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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID J. COTA, CDCR # C-26012,

vs.
L.E. SCRIBNER, et al.,

Plaintiff,

Defendants.

CASE NO. 09cv2507 BEN (BLM)
**ORDER ADOPTING REPORT
AND RECOMMENDATION**

INTRODUCTION

Plaintiff David J. Cota, a state prisoner proceeding pro se brought this action pursuant to 42 U.S.C. § 1983. Dkt. No. 1. On March 5, 2010, Defendants filed a motion to dismiss Plaintiff's Complaint. Dkt. No. 20. Plaintiff opposed the motion. Dkt. No. 34. On November 10, 2010, the Honorable Magistrate Judge Barbara L. Major issued a Report and Recommendation, recommending that the Court grant in part and deny in part Defendants' motion to dismiss. Dkt. No. 35. On December 8, 2010, in the absence of any objections from Plaintiff, this Court adopted the Report and Recommendation. Dkt. No. 36. On December 10, 2010, Plaintiff filed and this Court accepted Plaintiff's Objections. Dkt. Nos. 38-39. Defendants have filed a Reply to those Objections. Dkt No. 41. Having conducted a de novo review of those issues to which Plaintiff objects, the Court vacates its prior order adopting the Report and Recommendation and **ADOPTS** in its entirety the well-reasoned Report and Recommendation of the Magistrate Judge over Plaintiff's objections. Defendants' motion to dismiss is **GRANTED in part and DENIED in part.**

OR

1 **II. Plaintiff's Equal Protection Claim as to Defendant Bishop**

2 Plaintiff objects to the recommendation that his Equal Protection claim be dismissed
3 with leave to amend as to Defendant Bishop. Plaintiff emphasizes that Defendant Bishop
4 authored a false report to validate Plaintiff as a gang member. Defendants note in their
5 Reply that according to the allegations of Plaintiff's Complaint, he was transferred before
6 Defendant Bishop allegedly filed the report. Plaintiff has not sufficiently plead a
7 connection between the offending conduct and Defendant Bishop. Accordingly, the Court
8 **ADOPTS** the Magistrate Judge's Report over Plaintiff's objection. Plaintiff's Equal
9 Protection claim is **DISMISSED** with leave to amend as to Defendant Bishop.¹

10 **III. Language Addressing Plaintiff's Due Process Claim**

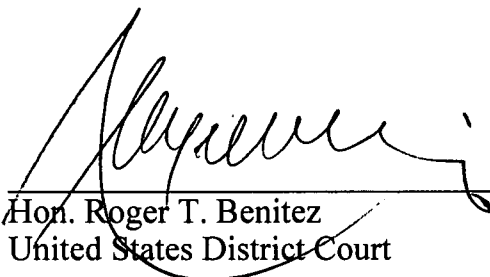
11 Plaintiff objects to the Magistrate Judge's "findings regarding [his] Due Process
12 claim — specifically the denial of employee assistance and witnesses." Presumably,
13 Plaintiff is in agreement with the Magistrate Judge's conclusion that he sufficiently plead
14 his Due Process claim and simply takes issue with the way she reaches that conclusion.
15 The Court, however, agrees with the Magistrate Judge's findings on this claim and
16 **ADOPTS** it over Plaintiff's objection.

17 **CONCLUSION**

18 The Court **ADOPTS** the Report and Recommendation in its entirety over Plaintiff's
19 objections and **GRANTS in part and DENIES in part** Defendants' motion to dismiss.
20 Plaintiff may amend his Complaint in accordance with the Report and Recommendation on
21 or before **March 8, 2011**.

22 **IT IS SO ORDERED.**

23
24 DATED: February 4, 2011

25 
26 _____
27 Hon. Roger T. Benitez
28 United States District Court

29 _____
30 ¹Plaintiff's Equal Protection claim is also dismissed with leave to amend at to the other
31 Defendants, except Defendant Scribner. These Defendants are not addressed here because Plaintiff
32 has not objected to their dismissal.