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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

JAE JEONG LYU,

Plaintiff, v. JIM McDONNELL,

Defendant.

Case No. 5:19-cv-00637-MCS (AFM)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Mark C. Scarsi, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, it is recommended that defendant's Motion to Dismiss be granted without leave to amend and the action dismissed. I. SUMMARY OF PROCEEDINGS

On April 9, 2019, plaintiff, a state prisoner proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) 1

Plaintiff filed a Request

1 This action was transferred to the calendar of the undersigned Magistrate Judge on April 29, 2020, by Order of the Chief Magistrate Judge. (ECF No. 26.) On September 25, 2020, by Order of the Chief District Judge, this action was transferred from the calendar of District Judge James V. Selna to the calendar of District Judge Mark C. Scarsi. (ECF No. 42.)

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to Proceed Without Prepayment of Filing Fees, which subsequently was granted. (See ECF Nos. 2, 5-7.) Plaintiff is now incarcerated at the California Rehabilitation Center in Norco, but the incidents giving rise to this action occurred while plaintiff was being held at jail facilities in Los Angeles

County. The Complaint named as defendants the Los Angeles County Sheriff, in his individual and official capacities and the wardens of two jail facilities. (ECF No. 1 at 3.)

In accordance with the mandate of the Prison Litigation Reform Act of 1995 ("PLRA"), the then-assigned Magistrate Judge screened the Complaint to determine whether the action is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A, 1915(e)(2); 42 U.S.C. § 1997e(c)(1). Following review of the Complaint, the allegations in the Complaint were found insufficient to state a claim on which relief may be granted. The Complaint was dismissed with leave to amend. Plaintiff was admonished that, if he failed to timely file a First Amended Complaint or failed to remedy the deficiencies of his pleading, then the Court would recommend that the action be dismissed without further leave to amend and with prejudice. (ECF No. 8.)

Plaintiff filed a First Amended Complaint ("FAC") on July 24, 2019. (ECF No. 10.) In his FAC, plaintiff named as defendant only the Los Angeles County Sheriff, in his individual and official capacities. (Id. at 1.) The then-assigned Magistrate Judge again screened the pleading in accordance with the mandate of the PLRA. In a First Report and Recommendation ("First R&R" ), the Magistrate Judge found that plaintiff's FAC failed to alle ges facts demonstrating standing to seek requested injunctive relief; failed to allege facts stating a plausible claim under the Equal Protection Clause of the Fourteenth Amendment; failed to state a claim against the Sheriff under the Eighth Amendment (assuming that plaintiff was a convicted criminal at the time the incidents giving rise to the claims took place) for failing to protect plaintiff in assigning him to the "Pitchess 700s dorm"; and arguably may be

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sufficient to allege a claim against the Sheriff in his individual capacity under the Eighth Amendment arising from the placement of plaintiff in general population housing at the jail facility. (ECF No. 12.) The First R&R was accepted by the then- assigned District Judge in an Order issued on August 30, 2019. Plaintiff's request for injunctive relief, his equal protection claim, and his Eight Amendment claim arising from his placement in the "Pitche ss 700s dorm" were dism issed without leave to amend. Plaintiff was granted leave to amend only his claim arising from his placement in general population housing. (ECF No. 13.)

On November 13, 2019, plaintiff filed a Second Amended Complaint naming only one defendant -- Los Angeles County Sheriff McDonnell, in both his individual and official capacities. (ECF No. 19; "SAC .") In the SAC, plaintiff alleges that Sheriff McDonnell was "the warden of the county jail" when plaintiff was "beaten by the black inmates in LA [sic] County Jail." ( Id. at 1.) Plaintiff raises one claim for failing to protect plaintiff under the Eighth Amendment. Plaintiff alleges:

Knowing my convictions were sexual charges that need special protection, he deliberately placed me

in general population inmate cell as a prey. After I was beaten and hospitalized, he again placed me into the Dorm 700s. (Id. at 1.) Plaintiff seeks monetary damages. (Id. at 2.)

Sheriff McDonnell filed a Motion to Dismiss (ECF No. 31; "Motion") pursuant to Fed. R. Civ. P. 12(b)(6) on June 4, 2020, on the grounds that the SAC fails to allege any specific facts against Sheriff McDonnell and fails to state a claim against Sheriff McDonnell in his official capacity. In addition, defendant contends that plaintiff is attempting to raise a claim in the SAC concerning his placement in the Pitchess 700s dorm in violation of the District Court's Order dismissing that claim with prejudice. The Court agrees. In his SAC, plaintiff alleges that he was "again placed . . . into the Dorm [sic] 700s." (ECF No. 19 at 1. ) To the extent that plaintiff is attempting to re-allege in the SAC a failure-to-protect claim arising from his

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placement in the Pitchess 700s dorm, that claim has been dismissed without leave to amend and with prejudice. (See First R&R, ECF No. 12 at 7-8; ECF No.13 at 1.)

Plaintiff filed his Opposition on July 2, 2020, in which he argues that the Motion "completely ignored the plaintiff's cl aim." (ECF No. 38.) Defendant filed a Reply on July 16, 2020. (ECF No. 39.) In his Reply, Sheriff McDonnell argues that plaintiff's Opposition merely reiterates his cl aim. Plaintiff does not add any factual allegations, does not show how Sheriff McDonnell was personally involved in plaintiff's housing assignment, and does not argue that the alleged constitutional deprivation was the result of a municipal policy, custom or practice. (Id. at 3.) II. LEGAL STANDARDS

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) "lack of a cognizable legal theory;" or (2) insufficient "facts alleged under a cognizable legal theory." See, e.g., Kwan v. SanMedica Int'l , 854 F.3d 1088, 1093 (9th Cir. 2017) (internal quotation marks omitted). In determining whether the pleading states a claim on which relief may be granted, its allegations of material fact must be taken as true and construed in the light most favorable to plaintiff. See, e.g., Soltysik v. Padilla, 910 F.3d 438, 444 (9th Cir. 2018). However, the "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Rather, a court first "discounts conclusory stat ements, which are not entitled to the presumption of truth, before determining whether a claim is plausible." Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1129 (9th Cir. 2013); see also Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). The Court is not "bound to accept as true a legal conclusion couched as a factual allegation or an unadorned, the- defendant-unlawfully-harmed-me accusation." Keates v. Koile, 883 F.3d 1228, 1243 (9th Cir. 2018) (internal quotation marks and citations omitted).

Since plaintiff is appearing pro se, the Court must construe the allegations of the pleading liberally and must afford plaintiff the benefit of any doubt. See Hebbe

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v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010); see also Alvarez v. Hill, 518 F.3d 1152, 1158 (9th Cir. 2008) (because plaintiff was proceeding pro se, "the district court was required to 'afford [him] the benefit of a ny doubt' in ascertaining what claims he 'raised in his complaint'") (alteration in or iginal). Nevertheless, the Supreme Court has held that "a plaintiff's obligation to pr ovide the 'grounds' of his 'entitle[ment] to relief' requires more than labe ls and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted, alteration in original); see also Iqbal, 556 U.S. at 678 (To avoid dismissal for failure to state a claim, "a complaint must contain sufficient f actual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has fa cial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (internal citation omitted)). Accordingly, a claim has "subst antive plausibility" if a plaintiff alleges "simply, concisely, and directly [the] events" that entitle him to damages. Johnson v. City of Shelby, 574 U.S. 10, 12 (2014).

"Prison officials have a duty . . . to prot ect prisoners from violence at the hands of other prisoners." Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005) (citing Farmer v. Brennan, 511 U.S. 825, 833 (1994)) (internal quotations omitted, alteration in original). A correctional official is "deliberately indifferent" under the Eighth Amendment if that official is "subjectiv ely aware of the risk and does nothing to prevent the resulting harm." Jeffers v. Gomez, 267 F.3d 895, 913 (9th Cir. 2001) (citing Farmer, 511 U.S. at 828-29). To be subjectively aware of a risk, a "prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . must also draw the inference." Labatad v. Corr. Corp. of Am., 714 F.3d 1155, 1160 (9th Cir. 2013) (citing Farmer,

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511 U.S. at 837) (internal quotation marks omitted, alteration in original). Correctional officials "cannot be found liable under the Eighth Amendment" for "merely being negligent, or failing to alle viate a significant risk that [they] should have perceived but did not." Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050 (9th Cir. 2002). Plaintiff must also allege that, objectively, "he is incarcerated under conditions posing a substantial risk of serious harm." Farmer, 511 U.S. at 834. 2 III. DISCUSSION

A. Official Capacity Claim The SAC again names Sheriff McDonnell in his official capacity as well as his individual capacity. (ECF No. 19 at 1.) However, the Supreme Court has held that an "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). Such a suit "is not a suit against the official personally,

for the real party in interest is the entity." Graham, 473 U.S. at 166 (emphasis in original). Thus, plaintiff's claim against Sheriff McDonnell in his official capacity is the same as a claim raised against the County of Los Angeles ("County").

A local government entity such as the County "may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whet her made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); see also Connick v. Thompson, 563 U.S. 51, 60 (2011) ("under § 1983, lo cal governments are responsible only for their own 2 It is not clear in this action if plaintiff was a pre-trial detainee or a convicted criminal at the relevant time. However, in the First R&R, it was noted that plaintiff alleged in his FAC that the incidents giving rise to his claims "occurred after he was convicted of a sexual offense." (ECF No. 12, at 6 n.3 (emphasis in original).) Plaintiff did not allege in his SAC that he had not already been convicted. Plaintiff's SAC again references hi s "convictions" and cites the Eighth Amendment. (ECF No. 19 at 1). Accordingly, the Court will analyze plaintiff's failure-to-protect claim under the Eighth Amendment.

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illegal acts" (emphasis in original, internal quotation marks omitted)).

Here, the SAC fails to set forth any factual allegations giving rise to a reasonable inference that a specific policy, practice, or custom promulgated by the County was the "actionable cause" of the a lleged constitutional violation. Nor does plaintiff argue in his Opposition that the constitutional deprivation resulted from a policy, practice, or custom of the County. See, e.g., Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1146 (9th Cir. 2012) ("Under Monell, a plaintiff must also show that the policy at issue was the 'actionable cause' of the constitutional violation, which requires showing both but-for and proximate causation."). In addition, liability against the County pursuant to Monell may not be premised on a single allegedly unconstitutional incident such as plaintiff is alleging in this action. See, e.g., Gant v. Cnty. of Los Angeles, 772 F.3d 608, 618 (9th Cir. 2014) (plaintiff does not establish liability under Monell without showing that "a single incident of unconstitutional actively" was more than an "iso lated or sporadic" incident); Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996). Plaintiff's mini mal factual allegations in the SAC are insufficient to raise a plausible inference that any policy, practice, or custom of the County caused the alleged violation of plaintiff's constitutional rights when he was placed into a general population cell. Rather, following his attempts at amendment, plaintiff's SAC continues to make sweeping and conclusory allegations such as that Sheriff McDonnell knew of plaintiff's "need [for] special protection." (ECF No. 19 at 1.) Such allegations, when plaintiff fails to set forth any supporting factual allegations, are not entitled to a presumption of truth in deciding the sufficiency of plaintiff's claim. See, e.g., Salameh, 726 F.3d at 1129. Plaintiff also does not point to any facts in his Opposition to show that Sheriff McDonnell was personally responsible for plaintiff's housing placement . Rather, plaintiff argues generally in his Opposition

that he has a "right to be protected from harm by other inmates, and thus, [sic] they did not protect the plaintiff." (ECF No. 38 at 3.)

In addition, plaintiff argues incorrectly that, because Sheriff McDonnel was a

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supervisor, he can be held liable in his official capacity. (ECF No. 38 at 2-3.) Although a local government may be liable for the act of a single official if that official "had final policymaking authorit y concerning the action at issue" and the alleged act constituted an act of official policy, plaintiff's SAC contains no factual allegations showing that Sheriff McDonnell had authority over the housing assignment of one jail inmate, or even that Sheriff McDonnell took any action or made any decision concerning plaintiff's housing assignment. See, e.g., Garmon v. Cnty. of Los Angeles, 828 F.3d 837, 846 (9th Cir. 2016); Hopper v. City of Pasco, 241 F.3d 1067, 1083 (9th Cir. 2001) (Monell liability may be established if a plaintiff shows "that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official government policy" (internal quotation marks omitted)).

It is plaintiff's burden to set forth suffi cient factual allegations in his pleading, when "taken as true," to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). As the Supreme Court has made clear "[t]hreadbare recitals of th e elements of a cause of action, supported by mere conclusory statements" are not sufficient to "unlock the doors of discovery." Iqbal, 556 U.S. at 678-79. Plaintiff's SAC fails to set forth any factual allegations showing either that a widespread practice, policy, or custom of the County caused the constitutional violation that plaintiff alleges, or that Sheriff McDonnell had authority over plaintiff's housing assignment.

Accordingly, the Court finds that plaintiff's SAC once again fails to present any factual allegations giving rise to a plausible inference that the County is liable for the alleged constitutional violation. See, e.g., Iqbal, 556 U.S. at 678.

B. Failure-to-Protect Claim The SAC alleges one claim against Sheriff McDonnell under the Eighth Amendment for failing to protect plaintiff when the Sheriff "deliberately placed

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[plaintiff] in general population inmate cell." (ECF No. 19 at 1.) Plaintiff names only Sheriff McDonnell as a defendant. To state a federal civil rights claim against a defendant, plaintiff must allege that the named defendant deprived him of a right guaranteed under the United States Constitution or a federal statute. See West v. Atkins, 487 U.S. 42, 48 (1988). "A person depr ives another 'of a constitutional right, within the meaning of section 1983, if he does an affirmative act,

participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains].'" Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (emphasis and alteration in original).

As the Supreme Court has made clear, to state a claim against an individual defendant, plaintiff must allege sufficient factual allegations against that defendant to nudge each claim "across the lin e from conceivable to plausible." See Twombly, 550 U.S. at 570. Plaintiff's SAC fails to a llege that Sheriff McDonnell took or failed to take a specific action at a specific time that caused plaintiff's alleged constitutional violation. Although the SAC alleges that the Sheriff was "the warden of the county jail" (ECF No. 19 at 1), plaintiff sets fo rth no facts showing that Sheriff McDonnell was acting as a "warden" at the jail facility where plaintiff was held at the relevant time. Plaintiff also alleges without any factual support that Sheriff McDonnell knew of plaintiff's need for "special protection." ( Id.) Plaintiff does not allege when Sheriff McDonnell made the decision to place plaintiff into a general population cell, how Sheriff McDonnell was in a position to make a decision concerning which cell plaintiff should be assigned to, or how Sheriff McDonnell was made aware of plaintiff's need for "special protection."

The Court is mindful that, because plaintiff is appearing pro se, the allegations of the SAC must be construed liberally and plaintiff must be afforded the benefit of any doubt. That said, the Supreme Court has made clear that the Court has "no obligation to act as counsel or paralegal to pro se litigants." Pliler v. Ford, 542 U.S. 225, 231 (2004). Plaintiff's unsupported a nd conclusory allegations that Sheriff

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McDonnell knew of plaintiff's convicti on on "sexual charges," that Sheriff McDonnell was aware that plaintiff required "special protection," that the Sheriff made a decision about what type of cell plaintiff should be assigned to at the jail facility (ECF No. 19 at 1), or that Sheriff McDonnell was "personally involved" in plaintiff's housing assignment (ECF No. 38 at 1-2), are not entitled to a presumption of truth in determining whether the SAC states a claim against Sheriff McDonnell that is plausible. See, e.g., Iqbal, 556 U.S. at 681; Keates, 883 F.3d at 1243 (a "court is not bound to accept as true a legal conclusion couched as a factual allegation or an unadorned, the-defendant-unlawfully-harmed-me accusation"). To the contrary, plaintiff appears to be attempting to hold Sheriff McDonnell liable in his individual capacity based on his role as the supervisor of the Los Angeles County Sheriff's Department. Supervisory personnel, however, are not liable under § 1983 on a theory of respondeat superior. See, e.g., Iqbal, 556 U.S. at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior"); Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). In his SAC, plaintiff fails to allege any facts showing that Sheriff McDonnell set "in motion a series of acts by others," or "knowingly refus[ed] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional

injury." Starr, 652 F.3d at 1207-08.

Accordingly, the meager factual allegations in plaintiff's SAC concerning Sheriff McDonnell's actions, or participation in the actions of others in assigning plaintiff to a general population cell, fall short of raising "more than a sheer possibility" that Sheriff McDonnell caused pl aintiff's constitutiona l deprivation, and plaintiff's allegations therefore are insuffi cient to survive a motion to dismiss. Iqbal, 556 U.S. at 678.

C. Further Leave to Amend Would be Futile Plaintiff has been apprised of the deficiencies in his pleadings and has been

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provided with multiple opportunities to amend his pleading to correct those deficiencies. Plaintiff's SAC and his O pposition fail to set forth any additional factual allegations raising more than a sheer possibility that Sheriff McDonnell caused plaintiff to suffer a constitutional violation. Accordingly, it has become clear that plaintiff will not be able to cure the deficiencies in his claims if provided further opportunities to amend. See, e.g., Gonzalez v. Planned Parenthood of L.A., 759 F.3d 1112, 1116 (9th Cir. 2014) (explaining that a "district court's discretion in denying amendment is particularly broad when it has previously given leave to amend" (internal quotation marks omitted)).

It is therefore recommended that this action be dismissed without further leave to amend and with prejudice for failure to state a claim. IV. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; (2) granting defendant's Motion to Dismiss (ECF No. 31); (3) dismissing plaintiff's Second Amended Complaint without further leave to amend and with prejudice for failure to state a claim; and (4) directing that judgment be entered dismissing this action.

DATED: 11/25/2020 _____ ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE