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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

RAHN G. THOMPSON,

1:07-cv-01299-LJO-GSA-PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT DEFENDANTS’  
MOTION TO DISMISS BE GRANTED IN  
PART  
(Doc. 52.)

v.

STATE OF CALIFORNIA, et al.,

Defendants.

OBJECTIONS, IF ANY, DUE IN THIRTY  
DAYS

**I. BACKGROUND**

Rahn G. Thompson (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on September 5, 2007. (Doc. 1.) This action now proceeds with the Second Amended Complaint filed on November 10, 2009, against defendant Tucker for subjecting Plaintiff to adverse conditions of confinement; against defendants Tucker, Green, Lee, Rincon, Hernandez, Deathridge, and Huckabay for failing to protect Plaintiff; against defendants Tucker, Green, and Huckabay for retaliating against Plaintiff; and against defendants Tucker, Thompson, and Melendez for using excessive force against Plaintiff.<sup>1</sup> (Doc. 25.)

On September 27, 2011, defendants Deathridge, Green, Hernandez, Huckabay, Lee, Melendez, Rincon, Thompson, and Tucker (“Defendants”) filed a motion to dismiss for failure to

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<sup>1</sup>On June 8, 2011, the Court dismissed all other claims and defendants from this action, based on Plaintiff’s failure to state a claim. (Doc. 37.)

1 exhaust administrative remedies under Rule 12(b), and failure to state a claim for retaliation under  
2 Rule 12(b)(6).<sup>2</sup> (Docs. 52-58.) On November 21, 2011, Plaintiff filed an opposition to the motion.<sup>3</sup>  
3 (Doc. 61.) On December 6, 2011, Defendants filed a reply to Plaintiff's opposition and objections  
4 to Plaintiff's evidence. (Docs. 66, 67.) On February 1, 2012, Plaintiff filed an opposition to  
5 Defendants' objections. (Doc. 71.) Defendants' motion to dismiss is now before the Court.

## 6 **II. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

7 Plaintiff is currently a state prisoner at High Desert State Prison in Susanville, California.  
8 The events at issue in the Second Amended Complaint allegedly occurred at Pleasant Valley State  
9 Prison ("PVSP") in Coalinga, California, while Plaintiff was incarcerated there. Plaintiff names as  
10 defendants Sergeant ("Sgt.") N. Green, Sgt. D. Huckabay, RN Ms. Davis, Med Tech Mr. Chapman,  
11 and Correctional Officers ("C/O's") W. Tucker, D. Thompson, J. Melendez, M. Hernandez, M. E.  
12 Rincon, T. Lee, Deathridge, and H. Martinez.<sup>4</sup>

13 Plaintiff alleges as follows in the Second Amended Complaint.

### 14 **Failure to Protect**

15 While Plaintiff was incarcerated at Pelican Bay State Prison, he became aware that he would  
16 be a victim of an attack by another inmate. After an investigation, prison officials determined that  
17 Plaintiff should be removed from the general population and housed in administrative segregation  
18 under safety watch. Plaintiff continued to receive death threats and was placed on single-cell status  
19 under protective custody watch. On November 22, 2005, the Institution Classification Committee  
20 decided that Plaintiff should be transferred to a sensitive needs yard at another prison and should  
21 remain on single-cell status.

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23 <sup>2</sup>It is not clear in the motion to dismiss whether defense counsel ("Counsel") represents defendant  
24 Hernandez; however, Counsel filed a notice of clarification on November 9, 2012, confirming that Counsel is  
25 representing all nine of the defendants, including defendant Hernandez, and that the motion to dismiss was brought  
on behalf of all nine of the defendants. (Doc. 87 at ¶1.)

26 <sup>3</sup>Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on  
27 June 6, 2011, July 10, 2012, and August 23, 2012. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Wyatt v.  
Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003); Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998). (Docs. 35, 75,  
78.)

28 <sup>4</sup>Defendants Davis, Chapman, and Martinez were dismissed from this action by the Court on June 8, 2011,  
based on Plaintiff's failure to state any claims against them upon which relief may be granted. (Doc. 37.)

1 In December 2005, Plaintiff was transferred to PVSP. When it became known that Plaintiff  
2 was at PVSP, he was threatened with attacks. Plaintiff immediately informed C/O Tucker, Sgt.  
3 Green, and Sgt. Huckabay and requested to be placed in protective custody. Plaintiff informed C/O  
4 Tucker, Sgt. Green, and Sgt. Huckabay of the written documentation in Plaintiff's prison records,  
5 to make them aware of Plaintiff's need for safe protective housing. Plaintiff alleges that all of the  
6 named defendants deliberately refused to consider Plaintiff's safety concerns.

7 In January 2006, Plaintiff was assaulted by a Crips gang member as he was exiting the  
8 shower. Plaintiff filed a 602 prison complaint, an investigation was conducted, and the appeals  
9 examiner confirmed that Plaintiff was defending himself. C/O Tucker, Sgt. Green, and Sgt.  
10 Huckabay became very angry about Plaintiff's complaints about his safety and told him he would  
11 get "dealt with." Shortly thereafter, Plaintiff was removed from his single cell and ordered by C/O  
12 Tucker to share a cell with a known Bloods gang member. C/O Tucker ordered Plaintiff to keep his  
13 mouth shut. Plaintiff's records contain documentation that he should not be housed with any Crips  
14 or Bloods gang member, or any Radical Muslim. Defendants C/O Tucker, Sgt. Green, Sgt.  
15 Huckabay, C/O Hernandez, C/O Rincon, C/O Deathridge, and C/O Lee were repeatedly informed  
16 by Plaintiff of his safety issues and concerns, but they all refused to provide Plaintiff with safe  
17 housing. Plaintiff continued to file complaints requesting to be placed in protective custody, but no  
18 one would listen or help him. He was finally removed from the cell, but only for a short period.

19 In October 2006, C/O Tucker ordered Plaintiff to accept a Radical Muslim inmate as a cell  
20 mate. Plaintiff again informed C/O Tucker that he would be in grave danger, begged C/O Tucker  
21 not to force him to be housed with a documented enemy, and repeatedly requested protective  
22 custody. C/O Tucker left and returned with several other officers and loudly ordered Plaintiff to  
23 follow orders. Plaintiff protested, informing C/O Tucker that he had been attacked by two of the  
24 Muslim inmate's associates at Pelican Bay State Prison. C/O Tucker pushed Plaintiff aside and told  
25 the Muslim inmate to enter his cell. Shortly thereafter, when Plaintiff was asleep, his cell mate  
26 assaulted him, resulting in Plaintiff being taken to the prison infirmary.

27 Later in October 2006, Plaintiff was ordered by C/O Lee to move into another building and  
28 share a cell with inmate Miller. Plaintiff emphatically informed C/O Lee that inmate Miller was his

1 enemy, an active Bloods gang member, and that there was documentation in Plaintiff's file showing  
2 he should not be housed with a Bloods gang member. C/O Lee refused to show concern for  
3 Plaintiff's safety and told Plaintiff he would "throw [Plaintiff's] ass in the Hole if [Plaintiff didn't]  
4 get out of his sight." (2d Amd Cmp ¶21.) Plaintiff informed C/O Lee that the inmate who attacked  
5 him a few weeks ago was housed in the other building, and made C/O Lee aware of the  
6 documentation in his file. C/O Lee ignored Plaintiff's concerns. As Plaintiff was moving to the  
7 other building, he was approached outside by inmate Miller who said, "Nigga I don't want you in  
8 my cell." (2d Amd Cmp ¶23.) The two inmates argued and were separated by other inmates before  
9 a fight started. Sgt. Green said they "should've fought and then Thompson's ass would have been  
10 thrown in the Hole." (2d Amd Cmp ¶24.) Plaintiff pleaded with Sgt. Green for his safety, but Sgt.  
11 Green ignored him and ordered him to enter the building.

12 Plaintiff entered the building but refused to enter the cell. He approached the floor officer  
13 C/O Deathridge and told him about the dangerous enemy situation with inmate Miller and the earlier  
14 assault by the Muslim inmate. Plaintiff also told C/O Deathridge about the documentation in his file.  
15 C/O Deathridge made a phone call, and afterward C/O Tucker arrived, moved inmate Miller's  
16 property from the bottom bunk to the top bunk, and ordered Plaintiff to move in. Plaintiff refused  
17 to enter the cell. He approached floor officers C/O Rincon and C/O Hernandez, informed them  
18 about his two enemies in the building, and asked to be housed in another building. C/O Hernandez  
19 pushed Plaintiff into the cell and shut the cell door. Plaintiff continued to complain about his  
20 situation to the defendants. Sgt. Green told him, "Handle it, Thompson." (2d Amd Cmp ¶34.) On  
21 November 14, 2006, inmate Miller attacked Plaintiff, stabbed him twice, cut Plaintiff's neck and eye,  
22 and stabbed him in the left arm.

23 **Adverse Conditions of Confinement and Excessive Force**

24 C/O Tucker knew Plaintiff needed his medically-ordered orthopedic knee brace and cane,  
25 but on October 5, 2006<sup>5</sup> he forcefully took the brace and cane and destroyed the brace. C/O Tucker  
26 then ordered Plaintiff to "get to your building now!" (2d Amd Cmp ¶37.) The building was more  
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28 <sup>5</sup>Although Plaintiff does not give a date for this event in the Second Amended Complaint, he gives the date  
as October 5, 2006 in the original Complaint filed September 5, 2007. Cmp, Doc. 1, Exh. D at 41-42.

1 than two hundred yards away. Plaintiff asked C/O Tucker to give him back the medical devices, but  
2 he refused and told Plaintiff that if he didn't get going, he would be thrown in the Hole. Plaintiff  
3 obeyed and limped the long distance. Upon entering the building, Plaintiff's knee gave out and he  
4 fell to the floor. Plaintiff cried out in pain and begged for help. C/O Tucker grabbed Plaintiff's  
5 arms, dragged him across the floor, and threw him into the cell. Plaintiff complained to C/O Tucker,  
6 Sgt. Green, and Sgt. Huckabay that he was in severe pain, but he was not allowed to see a doctor  
7 until a few weeks later.

8 The doctor examined Plaintiff. Plaintiff informed the doctor that C/O Tucker had taken away  
9 his medical devices. The doctor told Plaintiff that his knees had been further damaged by walking  
10 without the brace and cane. The doctor immediately ordered the return of Plaintiff's devices and said  
11 he should wear soft-soled shoes. The doctor told Med Tech Chapman and RN Davis that no prison  
12 guard should ever take away any of Plaintiff's medical devices, and C/O Tucker's actions were not  
13 acceptable. RN Davis and Med Tech Chapman questioned C/O Tucker, who admitted he took  
14 Plaintiff's brace and intentionally destroyed it, claiming he felt Plaintiff did not need a knee brace.

#### 15 *Additional Excessive Force*

16 On November 14, 2006, inmate Miller attacked Plaintiff, stabbed him twice, cut Plaintiff's  
17 neck and eye, and stabbed him in the left arm. That same night, C/O Thompson and C/O Melendez  
18 sprayed Plaintiff in his eyes, nose, and mouth, and across his upper torso with an unknown gas and  
19 chemicals, which burned Plaintiff terribly. C/O Thompson and C/O Melendez then grabbed Plaintiff  
20 and handcuffed his hands in back, disregarding Plaintiff's disability and limited mobility. C/O  
21 Thompson and C/O Melendez dragged Plaintiff, still cuffed, more than 250 feet across concrete,  
22 rocks, gravel, grass and dirt. At one point, C/O Melendez cursed at Plaintiff, and both officers threw  
23 him to the ground. Plaintiff begged them to stop the assault, but they continued to drag him until  
24 his pants and underwear came off and he was completely exposed. Several officers, including two  
25 female officers C/O Rincon and Ms. Magee, laughed loudly at him, and Ms. Magee picked his  
26 underwear up off the ground.

27 As a result of this attack, Plaintiff suffered severe and constant pain in his neck, back,  
28 shoulders, left knee, and head. Plaintiff was taken to the doctor who found that the officers had

1 damaged and ruptured several discs in Plaintiff's neck and back. The doctor ordered Plaintiff to use  
2 a wheelchair and told Plaintiff, in the presence of several nurses, that he should be careful because  
3 another attack could put him in a wheelchair permanently.

4 **Retaliation**

5 Plaintiff filed many 602 complaints for being denied safe housing, and C/O Tucker, Sgt.  
6 Green, and Sgt. Huckabay became very angry about Plaintiff's complaints about his safety and told  
7 him to "keep [his] mouth shut" and that he would be "dealt with." (2d. Amd Cmp ¶61.) Plaintiff  
8 alleges that Sgt. Green, Sgt. Huckabay, and C/O Tucker retaliated against him for filing complaints  
9 when they repeatedly removed him from his cell and forced him to share a cell with known enemy  
10 gang members.

11 **III. DEFENDANTS' EVIDENTIARY OBJECTIONS**

12 Defendants have filed evidentiary objections to Plaintiff's evidence in support of his  
13 opposition to the motion to dismiss. (Doc. 67.)

14 **A. Evidence Not Used by the Court**

15 Defendants object to the following evidence on various grounds. However, the Court did not  
16 rely on any of this evidence in making these findings and recommendations. Therefore, Defendants'  
17 objections to the evidence listed immediately below are overruled.

- 18 (1) Letter to Pearlie Mae Bell (Doc. 61 at 37, Ex. A #2.)
- 19 (2) Letter from Pearlie Mae Bell (Doc. 61 at 38-39, Exh. A #3-4.)
- 20 (3) Nov. 27, 2005, Inmate Request for Interview (Doc. 61 at 40-41, Exh. A #5-6.)
- 21 (4) Handwritten Notes (Doc. 61 at 42, Exh. A #7.)
- 22 (5) Letter from Ombudsman Lonnie Jackson (Doc. 61 at 45, Exh. B #10.)
- 23 (6) Compatibility Chrono (Doc. 61 at 69, Exh. F #33.)
- 24 (7) November 21, 2006 Statement of Facts (Doc. 61 at 89-92, Exh. G #55-58.)
- 25 (8) Handwritten Notes dated November 19, 2006 (Doc. 61 at 94-99, Exh. H.)
- 26 (9) Medical Records (Doc. 61-1 at 1-18, Exh. I.)
- 27 (10) Property Receipts (Doc. 61-1 at 28, 38-39, Exh. J #94, 104-104.)
- 28 (11) Medical and Inmate Appeal Records (Doc. 61-1 at 46-54, Exh. L.)

1           **B. CDC-695 Forms and Letter from Inmate Appeals Branch**

2           Defendants object to Plaintiff’s CDC 695 forms and a Letter from the Inmate Appeals Branch  
3 as evidence, listed immediately below, as hearsay with no existing exception. Defendants also  
4 object on the grounds that the documents appear altered, and that Plaintiff failed to include their  
5 chain of custody or lay a proper foundation.

- 6           (1) CDC 695 forms dated October 31, 2006, November 13, 2006, November 29, 2006,  
7           December 11, 2006 (Doc. 61 at 62-65, Exh. E #28-31.)
- 8           (2) CDC 695 forms dated November 13, 2006 and November 29, 2006 (Doc. 61 at 85,  
9           86, Exh. G #51, 52.)
- 10          (3) CDC 695 form dated December 18, 2006 (Doc. 61-1 at 27, Exh. J #93.)
- 11          (4) CDC 695 form dated December 8, 2006 (Doc. 61-1 at 44, Exh. K #110.)
- 12          (5) CDC 695 forms dated November 13, 2006 and December 13, 2006 (Doc. 61-1 at 59-  
13          61, Exh. M #126-128.)
- 14          (6) CDC 695 forms dated January 4, 2007 and January 19, 2007; and an undated form  
15          (Doc. 61-1 at 81-83 , Exh. P #149-151.)
- 16          (7) Letter from Inmate Appeals Branch dated May 7, 2006 and CDC 695 forms dated  
17          October 31, 2006, November 29, 2006, December 8, 2006, December 11, 2006 (2  
18          forms), December 13, 2006, and December 18, 2006, January 4, 2007, January 19,  
19          2007, and February 6, 2007; and an undated form (Doc. 61-1 at 85-92, 94-97, Exh.  
20          Q # 153-160, 162-165.)

21           Plaintiff argues that these forms are not hearsay, because they are direct responses from the  
22 appeals coordinators, and the fact that they are appeal forms used during the Inmate Appeal Process  
23 establishes a proper foundation and chain of custody. Plaintiff argues that some of these forms do  
24 not contain any notations and therefore are not “altered,” and Plaintiff’s handwritten notations on  
25 the other forms are his responses back to the appeals coordinator. Plaintiff also argues that the forms  
26 are relevant to show his efforts to exhaust administrative remedies and the appeals coordinators’  
27 efforts to block exhaustion.

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1           **Discussion**

2           These forms and letter are responses from the appeals coordinators and the Inmate Appeals  
3 Branch, informing Plaintiff of the reasons his appeal documents were screened out or otherwise  
4 rejected and returned to him without being considered on the merits. In the Court’s experience, these  
5 are standard forms used by the California Department of Corrections and Rehabilitation (CDCR) in  
6 responding to inmate appeals, and they fall under the hearsay exception for records of a regularly  
7 conducted activity. Fed. R. Evid. 803(5). Defendants raise the challenge of authentication as to  
8 these exhibits. Here, authentication does not need to be done by a person with knowledge, as the  
9 circumstances in which Plaintiff acquired the documents, the appearance of the documents, and  
10 substance of the documents are sufficient to suggest that these documents are what they purport to  
11 be. Fed. R. Evid. 901(a). Plaintiff’s handwritten notes on the forms do not undermine the  
12 authentication. In fact, Plaintiff has explained that the notes are to be part of the permanent appeal  
13 attachment and therefore part of the record. The bottom of the form invites Plaintiff to “return this  
14 form to the Appeals Coordinator with an explanation of why you believe it to be in error,” which  
15 Plaintiff did. See example, Doc. 61-1 at 92, Exh. Q #160. With respect to Defendants’ objection  
16 that Plaintiff has not laid a proper foundation, the Court finds it sufficient that Plaintiff refers to the  
17 exhibits, in the body of his opposition, as evidence in support of the arguments in his opposition.  
18 Accordingly, Defendants objections to these forms and letter are overruled.

19           **C.     CDC 602 Appeals**

20           Defendants object to some of the copies of CDC 602 Appeals submitted as evidence by  
21 Plaintiff, listed immediately below, on the ground that the appeals are hearsay with no existing  
22 exception. Defendants also object on the grounds that the documents appear altered, and that  
23 Plaintiff failed to include their chain of custody or lay a proper foundation.

- 24           (1)     CDC 602 Appeal dated October 19, 2006 (Doc. 61at 60, 61, Exh. E #25, 27.)  
25           (2)     CDC 602 Appeal dated December 5, 2006 (Doc. 61 at 66, 67, Exh. E #31, 32.)  
26           (3)     CDC 602 Appeal dated November 19, 2006 (Doc. 61 at 83, 84, Exh. G #47, 49.)  
27           (4)     CDC 602 Appeal dated December 8, 2006 (Doc. 61-1 at 20-22, Exh. J #85, 87, 88.)

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1 (5) CDC 602 Appeal dated November 30, 2006 (Doc. 61-1 at 41-43, Exh. K #106, 108,  
2 109.)

3 (6) CDC 602 Appeal dated January 28, 2007 (Doc. 61-1 at 78-80, Exh. P #145, 147,  
4 148.)

5 Plaintiff argues that these appeals are relevant to the claims in his complaint, that 602 appeal  
6 forms are part of the inmate appeals process and thus do not require a chain of custody or proper  
7 foundation, and that Defendants' argument that the appeals "appear" to be altered is insufficient.  
8 Plaintiff also asserts that the "alteration" on some of the forms is part of his re-submission of the  
9 appeal and is in compliance with the Inmate Appeals Process.

10 **Discussion**

11 These documents are copies of CDC 602 inmate appeals submitted by Plaintiff concerning  
12 various complaints about prison conditions. In the Court's experience, these documents are standard  
13 CDCR forms which inmates are required to use to submit inmate grievances and appeals, and  
14 therefore they fall under the hearsay exception for records of a regularly conducted activity. Fed. R.  
15 Evid. 803(5). Defendants raise the challenge of authentication as to these exhibits. Here,  
16 authentication does not need to be done by a person with knowledge, as the circumstances in which  
17 Plaintiff acquired the documents, the appearance of the documents, and substance of the documents  
18 are sufficient to suggest that these documents are what they are. Fed. R. Evid. 901(a). Plaintiff's  
19 handwritten notes and alteration of the forms do not undermine the authentication. In fact, it appears  
20 that the alterations were made by Plaintiff in response to instruction by prison officials, before re-  
21 submitting the appeal. See example, Doc. 61 at 62, Exh E #25, 27 (note at bottom of altered page  
22 states "Resubmitted Again as told to do so; see 695 form.") Thus, the Court finds the alterations to  
23 be part of the forms. With respect to Defendants' objection that Plaintiff has not laid a proper  
24 foundation, the Court finds it sufficient that Plaintiff refers to the exhibits in the body of his  
25 opposition as evidence in support of the arguments in his opposition. Accordingly, Defendants  
26 objections to these CDC 602 Appeals as evidence are overruled.

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1           **D.     Correspondence with the Director, Prison Law Office, and Inmate Appeals**  
2           **Branch**

3           Defendants object to the use of Plaintiff’s correspondence, listed below, as evidence, as  
4           hearsay without any exception and on the grounds that Plaintiff did not include their chain of custody  
5           or lay a proper foundation.

6           (1)     Correspondence with the “Director” and the Prison Law Office (Doc. 61-1 at 68-74,  
7                   Exh. O #135-141.)

8           (2)     Correspondence with the Inmate Appeals Branch (Doc. 61-1 at 73-75, Exh. O #140-  
9                   142.)

10          Plaintiff argues that these exhibits are not hearsay, and that there are no chain of custody  
11          issues or lack of proper foundation by Plaintiff.

12          **Discussion**

13          These exhibits contain letters, handwritten by Plaintiff and addressed to Mr. Director, N.  
14          Grannis and S. Emigh; Ms. Hagler at the Prison Law Office; and Prison Law Library Attorneys,  
15          complaining that his 602 appeals are not being processed. The letters are hearsay because they are  
16          offered in evidence to prove the truth of the matter asserted by Plaintiff, namely that Plaintiff’s 602  
17          appeals were not being processed, with no existing exception. Accordingly, Defendants’ hearsay  
18          objections are sustained, and these exhibits are stricken from the record..

19          **IV.     MOTION TO DISMISS FOR FAILURE TO EXHAUST**

20          **A.     Statutory Exhaustion Requirement**

21          Section 1997e(a) of the Prison Litigation Reform Act of 1995 provides that “[n]o action shall  
22          be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
23          a prisoner confined in any jail, prison, or other correctional facility until such administrative  
24          remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust  
25          the available administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211, 127  
26          S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).  
27          Exhaustion is required regardless of the relief sought by the prisoner and regardless of the relief  
28          offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the

1 exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 435 U.S.  
2 516, 532, 122 S.Ct. 983 (2002).

3 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative  
4 defense under which Defendants have the burden of raising and proving the absence of exhaustion.  
5 Jones, 549 U.S. at 216; Wyatt, 315 F.3d at 1119. The failure to exhaust nonjudicial administrative  
6 remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a  
7 summary judgment motion. Wyatt at 1119 (citing Ritza v. Int'l Longshoremen's & Warehousemen's  
8 Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)). In deciding a motion to dismiss for failure  
9 to exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed  
10 issues of fact. Wyatt at 1119-20. If the Court concludes that the prisoner has failed to exhaust  
11 administrative remedies, the proper remedy is dismissal without prejudice. Id. However, a prison  
12 inmate's compliance with the PLRA's administrative exhaustion requirement as to some, but not all,  
13 claims brought in civil rights action does not warrant dismissal of the entire action; rather, the court  
14 should proceed with the exhausted claims. Jones, 549 U.S. 199.

15 The Court takes judicial notice of the fact that the CDCR has an administrative grievance  
16 system for prisoner complaints. Cal.Code Regs., tit. 15 § 3084.1 (2006). The process is initiated  
17 by submitting a CDC Form 602. Id. at § 3084.2(a) (2006). At the time of the events at issue in  
18 Plaintiff's complaint, appeals were required to be submitted within fifteen working days of the event  
19 being appealed, and the process was initiated by submission of the appeal to the informal level, or  
20 in some circumstances, the first formal level. Id. at §§ 3084.5, 3084.6 (2006). Four levels of appeal  
21 are involved, including the informal level, first formal level, second formal level, and third formal  
22 level, also known as the "Director's Level." Id. at § 3084.5 (2006). In order to satisfy § 1997e(a),  
23 California state prisoners are required to use this process to exhaust their claims prior to filing suit.  
24 Woodford v. Ngo, 548 U.S. 81, 85 (2006); McKinney, 311 F.3d. at 1199-1201.

25 **B. Defendants' Motion**

26 Defendants argue that the claims against them should be dismissed because Plaintiff failed  
27 to exhaust the CDCR's administrative appeals process regarding his claims against Defendants.

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1                   **1.     Failure-to-Protect Claims Against Defendants Tucker, Green,**  
2                   **Huckabay, Hernandez, Rincon, Deathridge, and Lee**

3                   Defendants submit evidence that between Plaintiff's transfer to PVSP in December 2005 and  
4 the filing of his original Complaint with the Court on September 5, 2007, Plaintiff submitted  
5 seventeen inmate appeals that were accepted for review by the PVSP and Corcoran State Prison  
6 ("CSP") appeals offices. (Declaration of J. Morgan ("Morgan Decl."), Doc. 56 ¶5; Declaration of  
7 T. Campbell ("Campbell Decl."), Doc. 52-2 ¶5.) Six of those appeals were accepted and reviewed  
8 at the final level of review by the Office of Inmate Appeals before Plaintiff filed suit on September  
9 5, 2007. (Declaration of D. Foston ("Foston Decl."), Doc. 54 ¶3.) Defendants assert that none of  
10 those six appeals concerned allegations of staff misconduct committed by any of the Defendants.  
11 (Morgan Decl. ¶5, Campbell Decl. ¶5.)

12                  In opposition, Plaintiff provides evidence that he filed 602-appeal #PVSP-06-00906, which  
13 was denied at the Director's Level on August 4, 2006,<sup>6</sup> (Opp'n, Doc. 61 at 4, Exh. C.), and 602-  
14 appeal #PVSP-06-00844, which was denied at the Director's Level on September 19, 2006, (Id. at  
15 21, Exh. D).

16                  Defendants reply that Plaintiff's appeal #PVSP-06-00906 did not allege staff conduct by  
17 Defendants, but concerned a January 4, 2006 Rules Violation Report issued for mutual combat  
18 between Plaintiff and inmate Stringer, which Plaintiff believed to be incorrect because he was  
19 defending himself, and Plaintiff's request for psychological treatment and to have the disciplinary  
20 findings reversed. With respect to Plaintiff's appeal #PVSP-06-00844, Defendants reply that it was  
21 not a staff complaint, but concerned Plaintiff's psychological problems due to his housing with other  
22 inmates, because he was a convicted sex offender, and requested (1) no reprisals, (2) to have his  
23 single cell status honored, (3) to be removed from his cell and away from a gang member, and (4)  
24 to receive psychological and medical treatment. (Exh. 6 to Morgan Decl., Doc. 56-1 at 2.)

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26                  <sup>6</sup>In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look beyond  
27 the pleadings and decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. Plaintiff signed the Complaint, First  
28 Amended Complaint, and Second Amended Complaint under penalty of perjury. (Doc. 1 at 5; Doc. 19 at 4; Doc. 25  
at 5.) Therefore, Plaintiff's opposition to the motion to dismiss is based in part on the evidence in his verified  
complaints and their accompanying exhibits. Plaintiff's opposition filed on November 21, 2011, is also verified and  
therefore contains admissible evidence. (Doc. 61.)

1 Defendants also assert that appeal #PVSP-06-00844 was not decided at the final level of review until  
2 after Plaintiff filed this lawsuit. Id.

3 **Discussion**

4 The events at issue in this action, with regard to Plaintiff's failure-to-protect claims, concern  
5 incidents between Plaintiff and other inmates in January, October, and November 2006.  
6 Defendants' evidence supports the assertion that between December 2005 and September 5, 2007,  
7 the date Plaintiff's lawsuit was filed, seventeen of the appeals submitted by Plaintiff at PVSP and  
8 CSP were accepted for review at the first or second levels of review. (Morgan Decl. ¶5 and exhibits,  
9 Campbell Decl. ¶5 and exhibits.) Defendants' evidence also supports the assertion that six of the  
10 seventeen appeals were accepted for review, and denied, at the Director's Level of review. (Foston  
11 Decl., Doc. 54 ¶3.) The Court finds that only two of the six appeals make reference to Plaintiff's  
12 fears of attack, actual attack, or actions by prison officials placing Plaintiff at risk of attack: appeals  
13 #PVSP-06-00844 and #PVSP-06-00906.

14 ***Appeal #PVSP-06-00906***

15 Plaintiff initially submitted appeal #PVSP-06-00906 on March 18, 2006. (Opp'n, Doc. 61,  
16 Exh. C.) The appeal was denied at the second level of review on May 2, 2006, and at the third level  
17 of review on August 4, 2006. Id. This appeal focuses on Plaintiff's complaints that he was denied  
18 due process during an investigation and unfairly disciplined. Id. Plaintiff requests (1) to receive  
19 psychological treatment and (2) to have the disciplinary infraction erased from his file and credits  
20 restored. Id. While Plaintiff does state that he repeatedly told Sgt. Green and C/O Tucker of his  
21 "safety concerns," there is no further explanation of the "safety concerns," and Plaintiff's statement,  
22 without more, is not sufficient to give authorities notice of Plaintiff's allegations that Defendants  
23 were failing to protect him. Therefore, the Court finds that Plaintiff did not exhaust his remedies  
24 with appeal #PVSP-06-00906 with regard to his allegations that Defendants failed to protect him.

25 ***Appeal #PVSP-06-00844***

26 Plaintiff initially submitted appeal #PVSP-06-00844 on March 8, 2006. (Opp'n, Doc. 61,  
27 Exh. D.) He requests an investigation because of safety concerns he brought to the attention of staff,  
28 including Sgt. Huckabay, Sgt. Green, and C/O Tucker, on numerous dates. Id. Plaintiff states that

1 at Pelican Bay State Prison, he was placed in administrative segregation for his safety because of  
2 “several adamant threats on my life,” and when he was transferred to PVSP, it was decided that he  
3 should be placed in protective housing for his safety.<sup>7</sup> Plaintiff expresses concern that he has “seen  
4 more fights, more assaults on inmates by other inmates [on the PVSP Sensitive Needs Yard since  
5 his arrival at PVSP on December 22, 2005] than [during his] whole prison confinement.” Id.  
6 Plaintiff states that he told staff on March 8, 2006 of his concerns about “this current gangmember  
7 that I was forced against my will to cell up with,” asserting that Plaintiff is “documented on file” not  
8 to be placed in any cell with a Blood-Crip gangmember under any circumstances, due to his  
9 conviction, impaired physical mobility, and mental impairment. Id. Plaintiff expresses that his  
10 status as a convicted rapist causes him to feel highly at risk of attack and constantly very paranoid.  
11 Id. Plaintiff alleges that he has told floor staff repeatedly of his concerns, but is not receiving help.  
12 Id. He requests (1) to receive no reprisal (anymore), (2) for PVSP staff to respect and honor his  
13 single cell status, (3) to be removed from this cell with this known gangmember ASAP, and (4) to  
14 receive proper psychological and medical treatment. Id. The appeal was partially granted at the first  
15 level of review. Id. Plaintiff appealed to the second level, expressing dissatisfaction that PVSP  
16 continues to subject him to unsafe living conditions. Id. The appeal was denied at the second level  
17 on June 5, 2006, and at the third level on September 19, 2006. Id.

18 Defendants’ assertion that this appeal was not decided at the final level of review until after  
19 Plaintiff filed this lawsuit is incorrect, because the appeal was decided on September 19, 2006, and  
20 Plaintiff filed this lawsuit on September 5, 2007.

21 Defendants argue that this appeal does not concern allegations of staff misconduct committed  
22 by defendants Tucker, Green, Huckabay, Hernandez, Rincon, Deathridge, or Lee. Defendants are  
23 correct that this appeal does not allege particular misconduct by any of the Defendants in the appeal.  
24 However, Plaintiff does request an investigation because of safety concerns he alleges he brought  
25 to the attention of staff, including Sgt. Huckabay, Green, and C/O Tucker. Plaintiff did not name  
26 all of the defendants in the appeal; however, the legal standard is not whether all of the Defendants

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28 <sup>7</sup>Plaintiff refers to “Exhibits A, B, C, and D signed by Warden’s [*sic*], Assist. Warden, Lt. Miller, and Sgt. Maxwell,” which were not submitted to the Court for review. Id.

1 were named in the appeal or whether Plaintiff cited particular misconduct. The PLRA did not  
2 impose a "name all defendants" requirement as part of exhaustion. Jones, 549 U.S. at 217. "[T]he  
3 primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice  
4 to a particular official that he may be sued." Id. at 219; Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th  
5 Cir. 2009). Here, Plaintiff clearly states his concerns that he will be harmed by other inmates if  
6 forced to share a cell with a gangmember or remain on the Sensitive Needs Yard, due to a history  
7 of threats against him due to his conviction. Thus, this appeal placed prison officials on notice of  
8 the problem. Therefore, Plaintiff exhausted his remedies with appeal #PVSP-06-00844 with regard  
9 to his allegations in the complaint that defendants Tucker, Green, Huckabay, Hernandez, Rincon,  
10 Deathridge, and Lee failed to protect him. Accordingly, Defendants' motion to dismiss Plaintiff's  
11 failure-to-protect claims for failure to exhaust remedies should be denied.

12 **2. Conditions of Confinement and Excessive Force Claims Against**  
13 **Defendant Tucker**

14 Defendants provide evidence that Plaintiff did not address his allegations against defendant  
15 Tucker -- that Tucker took away Plaintiff's knee brace and cane and forced him to walk more than  
16 two hundred yards, dragged Plaintiff across the floor, and threw him into a cell -- in a prison appeal,  
17 at any level of review. (Morgan Decl. ¶5, Campbell Decl. ¶5, Foston Decl. ¶3.)

18 Plaintiff asserts that he submitted appeals concerning Officer Tucker's cruel orders and  
19 abusive actions towards Plaintiff, and also submitted a Complaint to the California Victims  
20 Compensation and Government Claims Board (CVCGCB) addressing Tucker's actions in taking  
21 Plaintiff's knee brace. Plaintiff submits as evidence a copy of an appeal, with no assigned log  
22 number, submitted on December 8, 2006. (Doc. 61, Exh. J.) In the appeal, Plaintiff requests to be  
23 relocated away from PVSP "[b]efore I am killed from the hands of ... your paid correctional  
24 officers." Id. Plaintiff states that Officer Tucker verbally threatened him, dragged him, attacked him,  
25 and "forcefully took my Doctor's [*sic*] Issued cane and my orthopedic knee brace! ('on 10/5/2006')." Id.  
26 Plaintiff also states in the appeal that Tucker admitted to medical staff that he felt Plaintiff did  
27 not need his medically-issued knee brace, so he took it and destroyed it. Id.

28 ///

1 Plaintiff also submits a copy of appeal #PVSP-07-00340 which he submitted on December  
2 27, 2006. Id. At the first formal level, Plaintiff complains that "[m]y orthopedic knee brace was  
3 'forcefully' took and destroyed by C/O W. Tucker on 10/5/06." Id. Plaintiff states that when the  
4 nurse contacted Tucker, inquiring about the knee brace, Tucker admitted that he felt Plaintiff didn't  
5 need his knee brace, so he destroyed it. Id.

6 Plaintiff also submits evidence of claim #G566941 which he submitted to the CVCGCB on  
7 April 4, 2007, in which Plaintiff complains that Officer Tucker forcefully took his knee brace and  
8 cane, and forced him to walk a long distance, causing him to fall when his damaged knee gave out,  
9 resulting in injuries. Id.

### 10 Discussion

11 Plaintiff's evidence shows that he submitted form-602 appeals at the prison concerning his  
12 allegations that defendant Tucker took away his knee brace and cane, destroyed the knee brace,  
13 forced him to walk a long distance, dragged him, and attacked him. (Doc. 61, Exh. J.) Evidence  
14 also shows that Plaintiff submitted a claim to the CVCGCB concerning the allegations that Tucker  
15 took his knee brace and forced him to walk, causing him to fall. Id. Resolution of CVCGCB claims  
16 do not act to exhaust remedies under the PLRA. Woodford, 548 U.S. at 85; McKinney, 311 F.3d.  
17 at 1199-1201. With regard to Plaintiff's form-602 appeals, there is no evidence that any of these  
18 appeals were accepted and decided at the third level of review. However, Plaintiff argues that the  
19 appeals process was not "available" to him because his appeals were improperly rejected.

20 The evidence shows that facially, Plaintiff's appeals were rejected for plausible reasons,  
21 such as for being untimely, incomplete, in improper form, duplicative, for addressing multiple issues  
22 in one appeal, for using abusive language, or for using whiteout.<sup>8</sup> (Id., Exh. P, Q.) However, the  
23 Court cannot discount the evidence of Plaintiff's persistent and vehement pleas that his 602 appeals  
24 complaining about staff abuse were rejected for improper reasons or not allowed to proceed to the  
25 final level of review. Plaintiff declares under penalty of perjury that he "did in good faith, tried over  
26 & over & over again to exhaust his 602's grievances to the next level, but the appeals coordinators

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27  
28 <sup>8</sup>California regulations in effect in 2006 and 2007 allowed appeals to be rejected for abuse of the appeal system. Cal.Code Regs., tit. 15 § 3084.4 (2006).



1 ‘continued’ to block all paths toward such.” (Opp’n, Doc. 61 at 27.) Plaintiff also declares that  
2 officials refused to process some of his appeals for "made-up excuse[s]" (Opp'n, Doc. 61 at 26-30.)  
3 Plaintiff provides copies of appeal documents in which he complained about his appeals not being  
4 processed despite his efforts to submit proper appeals or to make corrections and re-submit them.  
5 (Id. at 63, Exh. E #29; Doc. 61-1 at 78-80, 83, Exh. P #145-148, 151.) Plaintiff also provides copies  
6 of unexhausted appeals in which he complained that defendant Tucker had taken his knee brace and  
7 destroyed it, and that he was dragged over rocks and gravel until his pants and underwear came  
8 completely off. (Opp’n, Doc. 61-1 at 23-26, Exh. J #89-92; at 41-43, Exh. K #106-109.) Based on  
9 the foregoing evidence, the Court finds that Plaintiff exhausted the remedies available to him and  
10 provided sufficient notice to prison officials, with regard to his allegations of adverse conditions of  
11 confinement and excessive force against defendant Tucker. Therefore, Defendants' motion to  
12 dismiss this claim for failure to exhaust should be denied.

### 13 **3. Excessive Force Claims Against Defendants Melendez and Thompson**

14 Defendants argue that Plaintiff did not exhaust his remedies with respect to his excessive  
15 force claims against Officers Melendez and Thompson, because Plaintiff did not submit inmate  
16 appeals at any level of review addressing these claims. (Morgan Decl. ¶5, Campbell Decl. ¶5, Foston  
17 Decl. ¶3.)

18 Plaintiff submits a copy of an appeal with no assigned log number, which was submitted on  
19 November 30, 2006. (Doc. 61-1 at 41.) In the appeal, Plaintiff complains that he was handcuffed  
20 and assaulted and dragged across the ground by Officers Thompson and Melendez. Id. Plaintiff  
21 requests in the appeal (1) that video evidence to be preserved, (2) to be relocated from PVSP for  
22 safety concerns, and (3) to be placed on single cell status. Id.

#### 23 **Discussion**

24 The Court finds no evidence on the record that Plaintiff had any appeal decided at the third  
25 level of review that addressed the November 14, 2006 incident of excessive force alleged against  
26 defendants Melendez and Thompson. However, as discussed above, Plaintiff argues that the appeals  
27 process was not “available” to him because his appeals were improperly rejected, and submits  
28 evidence demonstrating that he persistently and vehemently complained that his 602 appeals

1 complaining about staff abuse were rejected for improper reasons or not allowed to proceed to the  
2 final level of review. Plaintiff also provides copies of unexhausted appeals in which he complained  
3 that defendants Melendez and Thompson “hand-cuffed (Hands in Back) & assaulted and forcefully  
4 & brutally [*sic*] dragged over ‘250 ft.’ across concrete, lose rocks, gravel, dirt & grass by coorectional  
5 [*sic*] officers C/O D. Thompson & also C/O J. Melendez,” and that he was dragged over rocks and  
6 gravel until his pants and underwear came completely off. (Doc. 61-1 at 41, Exh. J #106; at 41-43,  
7 Exh. K #106-109.)

8 Based on the foregoing, the Court finds that Plaintiff exhausted the remedies available to him  
9 and provided sufficient notice to prison officials, with regard to his allegations of excessive force  
10 against defendants Melendez and Thompson. Accordingly, Defendants' motion to dismiss these  
11 claims for failure to exhaust should be denied.

#### 12 **4. Retaliation Claims Against Defendants Green, Huckabay, and Tucker**

13 Defendants argue that Plaintiff did not exhaust his retaliation claims against Officers Green,  
14 Huckabay, and Tucker, because Plaintiff did not submit inmate appeals at any level of review  
15 addressing these claims. (Morgan Decl. ¶5, Campbell Decl. ¶5, Foston Decl. ¶3.) Defendants  
16 acknowledge that Plaintiff filed inmate appeal #PVSP-06-00844 on March 8, 2006, requesting no  
17 further “reprisals” to occur; however, they argue that he did not address any retaliatory acts  
18 performed by defendants Green, Huckabay, or Tucker.<sup>9</sup> (Foston Decl. ¶5, Exh. 1.)

19 In opposition, Plaintiff claims that he exhausted the remedies *available* to him with regard  
20 to his retaliation claim. Plaintiff asserts that appeals coordinators at PVSP repeatedly refused to  
21 process his 602 appeals, out of retaliation. Plaintiff submits as evidence copies of several written  
22 responses from appeals coordinators, rejecting his appeals for a variety of reasons. (Opp’n, Doc. 61,  
23 Exhs. P, Q.)

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27 <sup>9</sup>Defendants also argue that appeal PVSP-06-00844 was not reviewed at the third level of review until  
28 September 19, 2006, after Plaintiff filed suit. Id. This argument, which is without merit because Plaintiff did not file  
this lawsuit until September 5, 2007, was addressed by the Court above at IV.B.1.

1 Defendants argue that the rejection notices from appeals coordinators submitted as evidence  
2 by Plaintiff do not provide evidence that the appeals were improperly screened out, or that the  
3 appeals process was unavailable under the PLRA.

4 **Discussion**

5 The Court finds no evidence on the record that an appeal concerning Plaintiff's allegations  
6 of retaliation was completed through the Director's Level of review. Plaintiff's appeal #PVSP-06-  
7 00844 requests "No Reprisal (anymore);" however this request, without more, is not sufficient to  
8 place the prison on notice that Defendants were retaliating against Plaintiff for filing inmate  
9 complaints. (Opp'n, Doc. 61, Exh. D.) Appeal #PVSP-06-00844 focuses on Plaintiff's allegations  
10 that he was in danger from sharing a cell with gangmembers and being placed on the Sensitive Needs  
11 Yard, not on retaliation. Id.

12 As discussed above, Plaintiff's argument that the appeals process was not "available" to him  
13 because his appeals were improperly rejected is persuasive. However, Plaintiff provides no evidence  
14 that any of his unexhausted appeals, or responses to notices rejecting his appeals, concerned  
15 allegations that he was being subjected to retaliatory acts because he filed inmate appeals or  
16 otherwise acted within his First Amendment rights. Plaintiff has not alleged facts or provided  
17 evidence in support of his argument that he made a good faith effort to exhaust the remedies  
18 available to him with regard to his retaliation claim. Accordingly, the Court finds that Defendants'  
19 motion to dismiss Plaintiff's retaliation claim for failure to exhaust remedies should be granted,  
20 dismissing the retaliation claim against defendants Green, Huckabay, and Tucker.

21 **V. MOTION TO DISMISS RETALIATION CLAIM FOR FAILURE TO STATE A**  
22 **CLAIM – RULE 12(b)(6)**

23 Defendants move to dismiss Plaintiff's retaliation claim against defendants Green, Huckabay,  
24 and Tucker for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.  
25 As discussed above, the Court finds that Plaintiff did not exhaust the available administrative  
26 remedies for his retaliation claim before filing suit, and that Defendants are entitled to dismissal of  
27 the retaliation claim on this ground. Based on this finding, the Court does not reach Defendants'  
28 other arguments in support of their motion to dismiss the retaliation claim. See Perez v. Wisconsin

1 Dep't of Corr., 182 F.3d 532, 534 (7th Cir. 1999) (vacating judgment and remanding with  
2 instructions to dismiss for failure to exhaust in case where district court granted summary judgment  
3 to defendants on the merits and did not rule on their pending motion for dismissal based on failure  
4 to exhaust).

5 **VI. CONCLUSION AND RECOMMENDATION**

6 Defendants have met their burden of demonstrating that Plaintiff failed to exhaust his  
7 administrative remedies prior to filing suit, in compliance with § 1997e(a), for Plaintiff's retaliation  
8 claim against defendants Green, Huckabay, and Tucker. Defendants have shown an absence in the  
9 official records of any evidence that Plaintiff exhausted his remedies for the retaliation claim by an  
10 inmate appeal pursuant to Title 15 of the California Code of Regulations § 3084.1, et seq.,  
11 concerning Plaintiff's allegations in the complaint against Defendants in this action. Plaintiff has  
12 not submitted evidence of any appeals that satisfy the exhaustion requirement for the retaliation  
13 claims, nor has Plaintiff submitted evidence that he exhausted all of the remedies available to him  
14 for these claims. Therefore, the Court finds that Defendants are entitled to dismissal of Plaintiff's  
15 retaliation claims.

16 However, Defendants have not met their burden of demonstrating that Plaintiff failed to  
17 exhaust his administrative remedies prior to filing suit, in compliance with § 1997e(a), for (1)  
18 Plaintiff's adverse conditions of confinement and excessive force claims against defendant Tucker,  
19 (2) Plaintiff's excessive force claims against defendants Melendez and Thompson, or (3) Plaintiff's  
20 failure-to-protect claims against defendants Tucker, Green, Huckabay, Hernandez, Rincon,  
21 Deathridge, and Lee. Plaintiff has submitted evidence that he exhausted all of the remedies available  
22 to him with regard to these claims. Therefore, the Court finds that Defendants are not entitled to  
23 dismissal of these three claims.

24 Therefore, the Court HEREBY RECOMMENDS that:

- 25 1. Defendants' motion to dismiss, filed on September 27, 2011, be GRANTED IN  
26 PART, dismissing Plaintiff's retaliation claim, without prejudice, for failure to  
27 exhaust remedies; and

28 ///

