

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 IVAN FRANCES GOODLOW, JR.,
12 Plaintiff,
13 v.
14 Mr. CAMACHO, C-Yard Correctional
15 Officer, et al.,
16 Defendant.

Case No.: 18cv709-CAB-MDD

**ORDER ADOPTING REPORT AND
RECOMMENDATION [Doc. No. 40]
and GRANTING DEFENDANTS'
PARTIAL MOTION TO DISMISS
[Doc. No. 37]**

17
18 On April 9, 2018, Plaintiff Ivan Goodlow, Jr. (“Plaintiff”), a state prisoner
19 proceeding *pro se* and *informa pauperis*, filed a civil rights complaint pursuant to 42
20 U.S.C. §1983. [Doc. Nos. 1, 22.] Plaintiff alleges that eleven individuals working at
21 R.J. Donovan Correctional Facility (“RJD”) violated his civil rights by: (1) retaliating
22 against him in violation of the First Amendment; (2) imposing excessive force and
23 depriving him of one meal in violation of the Eighth Amendment; and (3) filing a false
24 disciplinary report in violation of the Eighth, Ninth, and Fourteenth Amendments. [Doc.
25 No. 1 at 5-13.] On February 14, 2019, Defendants Keener, Camacho, Smith, Self, Salas,
26 Marin, and Sigala (the only defendants who have been served) filed a motion to dismiss
27 certain defendants and parts of Plaintiff’s complaint. [Doc. No. 37.] Plaintiff filed an
28 opposition to Defendants’ motion to dismiss on March 11, 2019. [Doc. No. 39.]

1 On June 30, 2017, Magistrate Judge Mitchell D. Dembin issued a Report and
2 Recommendation to grant Defendants’ partial Motion to Dismiss (the “Report”). [Doc.
3 No. 40.] In the Report, Magistrate Judge Dembin also recommended that this Court issue
4 an Order to Show Cause (“OSC”) as to why the unserved defendants should not be
5 dismissed. [Doc. No. 40 at 2, n. 1., 14.] On May 10, 2019, Plaintiff filed what this Court
6 deemed to be objections to the Report, but the objections only pertain to the
7 recommendation regarding issuing an OSC as to the unserved defendants. [Doc. No. 42.]

8 REVIEW OF REPORT AND RECOMMENDATION

9 The duties of the district court in connection with a report and recommendation of
10 a magistrate judge are set forth in Federal Rules of Civil Procedure 72(b) and 28 U.S.C. §
11 636(b). The district judge must “make a de novo determination of those portions of the
12 report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
13 part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. §
14 636(b). The district court need not review de novo those portions of a report and
15 recommendation to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992,
16 1000 n. 13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003)
17 (en banc).

18 DISCUSSION

19 Having reviewed the portion of the Report regarding the partial motion to dismiss,
20 to which no objection was made, the Court finds that it is thorough, well-reasoned, and
21 contains no clear error. Accordingly, the Court hereby (1) **ADOPTS** Magistrate Judge
22 Dembin’s Report as to the partial motion to dismiss; and (2) **GRANTS** the partial motion
23 to dismiss, as set forth in detail below.

24 In the Report, Magistrate Judge Dembin also recommends that this Court issue an
25 OSC as to why the unserved defendants should not be dismissed. Plaintiff objects to this
26 portion of the Report, and requests the Court’s assistance in locating the unserved
27 defendants. [Doc. No. 42.] A review of the docket shows that the U.S. Marshal mailed
28 the summons and complaint to the Litigation Coordinator at RJD, and the summons were

1 returned unexecuted because the individuals were not employed at the institution. [See
2 Doc. Nos. 24-26, 28.] The only assistance the Court can provide is to allow Plaintiff
3 additional time to conduct discovery in the normal course as to the unserved defendants.
4 Therefore, the Court will not issue an OSC as to the unserved defendants at this time.
5 However, Plaintiff must serve the remaining (unserved) defendants with the operative
6 complaint by **June 28, 2019**.

7 CONCLUSION

8 For the reasons set forth above, (1) Magistrate Judge Dembin's Report is
9 **ADOPTED** as to the partial motion to dismiss and (2) Defendants' partial motion to
10 dismiss is **GRANTED**, as follows:

- 11 1. Defendants' motion to dismiss as to Plaintiff's official capacity claims against
12 all Defendants is **GRANTED WITHOUT LEAVE TO AMEND**;
- 13 2. Defendants' motion to dismiss as to all claims against Defendants Smith and
14 Self is **GRANTED WITHOUT LEAVE TO AMEND**;
- 15 3. Defendants' motion to dismiss the Eighth Amendment claim as to Defendant
16 Keener is **GRANTED WITHOUT LEAVE TO AMEND**;
- 17 4. Defendants' motion to dismiss the Fourteenth Amendment claim as to
18 Defendant Keener is **GRANTED WITH LEAVE TO AMEND**.¹
- 19 5. Should Plaintiff wish to amend his Fourteenth Amendment claim as to
20 Defendant Keener, he may do so by filing a First Amended Complaint (FAC)
21 no later than **June 21, 2019**. Plaintiff is cautioned that the FAC must be
22 complete in itself without reference to his original pleading. Defendants not
23 named and any claims not re-alleged in the FAC will be considered waived. *See*
24 *S.D. Cal. CivLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,

25
26
27 ¹ At this point, the following claims remain pending: 1) Plaintiff's Eighth Amendment claim against
28 Defendants Camacho, Sigala, Salas, and Marin, in their individual capacities; (2) Plaintiff's First
Amendment Retaliation claim against Defendants Camacho, Sigala, Salas, and Marin, in their individual
capacities.

1 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the
2 original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting
3 that claims dismissed with leave to amend which are not re-alleged in an
4 amended pleading may be “considered waived if not repled.”) However,
5 Plaintiff may not reallege the claims that have been dismissed without leave to
6 amend in this Order.

7 6. If Plaintiff does not file an FAC by June 21, 2019, then Defendants Camacho,
8 Sigala, Salas, and Marin shall answer the complaint, as amended by this Order,
9 by **July 8, 2019**.

10 7. Plaintiff shall serve the remaining (unserved) defendants with the operative
11 complaint (either the original complaint or the FAC) by **June 28, 2019**.

12 **IT IS SO ORDERED.**

13 Dated: May 23, 2019



14 _____
15 Hon. Cathy Ann Bencivengo
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28