UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWIN MCMILLAN,

Plaintiff,

v.

S. RINGLER, et al.,

Defendants.

No. 2: 13-cv-0578 MCE KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No 49.) For the reasons stated herein, the undersigned recommends that defendants' motion be granted in part and denied in part.

II. Is Defendants' Motion Procedurally Proper?

Plaintiff argues that defendants' motion to dismiss is improper because it raises arguments that were raised in their first motion to dismiss or that could have been raised in their first motion to dismiss. For the following reasons, the undersigned rejects this argument.

On March 12, 2014, the undersigned ordered service of plaintiff's first amended complaint. (ECF No. 17.) On July 1, 2014, defendants filed a motion to dismiss for failure to

state a colorable claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 29.) On December 19, 2014, the undersigned issued a detailed findings and recommendations, recommending that defendants' motion be granted in part and denied in part. (ECF No. 41.) In particular, the undersigned recommended that defendants' motion be granted as to claim six against defendant Muldong, claim eight against defendant Warden Swarthout in his official capacity, and claim nine, under California Civil Code § 52.1, as to defendants Henry, Scotland, Ruiz, Muldong, Popovits, Arnold, Young and Swarthout. (Id.) The undersigned recommended that defendants' motion to dismiss be denied in all other respects. (Id.)

On February 13, 2015, the Honorable Morrison C. England adopted the findings and recommendations. (ECF No. 44.) However, Judge England granted plaintiff leave to file a second amended complaint as to claims six and nine. (Id.) In response to Judge England's order, plaintiff filed his second amended complaint on March 16, 2015. (ECF No. 45.) In response to the second amended complaint, defendants filed the pending motion to dismiss. (ECF No. 49.)

Plaintiff is correct that defendants' second motion to dismiss raises new arguments as well as some arguments that were raised in the first motion to dismiss and rejected by the court.

"The law is clear in this Circuit that an 'amended complaint supersedes the original, the latter being treated thereafter as nonexistent.'" Gundy v. California Department of Corrections and Rehabilitation, 2013 WL 522789 at *6 (E.D. Cal. 2013) (quoting Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997), overruled in part on other grounds, Lacey v. Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012).) "Courts in this Circuit therefore have permitted defendants moving to dismiss an amended complaint to make arguments previously made and to raise new arguments that were previously available." Gundy, 2013 WL 522789 at *6; see In re Sony Grand WEGA KDF–E A10/A20 Series Rear Projection HDTV Television Litig., 758 F.Supp.2d 1077, 1098 (S.D. Cal. 2010) ("When Plaintiffs filed the [first amended complaint], it superseded their previous complaint, and Sony was therefore free to move again for dismissal."); Stamas v. Cnty. of Madera, 2010 WL 289310, at *4 (E.D. Cal. January 15, 2010) ("[A]n amended pleading is a new round of pleadings ... [and] is subject to the same challenges as the original (i.e., motion to dismiss, to strike, for more definite statement)."); Migliaccio v. Midland Nat'l

Life Ins. Co., 2007 WL 316873, at *2–3 (C.D. Cal. January 30, 2007) (rejecting plaintiffs' argument that Federal Rule of Civil Procedure 12(g)(2)'s ban on successive Rule 12 motions barred the defendants from raising new arguments or resurrecting arguments considered by the court in their first motion to dismiss). "The defense of failure to state a claim may be raised at any time before trial." Gundy, 2013 WL 522789 at * 6.

Accordingly, for the reasons set forth above, defendants' second motion to dismiss is properly brought.

III. Legal Standard for Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89 (2007), and construe the pleading in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999). Still, to survive dismissal for failure to state a claim, a pro se complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. Attachments to a complaint are considered to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard Reiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). In general, pro se

pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). The court has an obligation to construe such pleadings liberally. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of the claim that were not pled. Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

IV. Plaintiff's Claims

The second amended complaint proceeds against defendants Arnold, Henry, Muldong, Popovits, Ringler, Ruiz, Scotland, Swarthout, Young and Zuniga. (ECF No. 45.) All relevant events occurred at California State Prison-Sacramento ("CSP-Sac").

Plaintiff alleges that on or around October 2012, he was summoned to the Facility B program office to receive a telephone call from a judge regarding a settlement conference. (Id. at 4.) The telephone call occurred in defendant Scotland's office. (Id.) During the telephone call, defendant Scotland displayed anger toward plaintiff and repeatedly asked why the telephone call was routed through his office. (Id.) Defendant Ringler arrived shortly later and defendant Scotland told defendant Ringler the purpose of plaintiff's telephone call. (Id.) At this time, plaintiff told the judge that defendants Ringler and Scotland were listening to the discussion. (Id.) Plaintiff told the judge that defendants' presence made him uncomfortable. (Id.)

Approximately 1 ½ hours into the mediation, defendant Scotland told plaintiff to go sit on the bench in the hallway. (Id.) Plaintiff heard defendant Scotland tell the judge that he did not want plaintiff on his phone. (Id.) Plaintiff was then moved to a different location and given access to another phone to finish the settlement conference. (Id. at 4-5.)

As a result of hearing plaintiff on the telephone, plaintiff alleges that defendants Ringler and Scotland became aware that plaintiff was engaged in civil litigation against the California Department of Corrections and Rehabilitation ("CDCR") or its officers. (Id. at 5.) After October 2012, plaintiff alleges that defendants Ringler and Ruiz conducted repeated searches of plaintiff and his property under the supervision of defendant Scotland. (Id.)

Plaintiff alleges that on December 5, 2012, defendants Ringler and Zuniga conducted a contraband search of plaintiff's housing area. (Id.) Prior to that time, contraband searches were

conducted by the correctional officers assigned to the respective housing units. (Id.) From October 2012 until around January 17, 2013, defendants Ringler and Zuniga were assigned as yard Security and Escort officers for Facility D. (Id.) Defendants Ringer and Zuniga also supervised the D yard recreational yard and yard crew workers. (Id.) In other words, they were not assigned to plaintiff's housing unit. Plaintiff alleges that on December 5, 2012, defendants Ringler and Zuniga abandoned their Search and Escort positions in order to conduct the contraband search in plaintiff's dorm living area. (Id.)

Plaintiff alleges that prior to December 5, 2012, contraband searches were conducted once per month. (Id.)

Plaintiff alleges that during the December 5, 2012 search, plaintiff's bed linens, personal effects and photographs of family members were thrown to the ground. (Id.) In addition, plaintiff's legal materials were unbound and separated from their binding, and two of plaintiff's Holy Korans were destroyed. (Id.) At the end of the search, defendant Ringler asked plaintiff in a sarcastic voice, "How did your case turn out?" (Id) After asking this question, defendant Ringler confiscated plaintiff's personal appliances. (Id.)

At the end of the search, plaintiff told his housing unit officers Rothman and Williamson to summon the facility sergeant to take note of and document the status of his property.[1] (Id.) After making a telephone call, Officer Rothman told plaintiff that the facility sergeant on duty, Sergeant Militano, had instructed plaintiff to "put it in a 602." (Id.)

Plaintiff alleges that the circumstances of the search of his property were memorialized by the CSP-Solano Catholic Chaplain R. Boyle, in a memorandum dated December 6, 2012. (Id.) On that same day, the memorandum was personally delivered to defendant Young, Associate Warden. (Id.) Defendant Young summoned Investigative Lieutenant Brown to photograph "them" for evidentiary purposes. (Id.)

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[1] At some places in the second amended complaint, plaintiff refers to Officer Williamson as "defendant Williamson." (See ECF No. 45 at 8: 21.) However, Officer Williamson is not listed as a defendant in the caption of the complaint, nor is he consistently referred to as a defendant. Accordingly, the undersigned does not find that Officer Williamson is named as a defendant.

On December 14, 2012, defendant Ringler stated to plaintiff, "I know all about you. I'm not finished with you yet." (Id. at 6.) Defendant Ringler made this statement in the presence of Lieutenant Bickham. (Id.) Plaintiff asked Lieutenant Bickham to intercede on his behalf concerning defendant Ringler's statements and actions. (Id.)

Chaplain Boyle's memorandum was forwarded to Rachel Roberts at the Council on American-Islamic Relations. (Id.) After receiving the memorandum, Ms. Roberts sent a letter to the CSP-Warden addressing defendant Ringler's handling of plaintiff's Korans during the search. (Id. at 7.)

Chaplain Boyle's memorandum was forwarded to Jean Weiss, CDCR Ombudsman. (Id.) Ms. Weiss informed plaintiff's family by telephone that an investigation of the December 5, 2012 search would be conducted. (Id.)

Plaintiff filed a 602 grievance alleging that the December 5, 2012 search was retaliatory and in violation of prison regulations, grievance no. 12-3044. (Id.) Plaintiff submitted another 602 requesting the return of the personal property confiscated by defendant Ringler during the search. (Id.)

Defendant Henry was appointed to investigate the allegations in plaintiff's 602 grievances. (Id.) Defendant Henry's investigation consisted mainly of interviews of defendants Ringler and Zuniga, Officer Rathman, Officer Williamson and inmate witnesses Pratt and McClellan. (Id. at 8.)

Defendants Ringler and Zuniga were disciplined as a result of plaintiff's grievance no. 12-3044. (Id.) Prior to or during the completion of the investigation of this grievance, on January 17, 2013, defendant Ringler submitted a chrono stating that plaintiff was attempting to file a class action against him. (Id.) Defendant Ringler stated that based on this class action, plaintiff should be deemed a threat to him and to the safety and security of the institution. (Id.)

As a result of the chrono prepared by defendant Ringler, on January 17, 2013, Officer Williamson searched plaintiff's personal property and living space. (Id.) Officer Williamson did not discover any contraband as a result of this search. (Id.)

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Approximately 30 minutes after Officer Williamson conducted the search of plaintiff's living quarters, defendant Ruiz conducted another search of plaintiff's living quarters. As a result of this search, documents belonging to plaintiff were confiscated and defendant Ruiz reportedly discovered an electrical plug or charger. (Id.) Plaintiff alleges that in January 2013, CDCR permitted inmates to buy and possess various types of chargers. (Id. at 9.)

Plaintiff alleges that defendant Ruiz is a close personal friend with defendant Ringler. (Id.) Plaintiff alleges that defendant Ruiz conducted the search in retaliation for the grievance plaintiff filed against defendant Ringler. (Id.) Plaintiff alleges that defendant Ruiz did not normally conduct contraband searches in plaintiff's housing unit. (Id.)

Plaintiff alleges that defendant Ruiz issued a rules violation report against plaintiff charging him with possession of dangerous contraband. (Id.) Immediately after the search, plaintiff was handcuffed by defendant Ruiz and taken to the D Facility program office and placed in a holding cage. (Id.)

Plaintiff was later given a CDCR Form 114 "lock up order," authored by defendant Henry which referenced defendant Ringler's claim that plaintiff should be deemed an institutional security concern for his involvement in a class action lawsuit naming defendant Ringler. (Id.) Plaintiff alleges that defendant Henry is a close personal friend of defendant Ringler. (Id.) Plaintiff alleges that defendant Henry agreed to assist defendant Ringler in his attempt to retaliate against plaintiff for filing a grievance against him. (Id.) Plaintiff alleges that but for defendant Ringler's plan to retaliate against him, he would not have received the lock-up order that resulted in his placement in administrative segregation ('ad seg"). (Id. at 10.)

While in ad seg, plaintiff was served with another rules violation report dated January 8, 2013, alleging "misuse of state computer during work assignment," i.e., report no. 01-0013. (Id.) Plaintiff was alleged to be have authored and printed a document describing defendant Ringler's actions. (Id.) The rules violation report described the document as color printed on white card stock paper. (Id.) The rules violation report also contained a statement by defendant Muldong that no documents can or may be printed from plaintiff's work area due to padlocks on all inmate accessible computers and or printers. (Id.) Defendant Muldong went on to state that the

document was printed prior to plaintiff's arrival at his work assignment on the date it was discovered. (Id.)

The rules violation report also contained a statement by defendant Scotland that the document was printed in color on white card stock paper. (Id. at 11.) Defendant Scotland also stated that the document could not have been printed by plaintiff because CSP-Solano inmates do not have access to color printers or card stock paper. (Id.)

In December 2012, defendant Muldong informed plaintiff that he would not discipline any inmate for printing personal documents on the computers because they were made available for that purpose. (Id.) Plaintiff alleges that prior to January 8, 2013, defendant Muldong allowed other inmates to type, edit and print personal documents on the computers without risk of discipline. (Id.)

Plaintiff alleges that defendants Muldong, Scotland, Ringer and Young conspired to issue the January 8, 2013 disciplinary report against plaintiff in retaliation for his exercise of his First Amendment rights. (Id.) Plaintiff alleges that the January 8, 2013 rules violation report served as a basis for his retention in ad seg at the direction of defendants Arnold, Young and Popovits at the January 24, 2013 classification hearing. (Id. at 12.) Defendants Arnold, Young and Popovits also requested plaintiff's transfer away from CSP-Solano. (Id.) On May 25, 2013, plaintiff was transferred to Folsom State Prison. (Id. at 13.)

Plaintiff sent defendant Swarthout a "written communication" via the U.S. Mail, informing him of the retaliation by defendants Ringler, Young, Ruiz and Scotland. (Id.) Defendant Swarthout disregarded plaintiff's plea for assistance in a memorandum dated April 29, 2013, in which he advised plaintiff to submit another 602 grievance. (Id.)

Plaintiff alleges that all at times relevant, defendant Swarthout was aware of the policy of retaliation enacted by defendants Ringler, Ruiz and Young via complaints submitted from civil rights organizations. (Id. at 14.)

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IV. Plaintiff's Legal Claims

The undersigned herein describes the legal claims raised by plaintiff.

*Claim One*

Plaintiff alleges a retaliation claim against defendants Ringler, Zuniga and Scotland based on the December 5, 2012 search of his property. (Id. at 15.) Plaintiff alleges that defendants were retaliating against him based on their knowledge of his lawsuit against CDCR discussed during the telephonic settlement conference in defendant Scotland's office. (Id.)

*Claim Two*

Plaintiff alleges that defendants Zuniga and Ringler destroyed his Korans during the December 5, 2012 search in retaliation for his lawsuit against CDCR discussed during the telephonic settlement conference in defendant Scotland's office. (Id.)

*Claim Three*

Plaintiff alleges that defendant Ringler retaliated against him for his legal activities when Ringler prepared the January 17, 2013 chrono. (Id. at 16.)

*Claim Four*

Plaintiff alleges that defendants Henry, Young, Popovits and Arnold retaliated against him for his legal activities when they held him in ad seg from January 16, 2013 to April 25, 2013. (Id.) Plaintiff alleges that these defendants entered into an agreement with the other defendants to retaliate against plaintiff for his legal activities. (Id.)

*Claim Five*

Plaintiff alleges that defendant Ruiz retaliated against him for his legal activities when he conducted the search of plaintiff's quarters on January 17, 2013. (Id.) As discussed above, this search resulted in plaintiff being charged with possession of contraband, i.e., a charger. Plaintiff alleges that defendant Ruiz entered into an agreement with the other defendants to retaliate against plaintiff for his legal activities. (Id.)

*Claim Six*

Plaintiff alleges that defendant Muldong retaliated against him for his legal activities by issuing the rules violation report charging plaintiff with misuse of the state computer. (Id. at 17.)

Plaintiff alleges that defendant Muldong entered into an agreement with the other defendants to retaliate against plaintiff for his legal activities. (Id.)

*Claim Seven*

Plaintiff alleges that defendant Ringler retaliated against him for his legal activities when Ringler confiscated plaintiff's personal property for no legitimate purpose. (Id.)

*Claim Eight*

Plaintiff alleges that defendant Swarthout's failure or refusal to properly supervise or train the other named defendants "fostered or created a policy of overt retaliation." (Id.)

*Claim Nine*

Plaintiff alleges that all defendants conspired to retaliate against him for his legal activities and to violate his right to religious freedom pursuant to California Civil Code § 52.1. (Id. at 18.)

V. Analysis

Defendants move to dismiss claims 1 and 2 against defendant Zuniga, and claims 3, 4, 5, 6, 8 and 9.

A. Claims 1 and 2 Against Defendant Zuniga, Claims 3, 4, 5, 6

*Legal Standard for Retaliation*

It is well-established that prison inmates have a constitutional right to freedom from retaliation for engaging in activity protected by the First Amendment. Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2005). A prisoner retaliation claim has five elements. First, plaintiff must allege and show that he engaged in conduct protected by the First Amendment. See Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012). Second, a "plaintiff must claim that the defendant took adverse action against the plaintiff." Id. (citing Rhodes, 408 F.3d at 567). "The adverse action need not be an independent constitutional violation." Id. (citing Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995)). Third, the plaintiff must allege and show a causal connection between the protected conduct and the adverse action. Id. Fourth, the plaintiff must allege and prove either a chilling effect on the exercise of First Amendment rights or some other harm. Id. Finally, plaintiff must allege and show that the retaliatory action "'did not advance legitimate goals of the correctional institution....'" Id. (quoting Rizzo v. Dawson, 778 F.2d 527, 532 (9th

Cir. 1985)).

*Claims 1 and 2 Against Defendant Zuniga*

In claim 1, plaintiff alleges that defendant Zuniga participated in the December 5, 2012 search of plaintiff's housing area with defendant Ringler in retaliation for plaintiff's legal activities. In claim 2, plaintiff alleges that, during the December 5, 2012 search, defendants Zuniga and Ringler destroyed plaintiff's Koran in retaliation for his legal activities.

Defendants move to dismiss the retaliation claims alleged against defendant Zuniga in claims 1 and 2 on the grounds that plaintiff fails to allege that defendant Zuniga knew about any of plaintiff's First Amendment activities. Defendants argue that plaintiff has failed to plead facts demonstrating that plaintiff's protected conduct, i.e., his legal activities, were a substantial motivating factor behind defendant Zuniga's cell searches.

Defendants are correct that plaintiff has not directly alleged that defendant Zuniga had knowledge of his legal activities. However, plaintiff alleges that defendant Zuniga joined defendant Ringler, against whom he has stated a potentially colorable retaliation claim, to conduct the December 5, 2012 search. Plaintiff alleges that defendants conducted the search, although neither defendant was assigned to his housing area. Plaintiff alleges that at the conclusion of the search, defendant Ringler asked plaintiff, in a sarcastic voice, "How did your case turn out?" Plaintiff alleges that both defendant Ringler and Zuniga were disciplined as a result of the grievance he filed alleging that the December 5, 2012 search was retaliatory.

The timing and nature of the alleged retaliatory activities can provide circumstantial evidence of retaliation. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 13116 (9th Cir. 1989); see Pratt, 65 F.3d at 808 ("timing can properly be considered as circumstantial evidence of retaliatory intent"). Plaintiff has pled sufficient facts against defendant Zuniga from which retaliatory intent may be reasonably inferred. Accordingly, defendants' motion to dismiss plaintiff's retaliation claims against defendant Zuniga should be denied.

*Claim 3 Against Defendant Ringler*

In claim 3, plaintiff alleges that defendant Ringler submitted the 128-B Chrono dated January 17, 2013, in retaliation for plaintiff's exercise of his First Amendment rights. Defendants

moved to dismiss this claim in the first motion to dismiss. In the December 19, 2104 findings and recommendations, the undersigned recommended that defendants' motion to dismiss claim 3 be denied for the reasons stated herein:

> According to defendants, the Bulletins allegedly authored by plaintiff gave Ringler legitimate concern as to his own safety, as well as the safety and security of the institution, and the proper way to document this information was on a 128-B Chrono. In support, defendants cite Title 15, California Code of Regulations § 3000, which provides in pertinent part:
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> General Chrono means a CDC Form 128-B (Rev. 4-74) which is used to document information about inmates and inmate behavior. Such information may include, but is not limited to, documentation of enemies, records of disciplinary or classification matters, pay reductions or inability to satisfactorily perform a job, refusal to comply with grooming standards, removal from a program, records of parole or social service matters.
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> (See Motion to Dismiss, ECF No. 29-1 at 14-15.)
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> Plaintiff counters that he had a right, under applicable regulations, to file a grievance on behalf of a group of inmates. See 15 Cal. Code Regs. § 3084.2(h) (addressing procedures for a "Group appeal."). According to plaintiff, "Since plaintiff's exercise of his First Amendment [r]ight to seek redress of grievances was the ultimate subject of the 128B Chrono, plaintiff submits it should be construed as an adverse action supporting his claim of retaliation." (Opposition, ECF No. 33 at 8.) Plaintiff further argues that it has not been established that he was the author of the Bulletins, and that defendant Ringler "erroneously and unjustifiably concluded that plaintiff was the 'author.'" (Id. at 7.) Plaintiff is essentially arguing that Ringler retaliated against him for perceived participation in protected activity under the First Amendment.
>
> This issue seems better-suited for resolution at summary judgment or trial than on a motion to dismiss. It is unclear whether authoring and posting the Bulletins constitutes protected activity under the First Amendment. At this stage of the pleadings, defendants have failed to establish that it was not so protected.
>
> Moreover, significant factual questions are presented regarding who posted the Bulletins, where and when they were posted, what communications defendant Ringler received in connection with their posting, and whether he had, as defendants assert, a "legitimate safety concern" arising out of their contents. The allegations in the first amended complaint and the documents cited therein do not provide a basis for conclusively determining that plaintiff posted the Bulletins; accordingly, defendants cannot establish that plaintiff was legitimately disciplined for posting them.
>
> Finally, the Chrono recommends plaintiff's transfer to another

> institution. Transfer can constitute adverse action for purposes of a First Amendment retaliation claim. Rizzo v. Dawson, 778 F.2d 527 (9th Cir. 1985). While the mere fact that defendant Ringler recommended plaintiff's transfer does not make him liable for retaliation, the recommendation does, at the pleadings stage, bolster plaintiff's claim that Ringler had a retaliatory motive in writing the Chrono.
>
> Therefore, it is recommended that defendants' motion to dismiss plaintiff's third claim be denied.

(ECF No. 41 at 14-15.)

In the pending motion, defendants move to dismiss claim 3 against defendant Ringler on essentially the same grounds raised in the first motion to dismiss. (ECF No9. 49-1 at 17-18.) The undersigned recommends that the motion to dismiss claim 3 against defendant Ringler be denied for the reasons set forth above.

*Claim 5 Against Defendant Ruiz*

The undersigned herein summarizes plaintiff's retaliation claim against defendant Ruiz.

Plaintiff alleges that on January 17, 2013, Officer Williamson searched plaintiff's living space and personal property and discovered no contraband. Plaintiff alleges that 30 minutes after Officer Williamson conducted this search, defendant Ruiz searched plaintiff's living quarters again. Plaintiff alleges that defendant Ruiz found an electrical plug or charger. Plaintiff alleges that although he was allowed to possess this charger, defendant Ruiz charged plaintiff with possession of dangerous contraband based on his possession of this charger. Plaintiff alleges that defendant Ruiz conducted the search and issued the disciplinary report in retaliation for the grievance plaintiff filed against defendant Ringler based on the December 5, 2012 search. Plaintiff alleges that defendant Ruiz is a close personal friend of defendant Ringler and that defendant Ruiz does not normally conduct contraband searches in plaintiff's housing unit.

In the first motion to dismiss, defendants argued that cell searches were permitted under California law, and that in this instance, defendant Ruiz's search of plaintiff's cell was justified by his discovery of contraband. (ECF No. 41 at 16-17.) The undersigned rejected this argument, finding that cell searches may not be undertaken solely for retaliatory purposes. (Id.) The undersigned also rejected defendants' argument that plaintiff's claims against defendant Ruiz

were barred by Heck v. Humphrey, 512 U.S. 477 (1994), on the grounds that this argument was more appropriately raised in a summary judgment motion. (Id.)

In their second motion to dismiss, defendants move to dismiss the conspiracy to retaliate claim against defendant Ruiz on the grounds that plaintiff has not pled sufficient facts that defendant Ruiz entered into an agreement with defendant Ringler to retaliate against plaintiff. Defendants argue that plaintiff's claim that defendants Ringler and Ruiz were close friends is not sufficient to demonstrate that defendants entered into an agreement to retaliate against plaintiff.

The undersigned agrees with defendants that plaintiff is raising a conspiracy to retaliate claim against defendant Ruiz. A civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage. Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999). "Conspiracy is not itself a constitutional tort under § 1983, and it does not enlarge the nature of the claims asserted by the plaintiff, as there must always be an underlying constitutional violation." Lacey v. Maricopa Cnty., 693 F.3d 896, 935 (9th Cir. 2012) (en banc).

To survive a motion to dismiss, a plaintiff must plead enough facts to plausibly show an agreement between co-conspirators to retaliate with the common objective to violate constitutional rights. See Iqbal, 129 S. Ct. at 1949. Furthermore, a retaliation claim is not plausible if there are "more likely explanations" for the action. See Iqbal, 129 S. Ct. at 195. Plaintiff must allege enough facts to plausibly show defendants agreed to retaliate against him. See Iqbal, 129 S.Ct. at 1949.

For a section 1983 conspiracy claim, "an agreement or meeting of minds to violate [the plaintiff's] constitutional rights must be shown." Woodrum v. Woodward Cnty., 866 F.2d 1121, 1126 (9th Cir. 1989). However, "[d]irect evidence of improper motive or an agreement to violate a plaintiff's constitutional rights will only rarely be available. Instead, it will almost always be necessary to infer such agreements from circumstantial evidence or the existence of joint action." Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1302 (9th Cir. 1999). Therefore, "an agreement need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." Id. at 1301.

The undersigned agrees with defendants that plaintiff's assertion that defendants Ruiz and Ringler were close friends does not sufficiently demonstrate that defendants agreed to violate plaintiff's constitutional rights. See Bliss v. U.S. , 2014 WL 4415319 at *6 (M.D. Penn.) (granting Rule 20 motion to dismiss conspiracy claim on grounds that allegation that defendants were friends did not adequately demonstrate an agreement between individuals); O'Toole v. City of Antioch, 2015 WL 5138277 at *21 (N.D. Cal. 2015) (granting defendants summary judgment as to conspiracy claim based solely on allegations that defendants used to work together and were friends for years; court found that these allegations were not sufficient to establish that defendants were involved in any agreement to commit constitutional violations); McGee v. Dunn, 2015 WL 9077386 at * 7 (S.D. N.Y. 2015) (court granted summary judgment as to conspiracy claim, finding that, "Other than asserting that defendants Dunn and Karst were friends as stated in the complaint, the plaintiff offers no evidence to show an agreement or 'meeting of the minds' between the two.").

The undersigned further finds that an agreement to violate plaintiff's constitutional rights between defendants Ringler and Ruiz cannot be reasonably inferred from plaintiff's suggestion that defendant Ruiz planted the charger. Plaintiff's claim that defendant Ruiz planted the charger is not adequate circumstantial evidence of an agreement between defendants Ruiz and Ringler.[2]

Plaintiff's opposition contains no additional allegations demonstrating a meeting of the minds between defendants Ringler and Ruiz. Accordingly, the undersigned recommends that the conspiracy to retaliate claim against defendant Ruiz be granted on grounds that plaintiff has not pled sufficient facts to demonstrate a meeting of the minds between defendants Ruiz and Ringler.[3]

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[2] The undersigned notes that plaintiff's claims regarding the charger are somewhat inconsistent. While he suggests that the charger was planted, he also claims that he was allowed to possess it.

[3] Defendants further argue that the documentation shows that defendant Ruiz searched the entire building # 20, in accordance with his duties. Defendants attach a copy of the Rules Violation Report prepared by defendant Ruiz as exhibit E to their motion to dismiss. Defendants argue that this report demonstrates that defendant Ruiz had no knowledge of whether plaintiff's cell had been previously searched and that he had no reason to target plaintiff. This argument is very similar to the one raised in defendants' first motion to dismiss. However, the undersigned need not reach this argument because plaintiff has not alleged sufficient facts in support of his conspiracy claim.

*Claim 4 Against Defendant Henry*

Plaintiff alleges that defendant Henry issued the "lock up order" for plaintiff to be placed in administrative segregation because he was conspiring with defendant Ringler to retaliate against plaintiff for filing the grievance against defendant Ringler regarding the December 5, 2012 search. Defendants have attached a copy of the lock-up order to the motion to dismiss. (ECF No. 49-1 at 39.)

A court ordinarily may not consider evidence outside the complaint on a Rule 12(b)(6) motion to dismiss. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001). However, a court may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002); see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003); Chambers v. Time Warner, Inc., 282 F.3d 147, 153 n.3 (2d Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

Because the second amended complaint refers to the lock-up order issued by defendant Henry, the lock-up order is essential to plaintiff's claim, and no party questions the authenticity of the lock-up order attached to the motion to dismiss, the undersigned treats this lock-up order as part of plaintiff's second amended complaint.

The lock-up order states that on January 16, 2013, plaintiff was removed from Facility D general population and placed in ad seg. (ECF No. 19-1 at 39.) The lock-up order goes on to state that information was received by staff identifying plaintiff as the "author of and placing inappropriate material about Correctional Officer S. Ringler in all Facility D housing unit." (Id.) "Based on the nature of this article, it could be deemed as solicitation for other inmates to create disorder." (Id.) "Also, any interactions by Officer Ringler with you can be deemed as retaliation for your publications." (Id.) "Your presence in the general population … is deemed a threat to

the safety and security of the institution…" (Id.)

According to the lock-up order, plaintiff was placed in ad seg because of the bulletins he allegedly printed and posted containing statements regarding defendant Ringler.

In their first motion to dismiss, defendants argued that defendant Henry had a legitimate reason for writing the lock-up order. (ECF No. 41 at 15.) The undersigned rejected this argument on the grounds that plaintiff's alleged authoring and posting of the bulletins, on which the lock-up order was based, may have constituted protected activity under the First Amendment. (Id. at 16.) The undersigned also found that the allegations in the complaint did not provide a basis for concluding that plaintiff posted the bulletins, meaning that the argument that he was legitimately placed in administrative segregation was unavailing at this stage of the case. (Id.)

In the second motion to dismiss, defendants argue that plaintiff has not pled sufficient facts in support of his claim that defendant Henry conspired with defendant Ringler to retaliate against plaintiff. Defendants move to dismiss the conspiracy to retaliate claim against defendant Henry on the grounds that plaintiff has not plead sufficient facts that defendant Henry entered into an agreement with defendant Ringler to retaliate against plaintiff. Defendants argue that plaintiff's claim that defendants Ringler and Henry were close friends is not sufficient to demonstrate that defendants entered into an agreement to retaliate against plaintiff.

For the same reasons the undersigned above found that plaintiff's conspiracy to retaliate claim against defendant Ruiz was not adequately pled, the undersigned finds that plaintiff's conspiracy to retaliate claim against defendant Henry is not adequately pled. Plaintiff's claim that defendants Henry and Ringler were close friends does not adequately demonstrate a meeting of the minds.

Even assuming that plaintiff did not post the bulletins, this circumstance does not adequately demonstrate an agreement between defendants Ringler and Henry to violate plaintiff's constitutional rights. The alleged fact that defendant Ringler falsely accused plaintiff of posting the bulletins does not demonstrate that defendant Henry knew that the accusations were false when he issued the lock-up order. Plaintiff has pled no facts demonstrating that defendant Henry knew that the charges were allegedly false. Accordingly, the undersigned

recommends that the conspiracy to retaliate claim against defendant Henry be dismissed.

*Claim 4 Against Defendants Young, Popovits and Arnold*

Plaintiff alleges that on January 8, 2013, defendants Young, Popovits and Arnold decided to retain him in ad seg based on the rules violation report charging him with misusing the computer as part of the conspiracy with defendant Ringler to retaliate against plaintiff for filing a grievance against him. (ECF No. 45 at 12.) These defendants also requested that plaintiff be transferred away from CSP-Solano. (Id.)

Defendants argue that plaintiff's conspiracy to retaliate claims against defendants Young, Popovits and Arnold should be dismissed because plaintiff fails to allege any facts showing that these defendants knew about plaintiff's exercise of his First Amendment rights or that these defendants acted in response to plaintiff's exercise of his First Amendment rights. Defendants argue that plaintiff has alleged no facts demonstrating that any of these defendants had any reason for believing that the rules violation report, the supporting documentation, or the decision of the hearing officer, were written in bad faith.

The undersigned agrees with defendants that plaintiff's second amended complaint contains no allegations demonstrating that defendants Young, Popovits and Arnold knew that the disciplinary charges and related documents were allegedly false. Plaintiff has also pled no facts demonstrating that these defendants had an agreement to conspire with defendant Ringler to retaliate against plaintiff for his legal activities. Accordingly, defendants Young, Popovits and Arnold should be dismissed.

*Claim 6: Retaliation Claims Against Defendant Muldong*

Plaintiff alleges that defendant Muldong retaliated against him for his legal activities by issuing the rules violation report charging plaintiff with misuse of the state computer.

In the findings and recommendations addressing the first motion to dismiss, the undersigned recommended that the motion to dismiss the retaliation claim against defendant Muldong be granted:

> Defendants have the better of this argument. Regardless of whether plaintiff did or did not print the Flier, Muldong had some basis for believing that plaintiff was responsible, based on plaintiff's

> admission that he "did initially start on the document at my work site about C/O Ringler, however, I decided to erase it off the computer." (ECF No. 29-1 at 46.) As such, Muldong had a duty under § 3312(a)(3) to report "misconduct … believed to be a violation of law…"
>
> For this reason, plaintiff fails to state a retaliation claim against defendant Muldong and it is recommended that defendants' motion to dismiss be granted.

(ECF No. 41 at 18.)

As discussed above, Judge England granted plaintiff leave to amend as to this claim.

In the second amended complaint, plaintiff now claims that defendant Muldong stated in the rules violation report that the bulletin was printed before plaintiff arrived at his work assignment. (ECF No. 45 at 11.) Plaintiff also alleges that in December 2012, defendant Muldong told plaintiff that he would not discipline any inmate for printing personal documents on the computers because they were available to inmates for that purpose. (Id. at 11.) Plaintiff also alleges that prior to January 8, 2013, defendant Muldong allowed other inmates to type, edit and print personal documents on the computers without risk of discipline. (Id.) Based on these allegations, plaintiff is apparently claiming that defendant Muldong had no basis to believe that plaintiff had committed misconduct when he issued the rules violation report.

Defendants have attached a copy of the rules violation report issued by defendant Muldong to the motion to dismiss. Because the second amended complaint refers to the rules violation report, the rules violation report is essential to plaintiff's claim, and no party questions the authenticity of the rules violation report attached to the motion to dismiss, the undersigned treats this rules violation report as part of plaintiff's second amended complaint. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

The rules violation report charges plaintiff with misuse of a state computer during work on assignment. (ECF No. 29-1 at 22.) The rules violation report states that plaintiff admitted that he was the author of the document but that his original intent was not to print the document. (Id.) Plaintiff also stated that while he started to work on the document at his work site, he decided to erase it off the computer. (Id. at 26.) Plaintiff stated that he did not know who made the

document or how it got out. (Id.) The Rules Violation Report contains a statement by defendant Muldong that the document discovered on January 8, 2013, i.e., the Bulletin, was printed before plaintiff arrived at work. (Id. at 32.) Defendant Muldong also stated that it was possible that the document was printed by a clerk other than plaintiff. (Id.)

Defendants also provided a copy of the bulletin plaintiff is alleged to have authored. Because the second amended complaint refers to this document, it is essential to plaintiff's claim, and no party questions the authenticity of this document, the undersigned treats this document as part of plaintiff's second amended complaint. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

The bulletin states that defendant Ringler recently harassed inmates in retaliation for using the appeals process, destroyed property and defaced sacred religious artifacts. (ECF No. 29-1 at 33.) The bulletin goes on to state that as a result of these actions by defendant Ringler, CDCR Hiring Authority is conducting an investigation to determine whether sanctions should be imposed against defendant Ringler. (Id.) The bulletin asks inmates who have observed defendant Ringler engaging in any of the listed activities to provide a statement to CAIR California and S.D. Legal Services. (Id.)

In the second amended complaint, plaintiff added allegations in an attempt to demonstrate that defendant Muldong did not have good reason to believe that plaintiff had committed misconduct. In the pending motion to dismiss, defendants argue that the allegations in the second amended complaint still demonstrate that defendant Muldong had good reason to believe that plaintiff had committed misconduct. The undersigned agrees with defendants. Even if plaintiff did not actually print the bulletin, he does not deny being the author. Moreover, even if defendant Muldong allowed inmates to use the computers for personal use, it is clear that defendant Muldong did not intend for inmates to use the computers to prepare documents such as the bulletin described above.

In addition, plaintiff is alleging that defendant Muldong was motivated to file the allegedly false disciplinary charges because he had conspired with defendant Ringler to retaliate

against plaintiff for his legal activities. However, plaintiff's second amended complaint does not contain any specific allegations demonstrating an agreement between defendants Muldong and Ringler. Defendant Muldong's admissions that it was possible that another inmate printed the bulletin and that the bulletin was printed before plaintiff arrived at work suggest that defendant Muldong was not "out to get" plaintiff in support of the alleged conspiracy to retaliate.

For the reasons discussed above, the undersigned again recommends that the conspiracy to retaliate claims against defendant Muldong be dismissed.

B. Claim 8

Plaintiff alleges that defendant Swarthout's failure or refusal to properly supervise or train the other named defendants fostered or created a policy of overt retaliation.

Defendants move to dismiss this claim on the grounds that plaintiff has failed to establish that defendant Swarthout knew of any unlawful conduct by any other defendants before or at the time the alleged unlawful conduct occurred. Defendants quote Henry v. Sanchez, 923 F.Supp. 1266, 1272 (C.D. Cal. 1996), for the proposition that "[a] supervisory official, such as a warden, maybe liable under Section 1983 only if he was personally involved in the constitutional deprivations, or if there was a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Citing Barry v. Ratelle, 985 F.Supp. 1235, 1239 (S.D. Cal. 1997), defendants argue that for there to be a sufficient causal connection, the official must have actually known of a constitutional violation.

Defendants' argument that plaintiff must demonstrate that defendant Swarthout knew that defendants were violating plaintiff's constitutional rights in order to state a "failure to train" claim is not accurate. However, for the reasons discussed below, the undersigned finds that plaintiff has not stated a potentially colorable "failure to train" claim against defendant Swarthout.

To state a claim for failure to train, a prisoner must allege facts to support a finding that the failure to train amounted to deliberate indifference. See Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998). In other words, plaintiff must allege that, not only was the training inadequate, but that the inadequacy was the result of a deliberate or conscious choice by defendant Swarthout. Id. at 1213 (citing City of Canton,. Ohio v. Harris, 489 U.S. 378, 389

(1989).

Other than his conclusory assertion, plaintiff has pled no facts demonstrating that defendant Swarthout failed to train any defendant. Moreover, plaintiff has pled no facts demonstrating that any alleged failure to train by defendant Swarthout was the result of a deliberate or conscious choice. On these grounds, the undersigned recommends that the failure to train claim against defendant Swarthout be dismissed. See 28 U.S.C. § 1915(e)(2) (court may dismiss case at any time it determines that it fails to state a claim on which relief may be granted).

C. Claim 9

In claim 9, plaintiff alleges that all defendants conspired to retaliate against him for his legal activities and to violate his right to religious freedom pursuant to California Civil Code § 52.1, i.e., The Bane Act.

The Bane Act proscribes conduct by any person, "whether or not acting under color of law," who "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state. . . ." Cal. Civ. Code § 52.1(a). An action may be brought by the government, id., or by an individual, id. § 52.1(b), in a "civil action for damages, including, but not limited to, damages under Section 52,[4] injunctive relief, and other appropriate equitable

[4] Damages recoverable under Cal. Civil Code 52(b) are as follows:

> . . . (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
>
> (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
>
> (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.
>
> (3) Attorney's fees as may be determined by the court.

relief to protect the peaceable exercise or enjoyment of the right or rights secured," id.

"To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion." O'Toole v. Superior Court, 140 Cal. App. 4th 488, 502 (2006), citing Venegas v. Cnty. of Los Angeles, 32 Cal. 4th 820, 841-43 (2004). Section 52.1 "require[s] an attempted or completed act of interference with a legal right, accompanied by a form of coercion." Jones v. Kmart Corp., 17 Cal. 4th 329, 334 (1998) (quoted with approval in City and Cnty. of San Francisco v. Ballard, 136 Cal. App. 4th 381, 409 (2006)). "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., threats, intimidation or coercion), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." Shoyoye v. Cnty. of Los Angeles, 203 Cal. App. 4th 947, 956 (2012) (citations and internal quotation marks omitted). "Technically, whether a constitutional violation occurred and whether that violation was accompanied by any threats, intimidation or coercion are separate analytical inquiries (albeit with intertwining facts)." Barsamian v. City of Kingsburg, 597 F. Supp. 2d 1054, 1057 (E.D. Cal. 2009).

"It may be true that this section and other similar California statutes were enacted in response to the alarming increase in hate crimes. Nevertheless, there is no requirement that the violence be extreme or motivated by hate in the plain language of the sections, or in the cases construing them; there is also no requirement that the act constitute a crime. If the California legislature wanted to limit the reach of the statute to extreme, criminal acts of violence, it could have explicitly said so." Winarto v. Toshiba Am. Elec. Components, Inc., 274 F.3d 1276, 1289 (9th Cir. 2001) (citations and internal punctuation marks omitted).

The elements of a claim under section 52.1 are:

> (1) that the defendant interfered with or attempted to interfere with the plaintiff's constitutional or statutory right by threatening or committing violent acts; (2) that the plaintiff reasonably believed that if she exercised her constitutional right, the defendant would commit violence against her or her property [or] that the defendant

> injured the plaintiff or her property to prevent her from exercising her right or retaliate[d] against the plaintiff for having exercised her right; (3) that the plaintiff was harmed; and (4) that the defendant's conduct was a substantial factor in causing the plaintiff's harm.

McCue v. South Fork Union Elementary School, 766 F. Supp. 2d 1003, 1010 (E.D. Cal. 2011) (citing Austin B. v. Escondido Union School Dist., 149 Cal.App.4th 860, 882 (2007), and CACI No. 3025).

In the first motion to dismiss, defendants argued that plaintiff had failed to state a Bane Act claim because "[n]one of the [alleged] acts are violent acts, none of them involve physical contact, and some of these acts consist only of decision-making." (ECF No. 41 at 21.) The undersigned found that defendants' contention was largely correct, with the exception of defendants Ringler and Zuniga:

> Plaintiff alleges that after these defendants concluded their December 5, 2012 cell search, "two of plaintiff's Holy Korans were destroyed and or desecrated. One Koran was torn lengthwise or crosswise while the other was discovered face down in some unknown liquid." (FAC ¶ 11, ECF No. 18.) At the conclusion of the search, plaintiff alleges that Ringler sarcastically asked him, "How did your case turn out?" (Id. ¶ 12.) Nine days later, plaintiff alleges that defendant Ringler "spontaneously stated to [him,] 'I know all about you, I'm not finished with you yet.'" (Id. ¶ 18.) These allegations are sufficient to satisfy the first two elements of a Bane Act claim. The alleged desecration and/or destruction of plaintiff's Korans was both an allegedly violent act and an injury to his property. Ringler's question regarding the prior case indicates an intent to interfere with or retaliate for plaintiff's exercise of his Constitutional right of access to the courts. Ringler's subsequent spontaneous statement to plaintiff, coming shortly after the challenged cell search in which the Korans were damaged, could be construed as a threat to commit such acts in the future.
>
> Plaintiff has also alleged that he suffered harm (the third element of a Bane Act claim), in that his Korans were damaged during the search. Finally, he has alleged harm (the fourth and final element) as a result of the December 5, 2012 search and Ringler's statements, pleading, "As a proximate or direct result of the desecration of plaintiff's Holy Koran and threats of further retaliation, plaintiff experienced what he believed to be stress due to symptoms such as depression, lack of energy, appetite and loss of weight," for which he sought medical attention. (Id. ¶¶ 26, 27.)
>
> Based on the foregoing, it appears that the first amended complaint states a claim against defendants Ringler and Zuniga under California Civil Code § 52.1. Nevertheless, this claim should be dismissed against the remaining defendants. [Footnote 5]

> [Footnote 5: As Judge O'Neill observed, "[N]o case has actually applied supervisor liability to a Bane Act claim and this federal court is loath to expand the reach of Bane Act liability." Sanchez v. Cit of Fresno, 914 F.Supp.2d 1079, 1118 n.19 (E.D. Cal. 2012). It therefore appears that defendant Scotland cannot be properly named as a defendant under the Bane Act despite plaintiff's allegation that Scotland supervised Ringler's cell searches.]

(Id. at 21-22.)

In the second amended complaint, plaintiff now alleges that all defendants *conspired* to violate the Bane Act. (ECF No. 45 at 18.)

Under California law, civil conspiracy requires a plaintiff to plead that "the conspiring parties reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." See Gilbrook v. City of Westminster, 177 F.3d 839, 856 (1999) (citing Vieux v. East Bay Reg'l Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990)). Each conspirator "need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Id. at 856.

Plaintiff's potentially colorable Bain Act claim is that defendants Ringler and Zuniga damaged his Korans on December 5, 2012. Thus, to succeed on his Bane Act conspiracy claim, plaintiff must allege that defendants conspired to help defendants Ringler and Zuniga damage the Korans on December 5, 2012.

Defendants argue that plaintiff has not alleged sufficient facts to demonstrate that defendants Henry, Ruiz, Muldong, Young, Popovits and Arnold conspired with defendants Ringler and Zuniga to violate his rights under the Bane Act. The undersigned agrees. Plaintiff has not pled sufficient facts demonstrating that defendants Henry, Ruiz, Muldong, Young, Popovits and Arnold were in any way connected to the December 5, 2012 damage to the Korans. Plaintiff's claims against these defendants involve incidents occurring after December 5, 2012. Accordingly, plaintiff's claim against these defendants for conspiring to violate the Bane Act should be dismissed.

With respect to defendant Swarthout, the second amended complaint includes no allegations demonstrating that Swarthout entered an agreement to violate plaintiff's constitutional rights. Accordingly, plaintiff's claim against defendant Swarthout for conspiring to violate the

Bane Act should be dismissed.

With respect to defendant Scotland, plaintiff alleges that in October 2012, defendants Ringler and Scotland became aware of plaintiff's litigation against CDCR after plaintiff used the telephone in defendant Scotland's office to participate in a telephonic settlement conference. Plaintiff alleges that as a result of having knowledge of plaintiff's litigation, defendants Scotland and Ringler began retaliating against him. Plaintiff alleges that the first act of retaliation occurred on December 5, 2012, when defendants Ringler and Zuniga searched his cell. Plaintiff alleges that defendant Ringler conducted the search under the supervision of defendant Scotland. Based on these allegations, it may be reasonably inferred that defendant Scotland conspired with defendants Ringler and Zuniga to engage in the search that resulted in the damage to plaintiff's Korans. Accordingly, defendants' motion to dismiss the Bane Act claim against defendant Scotland should be denied.

Conclusion

The undersigned recommends that defendants' motion to dismiss be denied as to claims 1 and 2 against defendant Zuniga, claim 3 against defendant Ringler and claim 9 as to defendant Scotland. The undersigned recommends that defendants' motion to dismiss be granted in all other respects.

If these findings and recommendations are adopted, this action will proceed on the following claims: claim 1 against defendants Ringler, Zuniga and Scotland; claim 2 against defendants Zuniga and Ringler; claim 3 against defendant Ringler; claim 7 against defendant Ringler; and claim 9 against defendants Ringler, Zuniga and Scotland.

Based on the extensive briefing by the parties with respect to both motions to dismiss, as well as the undersigned's careful consideration of plaintiff's claims, the undersigned finds that it is not likely that plaintiff can cure the pleading defects discussed in these findings and recommendations. For that reason, the undersigned does not grant plaintiff leave to amend.

Accordingly, IT IS HERBY RECOMMENDED that defendants' motion to dismiss (ECF No. 49) be denied as to claims 1 and 2 against defendant Zuniga, claim 3 against defendant Ringler and claim 9 as to defendant Scotland; defendants' motion to dismiss should be granted in

all other respects.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: February 1, 2016

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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