

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN DARNELL BRYANT,

 Plaintiff,

 v.

R. ROMERO, et al.,

 Defendants.

1:12-cv-02074-DAD-GSA-PC

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
WADDLE’S MOTION FOR SUMMARY
JUDGMENT BE DENIED
(ECF No. 96.)

OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS

I. BACKGROUND

Kevin Darnell Bryant (“Plaintiff”), a state prisoner proceeding with counsel, filed this civil rights action pursuant to 42 U.S.C. § 1983 on December 26, 2012. (ECF No. 1.) This case now proceeds with the First Amended Complaint (“FAC”), filed on December 2, 2013, against defendants Lieutenant (Lt.) Constance Waddle and Correctional Officer (C/O) E. Castellanos, for retaliation against Plaintiff in violation of the First Amendment. (ECF No.16.)

On April 1, 2016, defendant Waddle (“Defendant”) filed a motion for summary judgment. Fed. R. Civ. P. 56. (ECF No. 96.) On June 16, 2017, Plaintiff filed an opposition, and on June 30, 2017, Defendant filed a reply.¹ (ECF No. 203.) The motion has been submitted upon the record

¹ At the time the motion for summary judgment was filed, Plaintiff was proceeding pro se in this action. Thus, concurrently with her motion for summary judgment, Defendant served Plaintiff with the requisite notice of the requirements for opposing the motion. Woods v. Carey, 684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 960-61 (9th Cir. 1998). (ECF No. 96 at 2-3.)

1 without oral argument pursuant to Local Rule 230(l), and for the reasons that follow, Defendant’s
2 motion should be denied.

3 **II. SUMMARY JUDGMENT STANDARD**

4 Any party may move for summary judgment, and the court shall grant summary judgment
5 if the movant shows that there is no genuine dispute as to any material fact and the movant is
6 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted);
7 Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position,
8 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular
9 parts of materials in the record, including but not limited to depositions, documents, declarations,
10 or discovery; or (2) showing that the materials cited do not establish the presence or absence of a
11 genuine dispute or that the opposing party cannot produce admissible evidence to support the fact.
12 Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The court may consider other materials in the
13 record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen
14 v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v.
15 Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

16 Defendant does not bear the burden of proof at trial and in moving for summary judgment,
17 he or she need only prove an absence of evidence to support Plaintiff’s case. In re Oracle Corp.
18 Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323,
19 106 S.Ct. 2548 (1986)). If the defendant meets his or her initial burden, the burden then shifts to
20 the plaintiff “to designate specific facts demonstrating the existence of genuine issues for trial.” In
21 re Oracle Corp., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 323). This requires the
22 plaintiff to “show more than the mere existence of a scintilla of evidence.” Id. (citing Anderson v.
23 Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)).

24 However, in judging the evidence at the summary judgment stage, the court may not make
25 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509
26 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all
27 inferences in the light most favorable to the nonmoving party and determine whether a genuine
28 issue of material fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v.

1 City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted).
2 The court determines only whether there is a genuine issue for trial. Thomas v. Ponder, 611 F.3d
3 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted).

4 **III. ALLEGATIONS IN THE FIRST AMENDED COMPLAINT (FAC)²**

5 Plaintiff is presently incarcerated at Salinas Valley State Prison. The events at issue
6 occurred in 2010 and 2011 at Kern Valley State Prison (KVSP) in Delano, California, when
7 Plaintiff was incarcerated there.

8 Plaintiff alleges as follows in his amended complaint. On June 7, 2010, Plaintiff filed a
9 form 602 prison appeal against C/Os R. Romero and Patrick Gallagher concerning Plaintiff's
10 prison job assignment. On November 30, 2010, defendant Lt. Waddle found out that Plaintiff had
11 filed the appeal, and she ordered Plaintiff locked up in administrative segregation (Ad-Seg)
12 claiming that she and Captain Cano were doing this to prevent Gallagher and Romero from
13 retaliating against him if they were disciplined because of an investigation. Plaintiff alleges,
14 however, that Lt. Waddle did not do this to protect Plaintiff, but to have Plaintiff moved to
15 Facility D so Waddle could have Plaintiff threatened and assaulted in order to force Plaintiff to
16 drop his appeal against Gallagher and Romero. On March 10, 2011, C/O Redmon moved Plaintiff
17 and his cell mate from Building 6 to Building 1, cell 225. Redmon told Plaintiff that Lt. Waddle
18 wanted him moved.

19 Plaintiff alleges that Lt. Waddle conspired with C/O D. Sellers to get Plaintiff assaulted for
20 filing the 602 appeal. Plaintiff has a signed declaration from inmate Cleave McCloud, J-55573,
21 stating that C/O Sellers told McCloud to assault Plaintiff because of the appeal. On April 15,
22 2011, the day Sellers was planning to have Plaintiff assaulted, Associate Warden Wood called
23 Plaintiff to the Captain's Office to speak to him. Plaintiff told Wood about Sellers and Waddle
24 conspiring to have Plaintiff assaulted by inmates in Building 1. Wood issued an order to move
25 Plaintiff to Building 8 to try to prevent the assault. Lt. Waddle spoke to Plaintiff on his way out,

26 ² Plaintiff's complaint is verified and his allegations constitute evidence where they are based on his personal
27 knowledge of facts admissible in evidence. Jones v. Blanas, 393 F.3d 918, 922-23 (9th Cir. 2004). The
28 summarization of Plaintiff's claim in this section should not be viewed by the parties as a ruling that the allegations
are admissible. The Court will address, to the extent necessary, the admissibility of Plaintiff's evidence in the sections
which follow.

1 telling Plaintiff that she runs this place and none of Plaintiff's 602 appeals would ever be granted
2 at KVSP again as she knows somebody in the appeals office who is going to see to that. Waddle
3 also told Plaintiff to be very careful about who Plaintiff files appeals or complaints against.

4 Plaintiff was moved to Building 8. Lt. Waddle conspired with C/O Castellanos to have
5 some inmates in Building 8 assault him. On May 8, 2011, Castellanos withheld one of Plaintiff's
6 outgoing letters and stole 40 stamps out of it.

7 On June 6, 2011, in Plaintiff's other lawsuit in this court, 1:11-cv-00046, Bryant v.
8 Gallagher, Plaintiff filed an emergency motion for a temporary restraining order and protection.
9 The court denied the motion but requested the Warden (Harrington) check to see if Plaintiff was in
10 any danger. The Warden failed to do that.

11 On June 29, 2011, defendant Castellanos went into Plaintiff's cell while he was away at the
12 law library, searched the cell, and deliberately ripped the cable off the back of Plaintiff's TV
13 breaking off the whole piece that the cable screws onto. Now there is nothing to screw a cable
14 onto.

15 In July 2011, defendant Castellanos told Plaintiff that he knew Plaintiff filed the staff
16 misconduct appeal and the lawsuit against C/Os Gallagher and Romero, and that if he doesn't drop
17 it all right away something bad is going to happen to Plaintiff.

18 On July 24, 2011, the building porter, inmate Moore #H-23858, told Plaintiff that
19 defendant Castellanos told him to get some inmates together and have them all jump Plaintiff and
20 hurt him badly. Inmate Moore also told Plaintiff that defendant Castellanos told him it was
21 because of the lawsuit Plaintiff filed against his friends Gallagher and Romero.

22 On July 28, 2011, Sergeant (Sgt.) Rivera came to Building 8 to talk to Plaintiff. Defendant
23 Castellanos, CCI Lane, and another officer were present. Sgt. Rivera asked Plaintiff to sign a pink
24 128 chrono he had, which was allegedly written by defendant Castellanos and falsely stated that
25 Castellanos had interviewed Plaintiff about some inmates who may be out to get Plaintiff.
26 Plaintiff told Sgt. Rivera that defendant Castellanos had not interviewed him about this. Sgt.
27 Rivera asked Plaintiff if he knew of any inmates out to get Plaintiff. Plaintiff asked him if he and
28 Castellanos knew of any. Sgt. Rivera refused to answer and told Plaintiff that if he didn't sign the

1 chrono he would lock Plaintiff up in Ad-Seg. Plaintiff told him that his (Plaintiff's) only safety
2 concerns were about the officers who are conspiring to harm him in retaliation for his appeals and
3 lawsuit, and if any inmates are out to harm Plaintiff it's because one of the officers paid or
4 manipulated them to do it. Plaintiff signed the chrono under reservation of rights by writing "All
5 Rights Reserved" above his signature. As soon as he signed it, Mr. Lane told Plaintiff, "Now if
6 you get stabbed we are not responsible or liable and you can't sue us." (ECF No. 16 ¶28.)

7 On July 30, 2011, defendants Waddle and Castellanos conspired to have Plaintiff stabbed
8 by two inmates, during which time Plaintiff believes that they were going to have the Building 8
9 control booth officer shoot him with a mini 14 assault rifle and try to kill him. Inmate Moore
10 came to Plaintiff's cell and told him that defendant Castellanos had paid two inmates to assault
11 Plaintiff by stabbing him because of the lawsuit and his failure to drop it, like defendant
12 Castellanos had threatened. Inmate Moore lied, saying it was two Mexican inmates and
13 Castellanos who were going to open Plaintiff's door and let them stab Plaintiff, but Plaintiff saw it
14 was two black inmates out in the rotunda waiting. Moore was trying to trick Plaintiff into coming
15 out of his cell so they could stab him, where they had a clear shot to shoot him. Plaintiff refused
16 to come out of his cell. Plaintiff began packing up all of his property in big trash bags and boxes.
17 At noon pill call, Plaintiff handed C/O B. Rodriguez a note under his cell door that said, "My life
18 is in danger. Somebody is out to kill me." (ECF No. 16 ¶32.)

19 Plaintiff told C/O Rodriguez and defendant Castellanos that he wanted to be placed in Ad-
20 Seg for his safety and wanted to talk to ISU Lt. Stiles. Defendant Castellanos became furious and
21 started calling Plaintiff vulgar names and cursing him out. Castellanos demanded to know what
22 Plaintiff was going to tell the lieutenant, and told Plaintiff not to go to Ad-Seg, begging Plaintiff to
23 just let him move Plaintiff to Building 6 and not to tell anyone about this, promising not to have
24 Plaintiff assaulted. Plaintiff refused his offer and demanded to be placed in Ad-Seg, so
25 Castellanos began threatening Plaintiff, stating that if he told ISU Lt. Stiles that he was trying to
26 have Plaintiff assaulted, he would send somebody to kill Plaintiff's family members and have him
27 murdered in Ad-Seg or wherever he went. Defendant Castellanos told Plaintiff to keep his mouth

28 ///

1 shut and drop the lawsuit and 602 appeals he filed, or Plaintiff and his family, including his kids,
2 would be killed.

3 Defendant Castellanos and C/O Rodriguez boxed up Plaintiff's property out of Plaintiff's
4 sight, while Plaintiff was locked in the shower stall, and Castellanos stole over \$500 worth of
5 Plaintiff's property, including photos of Plaintiff and his family and two address books containing
6 their addresses. They moved Plaintiff to a holding cage in the program office where Castellanos
7 continued to threaten Plaintiff and asked him not to go to Ad-Seg or tell ISU what happened.
8 Defendant Castellanos told Plaintiff he stole Plaintiff's property and admitted that he deliberately
9 broke Plaintiff's TV on June 29, 2011, because he did not drop the lawsuits and appeals, and told
10 Plaintiff he would not get his property back unless he did this right now.

11 On or about August 2, 2011, Lt. Waddle came to Ad-Seg to allegedly videotape his
12 statement, but Plaintiff refused to talk to her unless ISU Lt. Stiles was present. She became
13 furious, cursed Plaintiff, and told Plaintiff he would get what he had coming. She tried to trick
14 Plaintiff into giving a statement, but he did not fall for it.

15 Before Plaintiff gave any statement or saw anyone from ISU, defendant Waddle and
16 Captain Henderson generated a false investigation report which stated they had investigated all of
17 Plaintiff's allegations and nothing was found. They recommended that Plaintiff be sent back to D-
18 yard. Plaintiff explained to Warden Martin D. Biter on August 9, 2011, that the report was untrue.

19 On August 17, 2011, defendant Waddle arranged to have inmate Cleave McCloud put in
20 Plaintiff's cell by force, because Plaintiff refused to accept him. McCloud admitted to Plaintiff
21 that Lt. Waddle told him to assault Plaintiff and force him to drop his lawsuit and appeals, and
22 stop Plaintiff from telling ISU what she and Castellanos conspired to do to Plaintiff. Plaintiff has
23 a second signed declaration from McCloud stating what Lt. Waddle told him to do.

24 Plaintiff also found out that defendant Castellanos wrote a false 115 RVR stating that he
25 found a razor blade in Plaintiff's property on July 30, 2011. Castellanos had told Plaintiff he was
26 going to do this if Plaintiff didn't do what Castellanos wanted.

27 All the time that the defendants threatened to harm Plaintiff and his family, he was in
28 constant fear for his life and his family's lives, and he had to repeatedly talk to his psychiatric case

1 workers about his fears, and they documented it every time. Plaintiff was interviewed about these
2 events by ISU Lt. Stiles and each interview was recorded by him, and he alleged that an
3 investigation would be conducted. Prison officials, ISU staff, and the defendants conspired to
4 cover it all up to protect the defendants.

5 Based on these allegations, Plaintiff claims violations of the First Amendment.

6 **IV. SUMMARY JUDGMENT BASED ON EXHAUSTION**

7 **A. Legal Standards**

8 **1. Statutory Exhaustion Requirement**

9 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA) provides that “[n]o
10 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
11 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
12 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are
13 required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 549
14 U.S. 199, 211, 127 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th
15 Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner and regardless of
16 the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and
17 the exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 534
18 U.S. 516, 532, 122 S.Ct. 983, 993 (2002).

19 “[T]o properly exhaust administrative remedies prisoners ‘must complete the
20 administrative review process in accordance with the applicable procedural rules,’ []—rules that
21 are defined not by the PLRA, but by the prison grievance process itself.” Jones, 549 U.S. at 218
22 (quoting Woodford v. Ngo, 548 U.S. 81, 88, 126 S.Ct. 2378, 2386, 165 L.Ed.2d 368 (2006)). See
23 also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (“The California prison system’s
24 requirements ‘define the boundaries of proper exhaustion.’”). An untimely or otherwise
25 procedurally defective appeal will not satisfy the exhaustion requirement. Woodford, 548 U.S. at
26 90. However, the Ninth Circuit has made clear: A grievance need not include legal terminology
27 or legal theories unless they are in some way needed to provide notice of the harm being grieved.

28 ///

1 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). A grievance also need not contain every
2 fact necessary to prove each element of an eventual legal claim. Id.

3 Moreover, the Ninth Circuit has recognized that a grievance suffices to exhaust a claim if it
4 puts the prison on adequate notice of the problem for which the prisoner seeks redress. To provide
5 adequate notice, the prisoner need only provide the level of detail required by the prison's
6 regulations. Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (citing Jones, 549 U.S. at 218).
7 The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution,
8 not to lay groundwork for litigation. Id.; Griffin, 557 F.3d at 1120; see also Jones, 549 U.S. at 219
9 (citing Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) ("We are mindful that the primary
10 purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a
11 particular official that he may be sued; the grievance process is not a summons and complaint that
12 initiates adversarial litigation.")). Thus, in this case "[t]he California prison system's requirements
13 define the boundaries of proper exhaustion." Marella, 568 F.3d at 1027).

14 A prisoner may be excused from complying with the PLRA's exhaustion requirement if he
15 establishes that the existing administrative remedies were effectively unavailable to him. See
16 Albino v. Baca, 747 F.3d 1162, 1172-73 (9th Cir. 2014). When an inmate's administrative
17 grievance is improperly rejected on procedural grounds, exhaustion may be excused as
18 "effectively unavailable." Sapp, 623 F.3d at 823; see also Nunez v. Duncan, 591 F.3d 1217,
19 1224-26 (9th Cir. 2010) (warden's mistake rendered prisoner's administrative remedies
20 "effectively unavailable"); Ward v. Chavez, 678 F.3d 1042, 1044-45 (9th Cir. 2012) (exhaustion
21 excused where futile); Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required
22 to proceed to third level where appeal granted at second level and no further relief was available);
23 Marella, 568 F.3d 1024 (excusing an inmate's failure to exhaust because he did not have access to
24 the necessary grievance forms to timely file his grievance).

25 A California prisoner is required to submit an inmate appeal at the appropriate level and
26 proceed to the highest level of review available to him. Butler v. Adams, 397 F.3d 1181, 1183
27 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002); see also Cal. Code Regs.
28 tit. 15, § 3084.1(b) (explaining that a cancellation or rejection of an inmate's appeal "does not

1 exhaust administrative remedies”). However, a prisoner need not “press on to exhaust further
2 levels of review once he has received all ‘available’ remedies at an intermediate level of review or
3 has been reliably informed by an administrator that no remedies are available.” Brown, 422 F.3d at
4 936 (citing Booth, 532 U.S. at 736–739; see also Finley v. Skolnik, 616 Fed. Appx. 263, 264 (9th
5 Cir. 2012 (Reversing dismissal for failure to exhaust). Where prison officials improperly screen
6 out inmate grievances, they render administrative remedies effectively unavailable. See Sapp, 623
7 F.3d at 823. In such a case, “the inmate cannot pursue the necessary sequence of appeals.” Id.

8 In submitting an inmate grievance, California regulations require a prisoner to “list all staff
9 members involved” and to “describe their involvement in the issue.” Cal. Code Regs. tit. 15, §
10 3084.2(3). However, the Ninth Circuit has recently held that “a prisoner exhausts such
11 administrative remedies as are available . . . under the PLRA despite failing to comply with a
12 procedural rule if prison officials ignore the procedural problem and render a decision on the
13 merits of the grievance at each available step of the administrative process.” Reyes v. Smith, 810
14 F.3d 654, 658 (9th Cir. 2016); see also Franklin v. Foulk, 2017 WL 784894, at *4-5 (E.D. Cal.
15 Mar. 1, 2017); Franklin v. Lewis, 2016 WL 4761081, at *6 (N.D. Cal. Sept. 13, 2016). Thus, a
16 prisoner’s failure to list all staff members involved in an incident in his inmate grievance, or to
17 fully describe the involvement of staff members in the incident, will not necessarily preclude his
18 exhaustion of administrative remedies. Reyes, 810 F.3d at 958; Franklin v. Foulk, 2017 WL
19 784894, at *4 (“[T]he court in Reyes found that even though the plaintiff’s grievance failed to
20 name two physicians on the prison’s three-person pain committee, prison officials were put on
21 notice of the nature of the wrong alleged in the suit—that the plaintiff was wrongfully denied pain
22 medication.”); Franklin v. Lewis, 2016 WL 4761081, at *6 (“[T]o the extent Defendants argue that
23 Plaintiff failed to comply with a procedural requirement by not naming Defendants in [his appeal],
24 this deficiency is not necessarily fatal to Plaintiff’s claim pursuant to Reyes”); Grigsby v.
25 Munguia, No. 2:14-cv-0789 GAB AC P, 2016 WL 900197, at *11-12 (E.D. Cal. Mar. 9, 2016);
26 see also Bulkin v. Ochoa, 2016 WL 1267265, at *1-2 (E.D. Cal. Mar. 31, 2016).

27 Nonetheless, for administrative remedies to be exhausted by California prisoners as to
28 defendants who were not identified in the inmate grievance, there must be a “sufficient

1 connection” between the claim in the appeal and the unidentified defendants such that prison
2 officials can be said to have had “notice of the alleged deprivation” and an “opportunity to resolve
3 it.” Reyes, 810 F.3d at 959 (finding that plaintiff had satisfied PLRA exhaustion requirements as
4 to two prison doctors despite not having identified them in his inmate appeals because there was a
5 sufficient connection between plaintiff’s appeal based on inadequate pain management, and the
6 doctors, who served on the prison committee that had denied plaintiff medication); McClure v.
7 Chen, No. 1:14-cv-00932-DAD-GSA-PC, 2017 WL 1148135, (E.D. Cal. March 28, 2017)
8 (remedies exhausted even though doctors not named in appeal; prison was placed on notice)) .

9 **2. California Department of Corrections and Rehabilitation (CDCR)**
10 **Administrative Grievance System**

11 The court takes judicial notice of the fact that the State of California provides its prisoners
12 and parolees the right to appeal administratively “any policy, decision, action, condition, or
13 omission by the department or its staff that the inmate or parolee can demonstrate as having a
14 material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, §
15 3084.1(a). The process is initiated by submitting a CDCR Form 602. Id. at § 3084.2(a).

16 California prisoners are required to submit appeals within thirty calendar days of the event
17 being appealed, and the process is initiated by submission of the appeal at the first level. Id. at §§
18 3084.7(a), 3084.8(c) Three levels of appeal are involved, including the first level, second level,
19 and third level. Id. at § 3084.7. The third level of review exhausts administrative remedies. Id. at
20 § 3084.7(d)(3). A final decision at the third level³ of review satisfies the exhaustion requirement
21 under 42 U.S.C. § 1997e(a). Lira v. Herrera, 427 F.3d 1164, 1166 (9th Cir. 2005). In order to
22 satisfy § 1997e(a), California state prisoners are required to use this process to exhaust their claims
23 prior to filing suit. Woodford, 548 U.S. at 85 (2006); McKinney, 311 F.3d. at 1199-1201.

24 **3. Motion for Summary Judgment for Failure to Exhaust**

25 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
26 which defendants have the burden of raising and proving the absence of exhaustion. Jones, 549
27

28 ³ The third level is sometimes known as the Director’s level.

1 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). On April 3, 2014, the Ninth
2 Circuit issued a decision overruling Wyatt with respect to the proper procedural device for raising
3 the affirmative defense of exhaustion under § 1997e(a). Albino (“Albino II”), 747 F.3d at 1168–
4 69. Following the decision in Albino II, defendants may raise exhaustion deficiencies as an
5 affirmative defense under § 1997e(a) in either (1) a motion to dismiss pursuant to Rule 12(b)(6)⁴
6 or (2) a motion for summary judgment under Rule 56. Id. If the court concludes that Plaintiff has
7 failed to exhaust, the proper remedy is dismissal without prejudice of the portions of the complaint
8 barred by § 1997e(e). Jones, 549 U.S. at 223–24; Lira, 427 F.3d at 1175–76.

9 Summary judgment is appropriate when it is demonstrated that there “is no genuine dispute
10 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
11 56(a); Albino II, 747 F.3d at 1169 (“If there is a genuine dispute about material facts, summary
12 judgment will not be granted.”) A party asserting that a fact cannot be disputed must support the
13 assertion by “citing to particular parts of materials in the record, including depositions, documents,
14 electronically stored information, affidavits or declarations, stipulations (including those made for
15 purposes of the motion only), admissions, interrogatory answers, or other materials, or showing
16 that the materials cited do not establish the absence or presence of a genuine dispute, or that an
17 adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).
18 In judging the evidence at the summary judgment stage, the court “must draw all reasonable
19 inferences in the light most favorable to the nonmoving party.” Comite de Jornaleros de Redondo
20 Beach, 657 F.3d at 942. The court must liberally construe Plaintiff’s filings because he is a pro se
21 prisoner. Thomas, 611 F.3d at 1150.

22 In a summary judgment motion for failure to exhaust administrative remedies, the
23 defendants have the initial burden to prove “that there was an available administrative remedy, and
24 that the prisoner did not exhaust that available remedy.” Albino II, 747 F.3d at 1172. If the
25 defendants carry that burden, “the burden shifts to the prisoner to come forward with evidence
26 showing that there is something in his particular case that made the existing and generally
27

28 ⁴ Motions to dismiss under Rule 12(b)(6) are only appropriate “[i]n the rare event a failure to exhaust is clear on the face of the complaint.” Albino II, 747 F.3d at 1162.

1 available administrative remedies effectively unavailable to him.” Id. The ultimate burden of
2 proof remains with defendants, however. Id. “If material facts are disputed, summary judgment
3 should be denied, and the district judge rather than a jury should determine the facts.” Id. at 1166.

4 **B. Defendant Waddle’s Motion**

5 Defendant argues that there is no evidence, except Plaintiff’s vague allegations in the
6 FAC, that Plaintiff filed any 602 appeals against Defendant. In support of this argument,
7 Defendant cites Plaintiff’s FAC (ECF No. 16); the declarations of defendant Waddle (Appendix,
8 Exh. B, ECF No. 96-2 at 24-28), Appeals Coordinator D. Tarnoff (Id., Exh. C, ECF No. 96-2 at
9 29-32), Appeals Coordinator B. Daveiga, (ECF No. 98-1 at 4-5 (Exh. A)), and M. Voong (Chief,
10 Office of Appeals) (Appendix, Exh. D, ECF No. 96-2 at 34-36); and Plaintiff’s deposition
11 testimony (Appendix, Exh. A, ECF No. 96-2 at 3-23).⁵

12 In the FAC, Plaintiff alleges that he was obstructed from exhausting his administrative
13 remedies as to Defendant at the institutional level, but that he repeatedly filed appeals anyway,
14 which were rejected by Appeals Coordinator B. Daveiga to prevent exhaustion. (FAC at 4.)
15 Defendant asserts that Plaintiff never provided copies of the supposed rejections or what they say,
16 and that he fails to identify any dates when he allegedly filed these appeals. Defendant provides
17 evidence that Plaintiff admitted in his deposition that he does not recall if he ever filed a 602
18 against Defendant, and he does not think that he ever had an appeal go to the third level regarding
19 Defendant. (Exh. A to Appendix, ECF No. 96-2, Bryant Depo. at 74:19-25, 84:8-9.) Defendant
20 also asserts that there is no record at KVSP of Plaintiff submitting any appeal against Defendant
21 for retaliating against him and/or trying to have him assaulted by other inmates, (Exh. C to
22 Appendix, ECF No. 96-2, Tarnoff Decl. ¶5), or having an appeal decided by the Office of Appeals
23 at the third level of review relating to the allegation that Defendant tried to have other inmates
24 attack Plaintiff or that she retaliated against him in any other way, (Exh. D to Appendix, ECF No.
25 96-2, Voong Decl. ¶9). Defendant argues that there is no evidence that she (Waddle), the Appeals
26 Coordinator, or anyone else interfered with his ability to exhaust Plaintiff’s administrative
27

28 ⁵ All page numbers cited herein are assigned by the court’s CM/ECF system and not based on the parties’ pagination of their briefing materials.

1 remedies. Defendant provides evidence that she never instructed former KVSP Appeals
2 Coordinator Daveiga or anyone else to screen out appeals filed against her by Plaintiff or any other
3 inmate. (Exh. A to Appendix, ECF No. 96-2, Waddle Decl. ¶18.)

4 **C. Plaintiff's Opposition**

5 Plaintiff claims that he did submit 602 appeals against Defendant, but that his appeals were
6 improperly screened out, such that Plaintiff could not pursue his administrative remedies. Plaintiff
7 submits as evidence his declaration and attached exhibits (ECF No. 203) and inmate Cleave
8 McCloud's declaration of June 21, 2015. (See Exh. 6 to SSUF in support of defendant
9 Castellanos' MSJ, ECF No. 92-9.) Plaintiff also requests the court to take judicial notice pursuant
10 to Fed. R. Evid. 201 of the docket and entries in case 1:11-cv-00466 BAM (USDC Eastern District
11 of California).⁶

12 Plaintiff argues that he satisfied his requirement to exhaust remedies because he submitted
13 several 602 appeals against Defendant between August 18, 2011, and March 27, 2013, and these
14 602 appeals were repeatedly screened out for improper reasons or never responded to. (Bryant
15 Decl. ¶7 and documents attached as Exhibit A thereto (ECF No. 203). Plaintiff declares that
16 Appeals Coordinator Daveiga wrongfully screened the appeals out as duplicates or as "living
17 conditions" appeals, when the appeals were not duplicates and addressed staff misconduct, not
18 living conditions. (*Id.*) Plaintiff declares that he resubmitted the appeals with the appeal rejection
19 letters he received, with handwritten notes explaining why they were wrongfully being screened
20

21 ⁶ The Court may take judicial notice of its own records in other cases. Fed. R. Evid. 201(b)(2); United States v.
22 Wilson, 631 F.2d 118, 119–20 (9th Cir. 1980) (citations omitted). However, a court may not take judicial notice of
23 the facts contained within documents of such court records. "The concept of judicial notice requires that the matter
24 which is the proper subject of judicial notice be a fact that is not reasonably subject to dispute. Facts in the judicial
25 record that are subject to dispute, such as allegations in affidavits and declarations . . . are not the proper subjects of
26 judicial notice even though they are in a court record." Townes v. Paule, 407 F. Supp. 2d 1210, 1217 n.5 (S.D. Cal.
27 2005) (citation omitted); see also Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001) ("[W]hen a court
28 takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the
existence of the opinion, which is not subject to reasonable dispute over its authenticity.") (internal quotations and
citation omitted). Thus, although a court may take judicial notice of court records, it may not take judicial notice of
the truth of the contents of documents therein. See M/V American Queen v. San Diego Marine Constr. Corp., 708
F.2d 1483, 1491 (9th Cir. 1983) ("As a general rule, a court may not take judicial notice of proceedings or records in
another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a
cause then before it.") With these limitations, the court grants Plaintiff's request for judicial notice.

1 out, and also mailed them to the Director's Office requesting a response and protection and in a
2 further effort to exhaust administrative remedies. (Id.) Plaintiff also asserts that Defendant told
3 him that she had a friend in the appeals office who would see to it that none of his appeals would
4 be processed or granted. (Id. ¶3.)

5 Plaintiff asserts that Defendant deceptively claims, in her motion for summary judgment,
6 that Plaintiff failed to file a 602 appeal against her. Specifically, Plaintiff asserts that Defendant
7 took one page of Plaintiff's deposition out of context and fails to provide the court with
8 subsequent pages that explain that Plaintiff stated he filed a 602 appeal against Waddle and his
9 appeals were improperly screened.

10 Q. Because in your first amended complaint, I don't see anything about a
11 specific date where you filed a written 602 against Lieutenant Waddle?

12 A. Let me see my statement. Well, yeah, they—I filed—said on page 3 of the
13 amended complaint that I submitted 602 appeals and staff misconduct
14 complaints—on page 3—and that they were screened out by Ms. DeViega.
15 And Ms. DeViega told me—no—Waddle told me before that she has a
friend in the appeals office and that none of my appeals would ever be
granted at that prison.

16 (Bryant Depo. at 75: 8-18.)

17 Plaintiff set forth in his FAC:

18 I was deliberately obstructed from exhausting administrative remedies at the
19 institutional level on some of the matters stated in this petition in bad faith by the
20 prison officials I named herein. But despite this I did repeatedly submit the 602
21 appeals anyway and appeals coordinator DaViega has repeatedly rejected them to
prevent exhaustion. And I also filed claims on all this with the VCGCB which were
denied.

22 (FAC, ECF No. 16 at 3.)

23 Plaintiff further testified during his deposition why his 602 appeal against Defendant was
24 screened out:

25 Q. And specifically what was—what was the reason why your Complaint was
26 screened out with regards to Lieutenant Waddle?

27
28 ///

1 A. Because they were trying to cover up what she was doing. She has a history
2 of doing this.

3 (Bryant Depo. at 78: 6-10)

4 Q. But—so when you received the screened out appeal, what did it say?

5 A. Screened out due to living—they classified it living conditions. And I
6 would have to get it to tell you exactly what it says.

7 Q. So that’s—specifically about your complaint against Lieutenant Waddle
8 was screened out because it said it’s about living conditions?

9 A. They tried to keep it from being categorized as a staff misconduct
10 complaint, because she was already being investigated for other stuff that
she was subsequently found guilty of and disciplined for.

11 (Id. at 78:24 to 79:10).

12 Q. What did you do after it was screened out on the first level?

13 A. Wrote on there that they are screening it out illegally and submitted it back
14 to them and told them why they’re wrong.

15 Q. And what happened after that?

16 A. They screened it out again. I think I have two screened-out sheets on some
17 of them.

18 Q. Okay. Well you—

19 A. And I wrote—and I would write on those that if you fail to process my
20 appeal pursuant to state law and pursuant to your rules and regulations, you
21 waive all defenses of failure to exhaust. And I documented that and I served
it on them again with proof of services.

22 (Id. at 79:17 to 80: 6).

23 Plaintiff also finds Defendant’s claims deceptive that “Bryant also admits that he does not
24 think that he ever had an appeal go to the third level regarding Lieutenant Waddle,” because
25 Defendant has extracted one question out of context that does not provide Plaintiff’s complete
26 testimony. Plaintiff asserts that in his deposition, he clarified that he believed he appealed the 602
27 to the third level, although he was not required to do so as his 602 appeals were improperly
28 screened out at the first level.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q. So did you ever have an appeal go up to the third level regarding Lieutenant Waddle?

A. I don't—I don't think so.

Q. Okay. So you never got a response back from the third level?

A. I think I mailed them a copy of the appeal with the screened-out sheets and what I wrote, and I mailed it to them and told them if you fail to provide me a response or process my appeal, you hereby waive any defenses of failure to exhaust, because you are not making any remedies available to me administratively. So I wrote that on there and I mailed a copy to them on several appeals because they refused to process them.

Q. What dates did you write the third level?

A. I don't know. I would have to find the dates for you.

Q. Do you know approximate [sic] what dates?

A. No, I don't know approximate dates.

Q. And do you have copies of these letters?

A. I would hope so. If they're not missing from my property. I'm still trying to get my property from Corcoran.

(Id. at 84: 8 to 85:4).

Plaintiff also asserts that he received letters from Appeals Coordinator Daviega, screening out the 602 appeals he filed against Defendant. Plaintiff submits three CDC-695 forms, which serve as first level screening for 602 appeals. (Bryant Decl., ECF No. 203-2 at ¶7 and Exh. A at 12-14.) These forms are dated September 12, 2011, November 22, 2011, and December 27, 2011. (Id.) The September 12, 2011, form 695 refers to another 602 appeal filed by Bryant on September 2, 2011. (Id.) The November 22, 2011, form 695 claims that the 602 appeal that it addresses was a duplicate of a 602 appeal filed on November 17, 2011. (Id.) Plaintiff asserts that the 602 appeal to which the September 12, 2011 form 695 related was resubmitted for improperly being screened as a cover-up for Waddle, and the 602 appeals to which the November 22, 2011, and December 27, 2011, 695 forms were resubmitted because they were improperly screened out as “living conditions,” while in reality, these 602 appeals had to do with safety and security and

///

1 involved the allegations regarding Defendant's retaliation against Plaintiff for exercising his First
2 Amendment rights. (Id.) The November 15, 2011, 602 appeal stated, in part:

3 "I make this life or death emergency request to the institution head of KVSP due to
4 an imminent threat of serious injury from retaliation by staff. Nobody will tell the
5 Warden the Real truth about what happened to me and how I was severely injured.
6 Because of this I was assaulted by staff again on 11/9/11. B-1 Ad-seg officer hit me
7 in the mouth busting my lip."

8 (Bryant Decl., ECF No. 203-2 at 15-16 (Exh. A).

9 Plaintiff also filed other appeals against Defendant after the FAC was filed, including one
10 dated January 16, 2013, and another dated March 27, 2013. (Id. ¶17 and Exhibit A at 1-4.)
11 Plaintiff alleges that neither of the appeals was responded to. (Id.)

12 **D. Defendant Waddle's Reply**

13 Defendant asserts that Plaintiff does not dispute that he never had an appeal regarding his
14 retaliation claims against her decided at the third level. In reply to Plaintiff's argument that he
15 filed several appeals which were improperly screened, Defendant argues that the appeals produced
16 by Plaintiff in his opposition are insufficient to show that administrative remedies were not
17 available to him. Defendant discusses Plaintiff's appeals dated January 16, 2013, March 27, 2013,
18 November 9, 2011, and November 15, 2011. The court shall address these appeals and
19 Defendant's arguments in the discussion that follows.

20 **E. Discussion**

21 There is no dispute that KVSP has a process available for prisoners to file grievances
22 against prison staff. In her motion to dismiss, Defendant provides sufficient evidence that there is
23 no record at KVSP that Plaintiff submitted any appeal during the relevant time, accepted or
24 screened out, against Defendant for retaliating against him and/or trying to have Plaintiff assaulted
25 by other inmates. (Tarnoff Decl., ECF No. 96-2 at 32-33 ¶¶7,8.) Defendant also cites Plaintiff's
26 deposition testimony in which Plaintiff states that he does not recall if he ever filed a 602 appeal
27 against Defendant, and he does not think that he ever had an appeal go to the third level regarding
28 Defendant. (ECF No. 96-2, Exh. A to Appendix, Bryant Depo. at 74:19-25, 84:8-9.) The court
finds that Defendant has carried her initial burden to prove that there was an available

1 administrative remedy and that Plaintiff did not exhaust that available remedy. Therefore, the
2 burden shifts to Plaintiff to come forward with evidence showing that there is something in his
3 particular case that made the existing and generally available administrative remedies effectively
4 unavailable to him.

5 Plaintiff does not dispute the fact that he never successfully completed a form 602 appeal
6 against Defendant through all three levels of review. However, Plaintiff declares that he submitted
7 appeals against Defendant that were either improperly screened out or not responded to. Plaintiff
8 provides copies of letters and 602 appeals he submitted and responses that he received in Exhibit
9 A to his declaration. (ECF No. 203-2, Exh A.) Plaintiff states that he could not find copies of two
10 of the appeals. (Bryant Decl., ECF No. 203-2 ¶7.) Plaintiff declares that the documents found in
11 Exhibit A are “true and correct copies of some of the 602 appeals he submitted and the rejection
12 letters described herein.” (Id.)

13 **Letters**

14 Plaintiff provides copies of letters dated August 2, 2011, August 3, 2011, August 9, 2011,
15 September 28, 2011, March 7, 2012, March 19, 2012, June 3, 2012, and October 6, 2012,
16 handwritten by Plaintiff to various places, including the Appeals Coordinator, Internal Affairs, and
17 the Prison Law Office. (ECF No. 203-2, Exh. D.) Plaintiff also provides copies of responses he
18 received, some which clearly informed him that “[i]t is important to note that the filing of a letter
19 does not meet the criteria of the Prison Litigation Reform Act for exhaustion administrative
20 remedies,” and informing him of his right to file a 602 appeal. (Id., Exh D at 37, 43, 49.) There is
21 evidence that Plaintiff sent some of the letters after he filed this lawsuit. (Id. at 49, 50, 51, 52, 53.)
22 Nonetheless, none of these letters or replies are evidence of exhaustion of Plaintiff’s
23 administrative remedies at KVSP. See Woodford, 548 U.S. at 91, 93 (exhaustion under the PLRA
24 requires “compliance with an agency’s deadlines and other critical procedural rules”); Wilson v.
25 Wann, 2008 WL 4166886, *2 (E.D.Cal. Sept.8, 2008) (letters to Internal Affairs and warden were
26 insufficient to show exhaustion); see also Lees v. Felker, 2009 WL 2824862, *5 (E.D.Cal. Sept.1,
27 2009) (letter to warden is not an alternative method to the inmate grievance process for exhausting
28 administrative remedies).

1 **January 16, 2013, and March 27, 2013, Appeals**

2 Two of Plaintiff's appeals are dated January 16, 2013, and March 27, 2013. (ECF No.
3 203-2 at 8-10.) Defendant argues that these two appeals are dated two years after Plaintiff claims
4 that Defendant allegedly threatened him, and the current appeals coordinator at KVSP has verified
5 that there is no record that these appeals were ever submitted, accepted, or screened out by the
6 appeals office. (Gonzales Decl., ECF No. 206-3 at 3 ¶4.) The court finds that these two appeals
7 provide no evidence that Plaintiff still had administrative remedies available when he filed suit,
8 because they are dated after December 26, 2012, the date he filed this lawsuit. Prisoners are
9 required to exhaust the available administrative remedies *prior to filing suit*. Jones, 549 U.S. at
10 211 (emphasis added).

11 **November 9, 2011, Appeal – KVSP-0-11-01416**

12 Appeal KVSP-0-11-01416 was submitted by Plaintiff at the first level of review on
13 November 9, 2011. Plaintiff complained as follows:

14 On 11-9-11 CCI Quantum had me pulled out for court phone call at 8:30 AM, then
15 Lt. Snow had my 115 hearing. They locked me in the cage and the big tall bald
16 C/O went to pick up my property. I saw him throwing all my property in a trash
17 can and I started hollering for the Sgt. That big C/O came and opened the cage and
18 hit me in my mouth and told me to shut up or he will hit me again. They took all
19 my property and told me I better not say nothing or I won't get some of my
20 property ever again. Sgt. Sheldon came and said he is now moving me to building
21 #2. He did that because he did not want me to get no witnesses names or
22 declarations to the assault. This is just more retaliation for my legal work. And
23 C/O Capello said if he was to go today he will come be my cellie and rape me
24 every night. C/O Hefflefinger was standing there too so he heard it. The tall C/O
25 who hit me threw a lot of my personal property in the trash and refused to let me
26 see what or sent it home.

27 (ECF No. 203-2, Exh. C.)

28 Plaintiff requested action as follows:

 Somebody please come here to see me and investigate this assault and stop these
officials from this continuous retaliation and threats, and somebody please help me
get away from here to somewhere safe for me right away before I get murdered in
here. Take me to ICC right away and endorse me to go to MCSP or RJD, because
those are the 2 safest least violent CDCR prisons for SNY inmates. They don't
allow gang banging and violence. I want to be financially compensated for that
official hitting me in the mouth and splitting my lip today too. I want to mail home

1 all the property that C/O hit me took and threw in the trash. I have a right to send it
2 home because it's my personal property. I want to be compensated for my property
if it's missing. I want C/O Capello charged for telling me he will rape me.

3 (Id.)

4 Defendant argues that this appeal fails to satisfy the exhaustion requirement because it
5 does not pertain to Plaintiff's allegations against Defendant, but instead relates to Plaintiff's
6 allegations that a bald correctional officer allegedly punched him in the mouth on November 9,
7 2011. Defendant asserts that the appeal does not mention Defendant or indicate that she was
8 involved in any way. This appeal was accepted for review at the second level, but there is no
9 evidence that it was reviewed at the second level, improperly screened out, or sent to the third
10 level.

11 **November 15, 2011, Appeal**

12 Plaintiff's appeal dated November 15, 2011, complains as follows:

13 Life or death emergency request to the institution head of KVSP due to an
14 imminent threat of serious injury from retaliation by staff. Nobody will tell the
warden the real truth about what happened to me and how I was severely injured.
15 Because of this I was assaulted by staff again on 11/9/11. A B1 Ad-Seg official hit
me in the mouth busting my lip. The OIA has not told the warden the truth about
16 any of this. I am a non-violent CDCR prisoner and I deserve to be safe from harm,
retaliation, and severe harassment by staff. Where I am transferred to will
17 determine whether I will be safe. Safety and security is the number one priority.
Staff here at KVSP will not go against each other over an inmate and they cannot
18 be trusted to investigate themselves or each other. Not in this instance. On
19 7/12/10, Lt. Stiles & Lt. Harden called me in to OIA and told me "they know" what
happened to me, that staff had me assaulted. Now they have amnesia. They
20 recorded the interview. And it was recorded on 9/30/10 by Sgt. A. Sells. I need to
be transferred way from here and a safe place for me before I am assaulted again or
21 any more of my property is broken and stolen by staff. I been in Ad-Seg since
22 7/30/11 and mentally tortured by staff. I am CCCMS and I need help. I am
digressing in my mental health rapidly.

23 (Id., Exh. A at 15-16.)

24 Plaintiff requested this action be taken:

25
26 Process this as an emergency appeal pursuant to OP Section 54100.17 due to
imminent physical assault and personal injury risk. Under Section [illegible] I have
27 the right to appeal this condition [illegible] I request the warden to have me
transferred to MCSP or RJD Level IV SNY right away by special transport because
28 these are the 2 safest, least violent prisons. To resolve & expunge the non-existent

1 enemy name Robinson from my 812 because he is not a enemy and never was. To
2 get me transferred right away and out of Ad-Seg before my mental health
3 deteriorates any further and I have to go on heavy medications again. If this can't
4 be done please have the warden refer this issue to the DRB⁷ and let them hear the 2
5 audio recordings OIA made on 7/12/10 & 9/30/10 and all subsequent ones and see
6 all investigation reports & documents that were used or unused & re-written, and
7 also the same thing from Gerald Biances of the OIA in Bakersfield. Have the DRB
8 listen to and review all that and let them decide to keep me safe. Recordings on
9 8/25/11, 9/30/11 by Mr. Biances.

10 (Id.)

11 Defendant argues that this appeal fails to satisfy the exhaustion requirement as to
12 Defendant, because the appeal does not mention Defendant. Defendant further asserts that
13 Plaintiff's complaint does not mention being hit by the correctional officer, which is a separate
14 issue.

15 Plaintiff submits three of the prison's responses to his appeals, which notified him that the
16 appeals were being returned to him without a decision. The response dated September 12, 2011,
17 rejects the appeal, referred to as "Segregation/SHU, 09/07/2011," at the first level of screening
18 because "[y]our appeal has been rejected pursuant to the California Code of Regulations, Title 15,
19 Section (CCR) 3084.6(b)(3) [because y]ou have exceeded the allowable number of appeals filed in
20 a 14 calendar day period pursuant to CCR 3084.4(g)." (ECF No. 203-2 at 12.) Plaintiff has not
21 argued that this appeal was screened out improperly.

22 The other two responses appear to be rejections of Plaintiff's November 15, 2011, appeal
23 discussed above, which was re-submitted after the first rejection. The response dated November
24 22, 2011, rejects Plaintiff's appeal, titled by the prison as "Living Conditions, Other, 11/12/2011,"
25 at the first level of screening as a "[d]uplicate of appeal received on 11/17/11." (ECF No. 203-2 at
26 13.) Plaintiff argues, in notations on the response, that that this rejection is improper because his
27 appeal is about "safety and security," not living conditions, and is not a duplicate appeal, "because
28 I have never requested a DRB Review or Referral ever before." (Id.) The response dated
December 27, 2011, rejects Plaintiff's appeal, titled by the prison "Living Conditions, Other,
12/21/2011," because it "concerns an anticipated action or decision," because "[y]ou may not

⁷ Departmental Review Board

1 appeal to receive a DRB referral,” and because the appeal “refers to previously filed staff
2 complaints.” (Id. at 14.) Plaintiff argues, in his notes written on the response, that the appeal
3 should not have been rejected because it is not only a request for a DRB referral, but concerns a
4 staff assault which happened on 11/9/11 and a request to be transferred to another prison. He also
5 writes that “staff here are being allowed to repeatedly harm me [and] I will be set up to be
6 assaulted again real soon and B. DaVeiga is helping Lt. Waddle cover all this up.” (Id.)

7 Defendant argues that these rejections are not improper because Plaintiff did file a similar
8 appeal just six days prior, and that Plaintiff’s allegations against the correctional officer had
9 already been processed and everything else Plaintiff noted in his appeal related to future events.
10 Defendant also notes that Plaintiff was the one who characterized the November 11, 2011, appeal
11 as a “Request for warden to make DRB Referral re imminent danger.” (ECF No. 203-2 at 15-16,
12 24-26.)

13 The court finds the screening-out of Plaintiff’s November 15, 2011, appeal on November
14 22, 2011, and December 27, 2011, to be improper on the bases that (1) it is a duplicate of his
15 November 9, 2011, appeal, (2) it concerns an anticipated action or decision, (3) it improperly
16 requests a DRB referral, and (4) it refers to previously filed staff complaints.

17 First, the court finds that the November 15, 2011, appeal was improperly rejected as a
18 duplicate of the November 9, 2011, appeal. In the November 9, 2011, appeal, Plaintiff reports that
19 a correctional officer slapped him in the mouth and took his property, and the appeal requests
20 financial compensation for the assault and his missing property, to be allowed to send his property
21 home, and to be transferred to another prison.

22 The November 15, 2011, appeal reports a life or death emergency due to an imminent
23 threat of serious injury from retaliation by staff. While the appeal does mention the assault by the
24 correctional officer and Plaintiff’s loss of property, these incidents are used as examples of recent
25 retaliation and harassment by staff. Plaintiff also reports that there is a recorded interview from
26 November 30, 2010, in which he told Lt. Stiles and Lt. Harden about what is happening to him.
27 Plaintiff also alleges that he is being mentally tortured by staff. In the November 15, 2011, appeal,
28 Plaintiff requests to be transferred to a safe place and to have this issue referred to the

1 Departmental Review Board (DRB) so they can listen to the recorded interview. Based on these
2 differences between the November 9, 2011, appeal and the November 11, 2011, appeal, the court
3 finds that the November 15, 2011, appeal was improperly screened out as a duplicate of the
4 November 9, 2011, appeal.

5 To the extent that the appeals coordinator considers Plaintiff's report of "an imminent
6 threat of serious injury from retaliation by staff," to be an "anticipated action or decision" the
7 court finds the rejection of the appeal on this basis to be improper, particularly because retaliation
8 stems from an adverse action against Plaintiff and "the mere *threat* of harm can be an adverse
9 action...." Brodheim v. Cry, 584 F.3d 1262, 1270 (9th Cir. 2009). Moreover, the appeals
10 coordinator did not sufficiently indicate how Plaintiff could cure this deficiency. See Cal. Code
11 Regs. tit. 15, § 3084.6(a)(1) ("Unless the appeal is cancelled, the appeals coordinator shall
12 provide clear and sufficient instructions regarding further actions the inmate or parolee must take
13 to qualify the appeal for processing.")

14 The court also finds the rejection of the appeal because Plaintiff "may not appeal to receive
15 a DRB referral [and t]he appeal form is not a request form," to be improper. The appeal form
16 clearly *is* a "request form," as it includes a section for the prisoner to write down the "Action
17 requested" by the prisoner. (ECF No. 203-2 at 15.) While it may be accurate that the appeals
18 process is not the proper vehicle for requesting a DRB referral, rejecting Plaintiff's appeal on this
19 basis alone, considering the substance of Plaintiff's appeal, appears improper, because pursuant to
20 Cal. Code Regs. tit. 15, § 3084.1(a), the State of California provides its prisoners and parolees the
21 right to appeal administratively "any policy, decision, action, condition, or omission by the
22 department or its staff that the inmate or parolee can demonstrate as having a material adverse
23 effect upon his or her health, safety, or welfare."

24 Finally, the court considers whether Plaintiff's November 15, 2011, appeal was sufficient
25 to put defendants on notice of the nature of the wrongs alleged in his complaint against Defendant.
26 Plaintiff alleged in that appeal, as he does in his FAC, that prison officials have retaliated against
27 him since 2010, placing him in danger of further assault. Plaintiff alleged that prison officials
28 cannot be trusted to investigate themselves because staff at KVSP will not go against each other

1 ///

2 over an inmate. Plaintiff alleges that an interview with Plaintiff was recorded by Lt. Stiles, Lt.
3 Harden, and Sgt. A. Sells on September 30, 2010, concerning the wrongs against him.

4 Plaintiff was not required to identify defendant Waddle by name to exhaust the grievance
5 against her. Neither the PLRA itself nor the California regulations require an inmate to identify
6 responsible parties or otherwise to signal who ultimately may be sued. Sapp, 623 F.3d at 824
7 (citing See Jones, 549 U.S. at 217 (“[N]othing in the [PLRA] imposes a ‘name all defendants’
8 requirement.”)). The court finds that Plaintiff’s November 15, 2011, appeal, if accepted and
9 processed through all levels of review, would have given prison officials a fair opportunity to
10 respond to his complaints of retaliation by prison staff, including defendant Waddle, threatening
11 assault or other bodily harm. With respect to inmate appeals which prison officials elect to
12 address on the merits, there need only be a “sufficient connection” between the claim set forth in
13 the inmate appeal and the unidentified defendants, such that defendant prison officials were
14 adequately put on notice of the substance of plaintiff’s complaint. Reyes, 810 F.3d at 959. As
15 discussed above, such a connection exists here. This is sufficient to put the prison on “notice of
16 the alleged deprivation” for purposes of exhaustion under the PLRA. (Id.)

17 Having found that Plaintiff filed an inmate appeal that sufficiently put the prison on notice
18 of the nature of the wrong alleged in his retaliation claims, the court finds that Defendant has not
19 established that Plaintiff failed to exhaust his available administrative remedies prior to filing suit.

20 **V. SUMMARY JUDGMENT -- RETALIATION CLAIM**

21 **A. Legal Standard -- Retaliation**

22 As discussed by the Ninth Circuit in Watison v. Carter:

23 “A retaliation claim has five elements. Brodheim v. Cry, 584 F.3d 1262,
24 1269 (9th Cir. 2009). First, the plaintiff must allege that the retaliated-against
25 conduct is protected. The filing of an inmate grievance is protected conduct.
Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005).

26 Second, the plaintiff must claim the defendant took adverse action against
27 the plaintiff. Id. at 567. The adverse action need not be an independent
28 constitutional violation. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995).

1 “[T]he mere *threat* of harm can be an adverse action....” Brodheim, 584 F.3d at
2 1270.

3 Third, the plaintiff must allege a causal connection between the adverse
4 action and the protected conduct. Because direct evidence of retaliatory intent
5 rarely can be pleaded in a complaint, allegation of a chronology of events from
6 which retaliation can be inferred is sufficient to survive dismissal. See Pratt, 65
7 F.3d at 808 (“timing can properly be considered as circumstantial evidence of
8 retaliatory intent”); Murphy v. Lane, 833 F.2d 106, 108–09 (7th Cir. 1987).

9 Fourth, the plaintiff must allege that the “official’s acts would chill or
10 silence a person of ordinary firmness from future First Amendment activities.”
11 Robinson, 408 F.3d at 568 (internal quotation marks and emphasis omitted). “[A]
12 plaintiff who fails to allege a chilling effect may still state a claim if he alleges he
13 suffered some other harm,” Brodheim, 584 F.3d at 1269, that is “more than
14 minimal,” Robinson, 408 F.3d at 568 n.11. That the retaliatory conduct did not
15 chill the plaintiff from suing the alleged retaliator does not defeat the retaliation
16 claim at the motion to dismiss stage. Id. at 569.

17 Fifth, the plaintiff must allege “that the prison authorities’ retaliatory action
18 Thdid not advance legitimate goals of the correctional institution....” Rizzo v.
19 Dawson, 778 F.2d 527, 532 (9th Cir.1985). A plaintiff successfully pleads this
20 element by alleging, in addition to a retaliatory motive, that the defendant’s actions
21 were arbitrary and capricious, id., or that they were “unnecessary to the
22 maintenance of order in the institution,” Franklin v. Murphy, 745 F.2d 1221, 1230
23 (9th Cir.1984).”

24 Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012).

25 Not every allegedly adverse action will support a retaliation claim. See e.g. Huskey v. City
26 of San Jose, 204 F.3d 893, 899 (9th Cir. 2000) (retaliation claim cannot rest on “the logical fallacy
27 of post hoc, ergo propter hoc, literally, ‘after this, therefore because of this’”) (citation omitted).
28 However, an allegation of retaliation against a prisoner’s First Amendment right to file a prison
grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288
(9th Cir. 2003).

To raise a triable issue as to motive, a plaintiff must offer “either direct evidence of
retaliatory motive or at least one of three general types of circumstantial evidence [of that
motive]’, which usually includes: ‘(1) proximity in time between protected speech and the alleged
retaliation; (2) [that] the [defendant] expressed opposition to the speech; [or] (3) other evidence
that the reasons proffered by the [defendant] for the adverse . . . action were false and

1 pretextual.” McCollum v. California Dep't of Corr. & Rehab., 647 F.3d 870, 882 (9th Cir. 2011)
2 (quoting Allen v. Iranon, 283 F.3d 1070, 1077 (9th Cir. 2002).

3 The Court must “‘afford appropriate deference and flexibility’ to prison officials in the
4 evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory.” Pratt,
5 65 F.3d at 807 (9th Cir. 1995) (quoting Sandin v. Conner, 515 U.S. 472, 482 (1995)). The burden
6 is on Plaintiff to demonstrate “that there were no legitimate correctional purposes motivating the
7 actions he complains of.” Pratt, 65 F.3d at 808.

8 **B. Undisputed Facts**

9 Unless otherwise noted, these facts are undisputed by the parties or as determined by the
10 court based on a thorough review of the record.⁸

- 11 1. Plaintiff, Kevin Bryant, a prisoner of the State of California, was housed at Kern Valley
12 State Prison from 2009 to 2013. He is currently housed at Salinas Valley State Prison.
13 (Exh. I to Appendix, Bryant’s Movement History.)
- 14 2. Defendant Waddle is currently employed by the California Department of Corrections and
15 Rehabilitation (“CDCR”) as a Correctional Lieutenant at Kern Valley State Prison
16 (“KVSP”). She has held this position since 2008. (Exh. B to Appendix, Waddle Decl. ¶
17 2.)
- 18 3. Lieutenant Waddle interviewed inmate Bryant about his allegations on November 15,
19 2010. On December 8, 2010, Inmate Bryant was informed that an inquiry to his
20 allegations was conducted and staff did not violate CDCR policy. (Exh. B to Appendix,
21 Waddle Decl. ¶ 5; Exh. G to Appendix, Staff Complaint Response to Appeal #KVSP-O-
22 10- 02161.)
- 23 4. On November 30, 2010, Lieutenant Waddle endorsed Plaintiff for placement in Ad-Seg.
24 The Administrative Segregation Unit Placement Notice states that the reason for placement
25 is “jeopardizes integrity of an investigation of alleged serious misconduct or criminal

26 ⁸ These facts are taken from Defendant’s Statement of Undisputed Facts (DUF), ECF No. 96-1 at 1-7; Plaintiff’s
27 Responses to DUF, ECF No. 203-1 at 1-9; and Defendant’s Reply to Plaintiff’s Responses to DUF, ECF No. 206-1 at
28 1-23. The court has considered all declarations and exhibits submitted in support of each statement, including
pertinent portions of Plaintiff’s deposition of January 19, 2016, lodged with the court pursuant to ECF No. 94.

- 1 activity.” (Exh. B to Appendix, Waddle Decl. ¶ 6; Exh. H to Appendix, Administrative
2 Segregation Unit Placement Notice from November 30, 2010.)⁹
- 3 5. California Code of Regulations Title 15 Section 3335 states that one of the reasons an
4 inmate will be placed in Administrative Segregation is if he endangers the institution’s
5 security or jeopardizes the integrity of an investigation of an alleged serious misconduct.
6 (Exh. B to Appendix, Waddle Decl. ¶ 6.)
- 7 6. Plaintiff claims that Lieutenant Waddle told him she was placing him in Administrative
8 Segregation for his protection. (Exh. A to Appendix, Bryant Depo at 88:18-23.)
- 9 7. Ultimately, the institution decided to move Bryant to Facility D Sensitive Needs Yard
10 instead of Administrative Segregation. This decision was made by the facility captain,
11 who signed the Administrative Segregation Unit Placement Notice on December 1, 2010.
12 (Exh. B to Appendix, Waddle Decl. ¶ 8.)
- 13 8. According to inmate Bryant’s movement history, he was moved to Facility D Sensitive
14 Needs Yard on December 4, 2010. (Exh. B to Appendix, Waddle Decl. ¶9; Exh. I to
15 Appendix, Bryant’s Movement History.)
- 16 9. Bryant was never assaulted by any inmates he alleges were enlisted by Defendant Waddle.
17 (Exh. A to Appendix, Bryant Depo at 90:17- 20.)
- 18 10. Bryant does not allege that Lieutenant Waddle told him that she was going to have inmates
19 assault him in building 1. (Exh. A to Appendix, Bryant Depo at 97:19-22.)
- 20 11. Bryant never heard Lieutenant Waddle and Correctional Officer Sellers allegedly talk
21 about having him assaulted. (Exh. A to Appendix, Bryant Depo at 98:10- 17.)
- 22 12. Inmate McCloud was never offered compensation.
- 23 13. Bryant never saw Lieutenant Waddle speak to inmate Moore about allegedly assaulting
24 him. (Exh. A to Appendix, Bryant Depo at 104:15-17.)
- 25 14. Bryant never saw Lieutenant Waddle speak to inmate Moore about allegedly assaulting
26 him. (Exh. A to Appendix, Bryant Depo at 104:15-17.)

27 ///

28 _____
⁹ Plaintiff disputes the reason that defendant Waddle decided to send him to Ad-Seg.

- 1 15. Bryant never heard Lieutenant Waddle and Officer Castellanos discuss having him
2 assaulted.
- 3 16. Inmate Moore never assaulted Bryant.
- 4 17. Bryant never saw any Mexican inmates come to his cell to attack him on the day he alleges
5 that inmate Moore set him up to be attacked. (Exh. A to Appendix, Bryant Depo at 29:16-
6 30:9.)
- 7 18. Bryant believes that inmate Moore had enlisted two black inmates nicknamed Psych and
8 Tennis to assault him. Bryant saw these inmates peek around the window in the rotunda.
9 These inmates never actually attacked Bryant or said that they were going to. (Exh. A to
10 Appendix, Bryant Depo at 104:20-105:13; 107:7-9.)
- 11 19. Bryant never saw Lieutenant Waddle speak to the control booth officer or anyone about
12 doing anything to him. (Exh. A to Appendix, Bryant Depo at 109:19- 22.)
- 13 20. Lieutenant Waddle never assaulted inmate Bryant.
- 14 21. Bryant was never assaulted.
- 15 22. There is no record that Bryant had an appeal decided by the Office of Appeals at the Third
16 Level of review relating to the allegation that Lieutenant Waddle tried to have other
17 inmates attack inmate Bryant or retaliated against him in any other way. (Exh. D to
18 Appendix, Voong Decl. ¶ 9.)
- 19 23. Bryant does not recall specifically speaking to the appeals coordinator about an appeal
20 regarding Lieutenant Waddle. (Exh. A to Appendix, Bryant Depo. at 86:14- 19.)
- 21 24. Lieutenant Waddle is not aware of any appeals that inmate Bryant has filed against her
22 regarding his allegations that she conspired to have him assaulted, which is the subject of
23 this complaint. Lieutenant Waddle has never seen such an appeal, nor has any staff ever
24 told her that such an appeal exists. (Exh. B to Appendix, Waddle Decl. ¶ 17.)
- 25 25. In 2010, the policy stated that if an appeal is not properly or timely submitted, it will be
26 “screened out” and returned to the inmate without assigning a log number, with the reason
27 for the screening, and instructions on how to correct the defect, if correction is possible.
28 An inmate may resubmit his appeal for a subsequent review, and the appeal will then be

1 logged into the Inmate Appeal Tracking System (IATS) if the inmate followed all
2 instructions given on the “screen out” and resubmitted it in a timely manner. (Exh. C to
3 Appendix, Tarnoff Decl. ¶ 6.)

4 **C. Defendant Waddle’s Motion**

5 Defendant Waddle moves for summary judgment on Plaintiff’s claim for retaliation against
6 her, on the grounds that there is no evidence that Plaintiff was assaulted, that Defendant ever
7 conspired with anyone to have Plaintiff assaulted, or that Defendant’s actions were motivated by
8 Plaintiff’s appeals or legal action against Officers Gallagher and Romero. Defendant asserts that
9 although Plaintiff claims he was told by inmates McCloud and Moore that they were enlisted by
10 Defendant to assault him, these inmates have signed statements flatly denying such allegations.
11 Defendant further asserts that the undisputed evidence shows that Defendant moved Plaintiff to
12 administrative segregation to preserve the integrity of the investigation as to his complaint against
13 Officers Gallagher and Romero, not to have him assaulted or in retaliation for pursuing legal
14 action.

15 Defendant offers as evidence the declarations of Defendant Waddle, inmate McCloud, and
16 inmate Moore; Plaintiff’s deposition testimony; and prison records including Bryant’s Movement
17 History, the Staff Complaint Response to Plaintiff’s Appeal #KVSP-O-10-02161, and the
18 November 30, 2010, Administrative Segregation Unit Placement Notice.

19 **1. Adverse Action**

20 Defendant argues that there is no evidence that Plaintiff’s Ad-Seg placement was an
21 adverse action, and that evidence shows that Defendant approved Plaintiff to go to Ad-Seg to
22 protect him while the investigation of his allegations against Officers Romero and Gallagher were
23 pending. Defendant offers the following evidence.

24 California Code of Regulations Title 15 Section 3335 states that one of the reasons an
25 inmate will be placed in Ad-Seg is if he jeopardizes the integrity of an investigation of an alleged
26 serious misconduct. 15 CCR § 3335. Plaintiff himself admitted at his deposition that Defendant
27 told him she was placing him in Ad-Seg for his protection:

28 ///

1 Q. Okay. You said you guess. Did she ever say, "I'm moving you to D yard to have
2 you assaulted"?

3 A. No. She said she was putting me in Ad-Seg –

4 Q. Okay. She said –

5 A. -- to protect me from Gallagher and Romero. I had been there six months since
6 they assaulted me.

7 (Exh. A to Appendix, Bryant Depo at 88:18-23.)

8 Defendant asserts that throughout the FAC, Plaintiff states that whenever he felt threatened
9 by other inmates or staff, he would ask to be placed in Ad-Seg. Defendant offers this example
10 from the FAC: "I told both Rodriguez and Castellanos that I want to be put in Ad-Seg for my
11 safety." (FAC at 8 ¶33.)

12 2. Conspiracy

13 Defendant also argues that there is no evidence that she conspired with Officer Sellers and
14 inmate McCloud to have Plaintiff assaulted in April 2011, because a conspiracy requires a meeting
15 of the minds, and there is no evidence of a meeting of the minds to have Plaintiff assaulted in
16 alleged retaliation for pursuing legal action against Officers Romero and Gallagher. As evidence,
17 Defendant offers excerpts from her declaration inmate McCloud's declaration, and Plaintiff's
18 deposition testimony.

19 Lieutenant Waddle declared:

20 "I never threatened or assaulted inmate Bryant. I have never conspired with any
21 officer, inmate, of any other individual to have inmate Bryant assaulted."

22 (Exh. B to Appendix, Waddle Decl. ¶¶ 12-13.)

23 "I have never heard any officer, inmate, or any other individual discuss having
24 inmate Bryant assaulted."

25 (Id. ¶15.)

26 Plaintiff testified:

27 Q. Did you ever see Lieutenant Waddle speak to Inmate Moore about assaulting
28 you?

1 A. No.

2 (ECF No. 96-2, Exh. A to Appendix, Bryant Depo at 103:15-17.)

3 Inmate McCloud declared:

4 “In response to the actual allegations contained in [Bryant’s] declarations, I was never told
5 by Correctional Officer Sellers to ‘take care’ of Mr. Bryant. I never talked with Officer
6 Sellers about inmate Bryant at all. Likewise, I was never manipulated by Lieutenant
7 Waddle, or offered any compensation to hurt other inmates, as one of [Bryant’s]
8 declarations suggests, and Lieutenant Waddle never promised ‘to make my problems ago
9 away’ if I would assault Mr. Bryant. I rarely talk with correctional staff about other
10 inmates, and I have never talked with Lieutenant Waddle about Mr. Bryant.”

11 (Exh. 6 to Castellanos MSJ, ECF No. 92-9, McCloud Decl. ¶ 5.)

12 At his deposition, Plaintiff testified that he never saw or heard Defendant and C/O Sellers talk
13 about having him assaulted, and he has no evidence, except McCloud’s alleged words, that Defendant
14 enlisted inmate McCloud to assault him:

15 Q. Did you ever see Lieutenant Waddle or -- Did you ever specifically hear
16 Lieutenant Waddle and Correctional Officer Sellers talk about having you
17 assaulted?

18 A. “No. Not in front of me, no. They didn't -- I don't know what they talked about
19 without me being there, but she was the one conspiring to have me moved to that
20 building and with Sellers to have me assaulted.”

21 (ECF No. 96-2, Exh. A to Appendix, Bryant Depo. at 98:10-17.)

22 Q. Is your -- do you have any evidence that Waddle enlisted McCloud other than
23 McCloud's words to you?

24 A. No.

25 (Id. at 115:3-5.)

26 Regarding whether inmate McCloud ever signed any declarations for Plaintiff, McCloud
27 declared:

28 “Counsel with the California Attorney General’s Office informs me that Mr. Bryant
has filed at least four declarations with the Court bearing my signature. Copies of
these declarations are attached as exhibit A. I have reviewed these declarations and
can confirm that I have never seen them before, and that I did not sign any of these
four declarations for Mr. Bryant. The signature on these declarations is not mine.”

(Exh. 6 to Castellanos MSJ, ECF No. 92-9, McCloud Decl. ¶4.)

1 "I do not know why Mr. Bryant has submitted these declarations. They are,
2 however, fraudulent. I have not reviewed or signed any of these four declarations,
3 and I have not authorized Mr. Bryant to sign them on my behalf."

3 (Id. ¶6.)

4 Defendant also argues that Plaintiff has no evidence of a conspiracy to assault him in July
5 2011, and asserts that Plaintiff's claims are even more convoluted and specious. Plaintiff testified
6 in his deposition:

7 Q. Is this the same time period where you allege that the two inmates were -- two
8 black inmates were going to assault you, or is this a different incident?

9 A. Yeah, that's -- right after that, I saw those two black inmates. I don't know if two
10 Mexican inmates were there. But Officer Castellanos uses his porters to assault
11 dozens of inmates. And every single time he testified that his inmates were the
12 victims of the assault so that they wouldn't get in trouble but he had them assault
13 the persons.

14 Q. Okay. So you saw two black inmates outside your cell?

15 A. Not outside my cell. I saw them peek around in the window in the rotunda. I just
16 saw them out there. They walked over there and they walked back. So I know
17 they're out in the rotunda where the officers are.

18 Q. Did they ever say they were going to assault you?

19 A. No. I told them that "I'm going to Ad-Seg."

20 (ECF No. 96-2, Exh. A to Appendix, Bryant Depo. at 104:20-105:13.)

21 Q. What are their nicknames?

22 A. Psych. And the other one is Tennis or something. Psych and Tennis. I don't
23 know how to spell it.

24 (Id. at 107:7-9.)

25 Inmate McCloud denied this bizarre scenario:

26 "I never assaulted Bryant. I never planned to assault Bryant. I never came to
27 Bryant's cell and informed him that Officer Castellanos had directed me to assault
28 Bryant. I never informed Bryant that Officer Castellanos had directed me to gather
other inmates for the purposes of assaulting Bryant. I never came to Bryant's cell
for the purpose of luring him from his cell so that I, or other inmates, could assault
him. I never told Bryant that officer Castellanos had paid me to assault Bryant."

(Exh. 6 to Castellanos MSJ, ECF No. 92-9, McCloud Decl. ¶3.)

1 Defendant states that Plaintiff has no evidence that she was involved, and that there is no
2 connection between her and inmate Moore, or between her and the inmates who were allegedly
3 going to stab Plaintiff. Plaintiff testified:

4 Q. Okay. How do you know she enlisted Castellanos?

5 A. These are the staff that she supervised.

6 (ECF No. 96-2, Exh. A to Appendix, Bryant Depo. at 103:19-20.)

7 Inmate R. Moore declared:

8 “I have been informed by the California Attorney General’s Office that Bryant has
9 alleged that I told him that I conspired with Officer E. Castellanos to assault him.
10 This is not true. I have never conspired with any officer, including Officer
11 Castellanos, to assault other inmates, including Bryant. I was not part of an inmate
12 gang used by officer Castellanos, or any other officer, for the purposes of assaulting
other inmates. I was never promised, nor did I ever receive, other inmates’
property as payment for assaulting other inmates.”

13 (Exh. 7 to Castellanos MSJ, ECF No. 92-9, Moore Decl. ¶2.)

14 “I never assaulted Bryant. I never planned to assault Bryant. I never came to
15 Bryant’s cell and informed him that Officer Castellanos had directed me to assault
16 Bryant. I never informed Bryant that Officer Castellanos had directed me to gather
17 other inmates for the purposes of assaulting Bryant. I never told Bryant that
18 Castellanos has paid two Mexican inmates, or any other inmates, to assault Bryant.
I never came to Bryant’s cell for the purpose of luring him from his cell so that I, or
other inmates, could assault him. I never told Bryant that Officer Castellanos had
paid me to assault Bryant.”

19 (Id. ¶3.)

20 21 **3. Because of Plaintiff’s Protected Conduct**

22 Defendant argues that Plaintiff cannot establish that the retaliatory act was “because of”
23 Plaintiff’s protected conduct. Defendant argues there is no direct evidence that her motive to act
24 was to retaliate against Plaintiff for pursuing legal action against Officers Romero and Gallagher,
25 as shown by Plaintiff’s deposition testimony that he never saw or heard Defendant discuss or plan
26 the attempted assaults on him with any officer or inmate.

27 Defendant also asserts that there is no circumstantial evidence supporting Plaintiff’s claim
28 based on the timing of events, because Plaintiff alleges that Defendant found out about his claims

1 against officers Romero and Gallagher in November 2010, but Plaintiff alleges that Defendant
2 orchestrated the inmate attacks against him 5-7 months later, in April and July 2011. Defendant
3 argues that Plaintiff cannot show that she expressed opposition to his protected conduct, because
4 Defendant denied it in her declaration, discussed above, and also denied that she threatened
5 Plaintiff in any way.

6 “Although I know Officers Romero and Gallagher, I am not personally friends with
7 them. Even if I was, there is no reason why I would tell inmate Bryant to drop his
8 appeal or lawsuit, nor is there any reason why I would threaten him. Inmates
9 frequently file appeals and lawsuits against correctional officers and other staff
members, and there is no reason why I would single out inmate Bryant.”

10 (ECF No. 96-2, Exh. B to Appendix, Waddle Decl. ¶16.)

11 Based on the foregoing, the court finds that Defendant has met her burden of setting forth
12 evidence that there is no genuine issue of material fact for trial, which shifts the burden to Plaintiff
13 to submit admissible evidence showing the existence of genuine issues for trial.

14 **D. Plaintiff’s Opposition**

15 Plaintiff argues that a genuine dispute of material fact exists. Plaintiff submits as evidence
16 the Complaint, FAC, Undisputed Facts, declarations of inmate McCloud, Plaintiff’s own
17 declaration, copies of Plaintiff’s 602 appeals and responses, excerpts from Plaintiff’s deposition
18 testimony, and the court docket in case Bryant v. Gallagher (USDC ED Case #1:11-cv-00446-
19 BAM).

20 On June 30, 2017, Defendant filed objections to Plaintiff’s evidence on hearsay grounds,
21 for lack of foundation, as irrelevant, as speculative, as unduly prejudicial, and for lack of
22 authentication. (ECF No. 206-2.) The court notes Defendant’s objections. If the court refers to
23 any of Plaintiff’s evidence in this order without addressing the objections, by implication the
24 objections to that evidence are overruled.

25 **1. Adverse Action**

26 Plaintiff argues that there is a genuine dispute of fact as to what actions Defendant took
27 against him and whether they were adverse.

1 **Solicitation of McCloud to Assault Bryant**

2 Plaintiff asserts that there is a dispute of fact as to whether Defendant told inmate McCloud
3 to assault Plaintiff. A dispute exists because McCloud’s declaration signed on April 24, 2017,
4 contradicts McCloud’s declaration signed on June 21, 2015. In the June 21, 2015, declaration,
5 upon which Defendant relies, McCloud recants statements he made in prior declarations he signed
6 in 2011, which supported Plaintiff’s allegations:

7 “In response to the actual allegations contained in [McCloud’s prior] declarations, I
8 was never told by Correctional Officer Sellers to ‘take care’ of Mr. Bryant. I never
9 talked with Officer Sellers about inmate Bryant at all. Likewise, I was never
10 manipulated by Lieutenant Waddle, or offered any compensation to hurt other
11 inmates, as one of the declarations suggests, and Lieutenant Waddle never
12 promised ‘to make my problems go away’ if I would assault Mr. Bryant. I rarely
13 talk with correctional staff about other inmates, and I have never talked with
14 Lieutenant Waddle about Mr. Bryant.”

15 (Exh. 6 to Castellanos MSJ, ECF No. 92-9, McCloud Decl. ¶ 5.)

16 In the April 24, 2017, declaration, McCloud changes his story again:

17 “I have attached a copy of both the [2011] declarations I signed for inmate Bryant
18 here to and declare under oath these are true and correct copies of the originals I
19 signed in 2011 and I have signed and dated them again today 4/24/17 below my
20 previous signature.” . . . Everything I said about Lt. Waddle paying me to assault
21 other inmates in my staff complaint, my lawsuit against her and in the attached
22 declarations is completely true and I only said and signed anything to the contrary
23 to protect myself.”

24 (Exh. B to Plaintiff’s Declaration, ECF 203-2 at 20.)

25 Plaintiff argues that this evidence creates a genuine dispute of material fact as to what
26 Defendant told McCloud and the veracity and credibility of both with respect to their testimony
27 regarding the same.

28 **Placement of Plaintiff in Ad-Seg**

 Plaintiff argues that the facts differ as to why Defendant tried to place Plaintiff in Ad-Seg.
Plaintiff claims that Defendant tried to place him in Ad-Seg so he could be assaulted:

 “On November 30, 2010, Defendant Waddle escorted me from my cell to the
program office where she showed me the October 2, 2010 staff misconduct
complaint that I filed against Officers Gallagher and Romero. She then
recommended that I be put in Administrative Segregation and told me it was for my

1 safety and protection. I was moved to Ad Seg, and then later to Facility D, on
2 December 4, 2010 pursuant to the recommendation of Defendant Waddle for the
3 specific purpose of having me assaulted for the appeals and lawsuit I filed against
4 prison employees and Waddle's staff."

5 (Bryant Decl., ECF 203-2 ¶¶4, 5.)

6 However, Defendant claims that the only reason she attempted to place Plaintiff in Ad-Seg
7 was to protect him and ensure his safety while an investigation as to his allegations of Romero and
8 Gallagher were looked into:

9 "It was recommended that inmate Bryant be placed in Administrative Segregation
10 in order to preserve the integrity of the investigation of staff misconduct relating to
11 inmate Bryant's allegations against Officer Romero and Officer Gallagher. I
12 signed the Administrative Segregation Unit Placement Notice on November 30,
13 2010. Bryant was recommended for Administrative Segregation pursuant to
14 California Code of Regulations Title 15 Section 3335, which states that one of the
15 reasons an inmate will be placed in Administrative Segregation is if he endangers
16 the institution's security or jeopardizes the integrity of an investigation of an
17 alleged serious misconduct. Inmate Bryant was not recommended to be moved as
18 retaliation for filing an appeal against Officers Romero and Gallagher, nor was he
19 moved in an attempt to have him assaulted."

20 (Waddle Decl., Exh. B to Appendix, ECF No. 96-2 at 25 ¶¶6-7.) Attached as Exhibit "H" is a true
21 and accurate copy of the Administrative Segregation Unit Placement Notice from November 30,
22 2010. Defendant argues that her approval therefore was not an adverse action nor was it done to
23 jeopardize Plaintiff's safety, but the very opposite.

24 As to whether Defendant acted because of Plaintiff's appeals against Officers Romero and
25 Gallagher, Defendant claims that she only knew about Plaintiff's staff conduct complaint against
26 Gallagher and Romero for interfering with his mail and appeals, not about Plaintiff's complaint
27 against them for having him assaulted:

28 "The only appeal submitted by inmate Bryant involving Officer Romero and
Officer Gallagher, which I reviewed was Appeal # KVSP-O-10-02161. In this
appeal, inmate Bryant alleged that Officer Romero and Officer Gallagher were
interfering with his mail and appeals. I interviewed inmate Bryant about his
allegations on November 15, 2010. On December 8, 2010, Inmate Bryant was
informed that an inquiry to his allegations was conducted and staff did not violate
CDCR policy. Attached as Exhibit "G" is a true and accurate copy of the Staff
Complaint Response to Appeal # KVSP-O-10-02161."

(Waddle Decl., Exh. B to Appendix, ECF No. 96-2 at 25 ¶5.)

1 Plaintiff questions Defendant's credibility in stating that she did not know about Plaintiff's
2 staff misconduct complaint against Gallagher and Romero for having Plaintiff assaulted, because
3 this complaint raises safety concerns that would warrant moving Plaintiff to Ad-Seg, whereas the
4 appeal concerning mail and appeals does not raise such concerns.

5 Plaintiff also argues that Defendant's claim that she transferred Plaintiff to Ad-Seg for his
6 safety is suspect because Defendant did not recommend Plaintiff's placement in Ad-Seg until
7 November 30, 2010, over two weeks after Defendant claims to have interviewed Plaintiff
8 regarding his staff complaint on November 15, 2010. (Waddle Decl., Exh. B to Appendix, ECF
9 No. 96-2 at 25 ¶(6) (quoted hereinabove).

10 **Solicitation of Moore to Assault Bryant**

11 Plaintiff argues that there is a dispute of fact whether there was a direct connection
12 between Defendant and Inmate Moore. Defendant refers to testimony in Plaintiff's deposition in
13 support of her argument that there was no direct connection:

14 Q. Who enlisted Inmate Moore?

15 A. Castellanos.

16 Q. Did Lieutenant Waddle enlist Inmate Moore?

17 A. She enlisted Castellanos.

18 Q. Okay. How do you know she enlisted Castellanos?

19 A. These are the staff that she supervised. . .

20 (ECF No. 96-2, Exh. A to Appendix, Bryant Depo. at 103:15-21.)

21 Plaintiff asserts that Defendant deceptively left out lines of testimony that show a
22 connection between Waddle and Moore, for example:

23 A. These are the staff that she supervised. And she's had them assault other people
24 that have been investigated for that, too.

25 Q. Okay. So you're just basing it based on the fact that she supervised Castellanos?

26 A. I based it based on the fact that she told me I was gonna leave there in a body
27 bag and she was gonna get me. She threatened to do this to me already.

28 (Id. at 103:21 – 104:3.)

1 Plaintiff also points to his deposition testimony stating that “Inmate Moore told me that
2 Castellanos told him to assault me and ma[k]e me drop my cases and my complaints against staff.”
3 (ECF No. 203-2, Exh. E to Plaintiff’s Declaration, Bryant Depo. at 11:20-22.) However, the court
4 finds that inmate Moore’s statement is inadmissible hearsay. Fed. R. Evid. 802.

5 **E. Discussion**

6 The court finds genuine issues of material fact as to whether Defendant acted adversely
7 against Plaintiff and whether her actions were in retaliation for Plaintiff filing appeals and a
8 lawsuit.

9 **1. First Amendment Exercise**

10 The parties do not dispute that on October 2, 2010, Plaintiff filed a form 602 prison appeal
11 against Officers Romero and Gallagher for interfering with Plaintiff’s mail and appeals, that
12 Plaintiff filed an appeal regarding his claim that Officer Romero and Officer Gallagher conspired
13 to have him assaulted, that on March 17, 2011, Plaintiff filed a lawsuit against Officers Romero
14 and Gallagher, and that Plaintiff filed several appeals against defendant Waddle in 2011 through
15 2013. These facts are sufficient to satisfy the first element of a retaliation claim, demonstrating
16 that Plaintiff exercised his protected rights under the First Amendment.

17 **2. Adverse Action**

18 The parties do not dispute that on November 30, 2010, Defendant recommended that
19 Plaintiff be placed in Administrative Segregation, or that the form signed by Defendant stated that
20 Plaintiff was being placed there “after making allegations of staff misconduct [and] based upon the
21 aforementioned information you will remain in Administrative Segregation pending investigation
22 into staff misconduct.” (ECF No. 96-2, Appendix Exh. H.) However, the parties dispute the
23 reason that Defendant recommended this placement for Plaintiff. Plaintiff contends that
24 Defendant sought to place him in Ad-Seg to have him assaulted by other inmates, whereas
25 Defendant declares that Plaintiff was recommended for Ad-Seg pursuant to California Code of
26 Regulations Title 15 Section 3335, which states that one of the reasons an inmate will be placed in
27 Ad-Seg is if he endangers the institution’s security or jeopardizes the integrity of an investigation
28 of an alleged serious misconduct. (Waddle Decl., ECR No. 96-2, Appendix Exh. B ¶7.)

1 Plaintiff's evidence of Defendant's state of mind when she recommended Ad-Seg for
2 Plaintiff is disputed. Plaintiff declares that in April 2011, Defendant told him that "the only way I
3 would leave the prison was in a body bag and that I better be very careful about which staff I write
4 602 appeals, complaint and lawsuits against and what I say in those documents." (Bryant Decl.,
5 ECF No. 203-2 at 2 ¶6.) Defendant declares that she "never threatened or assaulted inmate
6 Bryant." (Waddle Decl., ECF No. 96-2, Appendix Exh B. ¶12.) Thus, the parties dispute whether
7 Defendant made threats to Plaintiff and whether she was in a state of mind to have Plaintiff
8 assaulted for filing appeals.

9 Plaintiff also alleges that Defendant conspired with other officers and inmates to have him
10 assaulted. However, Plaintiff has presented no admissible evidence of a conspiracy, and
11 Defendant denies any conspiracy. Plaintiff declares that Inmate McCloud "told him in 2011 that
12 he had assaulted inmates when asked by Waddle in exchange for payment and favors from
13 Waddle" and that "on or about August 16, 2011, Waddle told him to assault me in Ad Seg."
14 (Bryant Decl., ECF No. 203-2 at 3 ¶9.) Plaintiff also declares that he "learned from inmate Moore
15 that Castellanos and Waddle were trying to have me assaulted by him and other inmates." (*Id.* at 4
16 ¶14.) The court finds that these statements by McCloud are inadmissible hearsay. Defendant
17 declares that she has "never conspired with any officer, inmate, or any other individual to have
18 inmate Bryant assaulted[, nor has she ever "heard any officer, inmate, or any other individual
19 discuss having inmate Bryant assaulted." (Waddle Decl., ECF No. 96-2, Appendix Exh B. ¶13,
20 14.) Thus, the court finds no admissible evidence that Defendant conspired with others to arrange
21 for Plaintiff to be assaulted.

22 Based on the evidence, the court finds that a genuine issue exists as to whether Defendant
23 took an adverse action against Plaintiff.

24 **3. Because of Plaintiff's Exercise of His Rights**

25 The facts are disputed as to whether Defendant acted against Plaintiff *because* Plaintiff
26 filed prison appeals and a lawsuit. Plaintiff declares that on November 30, 2010, before Defendant
27 recommended that Plaintiff be placed in Ad-Seg, she "escorted me from my cell to the program
28 office where she showed me the October 2, 2010, staff misconduct complaint that I filed against

1 Officers Gallagher and Romero.” (Bryant Decl., ECF No. 203-2 at 2 ¶4.) See Pratt, 65 F.3d at
2 808 (“timing can properly be considered as circumstantial evidence of retaliatory intent”);
3 Murphy, 833 F.2d at 108–09. Defendant has not disputed that she showed Plaintiff the appeal and
4 then made her recommendation.

5 Plaintiff also alleges that Defendant was friends with Officers Romero and Gallagher,
6 declaring:

7 “I know that Lieutenant Waddle is friendly with officers Romero and Gallagher. In
8 my experience from being incarcerated for over 25 years, I have learned that prison
9 staff stick together. . . I also know that prison officials do not like it when the
10 employees who they are responsible for are found guilty of misconduct. It reflects
11 negatively on these officials since they are in charge and responsible for
12 subordinate officers. Gallagher and Romero were subordinate officers of
13 Lieutenant Waddle and she was supervising them on the June 8, 2010 when I was
14 assaulted.”

15 (Id. at 5-6 ¶18.)

16 Defendant declares:

17 “Although I know Officers Romero and Gallagher, I am not personally friends with
18 them. Even if I was, there is no reason why I would tell inmate Bryant to drop his
19 appeal or lawsuit, nor is there any reason why I would threaten him. Inmates
20 frequently file appeals and lawsuits against correctional officers and other staff
21 members, and there is no reason why I would single out inmate Bryant.”

22 (Waddle Decl., ECF No. 96-2, Appendix Exh B. ¶16.)

23 Plaintiff’s allegation that Defendant warned him that he better be very careful about which
24 staff he writes 602 appeals, complaints, and lawsuits against and what he says in those documents
25 is also a disputed fact, as discussed above.

26 Based on the evidence, the court finds that a genuine issue exists as to whether Defendant
27 took an adverse action against Plaintiff *because* Plaintiff filed appeals or a lawsuit.

28 **Chilling Effect**

As to a chilling effect, the Ninth Circuit has explained that the proper analysis of such a
retaliation claim is not whether a plaintiff was actually chilled in the exercise of his constitutional
rights. Brodheim, 584 F.3d at 1271. Rather, an objective standard applies. Id. Under that
objective standard, the court cannot say as a matter of law that a reasonable person would not have

1 been chilled in the exercise of his constitutional rights by Defendant’s alleged acts of
2 recommending Plaintiff’s placement in Ad-Seg so Plaintiff would be assaulted, threatening to put
3 Plaintiff in a body bag, or making other threats against Plaintiff. If a jury were to credit Plaintiff’s
4 testimony and draw an inference of retaliation for the filing of the inmate appeal based on the
5 timing of the recommendation of his placement in Ad-Seg, the jury could properly conclude that
6 the resulting transfer to administrative segregation would chill a reasonable person in the exercise
7 of the right to file an inmate appeal.

8 **Legitimate Correctional Purpose**

9 While Defendant argues that she recommended Plaintiff’s placement in Ad-Seg for a
10 legitimate correctional purpose, the proximity in time to Defendant allegedly showing Plaintiff a
11 copy of his inmate appeal could reasonably support a jury finding for Plaintiff on the issue.
12 Defendant may very well have believed that Plaintiff posed a threat to the institution based on the
13 possibility he may jeopardize an ongoing investigation. And after considering the testimony of
14 Defendant as well as Plaintiff, a reasonable jury might fully credit Defendant’s explanation for her
15 recommendation to transfer Plaintiff to Ad-Seg. Preserving institutional order, discipline, and
16 security are legitimate penological interests that, if they in fact motivated acts taken, will defeat a
17 retaliation claim. See Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994); Rizzo, 778 F.2d at
18 532. But a genuine dispute over this material issue of fact requires that it be resolved at trial.
19 “[P]rison officials may not defeat a retaliation claim on summary judgment simply by articulating
20 a general justification for a neutral process, when there is a genuine issue of material fact as to
21 whether the action was taken in retaliation for the exercise of a constitutional right.” Bruce, 351
22 F.3d at 1289–90. If a jury finds that Defendant threatened to put Plaintiff in a body bag, in
23 retaliation against him for filing inmate appeals, it could reasonably find for Plaintiff. See id. at
24 1289 (“But, if, in fact, the defendants used the gang validation procedure as a cover or a ruse to
25 silence and punish Bruce because he filed grievances, they cannot assert that Bruce’s validation
26 served a valid penological purpose, even though he may have *arguably* ended up where he
27 belonged.”) (citing Rizzo, 778 F.2d at 532).

28 ///

1 **F. Conclusion**

2 In sum, the court finds that Plaintiff has submitted sufficient evidence to establish a
3 genuine issue of material fact as to whether Defendant retaliated against him. A trier of fact will
4 consider the credibility of the parties and their witnesses and determine the weight to give to that
5 testimony, a determination which cannot be made on summary judgment. Nelson v. City of
6 Davis, 571 F.3d 924, 927 (9th Cir. 2009). Accordingly, it is recommended that Defendant’s
7 motion for summary judgment on Plaintiff’s retaliation claim against her be denied.

8 **VII. QUALIFIED IMMUNITY**

9 Defendant argues that she is entitled to qualified immunity for endorsing Plaintiff to be
10 housed in Ad-Seg.

11 **A. Legal Standard**

12 “Qualified immunity shields government officials from civil damages liability unless the
13 official violated a statutory or constitutional right that was clearly established at the time of the
14 challenged conduct.” Taylor v. Barks, --- U.S. ---, 135 S.Ct. 2042, 2044 (June 1, 2015) quoting
15 Reichle v. Howards, 566 U. S. 658, 132 S.Ct. 2088, 2093 (2012). Qualified immunity analysis
16 requires two prongs of inquiry: “(1) whether ‘the facts alleged show the official’s conduct
17 violated a constitutional right; and (2) if so, whether the right was clearly established’ as of the
18 date of the involved events ‘in light of the specific context of the case.’” Tarabochia v. Adkins,
19 766 F.3d 1115, 1121 (9th Cir. 2014) quoting Robinson v. York, 566 F.3d 817, 821 (9th Cir. 2009).
20 These prongs need not be addressed in any particular order. Pearson v. Callahan, 555 U.S. 223,
21 129 S.Ct. 808 (2009).

22 To determine whether a government official should be granted qualified immunity, under
23 the first prong, the facts are to be viewed “in the light most favorable to the injured party.”
24 Chappell v. Mandeville, 706 F.3d 1052, 1058 (9th Cir. 2013) quoting Saucier v. Katz, 533 U.S.
25 194, 201, 121 S.Ct. 2151 (2001), receded from on other grounds by Pearson, 355 U.S. at 817-21;
26 see also Bryan v. MacPherson, 630 F.3d 805, 817 (9th Cir. 2010). However, the existence of a
27 material factual dispute does not necessarily preclude a finding of qualified immunity. Estate of
28 Ford v. Ramirez-Palmer, 301 F.3d 1043, 1053 (9th Cir. 2002).

1 Under the second prong, clearly established law is not to be defined “at a high level of
2 generality.” Mullenix v. Luna, --- U.S. ---, 136 S. Ct. 305, 308 (2015) quoting Ashcroft v. al-Kidd,
3 563 U.S. 731, 742, 131 S.Ct. 2074 (2011). “The dispositive question is ‘whether the violative
4 nature of particular conduct is clearly established.’” Id. (emphasis added in Mullinex). “This
5 inquiry ““must be undertaken in light of the specific context of the case, not as a broad general
6 proposition.””” Id., quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596 (2004) (per
7 curiam) (quoting Saucier, 533 U.S. at 201). “The relevant inquiry is whether existing precedent
8 placed the conclusion that [the defendant] acted unreasonably in the [specific circumstances
9 confronted] ‘beyond debate.’” Id., at 309 (quoting al-Kidd, 563 U.S. at 741).

10 “To be clearly established, a right must be sufficiently clear that every reasonable official
11 would have understood that what he is doing violates that right.” Reichel, 132 S.Ct. at 2092; see
12 also Castro v. County of Los Angeles, 833 F.3d 1060, 1067 (9th Cir. 2016). “When properly
13 applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly
14 violate the law.” al-Kidd, 563 U.S. at 743 (citation and internal quotation marks omitted). “We
15 do not require a case directly on point, but existing precedent must have placed the statutory or
16 constitutional question beyond debate.” Id., at 741. “[A] ‘robust consensus of cases of persuasive
17 authority’” in the Courts of Appeals could establish the federal right [in question].” City and
18 County of San Francisco v. Sheehan, --- U. S. ---, 135 S.Ct. 1765, 1778 (2015).

19 **B. Parties’ Positions**

20 Defendant argues that she did not violate Plaintiff’s First Amendment rights, as there is no
21 evidence that she took adverse action against Plaintiff or that her alleged actions were motivated to
22 chill Plaintiff’s right to pursue appeals and legal claims. Defendant also argues that it would not
23 have been clear to a reasonable official that her actions in the same circumstances as defendant
24 Waddle could have violated Plaintiff’s constitutional rights, specifically that it was unlawful for
25 her to approve Plaintiff for Ad-Seg. to preserve the integrity of an investigation under California
26 Code of Regulations Title 15 Section 333.

27 Plaintiff responds that Defendant failed to address all of Plaintiff’s allegations when
28 arguing that qualified immunity applies, including allegations that Defendant solicited

1 Castellanos, Moore, and McCloud to assault Plaintiff or arranged to have others do it. Plaintiff
2 argues there can be no qualified immunity for those actions as no reasonable prison official would
3 have any doubt that such conduct was a blatant violation of Plaintiff's civil rights. With respect to
4 the allegation that Defendant attempted to place Plaintiff in Ad-Seg., Plaintiff argues that because
5 a dispute of fact exists as to the real reason defendant was placing Plaintiff in Ad-Seg, qualified
6 immunity will not allow her to escape liability at this juncture.

7 **C. Discussion**

8 As discussed above, triable issues of fact exist as to whether Defendant recommended
9 Plaintiff for placement in Ad-Seg, threatened Plaintiff, or attempted to arrange assaults against
10 Plaintiff as retaliation for filing an inmate appeal or lawsuit. Nonetheless, the state of the law in
11 2010, when the alleged constitutional violations took place, was well established and sufficient to
12 give defendant fair warning that she could not retaliate against an inmate for filing an appeal or
13 lawsuit. As early as 1995, "the prohibition against retaliatory punishment [was] clearly
14 established law in the Ninth Circuit for qualified immunity purposes." See Pratt, 65 F.3d at
15 806. The court finds that it would have been clear to a reasonable correction lieutenant, knowing
16 what Defendant knew (viewed in the light most favorable to Plaintiff) that recommending Plaintiff
17 for placement in Ad-Seg, threatening Plaintiff, or attempting to have Plaintiff assaulted
18 as retaliation for filing an inmate appeal or lawsuit would be constitutionally impermissible.
19 Accordingly, the court finds that Defendant is not entitled to summary judgment based
20 on qualified immunity.

21 **VIII. RECOMMENDATIONS AND CONCLUSION**

22 The court finds, based on the record before it, that Plaintiff exhausted his available
23 administrative remedies for his retaliation claim before filing suit, as required by the Prison
24 Litigation Reform Act, 42 U.S.C. § 1997e(a). As for the retaliation claim itself, the court finds
25 that genuine factual disputes exist as to whether Defendant took any adverse action against
26 Plaintiff because Plaintiff exercised his right to file prison appeals and lawsuits. Further, the court
27 finds that Defendant is not entitled to qualified immunity for her actions. Accordingly,
28 Defendant's motion for summary judgment, filed on April 1, 2016, should be denied.

1 Therefore, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 2 1. Defendant Waddle’s motion for summary judgment based on Plaintiff’s failure to
3 exhaust administrative remedies, filed on April 1, 2016, be DENIED;
- 4 2. Defendant Waddle’s motion for summary judgment on Plaintiff’s retaliation claim
5 against her, filed on April 1, 2016, be DENIED; and
- 6 3. Defendant Waddle’s request for summary judgment based on qualified immunity,
7 filed on April 1, 2014, be DENIED.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within fourteen**
10 **(14) days** after being served with these findings and recommendations, any party may file written
11 objections with the court. Such a document should be captioned “Objections to Magistrate Judge's
12 Findings and Recommendations.” Any reply to the objections shall be served and filed within ten
13 days after service of the objections. The parties are advised that failure to file objections within
14 the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d
15 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

16
17 IT IS SO ORDERED.

18 Dated: July 17, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

19
20
21
22
23
24
25
26
27
28