8 Mendoza was aware of a plan to attack Plaintiff. In it, McDuffy states that after he first attacked
9 Plaintiff on the yard and Plaintiff fled into the building, "the C/O that was in the watch tower told
10 me to 'finish him off.'" (*Id.* at 26). The facts alleged in the SAC make clear that McDuffy is
11 referring to Defendant Valencia-Mendoza. Liberally construed, this adequately alleges that
12 Valencia-Mendoza supported the attack on Plaintiff, and the Court can thus reasonably infer that
13 Valencia-Mendoza was aware of McDuffy's plan to attack Plaintiff when he released him from
14 his cell that night. Indeed, Valencia-Mendoza not only enabled the attack, but actively
15 encouraged McDuffy to continue attacking Plaintiff after an initial assault. This is sufficient to
16 establish an Eighth Amendment failure to protect claim.

17 The SAC also asserts that Valencia-Mendoza had a reasonable opportunity to intervene
18 after McDuffy began attacking him. The SAC alleges that Valencia-Mendoza was manning the
19 control tower at the time of the attack and that the attack took place "directly in front of his
20 window." (Doc. No. 30 at 14 ¶ 31). Thus, the Court reasonably infers that Defendant Valencia-
21 Mendoza was aware of McDuffy's attack on Plaintiff and the risk it posed of substantial harm.
22 Nevertheless, he failed to intervene. For all the reasons set forth above, the SAC adequately
23 alleges an Eighth Amendment failure to protect claim against Defendant Valencia-Mendoza.

24 3. Officer Parra

25 Next, the SAC asserts a Failure to Protect claim against Defendant Parra based on (1)
26 Parra allowing Defendant McDuffy to exit his building into the yard, where he attacked Plaintiff,
27 without checking that McDuffy was receiving medication at PM med-line; and (2) failing to
28 intervene when McDuffy attacked Plaintiff inside the building. (Doc. No. 30 at 14 ¶ 32).

1 While Defendant Parra may have been negligent in permitting Inmate McDuffy to exit the
2 building without verifying that he received evening medication, his actions do not demonstrate
3 deliberate indifference to a serious risk of harm. There are no facts—beyond Plaintiff’s
4 speculation as to Defendant Parra’s involvement in a conspiracy—establishing Parra’s knowledge
5 that McDuffy intended to harm Plaintiff that evening. Thus, the SAC does not allege facts
6 showing Defendant Parra possessed the state of mind necessary to satisfy the second prong of a
7 deliberate indifference claim.

8 However, the SAC adequately alleges that Defendant Parra failed to intervene after
9 Defendant McDuffy attacked Plaintiff “directly in front of” Parra and John Doe #1 in Building 4.
10 (*Id.*). The SAC alleges elsewhere that the attack lasted at least 2 minutes and that at no time did
11 Defendant Parra intervene to stop the assault despite it occurring in his immediate vicinity. (*Id.* at
12 8 ¶ 9). Thus, Defendant Parra had a reasonable opportunity to protect Plaintiff from further harm
13 but failed to do so. The SAC therefore adequately alleges an Eighth Amendment claim for failure
14 to protect against Defendant Parra.

15 4. Doe #1

16 The SAC alleges that Defendants Doe #1 was in the same proximity to the attack as
17 Defendant Parra but failed to intervene. (*Id.* at 14 ¶ 32). Thus, Officer Doe #1 was aware of the
18 substantial risk of harm posed to Plaintiff by allowing the attack to continue but failed to take any
19 action to stop it. Thus, the SAC adequately alleges an Eighth Amendment failure to protect claim
20 against Defendant Doe #1.

21 5. Officer Vang

22 According to the SAC, Officers Vang and Billings arrived on the scene after the attack
23 had been underway for some time. (*Id.* at 8 ¶ 9). Officer Billings shouted “stop” in an attempt to
24 halt the altercation but was unsuccessful. (*Id.*). Meanwhile, Officer Vang “stood on the
25 perimeter watching.” (*Id.*). Liberally construing the SAC, Officer Vang was in close proximity
26 to the attack on Plaintiff and had a realistic opportunity to intervene to prevent further harm, but
27 failed to do so. Thus, the SAC adequately alleges an Eighth Amendment failure to protect claim
28 as to him as well.

1 **F. Civil Conspiracy**

2 A civil conspiracy is a combination of two or more persons who, by some concerted
3 action, intend to accomplish some unlawful objective for the purpose of harming another, which
4 results in damage. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). To prove
5 a civil conspiracy, the plaintiff must show that the conspiring parties reached a unity of purpose
6 or common design and understanding, or a meeting of the minds in an unlawful agreement. *Id.*
7 To be liable, each participant in the conspiracy need not know the exact details of the plan, but
8 each participant must at least share the common objective of the conspiracy. *Id.* A defendant’s
9 knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and
10 from evidence of the defendant’s actions. *Id.* at 856–57.

11 Conclusory allegations of conspiracy are not enough to support a § 1983 conspiracy
12 claim. *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (per curiam). Although an
13 “agreement or meeting of minds to violate [the plaintiff’s] constitutional rights must be
14 shown,” *Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989), “[d]irect evidence
15 of improper motive or an agreement to violate a plaintiff’s constitutional rights will only rarely be
16 available. Instead, it will almost always be necessary to infer such agreements from
17 circumstantial evidence or the existence of joint action.” *Mendocino Environmental Center v.*
18 *Mendocino County*, 192 F.3d 1283, 1302 (9th Cir. 1999). Thus, “an agreement need not be overt,
19 and may be inferred on the basis of circumstantial evidence such as the actions of the
20 defendants.” *Id.* at 1301.

21 Here, the SAC asserts that Defendants Baeza, Gutierrez, Vang, Parra, Valencia-Mendoza,
22 Doe #1 and McDuffy “conspired together, acted individually or jointly in concert to physically
23 assault the Plaintiff in violation of” his constitutional rights. (*Id.* at 16 ¶ 40). Specifically, the
24 SAC alleges that Defendant Baeza, Gutierrez and McDuffy conspired to plan the attack, (*id.* at
25 16-17 ¶ 41), and Defendants Valencia-Mendoza, Parra, Doe #1 and McDuffy conspired to release
26 McDuffy from his cell during med-line and to not intervene when McDuffy attacked Plaintiff (*id.*
27 at 17 ¶ 42).

28 This claim is supported, at least in part, by the attached declaration of Defendant

1 McDuffy. As noted above, the declaration describes a meeting in December 2015 during which
2 Defendants Baeza and Gutierrez gave McDuffy a set of documents about Plaintiff and told him to
3 “get rid of this snitch.” (Doc. No. 30 at 25-26). Defendant Baeza told McDuffy “I want him
4 hurt.” (*Id.*). Gutierrez told McDuffy to “bag up” Plaintiff. (*Id.*). “A day or two later” McDuffy
5 waited for an opportunity to attack Plaintiff, assaulted him on the yard and took a chain off
6 Plaintiff’s neck. (*Id.*). After his initial attack on Plaintiff, the tower officer on duty, who is not
7 identified by name, told McDuffy to “finish [Plaintiff] off.” (*Id.* at 26). As noted above, the
8 Court infers that the SAC is referring to Defendant Valencia-Mendoza, who was the tower officer
9 on duty in Plaintiff’s yard.

10 Liberally construing the allegations in the declaration, the FAC adequately alleges a
11 conspiracy claim as to Defendants Baeza, Gutierrez, and Valencia-Mendoza. The SAC alleges
12 that Defendants Baeza and Gutierrez met with McDuffy and ordered him to attack Plaintiff and
13 steal his property, which McDuffy subsequently did. While McDuffy’s declaration does not
14 allege that Valencia-Mendoza was involved in soliciting McDuffy to attack Plaintiff, the fact that
15 Valencia-Mendoza released McDuffy from his cell and then encouraged McDuffy to “finish
16 [Plaintiff] off” after the initial assault supports an inference that Valencia-Mendoza was aware of
17 the attack and shared in the unlawful objective of harming Plaintiff.

18 As to Defendants Parra, Vang, and John Doe #1, however, the SAC fails to state a
19 conspiracy claim. The SAC does not allege any facts from which the Court can infer that these
20 Defendants were aware of the plan to harm Plaintiff or that any of their actions were consciously
21 done in furtherance of that objective. Notably, McDuffy does not mention any coordination with
22 these Defendants in his declaration nor allege any facts to suggest they were aware of a plan to
23 attack Plaintiff. Plaintiff’s mere speculation to that effect is insufficient to sustain a claim. *See*
24 *Claiborne v. Beebe*, 2008 WL 544577, at *3-4 (E.D. Cal. Feb. 26, 2008), *report and*
25 *recommendation adopted*, 2008 WL 942661 (E.D. Cal. Apr. 7, 2008); *Sherman v. Hill*, 2022 WL
26 17345926, at *12 (C.D. Cal. Sept. 14, 2022), *report and recommendation adopted*, 2022 WL
27 17342194 (C.D. Cal. Nov. 30, 2022).

28 Thus, the SAC adequately alleges a claim of civil conspiracy as to Defendants Baeza,

1 Gutierrez, and Valencia-Mendoza sufficient to survive the low threshold for *sua sponte* screening
2 pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123
3 (9th Cir. 2012).

4 **D. State Law Claims and Government Claims Act**

5 The SAC alleges a number of state law claims, including for negligence, intentional
6 infliction of emotional distress, and violations of the Bane Act. California’s Government Claims
7 Act requires that a tort claim against a public entity or its employees be presented to the
8 California Victim Compensation and Government Claims Board, formerly known as the State
9 Board of Control, no more than six months after the cause of action accrues. Cal. Gov’t Code §§
10 905.2, 910, 911.2, 945.4, 950–950.2. Presentation of a written claim, and action on or rejection
11 of the claim are conditions precedent to suit. *State v. Superior Court of Kings County (Bodde)*, 32
12 Cal.4th 1234, 1245 (Cal. 2004); *Mangold v. California Pub. Utils. Comm’n*, 67 F.3d 1470, 1477
13 (9th Cir. 1995); *see also Inman v. Anderson*, 294 F. Supp. 3d 907, 925 (N.D. Cal. 2018)
14 (Government Claims Act compliance required for claims under California Bane Civil Rights Act,
15 Cal. Gov’t Code 52.1). Because Plaintiff does not allege compliance with the Government
16 Claims Act as to any of his state law claims—including his claims for negligence, intentional
17 infliction of emotional distress, the Bane Act, the California Tort Claims act, and California Penal
18 Code §§ 2600 and 2601—the SAC fails to state any cognizable state law claims.

19 **CONCLUSION**

20 For the reasons set forth above, the undersigned finds that Plaintiff states cognizable First
21 Amendment retaliation claims against Defendants Baeza and Gutierrez, Eighth Amendment
22 Failure to Protect claims against Defendants Baeza, Gutierrez, Valencia-Mendoza, John Doe #1,
23 Parra, and Vang, and conspiracy claims against Defendants Baeza and Gutierrez. The
24 undersigned will therefore recommend Plaintiff be permitted to proceed on the above claims and
25 the remaining claims be dismissed. Because Defendant McDuffy was not a state actor, the
26 undersigned will recommend he be dismissed from this action. Finally, the undersigned will
27 recommend that Plaintiff be permitted to engage in discovery, prior to issuance of a discovery and
28 scheduling order, for the limited purpose of determining the identity of Defendant John Doe #1,

1 so that he may be served.

2 Accordingly, it is hereby **RECOMMENDED**:

3 1. This action proceed only on Plaintiff's First Amendment retaliation claims against
4 Defendants Baeza and Gutierrez, Eighth Amendment Failure to Protect claims against Defendants
5 Baeza, Gutierrez, Valencia-Mendoza, John Doe #1, Parra, and Vang, and conspiracy claims
6 against Defendants Baeza and Gutierrez.

7 2. Defendant McDuffy and the remaining claims be dismissed from this action based
8 on Plaintiff's failure to state claims upon which relief may be granted.

9 3. Plaintiff be permitted to engage in discovery, prior to issuance of a discovery and
10 scheduling order, for the limited purpose of identifying Defendant John Doe #1.

11 **NOTICE TO PARTIES**

12 These findings and recommendations 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)
14 days after being served with these findings and recommendations, a party may file written
15 objections with the court. The document should be captioned "Objections to Magistrate Judge's
16 Findings and Recommendations." Parties are advised that failure to file objections within the
17 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
18 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

19
20 Dated: December 22, 2023


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE

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