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

GUSTAVO RAMIREZ,

Plaintiff,

vs.
GEORGE GIURBINO; LARRY
SMALLS; E. SILVA; M. TAMAYO; E.
DUARTE; JOHN ZINNA; JAMES
MORENO,

Defendants.

CASE NO. 10cv1292-WQH-MDD
ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 29) issued by United States Magistrate Judge Mitchell D. Dembin, recommending that Defendants’ Motion to Dismiss the Second Amended Complaint (ECF No. 20) be granted in part and denied in part.

BACKGROUND

On December 16, 2010, Plaintiff Gustavo Ramirez, a state prisoner currently incarcerated at Calipatria State Prison and proceeding pro se, filed a “Second Amended Complaint for Violation of Civil Rights under Civil Rights Act, 42 U.S.C. § 1983” (“Second Amended Complaint”). (ECF No. 19). The Second Amended Complaint contains two counts. Count One alleges Defendants Silva, Duarte, Tamayo, Zinna and Moreno violated Plaintiff’s right to due process and First Amendments rights to freedom of speech and association by validating Plaintiff as a gang member, which resulted in Plaintiff being housed in a Security Housing Unit. *See id.* at 2-5. Count Two alleges that former Acting Warden Smalls and

1 California Department of Corrections Director Giurbino violated Plaintiff's right to due
2 process, First Amendment rights of freedom of speech and association, and Eight Amendment
3 right to be free from cruel and unusual punishment. *See id.* at 5-6.

4 On December 30, 2010, Defendants filed the Motion to Dismiss the Second Amended
5 Complaint. (ECF No. 20). Defendants contend that Plaintiff's First Amendment claims and
6 all claims against Defendants Smalls and Giurbino should be dismissed pursuant to Federal
7 Rule of Civil Procedure 12(b)(6). Defendants do not move for the dismissal of Plaintiff's Due
8 Process claims against Defendants Silva, Duarte, Tamayo, Zinna and Moreno.

9 On May 24, 2011, the Magistrate Judge issued the Report and Recommendation. (ECF
10 No. 29). The Magistrate Judge recommended that the Motion to Dismiss Plaintiff's First
11 Amendment claims against each Defendant be granted; the Motion to Dismiss Plaintiff's
12 Eighth Amendment claims against Defendants Smalls and Giurbino be granted; the Motion to
13 Dismiss Plaintiff's Due Process claim against Defendant Giurbino be granted; and the Motion
14 to Dismiss Plaintiff's Due Process claim against Defendant Smalls be denied. The Magistrate
15 Judge recommended that Plaintiff be given leave to amend as to all dismissed claims. The
16 Report and Recommendation provided that any objections must be filed no later than June 15,
17 2011.

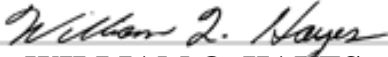
18 The docket reflects that no objections to the Report and Recommendation have been
19 filed.

20 REVIEW OF THE REPORT AND RECOMMENDATION

21 The duties of the district court in connection with a report and recommendation of a
22 magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b).
23 The district judge must "make a de novo determination of those portions of the report ... to
24 which objection is made," and "may accept, reject, or modify, in whole or in part, the findings
25 or recommendations made by the magistrate." 28 U.S.C. § 636(b). The district court need not
26 review de novo those portions of a Report and Recommendation to which neither party objects.
27 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d
28 1114, 1121-22 (9th Cir. 2003) (en banc).

1 No later than forty-five (45) days from the date of this Order, Plaintiff may file a third
2 amended complaint. If Plaintiff files a third amended complaint, the pleading must be
3 complete in itself, and may not incorporate by reference any prior pleading. Any defendant
4 not named and all claims not re-alleged will be deemed waived. If Plaintiff does not file a
5 third amended complaint within 45 days, this case shall proceed as to the claims in the Second
6 Amended Complaint which remain after this Order.

7 DATED: July 7, 2011

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9 **WILLIAM Q. HAYES**
10 United States District Judge

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