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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 12-5168-JGB (SSx) Date: March 18, 2013

Title: JAMES E. ENSTROM *-v-* REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.

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PRESENT: HONORABLE JESUS G. BERNAL, U.S. DISTRICT JUDGE

Maynor Galvez	Debbie Gale
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANTS:
David Austin French	Alan R. Zuckerman

PROCEEDINGS: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (DOC. NO. 30)

Before the Court is a Motion to Dismiss Portions of Plaintiff's Second Amended Complaint ("MTD") filed by Defendants Mark Yudof, Gene Block, Thomas Rice, Carole Goldberg, Linda Rosenstock, Hilary Godwin, Richard Jackson, and Barbara Housel (collectively "Defendants"). (Doc. No. 30.) After reviewing all papers filed in support of and in opposition to the MTD and the arguments presented at the March 18, 2013 hearing, the Court GRANTS IN PART and DENIES IN PART the Motion to Dismiss WITH LIMITED LEAVE TO AMEND.

I. BACKGROUND

A. Procedural History

Plaintiff James E. Enstrom filed his initial Complaint on June 13, 2012 against Defendants plus the Regents of the University of California. (Doc. No. 1.) On August 16, 2012, Plaintiff filed his Amended Verified Complaint on August 16, 2012 dismissing the Regents and keeping the remaining Defendants. (Doc. No. 19.)

Defendants filed their first Motion to Dismiss on September 5, 2012. (Doc. No. 22.) On November 27, 2012, the Court (Otero, J.) issued an order granting in part and denying in part Defendants' motion. (Order, Doc. No. 28.) In relevant part, the Court dismissed the Amended Complaint with leave to amend on the grounds that (a) Plaintiff failed to plead facts tying specific Defendants to all three of Plaintiff's causes of action, (b) Plaintiff's second cause of action for violation of his Fourteenth Amendment right to due process failed to state what due process rights were infringed or how they were violated, and (c) Plaintiff's third cause of action for breach of fiduciary duty failed to plead facts tying specific Defendants to Plaintiff's claim such that no fiduciary relationship was properly alleged. (Order at 5-6, 11-12.)

On December 14, 2012, Plaintiff filed his Second Amended Complaint alleging three causes of action for: (1) First Amendment retaliation under 42 U.S.C. § 1983, (2) violation of Plaintiff's Fourteenth Amendment Right to Due Process under 42 U.S.C. § 1983, and (3) breach of fiduciary duty. (SAC, Doc. No. 29, ¶¶ 114 -136.) Defendants filed the MTD on January 4, 2013. (MTD, Doc. No. 30.) Plaintiff opposed on February 25, 2013. (Opp'n, Doc. No. 35.) Defendants replied on March 1, 2013. (Reply, Doc. No. 36.)

B. Factual History

In his Second Amended Complaint, Plaintiff alleges the following facts. Plaintiff was a research faculty member in the University of California, Los Angeles ("UCLA") School of Public Health ("SPH") from July 1976 until November 2011. (SAC, ¶ 2.) Plaintiff has a Ph.D. and a Masters of Public Health and Postdoctoral Certification in Epidemiology. (SAC, ¶ 16.) Defendants hold various positions at

UCLA as faculty or administrative officers. (SAC, ¶¶ 8-15.)

Plaintiff was hired into the Department of Environmental Health Sciences ("EHS") at UCLA in July 2004. (SAC, ¶ 19.) His work there largely consisted of research into the effects of air pollution on human mortality. Specifically, at the time of his 2004 appointment to EHS, Plaintiff was conducting a study examining the relationship between fine particulate matter ("PM2.5") and human mortality in California. (SAC, ¶ 20.) Plaintiff published the findings of this research in December 2005 indicating that there was no relationship between PM2.5 and mortality in California. (SAC, ¶ 21.) Plaintiff alleges that this conclusion "represents a minority viewpoint at UCLA and contradicts the opinions of several senior EHS faculty members," including EHS Department Chair Richard Jackson ("Jackson"), a named Defendant in this case, and EHS Professor John Froines ("Froines") – both of whom believe that PM2.5 results in increased mortality risk. (SAC, ¶ 23.)

In June 2008, the California Senate Rules Committee held a hearing in which UCLA Law Professor Mary D. Nichols ("Nichols") was confirmed as the Chair of the California Air Resources Board ("CARB"). (SAC, ¶ 24.) Nichols' appointment was supported by Froines, who wrote a letter of recommendation in support of Nichols and expressed his support of new regulations on diesel emissions. (SAC, ¶¶ 24-25.) Plaintiff testified at Nichols' confirmation hearing, stating that there was significant evidence directly contrary to that presented by Froines. (SAC, ¶ 26.) Plaintiff also stated that he was concerned about the appointment process of the Scientific Review Panel on Toxic Air Contaminants ("SRP") because some members of the SRP board, including Froines, had served well beyond the terms of their initial appointments. (SAC, ¶ 26.)

In December 2008, Plaintiff continued to advocate against what he viewed as the "scientifically unsound, though ideologically orthodox, view" that PM2.5 and diesel particulate matter posed significant dangers to human health. (SAC, ¶ 27.) On December 4, 2008, five EHS professors, including Defendants Jackson and Linda Rosenstock ("Rosenstock") submitted public comments in support of proposed CARB regulations designed to curb PM2.5 and diesel particulate matter emissions. (SAC, ¶ 27.) On December 10, 2008, Plaintiff submitted his own public comments "challenging CARB diesel science and CARB regulations." (SAC, ¶ 28.) In addition,

Plaintiff drew further attention to the purportedly unlawful tenure of several SRP board members, including Froines. (SAC, ¶ 28.) Plaintiff also exposed the allegedly fraudulent credentials of CARB scientist Hien T. Tran ("Tran"), who had authored a report positing a causal relationship between PM2.5 and premature death in California. (SAC, ¶ 29.) Plaintiff's advocacy resulted in Pacific Legal Foundation filing a lawsuit in June 2009 based on SRP's failure to follow its legally specified appointment process (SAC, ¶ 32), which in turn resulted in the suspension and demotion of Tran and the replacement of five SRP members, including Froines. (SAC, ¶ 34.) On August 1, 2009, Plaintiff gave a presentation to the California Dump Truck Owners Association in which Plaintiff continued to criticize CARB diesel science and the SRP appointment process. (SAC, ¶ 35.) In November 2009, Plaintiff met with Defendant Mark Yudof ("Yudof") and other University of California officials concerning the CARB PM2.5 and diesel emissions regulations, "violations of UC Standards of Ethical Conduct, and the UC President's failure to make annual SRP nominations in accordance with" applicable California law. (SAC, ¶ 40.)

On November 3, 2009, Plaintiff received written notice from Defendant, EHS Administrator Barbara Housel (“Housel”) that his research appointment would be reviewed by the EHS faculty, and that he was required to submit a complete dossier for this purpose. (SAC, ¶ 36.) Plaintiff had never been required to submit such a dossier in connection with his reappointment. (SAC, ¶ 36.) Plaintiff's reappointment had also never before been subject to a vote by the entire EHS departmental faculty during his time at UCLA. (SAC, ¶ 37.) Defendant Jackson allegedly admitted that such a review was "unusual" and that the EHS faculty "hadn't [conducted a similar review] for another researcher." (SAC, ¶ 39.)

Furthermore, Plaintiff learned in December 2009 that there were irregularities in his university funding. (SAC, ¶ 41.) Specifically, Plaintiff learned that "during part of 2008 and through 2009, and without his knowledge or permission, his salary had been charged to three of his unrestricted funds . . . instead of Fund 59605, which had been the only source designated by [Plaintiff] for use in payment of his salary during his entire tenure in EHS" since July 2004. (SAC, ¶ 41.) Plaintiff alleges that his funds consisted of awards, grants, and private funding that were not contingent on his employment at UCLA and therefore were his property. (SAC, ¶ 42.) Plaintiff describes that his funding is managed by UCLA pursuant in part to Policy 910 which

states that "UCLA agrees to manage each Sponsored Project in compliance with various fiscal and administrative regulations." (SAC, ¶¶ 43-45.) Plaintiff alleges that Defendants Housel and Jackson shared responsibility for managing his funds and authorized charges in direct contravention of Plaintiff's agreement with UCLA. (SAC, ¶¶ 46-48.)

In January 2010, Plaintiff was notified that Fund 59605 had been overdrawn in April 2008 and closed in May 2009. (SAC, ¶ 49.) According to the SAC, these notices were untimely, in violation of UCLA Policy 910. (SAC, ¶ 52.) Plaintiff also learned that Fund 59605 was charged the higher On-Campus Indirect Cost Rate rather than the lower Off-Campus Rate despite the fact that Plaintiff had never maintained an office on campus. (SAC, ¶¶ 56, 60.) This resulted in UCLA overcharging Fund 59605 by approximately $100,000. (SAC, ¶ 63.) These irregularities forced Plaintiff to work without compensation for a significant period of time. (SAC, ¶ 51.)

After several failed attempts, Plaintiff met with Defendant Jackson on February 5, 2010, to discuss "[Plaintiff]'s long history in the SPH, the ongoing EHS faculty review of his appointment, the accounting irregularities [Plaintiff] had encountered regarding his funds, his research on PM2.5 and mortality in California, his concerns about the 26-year-long service of Professor Froines on the SRP, and [Plaintiff]'s meeting on November 12, 2009 with Defendant UC President Yudof and other top UC officials." (SAC, ¶ 54.) Jackson "became visibly upset" during this meeting. (SAC, ¶ 54.) Via email correspondence subsequent to the meeting, Plaintiff informed Defendants Jackson and Housel of the irregularities in his funding accounts, requested the identity of the person who authorized the charging of his salary to Plaintiff's unrestricted funds, and asked for a "full accounting of all of [Plaintiff's] funds since the year 2007." (SAC, ¶ 55, Exh. 6.) Plaintiff made several other requests for an accounting to Defendants Block, Goldberg, Rice, Rosenstock, and Godwin. (SAC, ¶ 69.) Plaintiff alleges UCLA never provided Plaintiff with such an accounting. (SAC, ¶ 70.) Instead, UCLA denied Plaintiff's requests for reimbursement and found that Plaintiff was responsible for raising significant fiscal issues with University officials during the active years of funding from 2003 to 2007. (SAC, Exh. 11.)

On February 8, 2010, Defendant Jackson sent Plaintiff UCLA's policy governing layoffs of academic appointees due to a depletion of his grant funding. (SAC, ¶ 64.) Plaintiff received his first official notice of termination on February 10, 2010 from "Defendant Jackson, with the knowledge and cooperation of Defendants Godwin[, former Associate Dean for Academic Programs in the SPH and current EHS Professor,] and Housel," stating that Plaintiff would be laid off indefinitely due to lack of funds effective April 21, 2010. (SAC, ¶ 65.) Plaintiff challenged this rationale as false and notified Jackson that his calculations indicated he should have sufficient funds. (SAC, ¶ 66.)

On March 8, 2010, Jackson openly criticized Plaintiff's research, circulating an email to other EHS faculty and commenting on a presentation Plaintiff made regarding PM2.5 and mortality rates. (SAC, ¶ 76.) Jackson also omitted Plaintiff from EHS's 2009-2010 Self-Review Report, which discussed and summarized the department's research and activities. (SAC, ¶ 77.)

On May 5, 2010, Jackson, with the knowledge and cooperation of Housel and Godwin, notified Plaintiff that the entire faculty of the EHS Department, including Froines, would be holding a confidential vote as to whether Plaintiff would be allowed to keep his position. (SAC, ¶ 74.) Jackson did not allow Plaintiff the opportunity to present his research and full dossier to the EHS faculty prior to this confidential vote. (SAC, ¶ 75.) On June 9, 2010, following this vote, Plaintiff received a second notice that his position was being terminated. (SAC, ¶ 78.) The rationale provided by Jackson, with the cooperation of Godwin and Housel, was that "programmatically, [Plaintiff's] research is not aligned with the academic mission of [EHS] and [Plaintiff's] research output and ability to secure continued funding does not meet the minimum requirements of [EHS]." (SAC, ¶ 78, Exh. 15.) Defendant Godwin, with the knowledge and cooperation of Defendants Rice, Rosenstock, and Housel, reiterated this rationale in a June 30, 2010 letter extending Plaintiff's appointment until August 30, 2010. (SAC, ¶¶ 79-80.)

Plaintiff appealed his termination numerous times over the course of the next year and also filed a whistleblower retaliation complaint, culminating in an adjudicatory grievance proceeding. (SAC, ¶¶ 81-107.) Plaintiff's termination was upheld. (SAC, ¶ 102.) Throughout this process, Plaintiff, and Plaintiff's

representatives, sent letters to several UCLA officials challenging his termination, including Defendants Rice (former Vice Chancellor of Academic Personnel), Godwin, Block (Chancellor of UCLA), Goldberg (current Vice Chancellor of Academic Personnel), and Yudof (President of UCLA). (SAC, ¶¶ 81, 82, 84, 85, 103, 106, 107.) Pending the resolution of the campus appeals proceedings, Plaintiff's appointment was extended by letters of Defendants Godwin and Goldberg through June 30, 2012 without pay. (SAC, ¶¶ 98, 105.)

C. Plaintiff's SAC Claims

1. First Amendment Retaliation

Based on the facts above, Plaintiff alleges that Defendants have retaliated against Plaintiff for exercising his clearly established right to free speech on matters of public concern, specifically his speech regarding public mortality and PM2.5 and the unlawful and unethical practices of the CARB and SRP. (SAC, ¶¶ 116, 118.) Prompted by their own personal motivations, Defendants retaliated by refusing to renew Plaintiff's appointment due to his scientific views, and used shifting justifications as a pretext to conceal improper motives. (SAC, ¶ 119.)

2. Fourteenth Amendment Right to Due Process

Plaintiff alleges he maintains a property interest in the awards, grants, and funding which he brought to UCLA, and for which UCLA and Defendants held in trust for him. (SAC, ¶ 123.) Based on UCLA policy and practice, Plaintiff contends he was assured and expected that he would be given timely notice of the management and accounting of his funds. (SAC, ¶ 124.) By failing to notify Plaintiff that his fund was depleted and refusing him an accounting, his due process right to an accounting was violated. (SAC, ¶ 125.)

3. Breach of Fiduciary Duty

Again, Plaintiff reiterates his property interest in the fund he brought to UCLA. (SAC, ¶ 131.) Plaintiff contends Defendants Rosenstock, Jackson, and Housel, maintained control of and responsibility for overseeing the management of Plaintiff's

funds, creating a duty of care to properly manage Plaintiff's funding. (SAC, ¶¶ 132-33.) He alleges the facts described above constitute a breach of this duty. (SAC, ¶ 134.)

II. LEGAL STANDARD

A. Dismissal Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.") (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint – as well as any reasonable inferences to be drawn from them – as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely

consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must 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).

Although the scope of review is limited to the contents of the complaint, the court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

III. DISCUSSION

A. Failure to Allege Specific Facts as to Each Defendant for Claims One and Two

Defendants move to dismiss all three claims against Defendants Yudof, Block, Rice, Goldberg, and Rosenstock on the grounds that Plaintiff has failed to plead sufficient facts tying each Defendant to each of the specific claims in the SAC, as required by the Court's November 27, 2012 Order. (MTD at 3.) Defendants Jackson and Godwin do not challenge the SAC for failure to plead specific facts as to them. (MTD at 4.)

Plaintiff's first and second claims come under 42 U.S.C. § 1983. To state a claim under § 1983, Plaintiff must demonstrate that each individually named defendant personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Section 1983 imposes liability on a defendant only if he or she personally participated in or directed a violation. James v. Rowlands, 606 F.3d 646, 653 n.3 (9th Cir. 2010).

The Supreme Court has emphasized that the term "supervisory liability," loosely and commonly used by both courts and litigants alike, is a misnomer. Iqbal, 556 U.S. at 677. Plaintiff must demonstrate that each defendant, through his or her own individual actions, violated Plaintiff's constitutional rights. Id. at 675–78. Defendants can not be held liable under § 1983 solely because of their supervisory capacity. "There is no respondeat superior liability under [§] 1983." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.1989).

Nevertheless, in rare instances, supervisors can be held liable under § 1983 for the actions of their subordinates "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) cert. denied, 132 S. Ct. 2101 (2012). According to the Ninth Circuit, the requisite causal connection may be established by (1) setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) culpable action or inaction in training, supervision, or control of subordinates; (3) acquiescence in the constitutional deprivation by subordinates; or (4) conduct that shows a reckless or callous indifference to the rights of others. See Starr, 652 F.3d at 1207.

The Court will examine Plaintiff's allegations as to each Defendant to determine whether he has set forth sufficient facts to state claims for First Amendment retaliation and violation of due process under the standards described herein.

1. Mark Yudof, President of University of California

Plaintiff makes very few factual allegations against Defendant Yudof. First, Plaintiff alleges that he met with Yudof and other UC officials on November 12, 2009 to "discuss matters of public concern" including the CARB regulations, violations of UC ethical standards, and Yudof's failure to make annual SRP nominations in accordance with law. (SAC, ¶ 40.) Plaintiff also alleges that on May 21, 2012 he sent Yudof a letter informing him of his termination, appeals, and constitutional violations. (SAC, ¶ 107.)

As to his claim for First Amendment retaliation, Plaintiff contends generally that Yudof, as an executive of UCLA regarding internal administration and faculty grievances, was notified of the action of other Defendants and endorsed and approved these actions by permitting the termination proceedings to continue. (SAC, ¶ 117.) As to his second claim for due process violations, Plaintiff alleges that by failing to address the wrongful depletion of his funds during his appeal process, Yudof denied him a fair opportunity to be heard. (SAC, ¶ 126.)

The Court finds these allegations are insufficient to state a claim against Yudof for violations of Plaintiff's First Amendment rights. Plaintiff does not allege Yudof had any role in Plaintiff's termination at the time it occurred. Subsequent notice via a letter from Plaintiff is not sufficient to establish Yudof's knowledge or personal involvement in Plaintiff's discharge. In an effort to establish supervisory liability, Plaintiff generally contends that Yudof was notified of the actions of other Defendants and endorsed them by permitting the termination to continue. (SAC, ¶ 117.) Other than the letter Plaintiff sent almost two years after Plaintiff received his termination notice, there are no allegations to support Yudof's notification of or acquiescence in the retaliatory acts by his subordinates. Plaintiff does not allege that at his November 12, 2009 meeting with Yudof anyone present discussed plans for Plaintiff's termination or Yudof's position on Plaintiff's speech. See OSU Student Alliance v. Ray, 699 F.3d 1053, 1075 (9th Cir. 2012) ("[W]e conclude that allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments."). Plaintiff must plead specific allegations that Yudof was on notice prior to or during the retaliatory actions and acquiesced to the other Defendants' unconstitutional actions. See Jacobson v. Schwarzenegger, 650 F. Supp. 2d 1032, 1061 (C.D. Cal. 2009) ("Mere evidence that defendants knew of plaintiff's protected speech is not sufficient to show retaliatory motivation."); Cf. OSU Student Alliance, 699 F.3d at 1075 (finding that the President of a university and the Vice President of Finance were supervisors responsible for a First Amendment violation where they were in frequent communication with the university official who made the violative decision and knew about the decision at the time it was made); See also Burch v. Regents of Univ. of California, 433 F. Supp. 2d 1110, 1133 (E.D. Cal. 2006) ("It is simply unreasonable to expect that a person who oversees an organization that

employs over 27,000 people would have any involvement in employment decisions for positions that are several levels below him . . . .").

Similarly, Plaintiff makes no factual allegations as to Yudof's role in his due process right to an accounting. A conclusory allegation states only that Yudof failed to address the wrongful depletion of his funds during his appeals process.[1] However, other than the letter described above, Plaintiff does not introduce facts to show Yudof was involved in the appeals process, or was involved in the management or distribution of Plaintiff's funds. In order to state a claim against Yudof for violating Plaintiff's due process rights, Plaintiff must tie Yudof to the violation itself, such that the denial of the accounting was his decision or was pursuant to a policy he created, promulgated, implemented or possessed responsibility for. See OSU Student Alliance, 699 F.3d at 1075-76 (finding that a due process violation can be alleged if it was the result of the supervisor's "own individual actions" or the "supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights"). The SAC contains no such allegations.

Accordingly, the first and second claims for violations of Section 1983 against Yudof are DISMISSED WITH LEAVE TO AMEND.

2. Gene Block, Chancellor of UCLA

[1] To the extent this allegation claims that Yudof should have interceded into the appeals process in order to grant Plaintiff's demands, Plaintiff's claim cannot stand. The University of California hearing and appeals process used by Plaintiff to challenge his termination is an administrative proceeding bound by law and delegated quasi-judicial power by the Constitution. See Einheber v. Regents of Univ. of California, 266 F. App'x 596, 599 (9th Cir. 2008) ("[T]he University [of California] is a statewide administrative agency possessing adjudicatory powers derived from the Constitution as to the problems and purposes of its personnel."). Thus, since Yudof was not an administrative officer of the proceedings, he could not have interceded in its outcome.

The allegations against Block are similar to those against Yudof. Plaintiff alleges that on July 5, 2011 he appealed the decision of the hearing officer to Block and Goldberg, and on August 30, 2011 Goldberg "issued a decision on behalf of Defendant Block" upholding his termination. (SAC, ¶¶ 103-04.) The Court finds that this allegation is insufficient to allege Block's actual involvement in Plaintiff's termination or decision to uphold his termination. The allegation that Goldberg's letter was issued on behalf of Block is vague and does not provide any specific facts of Block's actual knowledge, involvement, or acquiescence to upholding Plaintiff's termination. Plaintiff also relies on allegations that the Foundation for Individual Rights in Education sent Block a letter on August 26, 2010 "outlining Dr. Enstrom's plight, fully informing Defendant Block of the timeline of actions taken by Defendants Rice, Rosenstock, Godwin, and Jackson against Dr. Enstrom, and the failure of the University and Defendants to properly address Dr. Enstrom's questions and concerns." (SAC, ¶ 85.) Even assuming that Block received and read the alleged letter, Plaintiff has not provided allegations showing anything more than mere knowledge of other Defendants' purportedly retaliatory actions. Thus, his claim for First Amendment retaliation fails against Block. See Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that a supervisor may be held liable under § 1983 only if he or she was personally involved in the deprivation or if the supervisor's wrongful conduct was causally connected to the violation).

Second, as to Plaintiff's due process right to an accounting, Plaintiff again generally alleges that by refusing to consider his claims of wrongful depletion of his funds during his appeals process, Block denied him a fair opportunity to be heard. (SAC, ¶ 126.) The only relevant factual allegation is that Plaintiff sent a request for an accounting of his research funds to Block on one of seven potential dates listed in the SAC. (SAC, ¶ 69.) For the reasons discussed above, these allegations are insufficient. Plaintiff does not allege Block's actions were pursuant to any policy to deny him an accounting or that Block himself denied Plaintiff this right. For example, under Plaintiff's theory, if a postal delivery worker is fired and sends a letter to the Postmaster General demanding a hearing and he receives no response, the Postmaster is personally responsible for Plaintiff's due process violation. This cannot be the case; more than an unanswered letter must be alleged to establish supervisory liability for Plaintiff's accounting claim. See OSU Student Alliance, 699 F.3d at 1077 (finding it implausible to allege that "because some low-level

government officers engaged in purposeful discrimination, a cabinet-level official must also have engaged in purposeful discrimination").

Finally, Plaintiff alleges that Block received a series of letters from the President of Delta Construction Company in 2009 alleging unethical conduct of UCLA faculty members Froines and Nichols. (SAC, ¶ 31.) Since these letters are not from Plaintiff, and Plaintiff does not allege that they directly discuss Plaintiff's speech or funds, they have no bearing on Plaintiff's allegations as to First Amendment retaliation or a due process right to an accounting.

Accordingly, the first and second claims for violations of Section 1983 against Yudof are DISMISSED WITH LEAVE TO AMEND.

3. Thomas Rice, Former UCLA Vice Chancellor for Academic Personnel

The allegations against Rice relating to Plaintiff's First Amendment retaliation claim present a much closer case. Plaintiff alleges that on July 14, 2010, he sent a letter to Rice appealing UCLA's decision not to reappoint him. (SAC, Exh. 17.) On August 19, 2010, Rice responded to Plaintiff's inquires and assured Plaintiff that he would "have a full opportunity to address any complaints in the [adjudicatory] process." (SAC, ¶ 84.) Moreover, Plaintiff alleges that Defendant Godwin's June 30, 2010 and July 29, 2010 letters affirming the decision to not reappoint him and extending his appointment were sent with the knowledge and cooperation of Rice. (SAC, ¶¶ 79, 82.) Rice is copied on both letters from Godwin to Plaintiff. (SAC, Exhs. 16, 18.) Rice is also copied on an April 15, 2011 letter from UCLA's Academic Freedom Committee to Block expressing concern over SPH's decision not to reappoint Plaintiff. (SAC, Exh. 19.) Finally, Rice's role as Vice Chancellor of Academic Personnel means he was directly responsible for academic appointments and retention as well as faculty grievance proceedings when Plaintiff was terminated; thus, it is reasonable to infer he was involved in the decision to dismiss Plaintiff. See OSU Student Alliance, 699 F.3d at 1077 (finding it plausible that a "director of a university facilities department had a hand in the unconstitutional manner in which his employees enforced a department-wide policy"). Drawing all reasonable inferences in favor of Plaintiff, the Court finds these facts, taken together,

are sufficient to demonstrate that Rice had knowledge of and acquiesced to Plaintiff's dismissal. See Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir.1991) (holding that a supervisor may be liable for the constitutional violation of a subordinate due to "acquiescence in the constitutional deprivation"); see also Eng v. County of Los Angeles, 737 F. Supp. 2d 1078, 1101 (C.D. Cal. 2010) (finding it unreasonable to conclude that the supervisor was "unaware of the numerous allegedly unconstitutional suspensions and investigations undertaken by his subordinates against [the plaintiff] such that his acquiescence in their continuation would absolve him of section 1983 liability").

The same cannot be said for Plaintiff's allegations regarding his due process claim for accounting. The identical allegation that Plaintiff sent a letter to Rice requesting an accounting on one of seven dates is insufficient for the reasons discussed above. (SAC, ¶ 69.) Moreover, nowhere in Plaintiff's July 14, 2010 letter to Rice does he mention the alleged mishandling of funds or failure to provide an accounting. In addition, Rice's role as Vice Chancellor for Academic Personnel lends no support for the inference that he was involved in the management or wrongful depletion of Plaintiff's funds.

Thus, the Court finds that Plaintiff's claim for First Amendment retaliation as to Defendant Rice sufficiently pleads a plausible claim for relief. However, Plaintiff's claim that Rice violated Plaintiff's due process right to an accounting is DISMISSED WITH LEAVE TO AMEND.

4. Carole Goldberg, UCLA Vice Chancellor for Academic Personnel

Plaintiff's allegations against Defendant Goldberg are also fairly sparse. Goldberg did not assume her position as Vice Chancellor until July 1, 2011, a year and a half after Plaintiff received his first termination notice. (SAC, ¶ 11.) However, Plaintiff does allege that he appealed his termination decision to Goldberg on July 5, 2011, and she issued a decision on August 30, 2011. At this early stage of litigation, these allegations are sufficient to state a claim for retaliation. Viewed in the light most favorable to Plaintiff, Goldberg's denial of Plaintiff's appeal constitutes notice and acquiescence to Plaintiff's alleged retaliatory termination. See Gilbrook v. City of Westminster, 177 F.3d 839, 855 (9th Cir. 1999) (finding that "the final decision-

making authority in a multi-tiered termination process" could be found responsible for the retaliatory actions imposed on the plaintiff).

Other than an alleged letter to Goldberg on one of seven dates regarding his request for an accounting of his funds, Plaintiff makes no allegations regarding Goldberg's participation in his denial of an accounting. The Court finds that Plaintiff has failed to plead facts sufficient to state a claim against Goldberg for violating his due process right to an accounting.

The Court finds that Plaintiff has sufficiently alleged a claim of retaliation against Goldberg, but has not sufficiently alleged facts to plausibly state a due process claim for an accounting. Plaintiff's second claim alleging a due process violation against Goldberg is DISMISSED WITH LEAVE TO AMEND.

5. Linda Rosenstock, Dean of the UCLA School of Public Health

The allegations against Rosenstock fail to plead a claim for retaliation. Plaintiff alleges Rosenstock holds a contrary view to Plaintiff on the role of PM2.5 in increased mortality risks, and Rosenstock expressed that view in public comments in December 2008. (SAC, ¶ 27.) This allegation fails to show that Rosenstock took any retaliatory action against Plaintiff pursuant to their differing views. Plaintiff also alleges that Godwin's June 30, 2010 and July 29, 2010 letters reaffirming his termination were issued with the knowledge and cooperation of Rosenstock, who was copied on the letters. (SAC, ¶¶ 79, 82, Exhs. 16, 18.) In the context of the allegations against Rice, these facts contribute to the plausibility of Plaintiff's retaliation claims. As against Rosenstock however they hold substantially less weight. As Dean of the School of Public Health, Rosenstock was not in a position to make retention decisions regarding Plaintiff, who was, at the time of his termination, a professor in the Department of Environmental Health Studies. Thus, Plaintiff's conclusory allegation that Rosenstock "cooperated" in Plaintiff's dismissal is not sufficient to show she was in a position to retaliate against Plaintiff.

Just as with Goldberg, Plaintiff puts forth no factual allegations regarding Rosenstock's refusal to request an accounting. It is not plausibly alleged on the face of the SAC that Rosenstock, as the Dean of the School of Public Health, could have

been implicated in Plaintiff's due process claim for an accounting of his University funds.

The Court DISMISSES WITH LEAVE TO AMEND Plaintiff's claims for retaliation and an accounting as to Defendant Rosenstock.

6. Barbara Housel, UCLA Administrator in Department of Environmental Health Studies

Plaintiff fails to allege sufficient facts to support a First Amendment retaliation claim against Defendant Housel. The only substantive allegation in the SAC which implicates Housel in alleged retaliation is her request for Plaintiff's dossier to be reviewed by the EHS faculty at the next staff meeting. (SAC, ¶ 36.) However, Housel's request for this information does not implicate her in Plaintiff's termination or demonstrate any retaliatory motive. Viewing all potential inferences in favor of Plaintiff, Housel's request for information eventually led to an unprecedented confidential vote by the faculty on Plaintiff's appointment. However, Plaintiff does not allege, and the Court cannot assume, that Housel initiated, participated in, or was any way implicated in the vote. Moreover, since Housel's professional duties are limited to oversight of funds, the Court cannot reasonably infer that her inclusion on Defendant's letters of termination created any supervisory liability or implicated Housel as a decision-maker in Plaintiff's termination. Construed in the light most favorable to Plaintiff, the Court finds that the allegations in the SAC only reasonably allow an inference that Housel was a messenger of other Defendant's purportedly retaliatory acts, not that she engaged in or was causally connected to the retaliation herself.

Plaintiff alleges substantial facts as to Housel's participation in Plaintiff's alleged violation of his due process right to an accounting. As the administrator in charge of EHS's financial reporting and Plaintiff's monthly time sheets and monthly status reports, Housel participated in the management of Plaintiff's funds. (SAC, ¶¶ 15, 46.) Moreover, the SAC includes allegations that Housel authorized incorrect charges to Plaintiff's funds and communicated with other employees regarding the depletion of these funds. (SAC, ¶ 48, Exh. 20.) Finally, Plaintiff informed Housel of

his identified irregularities and requested an accounting. These allegations are sufficient to state a claim for a due process violation.

The Court finds that the allegations of retaliation against Housel must be DISMISSED WITH LEAVE TO AMEND, but that the second claim for due process of law is sufficiently alleged.

B. Constitutional Right to an Accounting

Defendants argue that Plaintiff has not established that he has a constitutional right to an accounting of his funds. (MTD at 9.) Plaintiff's second claim for relief states that he has a property interest in the awards, grants and funding that he brought to UCLA and for which Defendants held in trust for him. Plaintiff alleges he is entitled to procedural due process regarding his funds pursuant to UCLA Policy 910 which he contends ensured he would be given timely notice and an accounting. The failure to comply with these policies, Plaintiff alleges, violated his due process right to an accounting.

To state a claim under the Due Process Clause, a plaintiff must first establish that he possessed a "property interest" that is deserving of constitutional protection. See Gilbert v. Homar, 520 U.S. 924 (1997). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577(1972)

In his opposition, Plaintiff states that because he alleges in the SAC that he has a property interest in the "awards, grants, and private funding that he brought to UCLA," the Court must accept these facts as true. (Opp'n at 8.) Defendants ask the Court to take judicial notice of UC policy which they argue establishes that funding awards are made to the University, not Plaintiff, and therefore Plaintiff does not have a property interest in them.[2] (MTD at 9-10.) Although these documents have some

[2] The Court may take judicial notice of official University policies on the basis (continued...)

tendency to show that Plaintiff may not have a property interest in his "awards, grants, and private funding," at this stage, the Court cannot find as a matter of law that no property interest exists. First, it is not clear that the funds Plaintiff identifies in his SAC are subject to the policy provided by Defendants, as there appear to be multiple methods and types of funding. (See Decl. of Keri Lynn Bush, Doc. No. 30-1, Exh. A.) UC Policy provided states only that "[a]wards must be made to The Regents of the University of California." (Id. at 8.) However, on the following page, the policy states that exceptions to this requirement may be made on a case by case basis. (Id. at 9.) Defendants do not show that Plaintiff's funds were not excepted or that they were "awards" subject to the policy provided. Moreover, just because "funding awards are made to the University" does not necessarily mean that Plaintiff, as Principal Investigator, does not have a property interest in the award. Based on the limited judicially noticeable evidence before it on a motion to dismiss, the Court does not find that Plaintiff cannot demonstrate he has a property in the awards and funds held by the University.[3]

The Court finds that Plaintiff has sufficiently alleged facts to state a claim for a violation of his due process right to an accounting of the awards and funds held by UCLA. In accordance with the Court's November 27, 2012 Order, Plaintiff "clearly

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[2](...continued)
that it is a record of an administrative body. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir.1986) (holding that courts may also take judicial notice of the "records and reports of administrative bodies"); Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997) (holding that The Regents is an "arm of the state"); Ishimatsu v. Regents of the Univ. of Cal., 266 Cal.App.2d 854, 864 (1968) (holding that "[T]he University is a statewide administrative agency").

[3] To the extent Defendants argue that Plaintiff does not have a property right to an accounting (Reply at 6), this argument is contradicted by the allegations in Plaintiff's SAC. Plaintiff does not allege he has a property interest in an accounting; instead, he contends he has a property interest in the funds and is entitled to an accounting as a procedure necessary to ensure due process of law. (SAC, ¶¶ 123-25.) The Court need not address Defendants' argument which misunderstands the allegations in the SAC.

state[s] what due process rights he believes are being infringed and how they are allegedly being violated." (Order at 12.) Whether Plaintiff has a protected property interest in those funds and is entitled to an accounting under due process of law are questions the Court cannot decide pursuant to Defendants' instant motion. Moreover, as discussed above, Plaintiff only alleges sufficient facts to support this claim against Defendant Housel and those Defendants who did not challenge the particularity of the SAC, namely Defendants Jackson and Godwin. As to the remaining Defendants, Plaintiff fails to state a violation of his due process right to an accounting for the reasons discussed above.

C. Breach of Fiduciary Duty

Defendants argue that none of them were in a fiduciary relationship with Plaintiff. (Reply at 7.) In order to plead a claim for breach of fiduciary duty, the plaintiff must allege (1) the existence of a fiduciary relationship giving rise to a fiduciary duty, (2) breach of that duty, and (3) damage proximately caused by the breach. Pierce v. Lyman, 1 Cal. App.4th 1093, 1101 (1991). Whether a fiduciary relationship exists in any given situation is a question of fact. Michelson v. Hamada, 29 Cal. App. 4th 1566, 1575–1576 (1994). "A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accept or assume to accept the confidence, they cannot act so as to take advantage of the others' interests without their knowledge or consent." Tri–Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 216 Cal. App. 3d 1139, 1150 (1989).

First, the Court finds that Plaintiff has only alleged his third claim for breach of a fiduciary duty against Defendants Rosenstock, Jackson and Housel. These are the only three Defendants that Plaintiff names in his third claim for relief, and any argument by Plaintiff that other Defendants had a fiduciary duty is directly contradicted by the terms of the SAC. Therefore, the Court does not address the existence of a fiduciary relationship between Plaintiff and any other Defendant.

Plaintiff alleges that a fiduciary relationship exists because Plaintiff's funds were held in trust by UCLA and governed by Policy 910, which establishes that management of the funds is a shared responsibility between Plaintiff and

Defendants. (Opp'n at 10.) Viewing the facts in the light most favorable to Plaintiff, the Court finds that he has sufficiently alleged a fiduciary relationship between Plaintiff and Defendants Jackson, Housel, and Rosenstock. Plaintiff alleges that these Defendants shared primary responsibility for the management of contracts, grants, and agreements for sponsored projects in conformance with Policy 910. (SAC, ¶¶ 14-15.) It can reasonably be inferred from Plaintiff's allegations that he placed confidence in the integrity of these three Defendants to oversee his funds in accordance with Policy 910, and that the Defendants voluntarily assumed this responsibility by authorizing charges to and overseeing the management of Plaintiff's funds. (See SAC, ¶ 55.)

Thus, Plaintiff's claim for breach of fiduciary duty is sufficient as to Defendants Jackson, Housel, and Rosenstock. In accordance with the Court's November 27, 2012 Order, Plaintiff has "[pled] facts tying specific named defendants to Plaintiff's claim for breach of fiduciary duty." (Order at 12.)

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion to Dismiss the Second Amended Complaint. Plaintiff has failed to plead sufficient facts tying all Defendants to his first and second claims for First Amendment retaliation and Fourteenth Amendment due process right to an accounting. Plaintiff has sufficiently alleged a property interest in the funds and awards which supported his research and salary and which UCLA held in trust for him. Plaintiff has sufficiently alleged a breach of fiduciary relationship between Plaintiff and Defendant Rosenstock, Housel, and Jackson only. Plaintiff's SAC is DISMISSED WITH LEAVE TO AMEND. Plaintiff shall file a Third Amended Compliant in strict accordance with this Order within 14 days of the date of issuance.

IT IS SO ORDERED.