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

MARLIN PENN,

Plaintiff,

No. 2:09-cv-2443 KJM JFM (PC)

vs.

WARDEN MCDONALD, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on plaintiff’s claims raised in his amended complaint filed December 7, 2009, arising from allegations that defendants at High Desert State Prison (“HDSP”) tampered with, withheld and prevented his legal mail from being mailed. This matter is before the court on defendants’ motion for summary judgment.

PROCEDURAL BACKGROUND

On December 7, 2009, plaintiff filed a first amended complaint (“FAC”), superseding his August 31, 2009 complaint.¹ In the FAC, plaintiff claims that defendants have

¹ Though the court will proceed with this FAC as the operative complaint in this action, the undersigned notes that plaintiff filed it as an “amendment” to the original complaint and thereby did not attach to his FAC numerous exhibits that were attached to the original complaint. Although, as a general rule, an amended complaint supersedes the original complaint, see Loux

1 prevented plaintiff from corresponding with Federal Bureau of Investigations (“FBI”) Agent
2 Brian Cook (“Cook”) and with attorney Charoletta Ransom (“Ransom”).

3 On March 29, 2010, defendants M.D. McDonald and M. Keating filed an answer.
4 On April 9, 2010, a discovery and scheduling order issued. On October 25, 2010, defendants
5 McDonald and Keating filed the instant motion for summary judgment. On December 8, 2010,
6 defendant Jeanne Woodford filed a joinder to the motion for summary judgment. On December
7 29, 2010, plaintiff filed an opposition. On January 28, 2011, defendants filed a reply. On
8 February 7, 2011, plaintiff filed a sur-reply. On February 15, 2011, defendants filed a motion to
9 strike plaintiff’s sur-reply. On February 24, 2011, plaintiff filed a request to file a sur-reply.

10 SUMMARY JUDGMENT STANDARDS UNDER RULE 56

11 Federal Rule of Civil Procedure 56(a) provides that “[t]he court shall grant
12 summary judgment if the movant shows that there is no genuine dispute as to any material fact
13 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).² A shifting
14 burden of proof governs motions for summary judgment under Rule 56. Nursing Home Pension
15 Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir.
16 2010). Under summary judgment practice, the moving party

17 always bears the initial responsibility of informing the district court of the basis
18 for its motion, and identifying those portions of “the pleadings, depositions,
19 answers to interrogatories, and admissions on file, together with the affidavits, if
any,” which it believes demonstrate the absence of a genuine issue of material
fact.

20 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
21 56(c)). “Where the non-moving party bears the burden of proof at trial, the moving party need

22
23 v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967), the court finds that plaintiff misunderstood the order
24 granting him leave to amend and, therefore, will append the exhibits to the FAC. Reference to
these exhibits will include citation to the original complaint.

25 ² Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10,
26 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule
56, “[t]he standard for granting summary judgment remains unchanged.”

1 only prove that there is an absence of evidence to support the non-moving party’s case.” In re
2 Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R.
3 Civ. P. 56 advisory committee’s notes to 2010 amendments (recognizing that “a party who does
4 not have the trial burden of production may rely on a showing that a party who does have the trial
5 burden cannot produce admissible evidence to carry its burden as to the fact”).

6 If the moving party meets its initial responsibility, the opposing party must
7 establish that a genuine dispute as to any material fact actually does exist. See Matsushita Elec.
8 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). To overcome summary
9 judgment, the opposing party must demonstrate the existence of a factual dispute that is both
10 material, i.e., it affects the outcome of the claim under the governing law, see Anderson v.
11 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores
12 Brand Mgmt., Inc., 618 F.3d 1025, 1031 (9th Cir. 2010), and genuine, i.e., “the evidence is such
13 that a reasonable jury could return a verdict for the nonmoving party,” FreecycleSunnyvale v.
14 Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248). A
15 party opposing summary judgment must support the assertion that a genuine dispute of material
16 fact exists by: “(A) citing to particular parts of materials in the record, including depositions,
17 documents, electronically stored information, affidavits or declarations, stipulations . . . ,
18 admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do
19 not establish the absence or presence of a genuine dispute, or that an adverse party cannot
20 produce admissible evidence to support the fact.”³ Fed. R. Civ. P. 56(c)(1)(A)-(B). However,
21 the opposing party “must show more than the mere existence of a scintilla of evidence.” In re
22 Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

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25 ³ “The court need consider only the cited materials, but may consider other materials in
26 the record.” Fed. R. Civ. P. 56(c)(3). Moreover, “[a] party may object that the material cited to
support or dispute a fact cannot be presented in a form that would be admissible in evidence.”
Fed. R. Civ. P. 56(c)(2).

1 Incoming mail will be processed as confidential mail if the envelope “bears the
2 name or title and a return address of persons and the office of persons listed in Section 3141.” Id.
3 § 3143. Confidential mail may be opened and inspected for contraband only in the presence of
4 the inmate. CCR § 3144. The inspecting correctional officers may not read the contents of
5 confidential mail. Id.

6 In order for communications with an attorney to be processed confidentially, CCR
7 § 3142(a) states that “[t]he letter must be addressed to a person or to the office of a person listed
8 in Section 3141. The address of an attorney must match the address listed with the State Bar.”

9 Plaintiff’s amended complaint challenges defendants’ actions as they relate to
10 plaintiff’s confidential letters to Cook and Ransom, and plaintiff’s filings with the “courts.”
11 Although plaintiff contends that certain confidential mail has been tampered with, the evidence
12 shows that plaintiff has sent and received numerous confidential / legal documents through the
13 HDSP mailroom concerning and/or challenging his underlying conviction on allegations of
14 prosecutorial misconduct to, inter alia, various attorneys, the U.S. Department of Justice, the Los
15 Angeles Superior Court, the American Civil Liberties Union, and the U.S. House of
16 Representatives. See Mot. for Summ. J., Ex. C.

17 A. Plaintiff’s Correspondence with FBI Agent Brian Cook

18 1. The June 18, 2006 Letter to Cook (Appeal No. HDSP-06-1983)

19 On July 11, 2006, plaintiff filed an inmate appeal form⁴ (log number HDSP-06-
20 1983) complaining that a letter he mailed to Cook on June 18, 2006 was never received by Cook
21 and that it was not documented on the CDC 119 log, a mail log for confidential letters; plaintiff
22 requested that HDSP contact Cook regarding receipt of the letter. Compl. at 8. Plaintiff’s appeal
23

24 ⁴ California prison regulations provide administrative procedures in the form of one
25 informal and three formal levels of review to address an inmate’s claims. See Cal. Code Regs.
26 tit. 15, §§ 3084.1-3084.7. Administrative procedures generally are exhausted once a plaintiff has
received a “Director’s Level Decision,” or third level review, with respect to his issues or claims.
Cal. Code Regs. tit. 15, § 3084.5.

1 was partially granted at the informal level of review. Id. Plaintiff was informed that his letter
2 was mailed out, but was not logged on the CDC 119 log because the FBI is not listed as an entity
3 with whom an inmate may correspond confidentially. Id. Plaintiff appealed this decision on
4 August 25, 2006. Id.

5 Keating interviewed plaintiff at the first formal level, after which plaintiff's
6 appeal was partially granted. Compl. at 9-10. Plaintiff was advised that his future
7 correspondence with the FBI would be logged as confidential, but plaintiff's request that Cook be
8 contacted to confirm receipt was denied. Id.

9 Plaintiff appealed this decision October 4, 2006, asserting that previous
10 correspondence with the FBI had been documented on the CDC 119 log. Compl. at 9, 11.

11 Plaintiff's appeal was partially granted at the second formal level by McDonald.
12 Compl. at 10. Plaintiff was informed that all future correspondence with the FBI would
13 consistently be listed on the CDC 119 log and that HDSP delivered plaintiff's mail to the U.S.
14 Postal Service, after which it relinquished responsibility. Id. at 12-14.

15 Plaintiff appealed this decision. Compl. at 10.

16 On May 29, 2007, plaintiff's appeal was denied at the Director's Level. Compl. at
17 6. Plaintiff was again informed that although the FBI is not a recognized entity pursuant to CCR
18 3141 warranting confidential communication, HDSP has agreed to treat the communications as
19 such. Id. The Director's Level found no error regarding the processing of plaintiff's mail and
20 affirmed the second level's review of plaintiff's appeal. Id.

21 2. "Opened and Inspected" Stamp (Appeal No. HDSP-07-1670)

22 On April 18, 2007, plaintiff filed an inmate appeal form (appeal number HDSP-
23 07-1670) stating that he received a letter from Cook who had enclosed with his letter a mailing
24 envelope sent by plaintiff to Cook on April 16, 2007; that letter had an "Opened and Inspected by
25 the Mailroom" stamp on it. Compl. at 22. Plaintiff accused the HDSP mailroom staff of opening
26 plaintiff's confidential correspondence to Cook outside of plaintiff's presence, contrary to CDCR

1 regulations for the handling of confidential communications. Id. Plaintiff also argued that his
2 regular mail was being delayed or prevented. Id.

3 Plaintiff's appeal was partially granted at the informal level. Compl. at 23. While
4 HDSP asked for the stamped envelope so as to investigate the matter, HDSP denied having an
5 "Opened and Inspected" stamp and suggested that the receiving party stamped the envelope. Id.

6 Plaintiff appealed this decision on May 1, 2007, arguing that the receiving party
7 would have no reason to "open and inspect" the mail addressed to them. Compl. at 23.

8 Keating interviewed plaintiff at the first formal level, after which plaintiff's
9 appeal was partially granted. Compl. at 23, 26. During the interview, plaintiff allegedly became
10 argumentative, causing Keating to cancel the interview. Id. at 26. Plaintiff was informed that
11 HDSP does not have a stamp that looks like the one on the envelope, and that the stamp was
12 most likely placed by the receiver of the envelope and provided to plaintiff as proof of receipt.
13 Id. Plaintiff's assertion that his regular mail was being delayed or prevented was denied because
14 the interview was canceled before Keating obtained any information concerning this claim. Id.

15 Plaintiff appealed this decision, arguing that it was Keating who became
16 argumentative before canceling the appeal. Compl. at 23.

17 Plaintiff's appeal was partially granted at the second level by McDonald. Compl.
18 at 24-25. The first level response was affirmed as to the stamp and plaintiff was again informed
19 that HDSP does not have a stamp that states "Opened and Inspected by the Mailroom." Id. As to
20 plaintiff's allegation concerning his regular mail, this was denied as "unsubstantiated." Id.

21 Plaintiff appealed this decision on July 30, 2007. Compl. at 23.

22 Plaintiff's appeal was denied at the Director's Level. Compl. at 22. The
23 Director's Level affirmed the second level of review, and informed plaintiff that his legal mail
24 was processed per regulations and that he was receiving all in-coming mail. Id.

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1 B. Plaintiff's Correspondence with Attorney Charoletta Ransom

2 Prior to 2009, plaintiff sent approximately six letters to Ransom through regular
3 mail at Ransom's home address. P.'s Depo at 20-21. Ransom has never been retained as
4 plaintiff's attorney. Id. at 15.

5 On March 3, 2009 and March 9, 2009, plaintiff attempted to mail confidential
6 letters to Ransom at her home address. FAC at 6. The letters were both returned to plaintiff by
7 HDSP with directions to provide Ransom's State Bar number. Id.

8 On March 11, 2009, plaintiff filed an inmate appeal form (appeal number HDSP-
9 09-0645) complaining that the HDSP mailroom was prohibiting him from corresponding with
10 Ransom. Compl. at 43. Plaintiff's appeal was denied at the informal level of review, and
11 plaintiff was informed that he must supply the mailroom with the attorney's State Bar number
12 and correct mailing address before the letters can be mailed. Id.

13 Plaintiff appealed to the first formal level of review. Compl. at 43.

14 On March 18, 2009, plaintiff filed a second inmate appeal form (appeal number
15 HDSP-09-0696) also concerning his correspondence with Ransom. Compl. at 36. This appeal
16 was denied at the informal level of review, and plaintiff was informed that the mailroom staff
17 was unable to locate this attorney through the State Bar website. Id. at 36.

18 Plaintiff appealed this decision to the first formal level of review. Compl. at 36.

19 Keating reviewed these appeals and, due to their identical complaints, merged
20 them. During his investigation, Keating was informed by his staff that the name and address on
21 the envelope addressed to Ransom did not match any of the attorneys listed with the California
22 State Bar. Keating Decl., ¶ 4. Examination of the evidence reveals that HDSP misspelled
23 Ransom's first and last names when searching for her records through the State Bar website. See
24 Compl. at 42. The exhibits attached to the complaint indicate that HDSP misspelled Ransom's
25 first name as either "Charlette" or "Charletta." See Compl. at 36, 42. The proper spelling is
26 "Charoletta." HDSP also misspelled Ransom's last name as "Ransen." P.'s Depo at 35.

1 Keating spoke to plaintiff about his appeal, explaining that in order for plaintiff to
2 communicate with Ransom confidentially, plaintiff would need to provide Ransom’s address as
3 listed with the State Bar or Ransom’s State Bar number to enable access of her records through
4 the State Bar website. Keating Decl., ¶ 5. Plaintiff allegedly refused to provide either Ransom’s
5 office address or State Bar number. Id. ¶¶ 4-5. Keating then gave plaintiff the option of sending
6 the letters to Ransom through regular mail, which plaintiff refused. Id.; FAC at 6. Because
7 plaintiff did not provide any information to allow Keating to process the mail to Ransom
8 confidentially and because plaintiff did not want his mail to be processed regularly, plaintiff’s
9 appeal was cancelled on April 10, 2009 pursuant to CCR Title 15, section 3084.4(d) (“An
10 appellant’s refusal to be interviewed or cooperate with the reviewer shall result in cancellation of
11 the appeal”). Plaintiff did not complete the appeal to the Director’s Level.

12 On May 7, 2009, plaintiff again attempted to contact Ransom by mailing a
13 confidential letter; plaintiff completed a “Proof of Service by Mail” form evidencing delivery of
14 a letter addressed to Ransom’s home address and dropped off in a box for the United States Mail
15 at HDSP. FAC, Ex. 2 at 6.

16 On May 8, 2009, plaintiff’s correspondence was returned to him with notice that
17 per CCR § 3142(a), “The address of an attorney must match the address listed with the State
18 Bar.” Compl., Ex. 2 at 7. Plaintiff was informed that the address he provided did not match
19 Ransom’s address listed with the State Bar. Id. Plaintiff was again given the option of either
20 correcting the address or providing Ransom’s State Bar number. Id.

21 On May 11, 2009, plaintiff filed his third appeal alleging that Keating was
22 continuing to mishandle plaintiff’s confidential legal mail addressed to Ransom. FAC, Ex. 2 at
23 12. On May 15, 2009, plaintiff received an appeals screening form. FAC, Ex. 2 at 11. Noting
24 that the latest appeal was plaintiff’s third appeal concerning the same issue, plaintiff was
25 reminded that his first two appeals were canceled and returned to him for his failure to cooperate.
26 Id.

1 Plaintiff once again filed an inmate appeal form challenging Keating's alleged
2 refusal to mail correspondence to Ransom. FAC, Ex. 2 at 3. On June 22, 2009, plaintiff
3 received an appeals screening form stating that appeal was screened because it was plaintiff's
4 third appeal within three days. FAC, Ex. 2 at 1. Per CCR 3084.4(a)(1-4), an inmate may submit
5 only one non-emergency appeal within a seven-calendar day period.

6 On July 22, 2009, plaintiff received a letter from the HDSP mailroom stating that
7 Ransom's mail "can not be verified in the directory as an attorney" and that if plaintiff "wish[es]
8 to have this correspondence mailed as regular mail, [he should] open the envelope, attach this
9 notice, initial here x ____ and return everything to the mailroom for processing." FAC, Ex. 2 at
10 5.

11 Plaintiff was subsequently informed by her mother that Ransom received on or
12 around October 2009 all six letters addressed to her home address from 2007 to 2008. See P.'s
13 Depo. at 19-21, 42. Plaintiff, however, has not submitted any admissible evidence attesting to
14 this allegation.⁵

15 C. Plaintiff's Correspondence with the Courts

16 Lastly, plaintiff contends he has experienced difficulty with mailing filings to the
17 "courts." When asked at his deposition to clarify to which courts he was referring, plaintiff
18 stated that he has had difficulty with only one court, a state court in Torrance, CA. P.'s Depo at
19 30. Plaintiff has not experienced any difficulty mailing or receiving any items from any other
20 court. Id.

21 DISCUSSION

22 Defendants advance four grounds in support of their motion for summary
23 judgment. First, they contend that plaintiff did not exhaust his administrative remedies as to his

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25 ⁵ Plaintiff attached to his FAC what appears to be a letter from Ransom dated October
26 23, 2009 stating that as of October 20, 2009, she had received only two letters from plaintiff. See
FAC, Ex. 3. This letter, however, does not bear Ransom's signature and is not submitted under
penalty of perjury. See 28 U.S.C. § 1746.

1 claim that his letters to Ransom were not mailed by defendants. Second, they contend that
2 plaintiff has suffered no injury. Third, they contend that there is no evidence that defendants
3 McDonald or Woodford are liable under a theory of respondeat superior. Lastly, they contend
4 they are entitled to qualified immunity.

5 A. Failure to Exhaust

6 “Section 1997e(a) of Title 42 of the United States Code provides:

7 No action shall be brought with respect to prison conditions under
8 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
9 confined in any jail, prison, or other correctional facility until such
10 administrative remedies as are available are exhausted.

11 This exhaustion requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001).”
12 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. Dec. 5, 2002). Exhaustion must precede the
13 filing of the complaint; compliance with the statute is not achieved by satisfying the exhaustion
14 requirement during the course of an action. Id. at 1200. Claims dismissed for failure to exhaust
15 administrative remedies should be dismissed without prejudice. Id.

16 In Jones v. Bock, 549 U.S. 199, 218 (2007), the United States Supreme Court held
17 “that a prison’s own grievance process, not [42 U.S.C. § 1997e(a)], determines how detailed a
18 grievance must be to satisfy” the statutory requirement. Griffin v. Arpaio, 557 F.3d 1117, 1120
19 (9th Cir. 2009). In Griffin, the United States Court of Appeals for the Ninth Circuit held that
20 “when a prison’s grievance procedures are silent or incomplete as to factual specificity, ‘a
21 grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.’”
22 Id. at 1120 (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)). “The primary purpose
23 of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay
24 groundwork for litigation.” Id.

25 California’s Department of Corrections provides a four-step grievance
26 process for prisoners who seek review of an administrative decision or perceived
mistreatment. Within fifteen working days of “the event or decision being
appealed,” the inmate must ordinarily file an “informal” appeal, through which
“the appellant and staff involved in the action or decision attempt to resolve the
grievance informally.” Cal. Code Regs., tit. 15, §§ 3084.5(a), 3084.6(c).

1 [Footnote omitted.] If the issue is not resolved during the informal appeal, the
2 grievant next proceeds to the first formal appeal level, usually conducted by the
3 prison's Appeals Coordinator. *Id.* §§ 3084.5(b), 3084.6(c). Next are the second
4 level, providing review by the institution's head or a regional parole administrator,
5 and the third level, in which review is conducted by a designee of the Director of
6 the Department of Corrections. [Footnote omitted.] *Id.* § 3084.5(e)(1)-(2).

7 Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005). Department regulations provide that the
8 "informal level is waived for a variety of grievances, including those concerning 'alleged
9 misconduct by a departmental peace officer.' Cal. Code Regs. tit. 15, § 3084.5(a)(3)(G)."
10 Brodheim v. Cry, 584 F.3d 1262, 1265 (9th Cir. 2009).

11 "Proper exhaustion[, which] demands compliance with an agency's deadlines and
12 other critical procedural rules . . ." is required, Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378,
13 2386 (2006), and may not be satisfied "by filing an untimely or otherwise procedurally defective
14 . . . appeal," Woodford, 126 S.Ct. at 2382. Pursuant to applicable regulations, the failure to
15 cooperate or be interviewed constitutes abuse of the appeals system and results in cancellation of
16 the appeal, subjecting it rejection upon screening. Tit. 15, §§ 3084.3(c)(8), 3084.4(d).

17 Here, plaintiff's first two appeals concerning the processing of his mail to Ransom
18 were canceled after plaintiff refused to provide Keating with the proper spelling of Ransom's
19 name, her correct mailing address and/or her State Bar number. By refusing to cooperate,
20 plaintiff failed to comply with the procedural rules. As such, defendants' motion for summary
21 judgment on plaintiff's claim as they relate to the processing of his mail to Ransom should be
22 granted for failure to exhaust administrative remedies.

23 B. Plaintiff's Damage / Injury

24 Prison officials who deliberately interfere with the transmission of a prisoner's
25 legal papers, or deny him access to a legitimate means to petition for redress for the purpose of
26 thwarting his litigation may violate the prisoner's constitutionally protected right to access to the
court. Lewis v. Casey, 518 U.S. 343, 351-55 (1996); Vandelft v. Moses, 31 F.3d 794, 796 (9th
Cir. 1994). However, plaintiff must be able to demonstrate a specific actual injury involving a

1 nonfrivolous legal claim, Lewis, 518 U.S. at 351-55, and must allege facts showing that he
2 “could not present a claim to the courts because of the [defendants’] failure to fulfill [their]
3 constitutional obligations.” Allen v. Sakai, 48 F.3d 1082, 1091 (9th Cir. 1994). An actual injury
4 will exist only if “a nonfrivolous legal claim had been frustrated or was being impeded.” Lewis,
5 518 U.S. at 353 & n.3. Thus, an inmate must plead facts sufficient to show that prison officials
6 have actually frustrated or impeded a nonfrivolous attack on either his sentence or the conditions
7 of his confinement. Id. at 352-53.

8 In light of the court’s recommendation that plaintiff’s claim that HDSP was
9 deliberately thwarting his attempts to communicate with Ransom be dismissed, plaintiff’s
10 remaining claims are HDSP’s failure to mail a letter to Cook, HDSP’s improper handling of a
11 confidential letter addressed to Cook, and HDSP’s interference with mail sent to the “courts.”

12 Upon review, the undersigned finds no evidence to support any of these
13 allegations. As to plaintiff’s first claim, the facts show only that plaintiff submitted a letter to
14 HDSP for mailing, HDSP did not list that letter on the CDC 119 log, and Cook did not receive
15 the letter. No evidence has been submitted to justify a finding that Cook’s non-receipt of
16 plaintiff’s letter was due to any actions of HDSP staff as opposed to the U.S. Postal Service’s
17 failure to deliver. Moreover, plaintiff’s allegation that HDSP is preventing communication with
18 the FBI is belied by plaintiff’s CDC 119 log, which evidences that plaintiff has mailed to and/or
19 received from the FBI multiple letters.

20 As to plaintiff’s second claim that HDSP mishandled a confidential letter
21 addressed to Cook, the court again finds that there is no evidence from which to conclude that
22 HDSP violated plaintiff’s rights by improperly opening and stamping the letter. To the contrary,
23 Keating has declared, and plaintiff has not refuted, that HDSP does not possess a stamp that
24 states “Opened and Inspected by the Mailroom.”

25 Lastly, plaintiff’s argument that he has experienced difficulty communicating with
26 the “courts” is unsupported. Plaintiff admits that he has had difficulty with only one court,

1 despite numerous filings in state and federal courts. In his opposition, plaintiff asserts that he
2 attempted to mail a motion for extension of time to this court on October 31, 2010. Opp'n at 4.
3 Plaintiff argues that the court has not responded and/or acknowledged receipt of this motion. Id.
4 The docket, however, reflects that plaintiff filed a motion for an extension of time on November
5 15, 2010, which was granted on November 30, 2010. See Doc. Nos. 49-50. Plaintiff was
6 granted up to and including December 30, 2010 to file his opposition. Plaintiff filed his
7 opposition on December 29, 2010. Doc. No. 56.

8 Because the court does not find that plaintiff's mail has been tampered with, it is
9 immaterial whether plaintiff has claimed injury. Nonetheless, the court will address certain
10 unsustainable allegations of injury made in plaintiff's opposition. Plaintiff contends that as a
11 result of HDSP's mishandling of his mail, he has lost the representation of the Los Angeles
12 Public Defender's office and, further, that he has been denied multiple requests made pursuant to
13 the Freedom of Information Act, 5 U.S.C. § 552, to obtain records from the Bureau of Alcohol,
14 Tobacco, Firearms and Explosives ("ATF") – losses and denials that the plaintiff notes coincided
15 with the filing of the instant lawsuit. See Opp'n at 3. Any connection between these incidents is
16 tenuous. The Public Defender's letter withdrawing representation indicates that the withdrawal
17 was due to the fact that the type of claim plaintiff sought to pursue through habeas corpus
18 (prosecutorial misconduct) was not the type litigated by that office, which focuses on peace
19 officer misconduct. Opp'n, Ex. 2 at 1. Moreover, the ATF's denial of requests for information
20 was made nearly one year prior to the initiation of this suit and was based on exceptions provided
21 by 5 U.S.C. § 552(b)(3). See id. at 11.

22 Accordingly, the undersigned recommends that defendants' motion for summary
23 judgment be granted as to this ground.

24 C. Respondeat Superior

25 Next, defendants seek summary judgment on the ground that plaintiff has failed to
26 state any allegations as to defendants McDonald and Woodford.

1 Supervisory personnel are generally not liable under section 1983 for the actions
2 of their employees under a theory of respondeat superior and, therefore, when a named defendant
3 holds a supervisory position, the causal link between him and the claimed constitutional
4 violation must be specifically alleged. See Fyale v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);
5 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). Vague
6 and conclusory allegations concerning the involvement of official personnel in civil rights
7 violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

8 Examination of the FAC reveals no charging allegations as to either McDonald or
9 Woodford. In fact, other than listing their names as defendants in this action and McDonald's
10 processing of plaintiff's appeals at the second formal level, there is no further mention of either
11 McDonald or Woodford. Accordingly, defendants' motion for summary judgment should be
12 granted as to this ground.

13 D. Qualified Immunity

14 For the reasons set forth above, the court declines to address defendants' argument
15 for qualified immunity.

16 For all of the foregoing reasons, IT IS HEREBY ORDERED that:

- 17 1. Defendants' motion to strike be granted;
- 18 2. Plaintiff's motion to file a sur-reply be denied; and

19 IT IS HEREBY RECOMMENDED that defendants' September 17, 2010 motion
20 for summary judgment be granted.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
23 days after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that

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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: March 25, 2011.

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5 
6 UNITED STATES MAGISTRATE JUDGE

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