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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT MITCHELL,

Plaintiff,

No. CIV S-06-2321 GEB GGH P

vs.

D.G. ADAMS, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

Introduction

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ April 10, 2007, motion to dismiss, to which plaintiff filed his opposition on May 25, 2007.

Complaint

The court herein exhaustively sets forth the allegations of plaintiff’s 55-page complaint. Plaintiff sues some twenty-nine (29) defendants: 1) Corcoran State Prison Employees: D. G. Adams, D.D. Ortiz, K. Daveiga,¹ J.A. Diaz, T. Galaviz, B. Streeter, P.

¹ Defendants, in their motion to dismiss, have attempted to provide the correct spelling for this defendant’s name; however, in doing so they have spelled it alternatively, “Daviega” and “Daveiga.” See Motion to Dismiss (MTD), n. 1. The court will spell it “Daveiga,” as that spelling seems to appear more frequently in defendants’ motion.

1 Chatham, J. Hill, R. Hubach, A. Morrison, J. Diaz, S. Tellerico; and 2) High Desert State Prison
2 Employees: T. Felker, M. McDonald, D. Gunter, M. Wright, D. Billings, D. Vanderville, C.
3 Adams, S. Babich, R. Ingwerson, G. Marshall, A. Harnden, K. McCraw, J. Lynn, B. Epperson,²
4 C. Lockard, J. Owen, D. Hellwig. Plaintiff expressly states that he has exhausted his
5 administrative remedies as to “all facts” presented in his complaint as of September 22, 2006.
6 He also alleges that his State Board of Control claim was denied on September 27, 2006.
7 Complaint, p. 16.

8 Plaintiff was incarcerated at High Desert State Prison (HDSP) at the time of filing
9 his complaint.³ He alleges that defendants at both Corcoran State Prison (CSP) and HDSP
10 “collectively conspired” to violate his rights under the First and Fourteenth Amendments. *Id.*

11 Plaintiff contends that his conflict with defendants D.G. Adams, D.D. Ortiz, K.
12 Daveiga, J.A. Diaz, T. Galaviz, B. Streeter, P. Chatham, J. Hill, R. Hubach, A. Morrison, J. Diaz
13 and S. Tellerico started following his arrival at CSP on December 17, 2004. From then until
14 March 21, 2006, plaintiff filed numerous complaints against these defendants and other CSP
15 correctional officers (C/Os). *Id.*, at 17.

16 On December 6, 2005, plaintiff submitted a grievance to the above-
17 named defendants, alleging discrimination against African American inmates in compelling
18 them, including plaintiff, to double cell with African American prisoners only, forcing non-
19

20 ² Although plaintiff originally spelled this defendant’s name as “Epherson,” plaintiff later
21 provided the apparently corrected spelling of “B. Epperson” for this individual, pursuant to the
22 Order, filed on Feb. 21, 2007. Service of process on this defendant was again attempted,
23 pursuant to the Order, filed on May 11, 2007. Defendant B. Epperson’s executed waiver was
24 filed on September 7, 2007. In filing their motion to dismiss, defendants noted that, at least at
25 that the time, defendant “B. Epherson” had not yet been served. However, given that an executed
waiver of service as to this defendant has since been filed, this defendant (or his/her counsel) is
remiss in having failed either to file a notice of joinder in the pending motion, a separate motion
to dismiss or an answer on this defendant’s behalf. This defendant must show cause, within ten
(10) days, why he/she should not be found to be in default.

26 ³ By notices of change of address, filed on December 27, 2007, and January 4, 2008,
plaintiff informed the court of his transfer to California State Prison-Sacramento.

1 affiliated African American inmates, including plaintiff, to double cell with those who
2 participated in active inmate gangs and by punishing plaintiff and other non-gang affiliated
3 African American inmates for serious rule violations committed by the gang participants. *Id.*

4 On December 21, 2005, plaintiff was interviewed by defendant J.A. Diaz,
5 regarding the Dec. 6, 2005, grievance. Defendant J.A. Diaz stated: “Mitchell, your ass is still
6 here! I’m going to see to it that your ass gets transferred out of Corcoran because we’re tired of
7 you filing complaints.” He went on to tell plaintiff that defendant Warden D. G. Adams told him
8 to interview plaintiff as to the Dec. 6, 2005, grievance. Defendant J.A. Diaz noted that plaintiff’s
9 complaint involved the potential lockdown of the entire African American inmate population
10 related to the Dec. 13, 2005, scheduled execution of “Crip gang leader, Stanley ‘Tookie’
11 Williams,” and discrimination against African American inmates in housing and punishment.
12 *Id.*, at 17-18.

13 After plaintiff explained his complaint as to housing and punishment of African
14 American inmates, defendant J.A. Diaz noted that plaintiff had been filing complaints against
15 CSP administration every month since his arrival and informed plaintiff that he had just attended
16 a staff meeting with defendants Warden Adams and Associate Warden Ortiz, and several C/O’s
17 from the yard “where we discussed your complaint filing and your assisting other inmates with
18 their complaint filing against staff.” Defendant J.A. Diaz told plaintiff that “we’re” not going to
19 tolerate his continued complaint filing, that the method of housing and disciplining of African
20 American inmates would not change, and that plaintiff would be transferred from CSP. *Id.*, at
21 18-19.

22 Upon plaintiff’s stating that he would file a complaint because defendant J.A.
23 Diaz was violating his First Amendment rights, defendant J.A. Diaz informed plaintiff that he
24 had no rights other than “what we give you.” He also told plaintiff that he had instructed
25 defendant Appeals Coordinators T. Galaviz and B. Streeter and all of his staff to no longer
26 address plaintiff’s complaints because plaintiff was going to be transferred from CSP. *Id.*, at 19.

1 On Dec. 30, 2005, plaintiff filed a grievance (CSPC-3-06-00115) against
2 defendant J. Hill for threatening plaintiff's safety/life. On Jan. 4, 2006, plaintiff was called to
3 defendant J. Diaz's office, where J. Diaz was present along with defendants J.A. Diaz and S.
4 Tellerico, and plaintiff was informed by these defendants that they were putting plaintiff up for
5 transfer to "a 180 prison" because plaintiff had filed too many complaints and defendant Warden
6 Adams had told them to transfer plaintiff out of CSP. Plaintiff informed these defendants that he
7 had not gotten any disciplinary write-ups in the form of CDC-115's at CSP and asked why his
8 security housing level was being upgraded and he was to be transferred to a "180 design prison."
9 *Id.*, at 20.

10 Defendants J. Diaz and Tellerico told plaintiff that "we don't want your kind here,
11 so you're being transferred," while defendant J.A. Diaz referred back to his Dec. 21, 2005,
12 interview with plaintiff, telling plaintiff that people like him "who file lawsuits and complaints
13 are troublemakers and they have to go." Plaintiff replied that he would be filing a complaint
14 against each of these individuals, to which defendant J. A. Diaz responded: "[T]his is why we're
15 transferring you, to avoid having to respond to anymore of your complaints. We'll get rid of you
16 and we won't have to respond to, or return any of your complaints you have pending." *Id.*, at 21.

17 On Feb. 22, 2006, defendant J. Hill called plaintiff into his office about complaint
18 no. CSPC -3-06-00652, which plaintiff had filed against defendant A. Morrison. Defendant Hill
19 told plaintiff that he wanted to talk to him about the grievance against Morrison which plaintiff
20 had filed contending that Morrison had confiscated and destroyed plaintiff's legal documents, as
21 well as about CSPC-3-06-0115, which plaintiff had filed against defendant Hill for threatening
22 plaintiff's safety. *Id.*, at 21-22.

23 Defendant Hill called defendant Morrison to his office and Hill told plaintiff to
24 explain the circumstances giving rise to the grievance, whereupon plaintiff said that, on Nov. 12,
25 2005, defendant Morrison stopped plaintiff as he carried envelopes containing legal material and
26 asked plaintiff what was in the envelopes. Plaintiff told Morrison that he was on the way to the

1 law library to conduct legal research and to mail out his legal documents and showed Morrison
2 the documents, whereupon defendant Morrison snatched up the documents and tore them up,
3 telling plaintiff he could not have them. Plaintiff explained that they had been sent to him by the
4 state attorney general's office and concerned a pending case of his and were not contraband.
5 Morrison told plaintiff that the documents pertained to a lawsuit against correctional staff and
6 that they were "'FLSA' time sheets" that plaintiff could not have. Plaintiff told Morrison that his
7 having destroyed the documents sent by the attorney general's office before plaintiff had had a
8 chance to address appeal issues violated his First and Fourteenth Amendment rights, to which
9 Morrison replied that he did not care about plaintiff's rights and stated that since plaintiff had
10 arrived, inmates had started filing lawsuits and staff complaints had increased. *Id.*, at 22-23.

11 When Morrison tore up the documents, plaintiff informed him that he would file a
12 complaint against him to which Morrison responded that he did not care "because don't you
13 know that correctional staff at Corcoran don't find other correctional staff guilty of rule
14 violations. Nothing is going to happen." *Id.*, at 24.

15 When defendant Hill asked defendant Morrison if plaintiff's version of events had
16 occurred as plaintiff told it, defendant Morrison stated "yes," and also said that he had told
17 plaintiff they were tired of him and his complaint filing. When plaintiff told defendant Hill that
18 in light of Morrison's admission that plaintiff expected Hill to hold Morrison accountable to
19 departmental policy and procedure, defendant Hill "became enraged," approaching plaintiff with
20 a clenched fist and shouting, *inter alia*, "I don't give a rat's ass about you or your complaints.
21 We run this fucking yard the way we see fit and we don't have to answer to anyone. Now, I'm
22 telling you to drop your complaints, if you know what's good for you." *Id.*, at 24-25.

23 Defendant Morrison then threatened plaintiff with a "blanket party," saying "if
24 you keep on snitching and filing complaints, we're going to come an[d] pay your ass a visit
25 dressed all in black and snatch your ass out of your cell at 2 or 3 o'clock in the morning and beat
26 your ass! We've done this shit before and we'll do your ass too!" Both defendants laughed and

1 warned plaintiff to drop grievances nos. CSPC-3-06-00115 and CSPC -3-06-00652, and were
2 heard by unidentified inmates and correctional staff. The next day, Feb. 23, 2006, plaintiff filed
3 a complaint against defendants Hill and Morrison for the incident of Feb. 22, 2006, no. CSPC-3-
4 06-01022. *Id.*, at 25-26.

5 On Feb. 25, 2006, defendant R. Hubach interviewed plaintiff about grievance no.
6 CSPC-3-06-00115, telling plaintiff that defendants Warden Adams, Assoc. Warden Ortiz, and
7 Captain Daveiga, his supervisors, were tired of plaintiff's constant "snitching" and complaint
8 filing and had told Hubach to make the complaint "go away." He told plaintiff that it could be in
9 his "best interest" to withdraw CSPC-3-06-00115. When plaintiff protested, defendant Hubach
10 told him that if the complaint was not dropped, plaintiff would be put in administrative
11 segregation (*ad seg*), "and we will see to it [] that you don't go home on your release date."
12 Plaintiff withdrew the grievance in fear for his life and of losing his release date. Defendant
13 Hubach's statements were made in front of unidentified inmates and correctional staff. *Id.*, at 26-
14 27.

15 On March 15, 2006, plaintiff was called to defendant J. Diaz's office about a
16 complaint he had filed concerning race classification and African American inmates' cell
17 assignments. When asked, plaintiff informed J. Diaz that he was not a gang member but was
18 complaining that he was being discriminated against by being classified by race and forced to be
19 housed only with African American inmates. Defendant J. Diaz stated that all African American
20 inmates get punished when one commits a serious rules violation "because it is the 'mindset' of
21 blacks to assault correctional staff." Defendant J. Diaz went on to tell plaintiff that that is the
22 way it is at Corcoran and that, although plaintiff was right that he should be able to cell with any
23 race, California was not New York and that "out here, there is [*sic*] racial politics in prison
24 between inmates and between correctional staff." Defendant J. Diaz also told plaintiff that racial
25 segregation was allowed among inmates "because this is what the inmates want." *Id.*, at 27-28.

26 \\\

1 When plaintiff mentioned that the Supreme Court and the Ninth Circuit had said
2 that prison racial segregation was unconstitutional, Diaz told him that he knew about “the
3 Johnson v. California⁴ ruling,” but that it meant nothing because “our union allows us to run
4 these prisons as we see fit, and there is nothing any court can do about it” and that “some court”
5 would not stop segregation practices that had been on-going “for years.” Conceding that plaintiff
6 was right, defendant J. Diaz told him he was nevertheless not going to grant the appeal, but
7 instead was transferring him from CSP because of the many problems his complaint filing
8 caused. *Id.*, at 28.

9 On March 16, 2006, defendant R. Chatham interviewed plaintiff about grievance
10 no. CSPC-3-06-01022, which plaintiff had filed against defendants Hill and Morrison.
11 Defendant Chatham said that he had spoken with Correctional Counselor Smooth (not a
12 defendant) and Inmate L. Wimberly, CDC No. P-92181, who both confirmed hearing yelling and
13 threats from defendant Hill’s office on Feb. 24, 2006; plaintiff confirmed that these defendants
14 had threatened to harm him on that day if he did not drop this complaint, which plaintiff told
15 defendant Chatham that he wanted to do to avoid a staff assault. Chatham replied that he could
16 not guarantee that correctional staff would not assault plaintiff but “strongly” suggested plaintiff
17 drop the complaint and “not pursue any more” if plaintiff valued his safety. He also mentioned
18 that plaintiff would be transferred due to all of his complaint filing. *Id.*, at 26-27.

19 Plaintiff reports that on March 17, 2006, Corr. Counselor Smooth “became
20 verbally hostile” with Inmate Wimberly, yelling because Wimberly had put his name in a report
21 with which he did not wish to be associated, concerning the Feb. 24, 2006, incident in defendant
22 Hill’s office (concerning plaintiff’s being admonished to drop CSPC-3-06-01022, about the
23 earlier Feb. 22, 2006, incident in Hill’s office).

24
25 ⁴ Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141 (2005) (equal protection challenge
26 to state corrections dept.’s unwritten policy of double-celling new/transferred inmates in initial
60-day evaluation with cellmates of same race is subject to strict scrutiny standard of review).

1 On March 21, 2006, before plaintiff received any appeal responses to grievances
2 CSPC-3-06-00115, CSPC -3-06-00652 or CSPC-3-06-01022 or his complaint relating to
3 classification and cell assignment of African American inmates, plaintiff was transferred to
4 HDSP, with increased security level housing status, where he was housed on a 180 design yard
5 for inmates with serious disciplinary problems. Upon his arrival at HDSP, he was forced into a
6 holding cell for African American inmates only and all of his legal and personal property were
7 contraband. *Id.*, at 30-31.

8 Plaintiff was interviewed by three unnamed correctional lieutenants who told him
9 that at HDSP all cell and job assignments, etc., were made by race. Plaintiff was told that there
10 were no “black cells” on the 270 design yard and because of what had happened between
11 himself and CSP correctional staff, he would be housed in a 180 design special housing unit for
12 “black inmates with serious disciplinary problems.” *Id.*, at 31.

13 On March 23, 2006, plaintiff was interviewed by three unit classification
14 committee members (UCC), defendants D. Vanderville, D. Hellwig, and J. Owen, who told
15 plaintiff that he was “a non-adverse transfer from Corcoran,” but that there was a memo from
16 CSP UCC members defendants J.A. Diaz, J. Diaz, and Tellerico, saying that plaintiff files
17 complaints and lawsuits and must be housed at an increased security housing level and on 180
18 design special housing. *Id.*, at 31-32.

19 Plaintiff was told by defendants Vanderville, Hellwig, and Owen that he would be
20 housed on the C-Facility 180 yard because he was black, there were no open “black cells” on the
21 270 yard, and because Corcoran had so advised them. When plaintiff protested that he could be
22 housed with any race, according to departmental policy and procedure, and that he had no
23 disciplinary sanctions from CSP and did not display aberrant behavior to warrant increasing his
24 security status from 270 to 180, he was told by these defendants that he was being upgraded
25 because he filed “too many lawsuits and complaints on staff,” and this way he could be confined
26 to his cell for 23 hours a day which would prevent him from engaging in such activity. *Id.*, at 32-

1 33.

2 Plaintiff complained that the CSR⁵ endorsed him for housing on a 270 design
3 yard, to which defendants Vanderville, Hellwig, and Owen replied that they did not have to
4 follow the endorsement, that plaintiff was black and no black cells on the 270 yard were open,
5 that even if there were, he would not be housed there based on Corcoran's administration having
6 said to upgrade his security housing level. Plaintiff said that when he had arrived at HDSP
7 Receiving and Release (R&R), he had arrived with white, Hispanic, and Asian inmates who were
8 taken to be housed on the 270 yard. In addition to being housed on a 270 design yard, he asked
9 that he receive a clerk position equivalent to the job assignment as GED clerk he had had at CSP
10 with a pay number. These defendants told plaintiff the other inmates who were sent to be housed
11 on the 270 design yard were not black and did not file complaints and lawsuits against staff and
12 that at HDSP, "everything is done according to race" and black inmates who sue correctional
13 staff do not receive clerk assignments. When plaintiff complained of a violation of his First and
14 Fourteenth Amendment rights for which he intended to file a complaint, he was told that for
15 threatening to file a complaint, he would be deprived of his legal and personal property. *Id.*, at
16 33-34.

17 On March 23, 2006, plaintiff contacted his attorney, Robert A. Bailey, to enlist his
18 help in securing his legal and personal property so that plaintiff could meet court deadlines.
19 HDSP's Litigation Coordinator told his lawyer that she would track down plaintiff's legal
20 property to give to plaintiff. On March 29, 2006, plaintiff avers that defendants T. Felker, M.
21 McDonald, D. Billings, D. Gunter, D. Vanderville, G. Marshall, A. Harnden, K. McCraw, M.
22 Wright, and J. Lynn had a staff meeting and discussed race-based classification and cell
23 assignments raised by plaintiff on March 23, 2006, and the Johnson v. California [*supra*, 543
24 U.S. 499, 125 S. Ct. 1141] decision requiring prison cell desegregation. According to plaintiff,
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26 ⁵ Classification Staff Representative.

1 these HDSP defendants all concluded that they could ignore the order to CDCR to desegregate its
2 prisons. *Id.*, at 35-36.

3 On March 30, 2006, plaintiff filed a 602 appeal no. HDSP-C-06-00807,
4 concerning his transfer and the classification/cell assignment of African American inmates. On
5 April 6, 2006, defendant B. Epperson escorted plaintiff to R&R, where much of his legal and
6 personal property had been damaged and was confiscated, including, among other items, a
7 cassette radio, new razors, a doctor-prescribed knee/ankle brace wrap, a pair of Nike shower
8 shoes, a new hair brush, a pair of head phones, a pack of T-shirts, a pair of Reebok tennis shoes,
9 a beard trimmer. Legal property confiscated included a Black's Law Dictionary, Deering's
10 desktop Federal Rules of Civil Procedure, all of plaintiff's case law and federal and state writs,
11 writing pens, pleading paper, postage stamps and envelopes. *Id.*, at 36-37.

12 Defendant Epperson and an unnamed staffmember told plaintiff his property was
13 being confiscated because plaintiff had had his lawyer call and because he was housed on C-yard.
14 Plaintiff said that he had been told by Corcoran R&R staff that none of his personal and legal
15 property was contraband and that he had observed white, Hispanic and Asian inmates with some
16 of the same items. Defendant Epperson told him that because he was black and housed on the C-
17 Facility 180 design yard, he was not allowed the property. When plaintiff stated that he was
18 filing a complaint alleging violation of his constitutional rights, he was told by Epperson (and the
19 unnamed R&R staffmember) that at HDSP, things were done by racial classification and they did
20 not answer to the courts. *Id.*, at 37-38.

21 Plaintiff alleges that from March 20, 2006, until the present (the time of filing his
22 complaint, on October 20, 2006), he had repeatedly submitted requests/complaints to no avail to
23 defendant S. Babich at HDSP, and to CSP defendants Galaviz and Streeter, to respond to and
24 forward his grievance nos. CSPC-3-06-00115, CSPC -3-06-00652 and CSPC-3-06-01022, as
25 well as his complaint about HDSP African American inmate classification/cell assignments. *Id.*,
26 at 38-39.

1 Plaintiff alleges that Corcoran State Prison defendants, D. G. Adams, D.D. Ortiz,
2 K. Daveiga J.A. Diaz, T. Galaviz, B. Streeter, P. Chatham, J. Hill, R. Hubach, A. Morrison, J.
3 Diaz, S. Tellerico, conspired together to transfer him to High Desert in retaliation for his filing
4 grievances and to avoid responding to or returning his pending appeals and increased his security
5 housing level and confiscated and destroyed his property in violation of his First Amendment
6 rights. *Id.*, at 39. Defendants J.A. Diaz, K. Daveiga, P. Chatham, J. Hill, R. Hubach, and A.
7 Morrison conspired and threatened to physically harm him and place him in ad seg if he did not
8 withdraw his grievances, which he did out of fear in violation of his rights under the First
9 Amendment. Defendants D. G. Adams, D.D. Ortiz, K. Daveiga, J.A. Diaz, T. Galaviz, B.
10 Streeter, P. Chatham, J. Hill, R. Hubach, A. Morrison, J. Diaz, S. Tellerico, all threatened
11 plaintiff with physical harm, with delaying his release date, with placing him in ad seg, and
12 conspired to retaliate against him in the form of a prison transfer, and denied him full exhaustion
13 of his administrative remedies. *Id.*, at 40.

14 Defendants T. Felker, M. McDonald, D. Gunter, M. Wright, D. Billings, D.
15 Vanderville, C.Adams, S. Babich, R. Ingwerson, G. Marshall, A. Harnden, K. McCraw, J. Lynn,
16 [B. Epherson], C. Lockard, J. Owen, D. Hellwig at High Desert State Prison all ratified the
17 retaliatory conduct of the CSP defendants by refusing to take corrective measures and by
18 increasing his security housing level, by confiscating and destroying plaintiff's personal and legal
19 property, all at the request of the CSP defendants, in violation of plaintiff's First Amendment
20 rights. *Id.*, at 41.

21 Plaintiff alleges that all of the defendants "maintain segregationist policies,"
22 harboring a discriminatory animus against plaintiff and other African American inmates,
23 requiring them to be double celled only with African Americans, and in separate holding cells, a
24 claim of a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 42-48.
25 Plaintiff also alleges a state tort claim of negligence, contending that defendants inflicted
26 physical, mental and emotional injuries upon him by their acts and omissions. He claims that he

1 has lost wages, legal and personal property, and suffered “severe pain, humiliation,
2 indignities....” Id., at 49-50.⁶ Plaintiff also claims defendants’ conduct was willful, wanton,
3 malicious and oppressive. Id., at 52. Plaintiff seeks compensatory and punitive damages, a
4 declaratory judgment and injunctive relief. Id., at 44-53.

5 Motion to Dismiss

6 Defendants⁷ move for dismissal under nonenumerated Fed. R. Civ. P. 12(b) for
7 failure to exhaust administrative remedies and, as to certain defendants, under Fed. R. Civ.
8 12(b)(6), for failure to state a claim. Motion to Dismiss (MTD), pp. 1-2. As to defendants’
9 motion to dismiss for failure to state a claim, under Rule 12(b)(6), this court need not reach
10 defendants’ argument because, as to the defendants at issue on that ground, defendants Babich,
11 Ingwerson, Lockard and C. Adams (MTD, pp. 10-12), plaintiff does not oppose this portion of
12 defendant’s motion, instead himself moving for voluntarily dismissal of these defendants from
13 this action, citing Fed. R. Civ. P. 41(a)(1). See Opposition (Opp.), pp. 36-38. Therefore, these
14 defendants will be dismissed, and this portion of defendants’ motion denied as moot. The court
15 now considers the motion as to the remaining ground as to the remaining defendants.

16 Legal Standard under Non-Enumerated Fed.R.Civ.P. 12(b)

17 In a motion to dismiss for failure to exhaust administrative remedies under non-
18 enumerated Rule 12(b) of the Federal Rules of Civil Procedure, defendants “have the burden of
19 raising and proving exhaustion.” Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The
20 parties may go outside the pleadings, submitting affidavits or declarations under penalty of
21 perjury, but plaintiff must be provided with notice of his opportunity to develop a record. Wyatt
22 v. Terhune, 315 F.3d at 1120 n.14. The court provided plaintiff with such fair notice by Order,
23 filed on December 13, 2006 (and again by an Order, filed on May 11, 2007).

24
25 ⁶ Plaintiff’s putative “state tort claim torts in essence” is not readily decipherable, much
less colorable. Id., at 51.

26 ⁷ With the exception of defendant B. Epperson. See footnote 2.

1 Should defendants submit declarations and/or other documentation demonstrating
2 an absence of exhaustion, making a prima facie showing, plaintiff must refute that showing.
3 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the
4 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to
5 the court’s attention those parts of the complaint upon which plaintiff relies. If the court
6 determines that plaintiff has failed to exhaust, dismissal without prejudice is the appropriate
7 remedy for non-exhaustion of administrative remedies. Wyatt v. Terhune, 315 F.3d at 1120.

8 *PLRA Requirements*

9 The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) provides that,
10 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
11 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
12 such administrative remedies as are available are exhausted.” Inmates seeking injunctive relief
13 must exhaust administrative remedies. Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999). In Booth
14 v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825 (2001), the Supreme Court held that
15 inmates must exhaust administrative remedies, regardless of the relief offered through
16 administrative procedures. Therefore, inmates seeking money damages must also completely
17 exhaust their administrative remedies. Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819 (inmates
18 seeking money damages are required to exhaust administrative remedies even where the
19 grievance process does not permit awards of money damages). The United States Supreme Court
20 has held that exhaustion of administrative remedies under the PLRA requires that the prisoner
21 complete the administrative review process in accordance with the applicable procedural rules.
22 Woodford v. Ngo, 548 U.S. ___, 126 S. Ct. 2378 (2006). Thus, in the context of the applicable
23 PLRA § 1997e(a) exhaustion requirement, any question as to whether a procedural default may
24 be found should a prisoner plaintiff fail to comply with the procedural rules of a prison’s
25 grievance system has been resolved: the PLRA exhaustion requirement can only be satisfied by
26 “proper exhaustion of administrative remedies....,” which means that a prisoner cannot satisfy the

1 requirement “by filing an untimely or otherwise procedurally defective administrative grievance
2 or appeal.” Woodford v. Ngo, supra, 126 S. Ct. at 2382. Moreover, 42 U.S.C. § 1997e(a)
3 provides that no action shall be brought with respect to prison conditions *until* such
4 administrative remedies as are available are exhausted. McKinney v. Carey, 311 F.3d 1198 (9th
5 Cir. 2002).

6 Administrative Exhaustion Procedure

7 In order for California prisoners to exhaust administrative remedies, they must
8 proceed through several levels of appeal: 1) informal resolution, 2) formal written appeal on a
9 CDC 602 inmate appeal form, 3) second level appeal to the institution head or designee, and 4)
10 third level appeal to the Director of the California Department of Corrections. Barry v. Ratelle,
11 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. xv, § 3084.5). A final
12 decision from the Director’s level of review satisfies the exhaustion requirement. Id. at 1237-38.

13 Discussion

14 Defendants contend that as to several incidents, there is no evidence of plaintiff
15 ever having filed a grievance. The first identified is the Dec. 21, 2005, interview with defendant
16 J. A. Diaz, wherein plaintiff alleged that this defendant told plaintiff he would be transferred
17 because of a December 2005 grievance he had filed and that he (Diaz) had attended a staff
18 meeting with defendant Warden Adams and defendant Associate Warden Ortiz where they had
19 discussed plaintiff’s filing of grievances and assisting other inmates with staff complaints.
20 Defendant J.A. Diaz is alleged to have instructed defendants T. Galaviz and Streeter, the appeals
21 coordinators at Corcoran, not to address plaintiff’s grievances and plaintiff claims that defendants
22 Galaviz and Streeter have not responded to his requests to forward copies of his appeals. MTD,
23 p. 8. Defendants contend that:

24 [i]n addition to the administrative appeals process, an inmate can
25 file a staff complaint, in which the inmate may allege staff
26 misconduct. An inmate may make allegations of staff misconduct
on a CDCR 602 Form, but is permitted to make his allegations in
the form of a letter or other writing. The nature of the misconduct

1 may result in an investigation of the staff member. An inmate may
2 also request an appointment to meet with his correctional
3 counselor, and/or facility sergeant, lieutenant, captain, associate
4 warden, and warden. The inmate can also make his grievance
5 known to any one or all of these individuals by letter. The inmate
6 may also request to have his problem addressed by his
7 Classification Committee. Finally, the inmate can write a letter to
8 the California State Inspector General describing the problem,
9 request an investigation, and ask that the problem be addressed.

6 MTD, p. 7, Exhibit A, Declaration of V. Castillo, Corcoran Appeals Coordinator, ¶ 11; Exhibit
7 B, Declaration of D. Jackson, HDSP, Appeals Coordinator, ¶ 11. Plaintiff includes as part of
8 Exhibit D to his declaration in opposition, a copy of a letter⁸ signed by defendant Warden
9 Adams, noting that in the Dec. 21, 2005, interview with defendant J.A. Diaz, plaintiff had
10 acknowledged that his concern about a lockdown of African American inmates before or after the
11 scheduled Dec. 13, 2005, execution (of Stanley Williams) had never materialized. With regard
12 to other concerns expressed in his Dec. 6, 2005, letter to the warden about non-affiliated inmates
13 being subjected to lockdowns because of being housed with [gang-]affiliated inmates, plaintiff
14 was informed, inter alia, that situations requiring program modifications are carefully reviewed,
15 and determinations “made based on information provided by an investigation as to any non-
16 affiliated inmates and their cellmates regardless of their ethnicity.” Opp., Exhibit D. Plaintiff is
17 referred for further concerns to defendant J. A. Diaz, Captain, Facility 3B. The court’s review of
18 plaintiff’s opposition, declaration in support of the opposition, and exhibits thereto, indicates that
19 plaintiff does not demonstrate that he ever filed either a grievance or a staff complaint with
20 regard to the Dec. 21, 2005, incident. On the other hand, part of plaintiff’s allegation concerning
21 this incident is that defendant told plaintiff that his continued complaint filing would not be
22 tolerated, that the housing of African American inmates would not be changed, that plaintiff
23 would be transferred, and that when plaintiff stated that he would be filing a grievance, defendant
24 J.A. Diaz told him that he had instructed the appeals coordinators not to address plaintiff’s

25 ⁸ Plaintiff avers that the letter was dated Jan.14, 2006, but the date is illegible on the copy
26 presented. Opp., p. 17.

1 complaints. Complaint, p. 19. The fact that the letter from defendant Warden Adams
2 referencing that very interview and directing plaintiff to defendant J.A. Diaz for further concerns
3 suggests a Catch-22 for plaintiff. MTD, p. 8. The court will find in these circumstances that
4 plaintiff has exhausted his administrative remedies as to a claim of retaliation by defendant J.A.
5 Diaz with regard to this incident.⁹

6 As to the Jan. 4, 2006, incident, defendant maintains no grievance was filed with
7 respect to plaintiff's allegations that defendants J.A. Diaz, Tellerico, and J. Diaz on that day
8 informed him that he was being transferred to a 180 design prison because he had filed too
9 many grievances and they were ordered to transfer him by defendant Warden Adams. MTD, p.
10 8, Exhibit A, Castillo Dec. ¶ 13(c), Exhibit C, Declaration of Chief of Inmate Appeals Grannis, ¶
11 11(e). In opposition, plaintiff contends that on Jan. 4, 2006, he filed a 602 appeal, challenging
12 the transfer to a higher security 180 design prison for having filed too many grievances, seeking a
13 full investigation and the names of all personnel responsible for the hearing and asking that
14 retaliation against him be stopped. Opp., p. 22, plaintiff's Declaration in support of Opp., ¶¶18-
15 19. He refers to his Exhibit B, attached to his declaration and maintains that this 602 appeal has
16 been in the possession of Corcoran's (CSP's) administration which refuses to forward it to him.
17 Id. A review of plaintiff's Exhibit B reveals, inter alia, copies of grievances, filed at HDSP, on
18 4-20-06 and on 5-10-06, wherein plaintiff complains of having written without avail to defendant
19 Appeals Coordinator T. Galaviz regarding four appeals pending at Corcoran upon his transfer to
20 HDSP on 3-21-06, among which grievances was one appeal not identified by number but
21 referencing a grievance about cell assignments.¹⁰ A copy of an appeal, dated as signed on 3-13-
22 07, while post-dating the filing of the complaint is largely duplicative of the earlier filed appeals,
23

24 ⁹ See conclusion.

25 ¹⁰ The court does not consider the appeal dated 3-13-07, wherein plaintiff complains that
26 upon his transfer to HDSP on 3-21-06, he had four 602 appeals pending, including one dated as
Jan. 4, 2006, because it post-dates the filing of this complaint.

1 where again plaintiff complains that upon his transfer to HDSP on 3-21-06, he had four 602
2 appeals pending, including one which he specifies therein as having been dated as Jan. 4, 2006.
3 While neither side presents a definitively convincing resolution to this factual dispute, the court
4 finds in this instance that defendants have not sufficiently demonstrated that plaintiff never filed
5 a grievance as to this incident, and while it is plain that it did not process, that failing in the
6 circumstances should not be found to devolve in defendants' favor, particularly in light of the
7 allegations of this complaint. See discussion below.¹¹

8 Another incident for which defendant claims no grievance was filed is for the Feb.
9 25, 2006, allegation that defendant Hubach told plaintiff he would be placed in ad seg and his
10 release date delayed if he did not drop the grievance filed against defendant Hill, No.
11 CSPC-3-06-00115, and wherein plaintiff alleges that defendant Hubach was told to talk to him
12 by defendants Warden Adams, Ortiz, and Daveiga. MTD, p. 8. Plaintiff also averred that he
13 withdrew this in fear for his life as well as because he was afraid of his release date being
14 extended. Complaint, p. 27. As to this incident, plaintiff maintains that he submitted a grievance
15 in the form of a letter to defendant Warden Adams, citing Exhibit E. Opp., pp. 28-29. Plaintiff's
16 Exhibit E, attached to his declaration in opposition, is a copy of a signed handwritten letter
17 directed to defendant Warden Adams, dated February 26, 2006. The subject line references
18 "repeated threats made by Lieutenant Hubach and other correctional staff regarding the events on
19 February 25, 2006." The content of letter addresses the alleged events of that day and seeks an
20 investigation. Plaintiff also notes that defendants in their motion (MTD, p. 7) stated that an
21 inmate could make a staff complaint "in the form of a letter or other writing...which may result
22 in the investigation of the staffmember." Opp., p. 28. This form of raising a staff misconduct
23 issue suggests that defendants perceive this as a valid method of administrative exhaustion.¹²

24
25 ¹¹ Also, see conclusion.

26 ¹² See conclusion.

1 As to the allegation concerning the incident on March 15, 2006, wherein plaintiff
2 alleges that defendant J. Diaz told him that he was being transferred for filing grievances, which
3 defendants also identify as unexhausted, MTD, p. 8, plaintiff expressly states that he makes no
4 separate claim as to this incident, implicitly conceding a failure to exhaust this claim separately.
5 Opp., p. 31. This applies as well to plaintiff's March 16, 2006, allegation that he was threatened
6 with harm by defendant Chatham if he did not drop his grievance (no. CSPC-3-06-01022) against
7 defendants Hill and Morrison and allegedly told plaintiff that he was being transferred because of
8 his grievance activity. MTD, p. 8. Plaintiff in this instance states that he is not making a separate
9 claim against defendant Chatman as to the events of March 16, 2006 (Opp., p. 31), which the
10 court will construe as plaintiff's concession that the claim is unexhausted.

11 Defendants also argue that plaintiff's allegations that, on March 23, 2006,
12 defendants Vanderville, Hellwig, and Owen upgraded his security housing level to a 180 design
13 yard because of his grievance filing activities, placed him in segregated housing because of his
14 race, and threatened to withhold his personal and legal property if plaintiff filed a grievance
15 against them are unexhausted. MTD, p. 9, Exhibit B, Jackson Dec. ¶ 13(a), Exhibit C, Grannis
16 Dec., ¶ 11(j). In doing so, the court finds defendants to have been at best negligent in their
17 representations and at worst disingenuous, in light of plaintiff's exhibits in opposition. Plaintiff
18 avers that he filed a grievance on March 30, 2006, regarding this event, citing his Exhibit F.
19 Opp., p. 32. Plaintiff's Exhibit F contains a copy of an appeal identified as HDSP-C-06-0807. In
20 the appeal (with attachment), dated by plaintiff as initially filed on 3-30-06, plaintiff complains,
21 inter alia, of having been informed by three HDSP UCC (Unit Classification Committee
22 members) on March 23, 2006, that he was to be housed on the C-Facility 180 yard due to his
23 being black, notwithstanding his express desire to be housed with anyone on the 270 yard, who,
24 in reviewing his C-file, observed he was a non-adverse transfer but that Corcoran's Classification
25 Committee had noted that he filed complaints and should be housed on a 180 design yard. The
26 appeal was partially granted at the first level to the extent that he was to be placed on a waiting

1 list for the Facility B 270 yard, noting that his claim was one of discrimination based on his race
2 in being confined to a 180 design yard. Plaintiff's claim was exhausted at the third level in a
3 director's level appeal decision, dated Sept. 22, 2006. To the extent that plaintiff claims these
4 defendants allegedly threatened to withhold his legal and personal property, that specific claim
5 does not appear to have been exhausted; however, his claim of retaliation for grievance filing and
6 of racial discrimination in his housing as to these defendants appears adequately exhausted.¹³
7 Plaintiff goes on to say that in each level of review he requested the names and titles of all
8 correctional personnel responsible for the classification and cell assignments of inmates, and the
9 appeal responses bear him out on this point. The second and third level appeal responses
10 indicate that this request was granted in part because the staff responsible for plaintiff's own
11 classification was provided on the March 23, 2006, classification chrono (CDC 128G), which is
12 not provided by either party. The court logically infers, however, that notwithstanding plaintiff's
13 broadsweeping request for the name of all supervisory personnel responsible inmate
14 classification and cell assignments that plaintiff's grievance is exhausted only as to those
15 members of the March 23, 2006, HDSP classification committee who met with plaintiff and
16 determined his housing assignment. Thus, while plaintiff's allegations as defendants
17 Vanderville, Hellwig, and Owen of discrimination/retaliation arising from his housing
18 classification on March 23, 2006, have been shown to be exhausted, his claims arising from the
19 same event against defendants Felker, McDonald, Billings, Gunter, Marshall, Harnden, McCraw,
20 Wright, and Lynn cannot reasonably found to have been exhausted and should be dismissed.¹⁴

21 As to the incident of March 29, 2006, additionally identified by defendants as
22 unexhausted in their motion, wherein plaintiff also alleges that defendants Felker, McDonald,
23 Billings, Gunter, Vanderville, Marshall, Harnden, McCraw, Wright, and Lynn discussed
24

25 ¹³ See conclusion.

26 ¹⁴ See conclusion.

1 classification and cell assignments of inmates based on the issues brought up by plaintiff in the
2 March 23, 2006, classification meeting. MTD, p. 9. Within plaintiff's allegations, he claims that
3 these individuals met and discussed race-based classification and cell assignments raised by
4 plaintiff on March 23, 2006, as well as the Johnson v. California [supra, 543 U.S. 499, 125 S. Ct.
5 1141] decision requiring prison cell desegregation, deciding to ignore the order to CDCR to
6 desegregate its prisons. Complaint, pp. 35-36. Defendants contend that no evidence
7 demonstrates that plaintiff ever filed a grievance relating to this alleged event. MTD, p. 9,
8 Exhibit B, Jackson Dec., ¶ 3(b), Exhibit C, Grannis Dec., ¶ 11(k). To the extent that plaintiff
9 argues that his March 30, 2006, 602 appeal no. HDSP-C-06-00807, somehow covers this
10 putative staff meeting and its alleged attendees and ensuing discussion as well, this is simply not
11 borne out by the documents plaintiff provides. Opp., pp. 6, 32-36, Exhibit F. No reference is
12 made either in the grievance provided or appeal responses to any March 29, 2006, staff meeting,
13 and, indeed, it is difficult to discern the basis for plaintiff's certainty as to the occurrence of a
14 meeting in which he neither represents that he was a participant or attendee or identifies his
15 source for such a meeting ever taking place. Thus, the court must find that as to this allegation
16 against these defendants, the claim is administratively unexhausted.

17 Finally, defendants note that as to the allegations plaintiff raised in grievances
18 submitted at Corcoran, numbered CSPC-3-06-00115, filed on Dec. 30, 2005 (that defendant Hill
19 refused to replace plaintiff's property and threatened his safety), and CSPC-3-06-00652, filed in
20 Nov, 2005 (that defendant Morrison confiscated and destroyed plaintiff's legal documents in
21 Nov., 2005), plaintiff expressly states that he withdrew them and did not seek a Director's level
22 review. MTD, p. 9. As to the grievance filed at Corcoran on Feb. 23, 2006, no. CSPC-3-06-
23 01022, following plaintiff's Feb. 22, 2006, encounter with defendants Hill and Morrison,
24 concerning his grievances, no. CSPC -3-06-00652 and no. CSPC-3-06-00115, wherein plaintiff
25 was allegedly threatened with harm if he did not withdraw his grievances numbered CSPC-3-06-
26 00115 and CSPC -3-06-00652, defendants argue that there is no record the grievance as to this

1 incident, no. CSPC-3-06-01022, having been exhausted through the third level. MTD, 10,
2 Exhibit C, Grannis Dec., ¶ 11(f).

3 In opposition, plaintiff argues that as to his Nov. 12, 2005, grievance against
4 defendant Morrison, concerning the confiscation and destruction of his legal property, no. CSPC-
5 3-06-00652, C/O S. G. Vasquez, not a defendant, hand-delivered it to defendant Morrison for an
6 informal level response, after which, from Dec. 7, 2005, to Jan. 26, 2006, Morrison refused to
7 file an answer within ten working days, in accordance with CAL. CODE REGS. tit.XV, § 3084.6.¹⁵
8 Opp., p. 12. Instead, defendant Morrison issued a staff response on Jan. 27, 2006, rejecting the
9 appeal as exceeding appeal time limits, citing § 3084.6.¹⁶ Plaintiff warrants that he then filled
10 out the formal level section D portion of the appeal, stating that defendant Morrison was not
11 being truthful and that when C/O Vasquez hand-delivered the appeal, a due date of Dec. 14,
12 2005, was given. Opp., p. 13. After submitting the grievance for formal level review on Jan. 27,
13 2006, plaintiff contends that he was interviewed regarding the issue raised, and, on March 14,
14 2006, received a formal level response, indicating that the appeal was “partially granted.” Id.
15 Plaintiff was dissatisfied with that response and, on March 16, 2006, filed a second level appeal.
16 Id. Plaintiff then notes that five days later, he was transferred from Corcoran to HDSP. Id.
17 Plaintiff states that thereafter, he submitted 602 appeals to the HDSP appeals coordinator,
18 regarding his four outstanding appeals when he was transferred pending at Corcoran: CSPC-3-
19 06-00115, CSPC -3-06-00652 or CSPC-3-06-01022, as well as a 602 appeal regarding the Jan. 4,
20 2006, UCC hearing and cell assignments. Opp., p. 14, Exhibit B to plaintiff’s Dec. A review of
21 plaintiff’s Exhibit B reveals copies of inmate appeals, at least two of which were dated prior to
22 the filing of this complaint, on 4-20-06 and on 5-10-06, that were filed at HDSP, wherein

23
24 ¹⁵ CAL. CODE REGS. tit.XV, § 3084.6(b)(1) requires an informal level response to an appellant
by staff “within ten working days.”

25
26 ¹⁶ § 3084.6(c) requires an inmate/parolee file an appeal “within 15 working days of the
event or decision being appealed, or of receiving an unacceptable lower level appeal decision.”

1 plaintiff notes that he had written several letters to defendant Appeals Coordinator T. Galaviz at
2 Corcoran seeking to have the aforementioned appeals sent to him at HDSP. HDSP Appeal
3 Coordinator Babich evidently sent plaintiff forms rejecting his requests, dated 4-26-06¹⁷ and 6-
4 19-06, telling plaintiff, inter alia, that they were an abuse of the appeal process because plaintiff
5 was seeking information, not filing an appeal. Plaintiff also includes in his Exhibit B, a copy of
6 an “inmate request for interview” that was directed to the HDSP warden’s office, dated 5-03-06,
7 noting his 3-21-06 transfer to HDSP and noting that he had the above-referenced four appeals
8 pending at Corcoran when he was transferred. In addition, plaintiff includes copies of Corcoran
9 Inmate Appeal Level I and II tracking logs for plaintiff, one dated 2-27-06 and another dated 5-
10 10-06, which demonstrate that grievances numbered, CSPC-3-06-00115, CSPC-3-06-00652 and
11 CSPC-3-06-01022, were filed. CSPC-3-06-00115 is noted as having been received for Level 1
12 review on 1-20-06, with a response due dated of 3-07-06, but shown to be withdrawn on 3-16-06.
13 CSPC-3-06-00652 is noted as received for Level 1 review on 4-26-06, with a response due date
14 of 5-08-06, with no further disposition noted. CSPC-3-06-01022 is shown to have been received
15 for Level 1 review on 3-10-06, with a response due on 4-24-06, with first formal level review
16 completed on 3-22-06, and the disposition at that level noted as “granted in part,” with no further
17 processing.

18 Defendants file no response to plaintiff’s evidence and representations. As to
19 defendants reference to plaintiff having sought to withdraw two of his appeals, they make no
20 reference to the egregiousness of the alleged circumstances under which plaintiff states that he
21 felt compelled to do so. While they do not concede plaintiff’s allegations, neither do they dispute
22 the circumstances. It would be inappropriate for defendants to succeed in an allegation of failure
23

24 ¹⁷ In this rejection, Babich unhelpfully suggests that plaintiff seek an interview with the
25 Corcoran appeals coordinator, even though plaintiff states in his 4-20-06 appeal that he had
26 written several letters to defendant Galaviz, Appeals Coordinator at Corcoran, identifying as his
last letter at that point as having been sent on 4-9-06, regarding his concern about the status of
the appeals and appeal time limits.

1 to exhaust administrative remedies as to some claims without their at least addressing or
2 countering the alleged misconduct by some defendants that may have precipitated the withdrawal
3 of the grievances. Nor is any reference made to plaintiff's persistent efforts to retrieve and revive
4 them. In Booth v. Churner, 532 U.S. 731, 121 S.Ct. 1819 (2001), the Supreme Court held that
5 regardless of the form of relief sought, prisoners are required to exhaust available administrative
6 remedies. In Booth, the Supreme Court also stated that there were no exceptions to the statutory
7 exhaustion requirement:

8 That Congress has mandated exhaustion in either case defeats the
9 argument of Booth and supporting amici that this reading of §
10 1997e (1994 ed., Supp. V) is at odds with traditional doctrines of
11 administrative exhaustion, under which a litigant need not apply to
12 an agency that has "no power to decree . . . relief," Reiter v.
13 Cooper, 507 U.S. 258, 269, 113 S. Ct. 1213, 122 L.Ed.2d 604
14 (1993), or need not exhaust where doing so would otherwise be
15 futile. See Brief for Petitioner 24-27; Brief for Brennan Center for
16 Justice et al. as Amici Curiae. Without getting into the force of
17 this claim generally, we stress the point (which Booth
acknowledges, see Reply Brief for Petitioner 4) that we will not
read futility or other exceptions into statutory exhaustion
requirements where Congress has provided otherwise. See
McCarthy v. Madigan, 503 U.S. 140, 144, 112 S. Ct. 1081, 117
L.Ed.2d 291 (1992); cf. Weinberger v. Salfi, 422 U.S. 749, 766-
767, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975). Here, we hold only
that Congress has provided in § 1997e(a) that an inmate must
exhaust irrespective of the forms of relief sought and offered
through administrative remedies.

18 Booth, 532 U.S. at 741 n. 6, 121 S.Ct. at 1825 n. 6.

19 However, Booth does not refute the principle that a complaint should not be
20 dismissed for failure to exhaust administrative remedies where prison officials do not respond to
21 an appeal in the time allowed for responding under grievance procedures. Bowers v. Mounet,
22 No. Civ. A. 99-533-JFF, 2001 WL 826556 *2 footnote 1 (D.Del. 2001). See also Powe v. Ennis,
23 177 F.3d 393, 394 (5th Cir. 1999)("[a] prisoner's administrative remedies are deemed exhausted
24 when a valid grievance has been filed and the state's time for responding thereto has expired.").

25 Prison officials have apparently not followed their own regulations regarding the
26 time for processing administrative appeals in this case. Under these circumstances, the extreme

1 delay in the processing of plaintiff's appeal excuses further exhaustion. See Underwood v.
2 Wilson, 151 F.3d 292, 295 (5th Cir. 1998), cert. denied, 526 U.S. 1133, 119 S. Ct. 1809 (1999)(a
3 prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed
4 and the state's time for responding thereto has expired.)¹⁸

5 As to the claims raised against the defendants in CSPC-3-06-00115, CSPC-3-06-
6 00652 and CSPC-3-06-01022, defendants' motion of failure to exhaust should be denied.¹⁹

7 *Injunctive Relief*

8 As noted earlier, court records indicate that plaintiff is no longer incarcerated at
9 either Corcoran or High Desert State Prisons. When an inmate seeks injunctive relief concerning
10 an institution at which he is no longer incarcerated, his claims for such relief become moot. See
11 Sample v. Borg, 870 F.2d 563 (9th Cir. 1989); Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir.
12 1986). See also Reimers v. Oregon, 863 F.2d 630, 632 (9th Cir. 1988). Plaintiff has
13 demonstrated no reasonable possibility that he will be incarcerated at Corcoran or High Desert
14 State Prisons at any predictable time in the future. Accordingly, plaintiff's claims for injunctive
15 relief should be dismissed.

16 *Conclusion*

17 The undersigned's recommendation of denial of defendants' motion for failure to
18 exhaust administrative remedies as to many of plaintiff's allegations is compelled in large part
19 because the court has neither the time nor resources to conduct an evidentiary hearing to rule
20 definitively on the question of exhaustion. Therefore, the recommendation of denial of the
21 motion as to a number of plaintiff's allegations is made without prejudice to defendants' renewal
22 of their contention that said claims are administratively unexhausted, should they be able to
23 demonstrate lack of exhaustion with additional evidentiary support at the time of trial, should this

24
25 ¹⁸ Abrogation on another ground recognized in Carbe v. Lappin, 492 F.3d 325 (5th Cir.
2007).

26 ¹⁹ See conclusion.

1 case proceed to that point.

2 Accordingly, IT IS HEREBY ORDERED:

3 1. Defendant Epperson must show cause, within ten (10) days, why the court
4 should not find that he/she is in default for failing to file a response to the complaint;

5 2. Plaintiff has moved to voluntarily dismiss defendants Babich, Ingwerson,
6 Lockard and C. Adams from this action, and these defendants are dismissed; defendants' April
7 10, 2007, motion to dismiss these defendants is, therefore, denied as moot;

8 IT IS RECOMMENDED that defendants' April 10, 2007, motion to dismiss for
9 failure to exhaust administrative remedies be denied in part and granted in part, as follows:

10 (a) denied as to plaintiff's claims of constitutional violations against defendant
11 Morrison for alleged confiscation/destruction of plaintiff's legal property in an incident allegedly
12 occurring in November, 2005;

13 (b) denied as to the plaintiff's December 6, 2005, claims of discrimination in
14 violation of the Fourteenth Amendment against defendants D.G. Adams, D.D. Ortiz, K. Daveiga,
15 J.A. Diaz, T. Galaviz, B. Streeter, P. Chatham, J. Hill, R. Hubach, A. Morrison, J. Diaz and S.
16 Tellerico;

17 (c) denied as to plaintiff's claim of retaliation by defendant J.A. Diaz for an
18 alleged incident arising on December 21, 2005;

19 (d) denied as to plaintiff's claim of retaliation against defendant Hill from an
20 incident allegedly occurring on December 30, 2005;

21 (e) denied as to plaintiff's claims of retaliation by defendants J. Diaz, Tellerico,
22 and J.A. Diaz, based on an alleged incident occurring on January 4, 2006;

23 (f) denied as to plaintiff's claims of retaliation by defendants Hill and Morrison,
24 arising from an alleged incident of Feb. 22, 2006;

25 (g) denied as to plaintiff's claims of retaliation by defendant Hubach for an
26 alleged incident that occurred on Feb. 25, 2006;

1 (h) granted as to plaintiff's claims of retaliation and discrimination by defendant J.
2 Diaz, alleged to have occurred on March 15, 2006, and these claims be dismissed;

3 (i) granted as to any claim by plaintiff against defendant Chatham arising from an
4 alleged incident on March 16, 2006;

5 (j) denied as to plaintiff's claims of discrimination and retaliation by defendants
6 Vanderville, Hellwig, and Owen from an alleged event occurring on March 23, 2006, but granted
7 as to claims against these defendants relating to a threat of alleged deprivation of his legal and
8 personal property and this portion of plaintiff's claim against these defendants be dismissed;

9 (k) granted as to plaintiff's claims against defendants Felker, McDonald, Billings,
10 Gunter, Marshall, Harnden, McCraw, Wright, and Lynn arising from alleged events of March 23,
11 2006, and March 29, 2006, and these defendants be dismissed;

12 2. Plaintiff's claims for injunctive relief be dismissed as moot, and this matter
13 proceed on the remaining claims against the remaining defendants on plaintiff's claims for
14 money damages only.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served and filed within ten days after service of the objections. The parties are advised
21 that failure to file objections within the specified time may waive the right to appeal the District
22 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: 02/01/08

/s/ Gregory G. Hollows

24
25

GREGORY G. HOLLOWES
UNITED STATES MAGISTRATE JUDGE

26 GGH:009 - mitc2321.mtd