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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CHARLES RAY CATHY,

12 Plaintiff,

13 v.

14 S. McCAIN; M. McKENZIE;
15 SERGEANT CASTRO; G.
16 HERNANDEZ,

17 Defendant.
18

Case No.: 3:16-cv-01256-DMS (WVG)

**ORDER: DISMISSING ACTION
PURSUANT TO 28 U.S.C. § 1915A**

19 Charles Ray Cathy (“Plaintiff”), a state inmate currently incarcerated at Kern Valley
20 State Prison located in Delano, California, and proceeding pro se, has filed an action
21 brought pursuant to 42 U.S.C. § 1983. In his Complaint, Plaintiff claims his
22 constitutional rights were violated while he was housed at Calipatria State Prison. (*See*
23 *Compl.*, ECF No. 1, at 1.)

24 Plaintiff has prepaid the initial civil filing fee required to commence a civil action
25 pursuant to 28 U.S.C. § 1914(a). In addition, Plaintiff has filed a “Motion for
26 Verification of Plaintiff’s Pending Suit and Recognition of PLU Status,” along with a
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1 “Motion for Service of Summons and Complaint by United States Marshal.” (ECF Nos.
2 4, 6.)

3 **I. Initial Screening per 28 U.S.C. § 1915A(b)(1)**

4 Even though Plaintiff paid the filing fee, the Court can conduct a sua sponte review
5 of Plaintiff’s Complaint because he is “incarcerated or detained in any facility [and] is
6 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
7 terms or conditions of parole, probation, pretrial release, or diversionary program.” 28
8 U.S.C. § 1915A(a), (c). Section 1915A, enacted as part of the Prison Litigation Reform
9 Act (“PLRA”), requires sua sponte dismissal of prisoner complaints, or any portions
10 thereof, which are frivolous, malicious, or fail to state a claim upon which relief may be
11 granted. 28 U.S.C. § 1915A(b); *Resnick v. Hayes*, 213 F.3d 443, 446-47 (9th Cir. 2000).
12 A similar screening provision of the PLRA would apply to Plaintiff’s Complaint even if
13 he successfully moved to proceed in forma pauperis (“IFP”). See 28 U.S.C.
14 § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

15 **A. Eighth Amendment violations**

16 Plaintiff alleges that he is a “validated/documented Crip.” (Compl. at 4.) He further
17 alleges that Defendants McCain and McKenzie were aware of his gang status. (*Id.* at 4-5.)
18 On November 11, 2015, while Plaintiff was housed at Calipatria State Prison (“CAL”),
19 Defendants McCain and McKenzie came to his cell and informed him that he would be
20 changing cells. (*Id.* at 1, 4-5.) Other inmates informed Plaintiff that the cell he was being
21 moved to housed an inmate from a rival gang. (*Id.* at 4-5.) These inmates also informed
22 Plaintiff that the officers were aware of this issue and “were trying to set me up in a
23 gladiator like scenario.” (*Id.*) However, Plaintiff alleges that Defendants “McKenzie and
24 McCain then came back to my cell and told me that the guy in the other cell” is, in fact, a
25 member of a rival gang and the “Sergeant wants to send you to [administrative segregation]
26 since you refused to move.” (*Id.* at 5-6.) Plaintiff was then sent to administrative
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1 segregation (“ad-seg”) and was not placed with the inmate from the rival gang. (*Id.* at 6.)

2 The Eighth Amendment requires that prison officials take reasonable measures to
3 guarantee the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–
4 33 (1994); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To state an Eighth
5 Amendment failure to protect claim, however, Plaintiff must allege facts sufficient to
6 plausibly show that (1) he faced conditions posing a “substantial risk of serious harm” to
7 his health or safety, and (2) the individual prison officials he seeks to hold liable were
8 “deliberately indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611
9 F.3d 1144, 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff must
10 show that the defendant both knew of and disregarded a substantial risk of serious harm to
11 his health and safety. *Farmer*, 511 U.S. at 837. Thus, Plaintiff must allege “the official
12 [was] both be aware of facts from which the inference could be drawn that a substantial
13 risk of serious harm exist[ed], and [that] he . . . also dr[e]w that inference.” *Id.*

14 Ultimately, Plaintiff’s Complaint contains no facts to plausibly suggest that he faced
15 a “substantial risk of serious harm” at the time he was sent to ad-seg. While Plaintiff was
16 allegedly going to be housed with a member of a rival gang, and even assuming the facts
17 as true that the intent was to set up a “gladiator fight,” there are no facts to show that he
18 suffered any harm because he was never actually exposed to a risk based on his own
19 allegations. Moreover, when Plaintiff objected to being housed with an inmate from a rival
20 gang, prison officials responded by placing him in ad-seg as opposed to moving him into
21 that cell. “[P]rison officials who actually knew of a substantial risk to inmate health or
22 safety may be found free from liability if they responded reasonably.” *Id.* at 844. Plaintiff
23 does not allege any facts to support a finding that the Defendants responded unreasonably
24 to a substantial risk of harm. Therefore, the Court finds that Plaintiff has failed to allege
25 facts sufficient to find “deliberate indifference” on the part of any named Defendant.

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1 For these reasons, the Court finds Plaintiff's failure to protect claims must be
2 dismissed for failing to state a claim pursuant to 28 U.S.C. § 1915A(b)(1).

3 **B. Fourteenth Amendment Due Process claims**

4 Plaintiff also alleges that he was placed in ad-seg without due process. The Due
5 Process Clause protects prisoners against deprivation or restraint of "a protected liberty
6 interest" and "atypical and significant hardship on the inmate in relation to the ordinary
7 incidents of prison life." *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (quoting
8 *Sandin v. Conner*, 515 U.S. 472, 484 (1995)) (internal quotation marks omitted). Although
9 the level of the hardship must be determined in a case-by-case determination, courts look
10 to:

11 1) whether the challenged condition 'mirrored those conditions imposed upon
12 inmates in administrative segregation and protective custody,' and thus
13 comported with the prison's discretionary authority; 2) the duration of the
14 condition, and the degree of restraint imposed; and 3) whether the state's
action will invariably affect the duration of the prisoner's sentence.

15 *Ramirez*, 334 F.3d at 861 (quoting *Sandin*, 515 U.S. at 486-87). Only if an inmate has
16 alleged facts sufficient to show a protected liberty interest does the court next consider
17 "whether the procedures used to deprive that liberty satisfied Due Process." *Ramirez*, 334
18 F.3d at 860.

19 As currently pleaded, Plaintiff's Complaint fails to allege facts which show that
20 being placed in ad-seg for an unspecified period of time subjected him to any "atypical and
21 significant hardship in relation to the ordinary incidents of prison life." *Id.*; *Sandin*, 515
22 U.S. at 584. Plaintiff does not compare the conditions of his confinement before or after
23 his placement in ad-seg. Nor does he allege the duration of his time housed in ad-seg, or
24 the degree of restraint it imposed. *Ramirez*, 334 F.3d at 861 (quoting *Sandin*, 515 U.S. at
25 486-87).

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1 Plaintiff's Complaint contains no "factual content that allows the court to draw the
2 reasonable inference," *Iqbal*, 556 U.S. at 678, that Defendants' actions "presented a
3 dramatic departure from the basic conditions" of Plaintiff's sentence or caused him to
4 suffer an "atypical" or "significant hardship." *Sandin*, 515 U.S. at 584-85.

5 For these reasons, the Court finds Plaintiff's due process must be dismissed for failing
6 to state a claim pursuant to 28 U.S.C. § 1915A(b)(1).

7 **II. Motion for Verification of Plaintiff's Suit and Recognition of PLU Status**

8 Plaintiff has also filed a motion in which he "requests for the Court to verify
9 Plaintiff's current activity in the above matter to secure his "P.L.U."¹ status with Kern
10 Valley State Prison and any other State facility. (Pl.'s Mot., ECF No. 4, at 1.) Plaintiff
11 claims that "Legal Officer Valdez" will not provide Plaintiff with photocopies and has
12 denied him "Priority Legal User" status. To the extent that Plaintiff is attempting to amend
13 his Complaint to add an access to courts claim, the Court denies Plaintiff's Motion because
14 the facts as alleged are insufficient to state a claim.

15 Prisoners do "have a constitutional right to petition the government for redress of
16 their grievances, which includes a reasonable right of access to the courts." *O'Keefe v.*
17 *Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); accord *Bradley v. Hall*, 64 F.3d 1276, 1279
18 (9th Cir. 1995). In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that "the
19 fundamental constitutional right of access to the courts requires prison authorities to assist
20 inmates in the preparation and filing of meaningful legal papers by providing prisoners
21 with adequate law libraries or adequate assistance from persons who are trained in the law."
22 *Id.* at 828. To establish a violation of the right to access to the courts, however, a prisoner
23 must allege facts sufficient to show that: (1) a non-frivolous legal attack on his conviction,

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25 ¹ "Inmates who have established court deadlines may apply for Priority Legal User (PLU) status to
26 the prison law libraries. Inmates who are granted PLU status based on their applications shall receive
27 higher priority to prison law library resources than other inmates." Cal. Code Regs., tit. 15 § 3122(b)
(2015).

1 sentence, or conditions of confinement has been frustrated or impeded, and (2) he has
2 suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An
3 “actual injury” is defined as “actual prejudice with respect to contemplated or existing
4 litigation, such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348;
5 *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d
6 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

7 Here, Plaintiff fails to allege that any CDCR official’s refusal to grant him PLU
8 status or failure to comply with photocopy procedures on any particular occasion precluded
9 his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction
10 or sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right
11 to access to the courts protects only an inmate’s need and ability to “attack [his] sentence[],
12 directly or collaterally, and ... to challenge the conditions of [his] confinement.”). In
13 addition, Plaintiff must also, but has failed to, describe the non-frivolous nature of the
14 “underlying cause of action, whether anticipated or lost.” *Christopher v. Harbury*, 536
15 U.S. 403, 415 (2002).

16 In short, unless Plaintiff can show that “a complaint he prepared was dismissed,” or
17 that he was “so stymied” by CDCR officials’ actions that “he was unable to even file a
18 complaint,” direct appeal, or petition for writ of habeas corpus that was not “frivolous,” his
19 access to courts claim must be dismissed. *Lewis*, 518 U.S. at 351; *Christopher*, 536 U.S.
20 at 416 (“like any other element of an access claim[,] ... the predicate claim [must] be
21 described well enough to apply the ‘nonfrivolous’ test and to show that the ‘arguable’
22 nature of the underlying claim is more than hope.”).

23 Thus, Plaintiff’s “Motion for Verification of Plaintiff’s Pending Suit and
24 Recognition of PLU Status” is GRANTED in part, and DENIED in part. The Motion is
25 GRANTED to the extent that Court’s docket verifies that Plaintiff has filed a civil rights
26 action in this Court, however, the Court declines to interfere with the CDCR’s regulations
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1 in determining whether Plaintiff is entitled to PLU status as he has failed to show that he
2 has been denied access to the courts.

3 **Conclusion**

4 For all the reasons set out above, IT IS ORDERED that:


5 (1) Plaintiff's Complaint is DISMISSED without prejudice pursuant to 28
6 U.S.C. § 1915A(b). However, Plaintiff is granted forty five (45) days leave from the date
7 this Order is "Filed" in which to file a First Amended Complaint which cures all the
8 deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete
9 in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1.
10 Defendants not named and all claims not re-alleged in the Amended Complaint will be
11 deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).
12 Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be
13 granted, it may be dismissed without further leave to amend and may hereafter be
14 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172,
15 1177-79 (9th Cir. 1996).

16 (2) Plaintiff's "Motion for Verification of Plaintiff's Pending Suit and
17 Recognition of PLU Status" is GRANTED in part, and DENIED in part.

18 (3) Plaintiff's "Motion for Service of Summons and Complaint" is DENIED as
19 moot in light of the Court's dismissal, without prejudice, of the entire action.

20 The Clerk of Court is directed to mail a form civil rights complaint to Plaintiff.

21 Dated: June 28, 2016

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23 Hon. Dana M. Sabraw
24 United States District Judge