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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RONALD C. DIAZ,
CDCR #AD2009

Plaintiff,

v.

N. McGEE; S. RUTHLEDGE; D.
HOLBROOK; J. WILBORN; CALVERT;
RICHARD J. DONOVAN
CORRECTIONAL FACILITY ,

Defendants.

Case No.: 3:17-cv-1772-LAB-BLM

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A**

I. Procedural History

On August 31, 2017, Ronald C. Diaz (“Plaintiff”), a state inmate currently incarcerated at California State Prison - Los Angeles County located in Lancaster, California and proceeding pro se, filed a civil rights Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. (ECF No. 1.) He alleged violation of his First, Eighth and Fourteenth Amendment rights when he was previously housed at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California. (Compl. at 1.) In addition,

1 Plaintiff filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C.
2 § 1915(a). (ECF No. 2.)

3 The Court granted Plaintiff’s Motion to Proceed IFP and simultaneously dismissed
4 his Complaint for failing to state a claim upon which relief could be granted pursuant to
5 28 U.S.C. § 1915(e)(2) and § 1915A. (ECF No. 4.) Plaintiff was granted leave to file an
6 amended pleading in order to correct the deficiencies of pleading identified in the Court’s
7 Order. (*Id.*) On October 30, 2017, Plaintiff filed his First Amended Complaint (“FAC”).
8 (ECF No. 4.)

9 **II. Sua Sponte Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

10 **A. Standard of Review**

11 As the Court previously informed Plaintiff, “[t]he Court shall review, before
12 docketing, if feasible or, in any event, as soon as practicable after docketing,” complaints
13 filed by all persons proceeding IFP, and by those who are “incarcerated or detained in
14 any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
15 criminal law or the terms or conditions of parole, probation, pretrial release, or
16 diversionary program.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). The Court must sua
17 sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to
18 state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
19 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000).

20 All complaints must contain “a short and plain statement of the claim showing that
21 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
22 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
23 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
24 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Determining
25 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
26 requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at
27 679. The “mere possibility of misconduct” falls short of meeting the *Iqbal* plausibility
28 standard. *Id.*; *see also Moss v. U. S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

1 “When there are well-pleaded factual allegations, a court should assume their
2 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
3 Iqbal, 556 U.S. at 679; see also Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000)
4 (“Under § 1983, when determining whether a complaint states a claim, a court must
5 accept as true all allegations of material fact and must construe those facts in the light
6 most favorable to the plaintiff.”); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
7 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
8 Procedure 12(b)(6)”). However, while the court has an “obligation . . . where the
9 petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally
10 and to afford the petitioner the benefit of any doubt,” Hebbe v. Pliler, 627 F.3d 338, 342
11 (9th Cir. 2010), citing Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en
12 banc), it may not, in so doing, “supply essential elements of the claim that were not
13 initially pled.” Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268
14 (9th Cir. 1982).

15 “Section 1983 creates a private right of action against individuals who, acting
16 under color of state law, violate federal constitutional or statutory rights.” Devereaux v.
17 Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
18 substantive rights, but merely provides a method for vindicating federal rights elsewhere
19 conferred.” Graham v. Connor, 490 U.S. 386, 393-94 (1989) (internal quotation marks
20 and citations omitted). “To establish § 1983 liability, a plaintiff must show both
21 (1) deprivation of a right secured by the Constitution and laws of the United States, and
22 (2) that the deprivation was committed by a person acting under color of state law.” Tsao
23 v. Desert Palace, Inc., 698 F.3d 1128, 1138 (9th Cir. 2012).

24 **B. Plaintiff’s Allegations**

25 On August 28, 2015, Plaintiff went to “medical for chest pains” and was later “sent
26 to C.T.C. crisis bed for suicidal ideations.” (FAC at 3.) He further claims that “T.A.A.
27 officers (never) called Plaintiff’s unit officer, Rodgers, to remove and pack up Plaintiff’s
28

1 property” from his cell. (Id.) Instead, Correctional Officer Rodgers¹ “went home and all
2 of Plaintiff’s property” was “stolen by Plaintiff’s then cellie.” (Id.) Plaintiff discovered
3 that his property had been stolen when he returned to RJD two weeks later. (Id.)

4 Plaintiff claims that Rodgers admitted he was negligent in failing to secure
5 Plaintiff’s property. (Id. at 4.) However, when Plaintiff sought reimbursement for his
6 property, he claims Defendants McGee, Ruthledge and Holbrook denied his requests and
7 his grievances. (Id. at 4-5.) He further claims that these denials were in retaliation for
8 Plaintiff “reporting staff misconduct on them and [their] partners.” (Id.) On June 20,
9 2016, Plaintiff’s request for reimbursement of his lost items was granted by RJD Chief
10 Deputy Warden, G. Stratton. (Id., Ex. 8, ECF No. 4 at 35-37, Second Level Appeal
11 Response dated June 20, 2016.)

12 **C. Waived Claims and Defendants**

13 In the Court’s September 25, 2017 Order, Plaintiff was instructed that any
14 “Defendants not named and any claim not re-alleged in his Amended Complaint will be
15 considered waived.” (ECF No. 3 at 8, citing S.D. CAL. CIVLR 15.1; Hal Roach Studios,
16 Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended
17 pleading supersedes the original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir.
18 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
19 amended pleading may be “considered waived if not repld.”).

20 In Plaintiff’s FAC, he no longer names Defendants Calvert and Wilborn. (See
21 FAC at 1-2.) In addition, he no longer alleges any Fourteenth Amendment claims in his
22 FAC. Therefore, Plaintiff’s Fourteenth Amendment claims and the claims against
23 Defendants Calvert and Wilborn are DISMISSED.

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28 ¹ Rodgers is not a named Defendant.

1 **D. Retaliation**

2 Plaintiff alleges that the Defendants retaliated against him because he has been
3 reporting “serious staff misconduct and filing 602 complaints” throughout the “years
4 while at Donovan Prison.” (FAC at 3.)

5 Retaliation against a prisoner for exercising his rights to speech or to petition the
6 government may violate the First Amendment. *See Rizzo v. Dawson*, 778 F.2d 527, 532
7 (9th Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989);
8 *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). “Within the prison context, a viable
9 claim of First Amendment retaliation entails five basic elements: (1) An assertion that a
10 state actor took some adverse action against an inmate (2) because of (3) that prisoner’s
11 protected conduct, and that such action (4) chilled the inmate’s exercise of his First
12 Amendment rights, and (5) the action did not reasonably advance a legitimate
13 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

14 Here, Plaintiff does not allege that any Defendants took “adverse action” against
15 him because he was engaging in “protected conduct.” *Id.* Plaintiff acknowledges that he
16 was ultimately reimbursed for his property and therefore, he ultimately did not suffer any
17 “adverse action.” In addition, Plaintiff only generally states that he has a history of filing
18 complaints but he does not provide further detail as to the nature of the grievances and
19 whether the Defendants named in this litigation were directly aware of the grievances
20 filed by Plaintiff. The only grievance Plaintiff refers to as to Defendant McGee is dated
21 April 27, 2016 which is a date that is *after* the alleged acts of retaliation. (*See* FAC at 30,
22 Inmate/Parolee Request for Interview dated Apr. 27, 2016.) Therefore, Plaintiff is unable
23 to show that the actions taken by the named Defendants were due to Plaintiff engaging in
24 “protected conduct.”

25 As set forth above, the “mere possibility of misconduct” or “unadorned, the
26 defendant-unlawfully-harmed me accusation[s]” fall short of meeting *Iqbal*’s plausibility
27 standard. *Iqbal*, 556 U.S. at 678. Therefore, Plaintiff’s claims of retaliation are dismissed
28 for failing to state a claim.

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2 **III. Leave to Amend**

3 Because Plaintiff is proceeding without counsel, and he has now been provided
4 with notice of his Complaint's deficiencies, the Court will grant him leave to amend. See
5 Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) ("A district court should not
6 dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C.
7 § 1915(e)(2)(B)(ii)] unless 'it is absolutely clear that the deficiencies of the complaint
8 could not be cured by amendment.'" (quoting Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th
9 Cir. 2012)).

10 **IV. Conclusion and Orders**

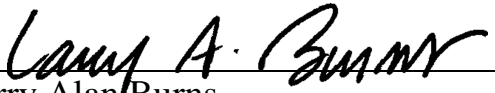
11 Good cause appearing, the Court:

12 1. **DISMISSES** Plaintiff's First Amended Complaint in its entirety for failing
13 to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)
14 and § 1915A(b), and **GRANTS** him forty-five (45) days leave from the date of this Order
15 in which to file an Amended Complaint which cures all the deficiencies of pleading
16 noted. Plaintiff's Amended Complaint must be complete by itself without reference to his
17 original pleading, and must comply with S.D. CAL. CIVLR 8.2(a). Defendants not named
18 and any claim not re-alleged in his Amended Complaint will be considered waived. See
19 S.D. CAL. CIVLR 15.1; Hal Roach Studios, Inc., 896 F.2d at 1546; Lacey, 693 F.3d at
20 928.

21 2. The Clerk of Court is directed to mail Plaintiff a copy of a court approved
22 form § 1983 complaint.

23 **IT IS SO ORDERED.**

24 Dated: November 13, 2017

25 
26 Hon. Larry Alan Burns
27 United States District Judge
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