

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

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

STEWART MANAGO,

Plaintiff,

No. 2:07-cv-2290 LKK KJN P

vs.

BRAD WILLIAMS, et al.,

Defendants.

AMENDED¹

FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

Plaintiff is a state prisoner, currently incarcerated at the California Correctional Institution (“CCI”), in Tehachapi, California, under the authority of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff proceeds in forma pauperis and without counsel² in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action proceeds on

¹ These findings and recommendations are amended solely for the purpose of correctly citing current Federal Rule of Civil Procedure 56, which was revised and rearranged effective December 10, 2010. As stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, “[t]he standard for granting summary judgment remains unchanged.” Accordingly, the legal analyses set forth herein remain unchanged.

² The court informed plaintiff that it would consider a request for appointment of counsel in this action. (Dkt. No. 124.) Plaintiff responded with a request that Los Angeles attorney Ollie P. Manago be appointed as “advisory counsel,” to assist plaintiff only with limited legal tasks. (Dkt. No. 152.) The court denied plaintiff’s request without prejudice, for the following reasons

1 plaintiff's First Amended Complaint ("FAC" or "complaint"), filed November 26, 2008 (Dkt.
2 No. 20), wherein plaintiff alleges that officials at CDCR's Office of Internal Affairs-Northern
3 Region ("OIA"), and California State Prison-Sacramento ("CSP-SAC"), improperly relied upon
4 plaintiff to investigate allegations of sexual misconduct by CSP-SAC Correctional Officer Mary
5 Brockett. The investigation resulted in the termination of Brockett's CDCR employment.
6 Plaintiff contends that his participation in this "sting operation" compounded his serious mental
7 health needs, and that plaintiff was thereafter denied adequate mental health care, and subjected
8 to retaliatory actions by correctional staff.

9 Following this court's rulings on defendants' motions to dismiss (see Dkt. Nos.
10 78, 89), this action proceeds on the following claims, against the following defendants: (1)

11 _____
12 (Dkt. No. 155 at 2):

13 Plaintiff's current request for appointment of a specific attorney, to
14 act in a very limited capacity at the primary direction of plaintiff, is
15 not the type of appointment authorized by this court. While the
16 court occasionally appoints attorneys for a limited purpose (e.g.,
17 settlement or mediation), an attorney is not assigned to act in a
18 legal-assistant capacity. Moreover, while this court's review
19 indicates that Ollie Manago is currently a member in good standing
20 of the State Bar of California, and is admitted to practice in the
21 United States District Court for the Eastern District of California,
22 she has neither sought appointment to this court's Pro Bono Panel,
23 nor filed a declaration in support of plaintiff's instant motion
24 indicating her willingness to accept appointment on behalf of
25 plaintiff. The court emphasizes, however, that even if Ms. Manago
26 fulfilled these matters, plaintiff's current request for appointment
of "advisory counsel" falls outside the parameters authorizing
appointment of counsel by this court.

21 Plaintiff did not further pursue a request for appointment of counsel in this action.

22 The court notes, parenthetically, that in 1990 the California Court of Appeal affirmed the
23 trial court's denial of Manago's request to represent himself in the criminal trial that resulted in
24 plaintiff's underlying convictions, on the ground that plaintiff appeared unqualified to present
25 even a rudimentary defense. See People v. Manago (1990) 220 Cal. App. 3d 982. However, this
26 ruling has since been abrogated by cases holding that the determination whether a defendant
knowingly and intelligently waives his right to counsel generally depends on the defendant's
understanding of the significance and consequences of his decision, rather than the defendant's
ability to represent himself. See, e.g., Godinez v. Moran, 509 U.S. 389, 399-400 (1993); People
v. Taylor (2009) 47 Cal. 4th 850, 873- 91.

1 Eighth Amendment claim for sexual misconduct, against defendant Mary Brockett; (2) Eighth
2 Amendment claims for deliberate indifference to plaintiff’s serious mental health needs, against
3 defendants K. Kelly (CSP-SAC Chief Psychologist and Health Care Manager); M. Jaffe (CSP-
4 SAC Chief Psychiatrist); J. Martin (CSP-SAC Senior Supervising Psychologist); B. Williams
5 and J. Chapman (both agents with CDCR’s OIA); S. Vance (CSP-SAC Correctional Captain),
6 and P. Kennedy (CSP-SAC Correctional Counselor); (3) Eighth Amendment failure to protect
7 claims, against defendants Kelly, Jaffe, Martin, Vance, Williams, and Chapman; (4) First
8 Amendment retaliation claims, against defendants Williams; Chapman; Vance, Kennedy; R. Hill
9 (former CSP-SAC Associate Warden); S. Shannon (CSP-SAC Correctional Lieutenant); B.
10 Joseph and C. Gold (both CSP-SAC Correctional Sergeants); R. Garcia (Investigative Services
11 Unit Correctional Officer); and J. Tinseth, J. Wachter, and R. Morrow (all Correctional Officers);
12 and (5) “failure to supervise” claims, against defendants Kelly, Jaffe, Williams, Chapman, Hill,
13 Vance, Shannon, Joseph, and Gold.

14 Presently pending for decision are the motions for summary judgment filed,
15 respectively, by defendant Brockett (Dkt. No. 183-84), and all other defendants (Dkt. Nos. 164-
16 82).³ Plaintiff timely opposed the motions, and also filed authorized supplemental oppositions,
17 surreplies and supporting exhibits (Dkt. Nos. 190-94, 197-98, 231, 250); defendants replied (Dkt.
18 Nos. 221-26, 251-52). Defendants also submitted additional relevant evidence ordered by the
19 court. (Dkt. Nos. 237-38, 246.)

20 For the reasons that follow, the court recommends summary judgment for
21 defendants on plaintiff’s First Amendment retaliation claims, and summary judgment for
22 defendants on plaintiff’s Eighth Amendment claims, with the exception of narrowed Eighth
23 Amendment claims, including certain failure to supervise claims addressed herein, against

24
25 ³ The motions for summary judgment were re-noticed, and supplemental briefing
26 authorized, pursuant to the court’s order informing plaintiff of the requirements for opposing a
motion for summary judgment. (See Dkt. No. 239.) See Woods v. Carey, 684 F.3d 934 (9th Cir.
2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc).

1 defendants Brockett, Kelly, Jaffe, Martin, Chapman, Vance and Kennedy, which the undersigned
2 finds should proceed to trial.

3 II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

4 Summary judgment is appropriate when it is demonstrated that the standard set
5 forth in Federal Rule of Civil procedure 56 is met. “The court shall grant summary judgment if
6 the movant shows that there is no genuine dispute as to any material fact and the movant is
7 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

8 Under summary judgment practice, the moving party always bears
9 the initial responsibility of informing the district court of the basis
10 for its motion, and identifying those portions of “the pleadings,
11 depositions, answers to interrogatories, and admissions on file,
together with the affidavits, if any,” which it believes demonstrate
the absence of a genuine issue of material fact.

12 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
13 56(c).) “Where the nonmoving party bears the burden of proof at trial, the moving party need
14 only prove that there is an absence of evidence to support the non-moving party’s case.” Nursing
15 Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376,
16 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 Advisory
17 Committee Notes to 2010 Amendments (recognizing that “a party who does not have the trial
18 burden of production may rely on a showing that a party who does have the trial burden cannot
19 produce admissible evidence to carry its burden as to the fact”). Indeed, summary judgment
20 should be entered, after adequate time for discovery and upon motion, against a party who fails to
21 make a showing sufficient to establish the existence of an element essential to that party’s case,
22 and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322.
23 “[A] complete failure of proof concerning an essential element of the nonmoving party’s case
24 necessarily renders all other facts immaterial.” Id. at 323.

25 Consequently, if the moving party meets its initial responsibility, the burden then
26 shifts to the opposing party to establish that a genuine issue as to any material fact actually exists.

1 See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting
2 to establish the existence of such a factual dispute, the opposing party may not rely upon the
3 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the
4 form of affidavits, and/or admissible discovery material in support of its contention that such a
5 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
6 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
7 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
8 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
9 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
10 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,
11 1436 (9th Cir. 1987).

12 In the endeavor to establish the existence of a factual dispute, the opposing party
13 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
14 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
15 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary
16 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
17 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
18 committee’s note on 1963 amendments).

19 In resolving a summary judgment motion, the court examines the pleadings,
20 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
21 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,
22 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the
23 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
24 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
25 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
26 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.

1 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
2 show that there is some metaphysical doubt as to the material facts. . . . Where the record taken
3 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
4 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

5 III. EVIDENTIARY OBJECTIONS

6 The parties have raised numerous evidentiary objections. For purposes of ruling
7 on the pending motions for summary judgment, the court addresses only those objections to
8 evidence actually relied on by the court. The court declines to address any remaining evidentiary
9 objections.⁴

10 IV. FACTS

11 The following summary sets forth the relevant facts that are undisputed by the
12 parties or, following the court’s review of the evidence, have been deemed undisputed for
13 purposes of the pending motions. Pertinent averments and disputed facts are also noted.
14 Previously-submitted evidence that cannot reasonably be disputed, e.g., copies of plaintiff’s
15 relevant administrative appeals, are also noted.

16 1. Plaintiff was born on July 23, 1966, and is now 46 years of age. Plaintiff
17 testified that he first received mental health treatment when he was about ten years old.
18 (Plaintiff’s Deposition (Lodged pursuant to Dkt. No. 182) (“Pltf. Depo.”) at 19, 21-2.)

19 2. Plaintiff was committed to CDCR in 1988, following convictions for
20 residential burglary, residential robbery and forcible rape. (Nov. 10, 1988, Abstract of Judgment-
21

22 ⁴ The court notes that there are thousands of pages of briefing and supporting evidence in
23 this case. Moreover, plaintiff’s submission of documents and/or the electronic filing of
24 plaintiff’s documents, are not in chronological or substantive order, and do not adhere to the
25 sequence identified in plaintiff’s list of 324 attached documents. (See Dkt. No. 193 at 2-11.)
26 These challenges, coupled with defendants’ apparent effort to provide a selectively-responsive
record, has required the court to rely on documents submitted by plaintiff but objected to by
defendants, for the reasons stated below. The court further notes that, as a practical matter, it has
relied on the available transcripts of audio recordings submitted in this action, rather than the
actual audio recordings.

1 Commitment (Dkt. No. 184-2 at 4).)

2 3. While incarcerated, plaintiff was convicted in 1993 of aggravated assault with
3 a deadly weapon and, in 1996, pled guilty to two counts of resisting an officer. (Dkt. No. 184-2
4 at 2, 3.)

5 4. In 1991, plaintiff was transferred from the Segregated Housing Unit (“SHU”)
6 at California State Prison-Corcoran (“CSP-COR”) to the SHU at Pelican Bay State Prison
7 (“PBSP”). Plaintiff was transferred from PBSP to CSP-SAC on June 1, 2000, where he
8 remained until January 21, 2004, when plaintiff was transferred to Salinas Valley State Prison
9 (“SVSP”). Plaintiff remained at SVSP until September 14, 2004, with the limited exception of
10 June 2, 2004, when he was returned to CSP-SAC to give testimony in the State Personnel Board
11 action against defendant Brockett. From September 14, 2004, until April 6, 2005, plaintiff was
12 housed at High Desert State Prison (“HDSP”). Plaintiff was transferred back to CSP-SAC on
13 April 6, 2005, and remained there through commencement of this action on October 26, 2007.
14 Plaintiff was transferred to the California Correctional Institution (“CCI”) in October 2009,
15 where he remains incarcerated.

16 5. In December 1995, in response to litigation on behalf of prisoners incarcerated
17 in segregated housing at Pelican Bay State Prison (“PBSP”), plaintiff was transferred from
18 PBSP’s SHU to PBSP’s “B Facility, to the psych service unit.”⁵ (Pltf. Depo. at 36-7.) Plaintiff
19 testified that his move was based on the March 21, 1994 finding of PBSP psychiatrist Dr.

20 Shepherd that plaintiff had an Axis I diagnosis of “Schizophrenia, paranoia 295.34, chronic with

21 ////

22
23 ⁵ Plaintiff testified that he was moved from PBSP’s SHU to its PSU, and then to CSP-
24 SAC, because he is a member of the classes of prisoners represented in Madrid v. Gomez, 889 F.
25 Supp. 1146 (N. D. Cal. 1995) (class action of PBSP inmates holding, inter alia, that SHU
26 placement of mentally ill prisoners constitutes cruel and unusual punishment); and Coleman v.
Wilson, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995) (special master appointed to oversee
development and implementation of plan to provide constitutionally adequate mental health care
to prisoners). (See Pltf. Depo. at 12-4, 33-4, 36-7, 44, 136-37.)

1 acute exacerbation.”⁶ (Id. at 39.) Plaintiff testified that he was prescribed lithium and other
2 medications. (Id. at 40-2.)

3 6. Plaintiff testified that he was transferred to CSP-SAC in April 2000, at the
4 recommendation of his PBSP treating psychologist, Dr. Grimes, and staff psychiatrist, Dr.
5 Johnson, who “wanted me in a more stable environment,” with the intent of reducing plaintiff’s
6 flashbacks associated with Post-Traumatic Stress Disorder (“PTSD”). (Id. at 43.) In January
7 2000, plaintiff “appeared before the [PBSP] institution committee for a mental health transfer.
8 . . . Dr. Grimes and the committee and the warden -- the associate warden . . . said that they had
9 contacted Karen Kelly, the [CSP-SAC] senior psychologist . . . and she agreed to accept me into
10 the PSU [Psychiatric Services Unit]⁷ program at California State Prison Sacramento.” (Id. at 44-
11 5; accord, Dkt. No. 193 at 13 (“[t]he Sr. Psychologist at SAC PSU has agreed to accept”
12 Manago).

13 7. In a “Discharge Psychological Evaluation,” dated April 19, 2000, prepared in
14 anticipation of plaintiff’s transfer to CSP-SAC, PBSP psychologist William Grimes, Ph.D., noted
15 plaintiff’s complex psychological diagnostic history, including present diagnoses of PTSD (Dkt.
16 No. 193 at 16):

17 [T]here has been considerable disagreement about the diagnosis of
18 Mr. Manago’s condition. He has been given diagnoses of:
19 schizophrenia, paranoid; depression; bipolar disorder; cognitive
20 disorder, NOS; and Axis II personality disorders with antisocial,
21 borderline, and narcissistic features. . . . [¶] [B]oth the treating
psychiatrist and this writer agree on posttraumatic stress disorder as
an Axis I diagnosis. Dr. Johnson, however, favors schizoaffective
disorder after PTSD, based on a history of mood disturbance and
the bizarre quality of his somatic delusion. This writer, however,

22
23 ⁶ The American Psychiatric Association has established a five-part Multiaxial
24 Assessment for diagnosing mental disorders. “Axis I” identifies “clinical disorders.” See
Diagnostic and Statistical Manual of Psychiatric Disorders (“DSM-IV”), at pp. 25-33.

25 ⁷ “A PSU provides secure housing and care for inmates with diagnosed psychiatric
26 disorders not requiring inpatient hospital care, but who require placement in housing equivalent
to Security Housing Unit (SHU), as described in subsection 3341.5(c), at the Enhanced
Outpatient Program level of the mental health delivery system.” 15 C.C.R. § 3341.5(b).

1 leans toward dissociative identity disorder [“DID”] as the second
2 Axis I diagnosis. DID is seen, dynamically, as a predictable
3 evolution of PTSD during development of psychological defenses.

4 8. Dr. Grimes further noted, in concluding his April 2000 “Discharge
5 Psychological Evaluation,” that plaintiff “is extremely suspicious of therapists, as well as others,
6 upon initial meeting, and it is strongly suggested that caution be taken to prevent the suspicion
7 and resistance before a good therapeutic relationship may develop.” (Dkt. No. 193 at 19.)

8 9. Plaintiff was transferred to CSP-SAC on June 1, 2000. (Pltf. Depo. at 38, 44-
9 5.) In January 2001, plaintiff’s SHU term was suspended and he was transferred to the Enhanced
10 Outpatient Program (“EOP”) in Facility A. (Id. at 45-7.) Plaintiff testified that he was there
11 diagnosed with paranoid schizophrenia by his primary care physician, Dr. Windham; with PTSD
12 and schizophrenia by Dr. Gervin; and with schizoaffective disorder by his treating psychiatrist,
13 Dr. Frishman. (Id. at 46-7.)

14 10. In December 2003 and January 2004, plaintiff was housed in CSP-SAC’s
15 EOP in Facility A, Building 4 (also known as “4 Block”). Plaintiff worked in 4 Block as a
16 housing unit porter, where he assisted unit correctional officers in passing out meals. The job
17 required that plaintiff enter the dining room to retrieve the dinner trays, then take the trays to the
18 unit officers; pursuant to these tasks, plaintiff was generally subject to escort by correctional
19 staff. (FAC at 5; Pltf. Depo. at 48, 151-52.)

20 11. Defendant Mary Brockett worked as a CDCR correctional officer from
21 February 1994 until March 31, 2004. In December 2003 and January 2004, Brockett worked as a
22 Facility Relief Officer on Second Watch, in the CSP-SAC Facility A, 4 Block, dining unit, on
23 Fridays and Saturdays. (Brockett Decl. (Dkt. No. 184-3 at 2-4) at ¶¶ 2, 5.)

24 12. Plaintiff and defendant Brockett dispute the nature and extent of their
25 interactions at all relevant times. Brockett avers that, prior to January 10, 2004 (a Saturday), she
26 had “never had any extended conversations with Mr. Manago as he did not work for me as a
Porter.” (Id. at ¶ 6.) Brockett avers that she “became aware of inmate Manago since he worked

1 as a Porter when I worked 4 Block on Saturdays, but I had little contact with him as he would be
2 working and subject to escort by other correctional officers.” (Id.)

3 13. Plaintiff alleges, in contrast, that Brockett began making sexual comments to
4 him during the summer 2003, primarily when he was on the yard, but also in the visiting and
5 laundry rooms, and when plaintiff was in his cell.⁸ (Pltf. Depo. at 50-3, 142-51, 181.) Plaintiff
6 alleges that he “first just brushed it off,” and told Brockett that he was “involved with somebody
7 already.” (Id. at 53-4.)

8 14. Plaintiff avers that, on October 26, 2003, he “filed an ADA complaint”
9 requesting a transfer to California Medical Facility (“CMF”), because of Brockett’s advances but
10 without mentioning her, because he “didn’t want to be hit with no -- no type of sex charges.” (Id.
11 at 54-5.) A copy of plaintiff’s ADA (CDC Form 1824) request (Log No. SAC-A-03-2413),⁹
12 indicates that plaintiff sought a transfer to the California Medical Facility (“CMF”), or California
13 Men’s Colony (“CMC”), on the ground that he believed that his placement at CSP-SAC’s EOP,
14 which included intermingling with the prison’s Level IV general population (“GP”) (including

15 _____
16 ⁸ Plaintiff testified at his deposition that Brockett made numerous sexually inappropriate
17 comments to him prior to December 2003, including the following (Pltf. Depo. at 51-3, 143-45):

18 • Plaintiff testified that Brockett said to him: “I see you in the visit room all the time,
19 and what’s up with that? Was that your girlfriend?” “Well, I want to be your girlfriend.”
20 “Well, she can’t do nothing for you in here, right?”

21 • Plaintiff testified that Brockett “wanted to oral copulate me;” “she wanted to give me a
22 blow job;” “[she] told me on numerous occasions that she wanted to suck my big, Black
23 dick. You know what I’m saying? That I got a sexy body; that I got a cute ass. She --
24 numerous times she tried to slap me on the ass. Numerous times that she went in and
25 tried to pull my dick out, right? Told me I got a big dick, she’s going to suck it.”

26 ⁹ Defendants’ objections to this and similar evidence (i.e. copies of administrative
27 decisions and medical records submitted by plaintiff), are overruled. Given defendants’ failure to
28 provide all of plaintiff’s pertinent custodial, administrative and mental health records, the court is
29 obliged to rely on plaintiff’s evidence, particularly when these apparently official documents are
30 consistent with the remainder of the record. The undersigned declines to ignore such evidence at
31 this stage of the litigation. Documents that are not authenticated at summary judgment may
32 nonetheless be admissible at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)
33 (evidence which could be made admissible at trial may be considered on summary judgment);
34 see also Aholelei v. Hawaii Dept. of Public Safety, 220 Fed. Appx. 670 (9th Cir. 2007).

1 special needs and protective custody inmates), placed him at higher risk of decompensation,
2 injury and charges of misconduct.¹⁰ (Dkt. No. 190-4 at 41-9.) Plaintiff sought “optimal
3 treatment” at another facility that would “assist in preventing petitioner from deteriorating on a
4 level IV GP yard. And/or potentially self-destructive behaviors.” (Id. at 41.)

5 15. Plaintiff’s ADA request was reviewed by defendant P. Kennedy, Correctional
6 Counselor I, who interviewed plaintiff on November 13, 2003. Kennedy noted plaintiff’s request
7 to be transferred to a “yard or facility [in] which he can concentrate on his mental health issues
8 and not the politics or prison violence associated with level IV yards.” (Id. at 42.) Nevertheless,
9 Kennedy noted plaintiff’s success in his designated “MHLOC” (Mental Health Level of Care),
10 opined that plaintiff’s mental health and security needs were being met at SCP-SAC’s EOP unit,
11 then, despite plaintiff’s protestations (see n.10, supra), dropped plaintiff’s LOC to CCCMS,
12 noting that plaintiff “should be re-evaluated for appropriate placement.” (Id.) Kennedy’s
13 recommendations were approved by Associate Warden Stiles on November 19, 2003. Kennedy
14 does not reference this matter in her declaration filed in this action. (Dkt. No. 165-5 at 2-6.)

15 16. Meanwhile, on July 14, 2003, CSP-SAC Investigative Captain R. Mandeville,
16 on behalf of CSP-SAC Chief Deputy Warden G. Stratton, submitted a request to the Office of
17 Internal Affairs-Northern Region (also known as the Internal Affairs Unit (“IAU”)), to initiate an
18 investigation of defendant Brockett, based on evidence that Brockett may have been overfamiliar
19 with an inmate, and may have failed to notify superiors of similar misconduct by another female
20 correctional officer. (Internal Affairs Investigation Report - Case No. SAC-249-03, Feb. 21,
21 2004 (Lodged under Seal on May 4, 2012, pursuant to Order filed April 9, 2012 (Dkt. No. 228),
22

23 ¹⁰ Plaintiff noted, for example, that GP yards are prone to “fights, staff assaults, and/or
24 stabbing[s],” which could trigger psychotic episodes by mentally ill patients who are unable to
25 conform to protocol (e.g., down on the yard). (Dkt. No. 190-4 at 43.) Plaintiff also noted that
26 EOP inmates who are “dropped” to CCCMS (Correctional Clinical Case Management System)
status, for purposes of integration with other inmate populations, are particularly at risk. Plaintiff
explained that, when his own status was dropped to CCCMS in 1996, he “did alright for about 3
months,” but then received a Rules Violation Report (“RVR”) for stabbing a correctional officer.
(Id.)

1 hereafter “Investigative Report,” or “Report.”).) The request was addressed to CSP-SAC
2 Warden Cheryl Pliler, and Regional Special Agent-in-Charge Sandi Grout. On July 15, 2003,
3 IAU Special Agent Erin Parker signed the request as the investigating employee. (IAU Rpt. at
4 BR-1-Page # (hereafter “IAU Rpt.”) at 13.)

5 17. In a confidential memorandum dated December 17, 2003, Agent Grout
6 informed CSP-SAC Warden Mike Knowles that IAU-Northern Region had accepted the subject
7 complaint, and that case responsibility was assigned to Senior Special Agent James Rogers and
8 Agent Jill Chapman. (Id. at 14.)

9 18. The resulting Investigative Report, completed February 21, 2004, by Agent
10 Parker, was addressed to CDCR Director Richard A. Rimmer, and Office of Investigative
11 Services Assistant Director Martin H. Hoshino; the Report recounts the details of the Brockett
12 investigation. (Id. at 15-134.) The Report was signed by Agent Parker, Special Agent-in Charge
13 Grout, and Senior Special Agent Julie Mansfield, all agents at IAU-Northern Region. (Id. at 48.)

14 19. The Investigative Report notes that responsibility for the Brockett
15 investigation was assigned to Agent Chapman, defendant herein, on December 17, 2003. The
16 case was re-assigned to Agent Parker on January 29, 2004. (Id. at 16.)

17 20. The Report recounts an initial meeting with plaintiff, by Investigative
18 Services Unit (“ISU”) Correctional Officer R. Garcia, defendant herein, on December 11, 2003.
19 (Id. at 17.) In a confidential memorandum addressed to CSP-SAC Chief Deputy Warden G.
20 Stratton, also dated December 11, 2003, Garcia stated that he had conducted a confidential
21 interview with plaintiff, together with ISU Officer R. Mendoza, at plaintiff’s request. Plaintiff
22 told Garcia and Mendoza that a “female A-Facility employee” had provided contraband to
23 inmates, including cell phones and a clothes iron. (Id. at 53.) The memorandum did not identify
24 the subject employee, and does not contain allegations of sexual misconduct. However, the
25 interview was audio recorded and provided to ISU Lieutenant D. Leiber, “due to other allegations

26 ///

1 of staff misconduct made by Manago.”¹¹ (Id.)

2 21. Defendant Garcia has filed a declaration herein, in which he states, in
3 pertinent part, that he served three years in CSP-SAC’s ISU, from April 1999 to January 2004,
4 but that his December 11, 2003 interview of plaintiff, and resulting memorandum to Warden
5 Stratton, constitute his only involvement in this action. (Garcia Decl., Dkt. No. 165-3 at 2-3.)
6 Although not included in his memorandum, Garcia concedes in his declaration that his interview
7 of plaintiff included “Manago’s allegations against Mary Brockett.” (Id. at 3.) However, Garcia
8 avers that he “had no specific information or involvement in any investigation [of Brockett] after
9 my interview with Manago and the report I drafted following my interview with him.” (Id.)

10 22. In disavowals common to all of the correctional defendants in this action,
11 Garcia states that he knew who Brockett was, but did not have a personal relationship with her
12 (and hence, implicitly, had no motivation to cause Brockett harm or to retaliate against plaintiff
13 for participating in the investigation against Brockett); that he “had no authority to administer
14 medical or mental health services to Plaintiff Manago”; “never intentionally or deliberately
15 disregarded any known risk and/or serious injury” to plaintiff; “never intentionally or
16 deliberately” delayed or denied plaintiff “access to medical/mental health care and/or treatment”;
17 never “intentionally or knowingly cause[d] Plaintiff any pain, suffering, injury or harm”; “never
18 at any time attempted to cause harm or incite or direct others to cause harm to inmate Stewart
19 Manago”; at no time referred to plaintiff as a “snitch”; never told anyone that it was “open
20 season” on plaintiff; and was never a member of any “Green Wall” (gang of prison staff
21 members sharing a code of silence). (Dkt. No. 165-5 at 4.) (The court notes that these
22 disavowals are common to all the correctional defendants.)

23
24 ¹¹ The Investigative Report provides that the following additional information was
25 contained in the audio recording of Garcia’s interview with plaintiff, again without identifying
26 Brockett by name: that plaintiff had known the “female CO” for about a year; that the CO
trusted plaintiff because her boyfriend said plaintiff was “cool;” that the CO told plaintiff she
would have his baby if he paid \$10,000 to have her tubes untied; and that the CO had provided
plaintiff with personal information and told him to watch his back. (IAU Rpt. at 17-8.)

1 23. Meanwhile, on December 10, 2003, the day before plaintiff met with
2 defendant Garcia, plaintiff was forcibly extracted from his cell and placed in administrative
3 segregation (“AdSeg”). In a staff complaint plaintiff later filed against defendant Vance, Facility
4 A Correctional Captain, on December 14, 2003 (Log No. SAC-03-2823), plaintiff alleged as
5 follows (Dkt. No. 35-1 at 15-7):

6 This is a Citizens complaint pursuant to Penal Code Section 832.5,
7 against Correctional Captain S. Vance, and other employees, who
8 participated in the December 10, 2003, holding cell extraction of
9 inmate/patient Manago. It appears that Captain Vance used
10 unlawful influence upon other (C.D.C.) employees to deny my
11 request for suicidal intervention. Prior to the extraction, Counselor
12 Kennedy and Dr. Frishman informed me that I was accepted in
13 (O.H.U.) [Outpatient Housing Unit]. I have been felling (sic) very
14 paranoid and actively suicidal. I told the extraction team members
15 that if they place me in AdSeg, that I would hang myself. It’s all
16 on video tape. Custody staff still forced me to go into 6-Block
17 Housing Unit. Only after I started to protect their Misconduct I
18 was removed from the cell. I have evidence that Captain Vance
19 and other Staff were irresponsible and have engaged in unethical
20 misconduct which reflect discredit on themselves.

21 24. On December 14, 2003, plaintiff was transferred from CSP-SAC’s EOP unit
22 to the institution’s Correctional Treatment Center (“CTC”), for suicide precautions.¹² (Exh. N to
23 Kelly Decl., Dkt. No. 166-1 at 3; see also Dkt. No. 166-2 at 6.)

24 25. On December 17, 2003, pursuant to the OIA’s Brockett investigation,
25 plaintiff was interviewed by defendant Chapman, OIA Agent. Plaintiff told defendant Chapman,
26 in pertinent part, that Brockett “started getting attached to him” after her boyfriend, inmate
Johnson, was transferred to another institution, and that Brockett told plaintiff that she wanted to
have sexual relations with him. Plaintiff stated that, two or three weeks before, Brockett told

12 ¹² According to CDCR’s own Mental Health Policies, an inmate may be placed for
emergency short-term treatment in a “Mental Health Crisis Bed Placement (‘MHCBP’),” which
may be at an institution’s “Correctional Treatment Center (‘CTC’),” that “offer[s] 24-hour basic
medical, nursing, and other health services.” IMSP&P Manual (Mental Health Services), at 12-
1-8 to 9. “The MHCB . . . provides short-term inpatient care for seriously mentally disordered
inmate-patients awaiting transfer to a hospital program or being stabilized on medication prior to
transfer to a less restrictive level of care” within the institution. (Id. at 12-1-8.)

1 plaintiff that she would have his child if he gave her \$10,000 to get her tubes untied. Chapman
2 asked plaintiff if he thought that Brockett would “take a letter out for him”; plaintiff responded in
3 the affirmative. (IAU Rpt. at 18-9; see also Pltf. Depo. at 69-71.)

4 26. On December 18, 2003, plaintiff was discharged from the CTC, and
5 readmitted to the EOP unit. (Dkt. No. 166 at 15.) The treatment notes, signed by Dr. Paizis,
6 indicate that plaintiff’s discharge prescriptions included Zyprexa (antipsychotic medication), and
7 Lithium (mood stabilizing medication). (Id.) Also on December 18, 2003, CSP-SAC Warden
8 Knowles partially granted plaintiff’s staff complaint against defendant Vance (Log No. SAC
9 03-02823), at the second level review (informal and formal level reviews were bypassed), based
10 on the referral of plaintiff’s complaint for investigation. (Dkt. No. 35-1 at 16, 18, 20.)

11 27. Plaintiff testified that he had no physical contact with Brockett prior to
12 December 20, 2003. (Pltf. Depo. at 155-56; 158.) Plaintiff told Chapman, and later testified,
13 that, on December 20, 2003, Brockett gave plaintiff a French kiss and a personal handwritten
14 note, and “couldn’t keep her hands off of him.” (Id. at 76-7; IAU Rpt. at 20.)

15 28. Plaintiff told Chapman, and later testified (but with less clarity regarding the
16 date), that he engaged in sexual touching with Brockett on January 3, 2004, which allegedly
17 included Brockett touching plaintiff’s genitals, then plaintiff touching Brockett’s breasts through
18 her clothing. (IAU Rpt. at 20; Pltf. Depo. at 158, 165-67, 176.) Chapman noted, on January 7,
19 2004, that plaintiff “was 100 percent certain he could get her [Brockett] to do anything he wanted
20 her to do . . . Manago sounded very confident that ‘everything’ could be captured on audio and
21 video camera.” (IAU Rpt. at 20-1.)

22 29. On January 9, 2004, Chapman informed plaintiff of the IAU “operation plan,”
23 which would include plaintiff’s participation in the Brockett investigation. Plaintiff agreed, in
24 pertinent part, to write a letter to his putative brother, addressed to an undercover post office box
25 address, and ask Brockett to mail it out, circumventing institutional mail procedures. Chapman’s
26 written summary of this meeting concludes that “Manago acknowledged Agent Chapman made

1 no promises to him in return for his cooperation.” (IAU Rpt. at 22.)

2 30. Plaintiff reported to Chapman that, on January 10, 2004, he gave Brockett the
3 letter and asked her to mail it; and that Brockett reportedly placed the letter in her inside jacket
4 pocket. (Id. at 22-3.) Brockett later averred that, when plaintiff asked her to mail the letter, she
5 refused, but plaintiff left the letter in the office; when Brockett later noticed the letter, she
6 “picked it up and put it in my coat pocket and forgot about it and accidentally took the letter
7 home.” (Brockett Decl. at ¶ 7.)

8 31. On January 16, 2004, Chapman supplied plaintiff with a voice recorder, for
9 the purpose of surreptitiously recording his interactions with Brockett on January 17, 2004.¹³

10 32. Brockett returned the subject letter to plaintiff during their recorded
11 interactions on January 17, 2004. Brockett avers that, when she returned the letter to plaintiff
12 and told him that he needed to mail it through the Housing Unit Officer, plaintiff became upset
13 and angry, so she “engaged him in conversation in an attempt to diffuse any inmate who was
14 beginning to show some hostility toward me.” (Brockett Decl. at ¶¶ 8-9.) Brockett explains that
15 she had “previously . . . been assaulted in the same dining hall by an inmate,” and “[t]hat incident
16 came to mind as Mr. Manago, who suddenly appeared in the dining hall without escort, retrieved
17 his letter.” (Id.)

18 ////

19 ¹³ Authorization for plaintiff to wear the recording device was granted by the Sacramento
20 County District Attorney’s Office, Prison Prosecution Unit, on January 14, 2004; CSP-SAC
21 Warden Mike Knowles was informed of the plan on January 15, 2004. Plaintiff recorded his
22 interactions with Brockett on January 17, 2004. On January 22, 2004, the subject recording was
23 sent to the Department of Justice for enhancement; the recording was copied onto CDs and
24 provided to Chapman on January 28, 2004. On January 29, 2004, plaintiff listened to the
25 recording with Chapman, who subsequently prepared a transcript which includes plaintiff’s
26 parenthetical descriptions of his interactions with Brockett on January 17, 2004. This transcript
was provided to the court under seal, as an attachment to the IAU Investigative Report. (IAU
Rpt. at 22, 57-9; Jan. 17, 2004 Transcript at id. 64-110.)

Although not supported by the current record, plaintiff testified that he wore a recording
device for three or four weeks, but that apparently only his January 17, 2004 interactions were
transcribed (Pltf. Depo. at 179, 182), and that there was a video recording of Brockett orally
copulating plaintiff (id. at 180).

1 33. Brockett denies any sexual contact with plaintiff at any time, and avers that
2 she responded to plaintiff’s sexual innuendos on January 17, 2003, “in order to keep the peace.”

3 (Id. at ¶ 10.) Brockett describes the following interactions with plaintiff on January 17, 2004
4 (id.):

5 Mr. Manago would come into my office, engage me in
6 conversation and then later return to engage me in more
7 conversation [in] which he initiated sexual comments which I
8 attempted to deflect. For example, he asked when was the first
9 time I had oral sex. He began calling me “babe” or “baby.” He
10 stated, “You are all the woman [he] [I] need” and that he [would]
11 “make love to [me] real good.” He also said that he had thought
12 about kissing me. In fact, during the several times Mr. Manago
13 would return to my office on the 17th he would make several
14 comments of a sexual nature. I did not know at the time that Mr.
15 Manago voluntarily agreed with CDCR Internal Affairs to initiate
16 contact with me and induce me in making over familiar statements
17 to Mr. Manago. In hindsight that explains the strange interactions
18 Mr. Manago was having with me that day.

19 34. Plaintiff told Chapman and testified that, on January 17, 2004, Brockett
20 kissed plaintiff, touched his genitals and orally copulated him. (IAU Rpt. at 24-5; Pltf. Depo. at
21 159-67; 182-3.) Plaintiff’s allegations are not inconsistent with the transcript of plaintiff’s
22 January 17, 2004 interactions with Brockett; but neither does the transcript prove plaintiff’s
23 allegations. Plaintiff testified that some of his recorded statements reflect his attempt to describe
24 Brockett’s actions rather than to solicit such conduct, e.g., saying “Why you infatuated with my
25 butt?” after Brockett allegedly slapped it. Plaintiff explained that “because it was a part of the
26 investigation, I said whatever internal affairs needed to hear to prove my allegations, to prove
that I wasn’t lying or deceiving them.” (Pltf. Depo. at 161-62; see generally id. at 160-65.)

 35. Plaintiff testified that he continued to participate in the investigation of
Brockett at Chapman’s urging. He stated that, “at the end of December,” he asked Chapman to
terminate the investigation before his relationship with Brockett became too “personal,” or

////

////

1 plaintiff felt it necessary to demonstrate to Brockett that he wasn't gay.¹⁴ (Id. at 76-82, 154-55,
2 170-71.) Chapman allegedly responded that the investigation "needed to go on" (id. at 77), and
3 that plaintiff should try to "get what you can get. Work her, work her, work her." (Id. at 80.)
4 Plaintiff testified that, when he "looked at like what Jill Chapman was telling me I started to feel
5 uncomfortable because I looked at she was telling me to compromise me," but Chapman
6 reportedly responded, "[r]egardless, just get what you can get." (Id. at 80-1.) Plaintiff stated,
7 that "[o]n the 28th or the 24th, when she [Chapman] initiated that visit that week, I believe that
8 she had way more than enough, and there was no sexual misconduct, other than her [Brockett's]
9 sexual harassment kind of stuff talking like and trying to touch, but it wasn't to the point where it
10 got actual physical. It was like she [Chapman] wanted it to go on and on and on and on. You
11 know what I'm saying? . . . I'm talking about actually her [Brockett] oral copulating and all that,
12 it didn't get that far yet [prior to December 28, 2003]." (Id. at 81.) Plaintiff testified that the
13 investigators wanted to hear evidence of sexual activity on tape, that, "because it was a sexual
14 misconduct allegation against her [Brockett] . . . Jill Chapman wanted to see how far it was going
15 to go." (Id. at 75, 164.) In contrast, plaintiff testified that, before he was involved in the
16 Brockett investigation, he "ke[pt] moving it where she can't touch me." (Id. at 157.)

17 36. Plaintiff testified that he engaged in sexual activity with Brockett solely for
18 purposes of the investigation, explaining as follows:

19 Did I have any intent to make your client feel good? Absolutely
20 not, because if I wanted to make her feel good I would have been
21 doing it. I would have told ya'll nothing. I would have just kept
22 her as my prize, but she wasn't my prize. I reported her
23 misconduct. That's all it was. (Id. at 164-65.)

24 I was so fed up with your client, right? It was nothing sexual. Like
25 I said in the 602, I didn't enjoy nothing that your client did. I

26 ¹⁴ Plaintiff testified that, when Brockett suggested that plaintiff may be gay "I got to the point, to be honest with you, I said, 'Yeah. I'm going to stick my dick in her mouth and let her know that I'm not gay, period.'" (Pltf. Depo. at 170; see also id. at 171 ("she try to make you feel like you less than a man, talking about 'Oh, you gay. You gay.' No, I'm not gay. Okay? So I prove my case to show that your client is a predator."))

1 didn't even like your client.” (Id. at 171.)

2 I was busy working as a special agent for CDC to prove that your
3 client was engaging in sexual misconduct and that's what I was
4 doing. (Id. at 172.)

5 I didn't set her up. I didn't like her sexual advances. If I did, I
6 wouldn't have told ya'll about it. We wouldn't even be here today.
7 (Id. at 173.)

8 37. Defendant Chapman avers that plaintiff “was willing to assist in the
9 investigation,” and that Chapman never told him “to engage in sexual relations with Officer
10 Brockett,” or that “he would be written up if he refused to continue to cooperate with the
11 investigation.” (Chapman Decl., Dkt. No. 165-2 at 3.)

12 38. Brockett was terminated from employment with CDCR on March 31, 2004,
13 as a result of the subject IAU investigation. (Chapman Decl. at 3; Brockett Decl. at ¶¶ 2, 3.)
14 The Notice of Adverse Action sustained allegations that Brockett participated in an overly
15 familiar relationship with plaintiff, based on their recorded verbal exchanges involving personal
16 and sexual topics; failed to comply with established policy and procedure when plaintiff asked
17 her to mail a letter for him; and been dishonest in her investigative interview. Although
18 Brockett's dismissal was not based on findings that Brockett had engaged in sexual relations with
19 plaintiff, plaintiff was noted to be a “reliable informant.” (IAU Rpt. at 2-7.)

20 39. Brockett appealed her dismissal to the California State Personnel Board.
21 Pursuant to hearings convened May 2, 2007, January 24, 2008, and February 25, 2008, which
22 included testimony by Brockett, Manago and Chapman, the dismissal was sustained on
23 November 11, 2008. (Documents Lodged Under Seal (Dkt. Nos. 237-38, 246).) The Board's
24 findings of fact include Brockett's failure to sound an alarm when plaintiff's conduct was overtly
25 sexual, but did not include a finding that Brockett engaged in sexual relations with plaintiff.
26 (Dkt. No. 246-3 at 4.)

 40. Brockett was at no time criminally prosecuted for violation of California
 Penal Code § 289.6 (making it a public offense for an employee of a state prison to engage in

1 sexual activity with a confined, albeit consenting, adult). (Brockett Decl. at ¶ 11.)

2 41. On January 21, 2004, plaintiff was transferred from CSP-SAC to SVSP's
3 EOP unit, where he remained until September 14, 2004, with the limited exception of returning
4 to CSP-SAC on June 2, 2004 to testify before the State Personnel Board. In an administrative
5 grievance filed on May 11, 2004 (Log No. SAC 04-0946), plaintiff alleged that he had been "the
6 victim of Sexual Harassment and Sexual Assault" by Brockett and that, despite his transfer from
7 PBSP to the CSP-SAC EOP program "for therapeutic reasons," where his "psychiatric symptoms
8 [had] stabilized," he had been transferred to SVSP in retaliation for his participation in the
9 Brockett investigation. (Dkt. No. 35-1 at 23, 27.) Plaintiff also alleged that, in February 2004,
10 he had been approached by inmate Brian Hackett, who gave plaintiff a message from defendants
11 Vance and Kennedy that, if plaintiff testified against Brockett, "[t]hey gonna send somebody to
12 kill you or you kill them either way you'd never see day light or the streets again." (Id. at 29.)
13 This grievance was reviewed, in pertinent part, by defendant B. Williams, then OAI-Northern
14 Region Acting Special Agent in Charge, who denied the appeal, with the exception of ordering
15 further review of plaintiff's retaliation claims. (Dkt. No. 35-1 at 26; Williams Decl. at 2-3.)
16 Further findings supporting a denial of plaintiff's retaliation claims were issued separately by
17 Williams and defendant Joseph in October 2005. (See Dkt. No. 193-4 at 22; Dkt. No. 165-8 at 7-
18 8, 13-4.)

19 42. On July 2, 2004, while at SVSP, plaintiff was charged with conspiracy to
20 assault staff and placed in AdSeg. (Dkt. No. 194-1 at 1.) The charges were later dismissed. (Id.
21 at 14.) Plaintiff was placed in SVSP's Modified Program from August to September 2004. (Dkt.
22 No. 193-4 at 16-17.)

23 43. On August 19, 2004, plaintiff sent the following letter to defendant Chapman,
24 with a copy sent to the Prison Law Office (Dkt. No. 193-4 at 20-1):

25 Dear Ms. Chapman,

26 I am writing to you concerning my present housing situation. On

1 the above-stated date I was released from ASU based on . . . false
2 charges dated June 16, 2004 and July 2, 2004 . . . of conspiracy to
3 assault staff at SVSP . . . I was found not guilty of these false
4 charges. You promised me that I was not going to be retaliated
5 against if I testified (sic) against Officer Mary Brockett. It should
6 be noted that, after I provided testimony against Officer Brockett,
7 on June 2, 2004, against some prison official['] wishes, you failed
8 to protect me as promised by (OIA). You said that after I provided
9 testimony that CDC-Prison Officials had my back, and you told
10 Dionne the same thing. Now after I was relieved from ASH (ICC)
11 refused to allow me to return to (EOP) for my much need[ed]
12 mental health treatment. I'm currently housed on "D" Facility
13 pending transfer to High Desert State Prison. You said that I
14 would be transferred to (CMF) to assure me that I would not be
15 subjected to retaliation. Lt. Middlebrooks had Dr. Scramozzino to
16 drop my level of care, in order to be transfer[red] to (CMF), due to
17 alleged enemy in (EOP) at (CMF). I do believe that prison
18 officials are attempting to endanger my life, by transferring me to a
19 prison where there [are] no (EOP) to treat me for my (PTSD) and
20 other disorders. There was a Warden to Warden agreement to
21 officially transfer me to (CMF) as a (CCCMS) main line until the
22 alleged enemy was transfer[red] to another []. Please call (Dionne)
23 and let her know what's going on with my transfer to (CMF). So
24 that she will let me know at visiting. [¶] Thank you very much.
25 [¶] Respectfully submitted

14 44. On September 14, 2004, plaintiff was transferred to HDSP.

15 45. On October 13, 2004, plaintiff filed an administrative grievance (Log No.
16 SVSP-04-2845) alleging, in pertinent part, that his transfer to HDSP had been retaliatory on the
17 part of SVSP staff; that the precipitating RVR at SVSP had since been dismissed; and that, at
18 HDSP, plaintiff was being "denied all mental health treatment." (Dkt. No. 193-4 at 14.) As a
19 result, plaintiff asserted, "I have been having mental health problems. The voices tell me to do
20 crazy things." (*Id.* at 8, 12.)

21 46. In October 2004 and February 2005, staff with the Prison Law Office
22 ("PLO") (legal representatives of the plaintiff class of inmates in *Coleman v. Wilson*, *supra*, 912
23 F. Supp. 1282) sent to CDCR's "Coleman Project Team" the following letters on plaintiff's
24 behalf:

25 a. In an October 28, 2004 letter to the "Coleman Project Team, Health Care
26 Services Division," regarding "Urgent Mental Health Concern (Stewart Manago, E-02564),"

1 PLO staff attorney Keith Wattlely stated (Dkt. No. 193-4 at 18):

2 We have been corresponding with the above-referenced High
3 Desert prisoner. Mr. Manago has a lengthy record of mental health
4 treatment and spent years in the EOP and PSU at Pelican Bay,
5 CSP-Sacramento and Salinas Valley. He was recently removed
6 from the EOP to CCCMS while at Salinas Valley. He was
7 subsequently transferred to High Desert's C facility, which has
8 been on lockdown for 15 months. Since being housed at High
9 Desert Mr. Manago has been experiencing ongoing racial tension
10 and is not taking prescribed medications because he wants to be
11 prepared to defend himself. He reports increased voices and other
12 symptoms.

13 Plaintiffs remain very concerned about the impact of lengthy
14 lockdowns on mental health programs. This patient is obviously
15 decompensating and must be immediately transferred to a facility
16 with the appropriate EOP level of care.

17 b. In a February 16, 2005 letter to the "Coleman Project Team, Health Care
18 Services Division," regarding "Urgent Mental Health Concern (Stewart Manago, E-02564),"
19 Della Burke, Litigation Assistant to PLO staff Keith Wattlely, wrote (Dkt. No. 193-4 at 19):

20 We continue to be concerned about the treatment of the above-
21 referenced High Desert prisoner. As we previously informed you,
22 Mr. Manago has a lengthy record of mental health treatment and
23 spent years in the EOP and PSU at Pelican Bay, CSP-Sacramento
24 and Salinas Valley. He was recently removed from the EOP to
25 CCCMS while at Salinas Valley. He was subsequently transferred
26 to High Desert's C facility, which has been on extended lockdowns
over the last couple years. Since being housed at High Desert Mr.
Manago has been experiencing tensions, and he stopped taking
prescribed medications. He started reporting increased voices and
several other symptoms.

Mr. Manago now informs us that he was sent to the CTC at the end
of January and placed in five-point restraints. He states that he has
now been placed in administrative segregation, although he does
not explain why.¹⁵

Plaintiffs asked that Mr. Manago be immediately transferred to a
facility with the appropriate EOP level of care in our October 28,

¹⁵ On January 13, 2005, plaintiff was placed into administrative segregation at HDSP for conspiring to assault staff. Plaintiff was found guilty in a decision reached on March 2, 2005. (Dkt. No. 194-1 at 2, 15, 17, 29.) Plaintiff's challenge to this finding (Log Nos. SAC-05-2099 and HDSP 05-3434), was rejected at the Director's Level Review on February 2, 2007. (Id. at 1-3.)

1 2004 letter. Please response (sic) and inform us if he has been
2 endorsed for transfer and to what facility he will be transferred.

3 47. On April 6, 2005, plaintiff was transferred from HDSP to CSP-SAC, based
4 on his “alleged mental health needs;” plaintiff was endorsed for the “EOP/ASU HUB” due to the
5 pending RVR against him for conspiracy to assault staff (see n.15, supra), with instructions to be
6 seen by the Institutional Classification Committee (“ICC”) within 10 days. (Dkt. No. 194-1 at
7 2,16.)

8 48. On March 26, 2006, plaintiff filed an administrative grievance (Log No. SAC
9 06-0783), requesting that CSP-SAC prison officials and mental health staff transfer plaintiff to
10 Atascadero State Hospital (“ASH”), for “optimal [mental health] treatment,” based on plaintiff’s
11 allegations that he had been diagnosed with “a post-traumatic stress disorder amongst other
12 disorders.” (Dkt. No. 35-2 at 4, 6.) Plaintiff explained that he had been the victim of sexual
13 assault by CO Brockett while housed at CSP-SAC, and that his cooperation in the Brockett
14 investigation had resulted in acts of “retaliation and retribution” by mental health and
15 correctional staff, including false rule violations and illegal placement in administrative
16 segregation. (Id.) As a result, plaintiff explained, he was “continuing to experience” symptoms
17 of stress, anxiety, depression, paranoia, nightmares, vomiting, rage, flashbacks and hearing
18 voices. (Id. at 6.) Plaintiff’s grievance was reviewed, in pertinent part, by defendants J. Martin
19 (CSP-SAC Senior Supervising Psychologist), M. Jaffe (CSP-SAC Chief Psychiatrist), and K.
20 Kelly (CSP-SAC Chief Psychologist and Health Care Manager), and denied at the Director’s
21 Level on September 18, 2006.

22 49. On June 12, 2006, plaintiff filed another administrative grievance (Log No.
23 SAC 06-01729), alleging perjury, “fraud and falsication (sic) of official state records,” by “M.
24 Jaffe, M.D., Chief Psychiatrist, R. Kelly, Ph.D., Health Care Manager, and J. Martin, Ph.D.,
25 Senior Psychologist at CSP-Sacramento.” (Dkt. No. 35-2 at 23.) Plaintiff challenged the
26 findings of these officials, when they reviewed plaintiff’s prior grievance (Log No. SAC 06-

1 00783), that plaintiff did not have PTSD; plaintiff also challenged these defendants' refusal to
2 address plaintiff's claims of stress and anxiety due to his alleged sexual abuse by Brockett and
3 the retaliation of staff against plaintiff for his participation in the Brockett investigation. (Id. at
4 30.) This appeal was denied at the Director's Level on February 6, 2007.

5 50. On October 15, 2006, plaintiff filed another administrative grievance (Log
6 No. SAC 06-02306), wherein he alleged that defendants Captain S. Vance, Lieutenant S.
7 Shannon, Sergeant B. Joseph, and Correctional Officers R. Garcia, J. Tinseth, J. Wachter, R.
8 Morrow spread rumors that plaintiff was a "snitch" for reporting Brockett's alleged misconduct,
9 rendering it "open season" against plaintiff; that defendants were "conspiring or inciting other
10 inmates to assault appellant, . . . working hand to hand in order to have additional false
11 confidential information placed in appellant's C-file, . . . as a flavor (sic) for Captain S. Vance
12 and other corrupted staff on 'A' Facility." (Dkt. No. 35-3 at 4-6.) Plaintiff requested that an
13 unbiased investigation into these allegations be conducted by the OIA, and that plaintiff be
14 awarded one million dollars as "relief for retaliation." (Id. at 4.) The Director's Level Decision,
15 issued April 12, 2007, granted in part plaintiff's appeal, on the ground that the underlying
16 investigation into plaintiff's allegations had been inadequate, and ordered that a new inquiry be
17 conducted. (Id. at 2.)

18 51. On October 23, 2006, plaintiff filed another administrative grievance (Log
19 No. SAC 06-0264), alleging that he was not receiving adequate mental health treatment at
20 CSP-SAC. Plaintiff repeated his alleged interactions with Brockett and his allegations of staff
21 retaliation for plaintiff's participation in the Brockett investigation. (Dkt. No. 35-3 at 13, 15.)
22 Plaintiff stated that he had symptoms of PTSD, stress, anxiety, hearing unwanted voices, feeling
23 depressed and paranoid, having flashbacks of the alleged sexual abuse, nightmares, vomiting,
24 and rage; plaintiff also stated that he was unable to confide in the CSP-SAC mental health staff.
25 Plaintiff "respectfully request[ed] a transfer to the intermediate care facility at Vacaville [CMF]
26 or Atascadero State Hospital for Mental Health Treatment." (Id. at 13.) This appeal was denied

1 at the Director's Level on June 11, 2007. (Id. at 12.)

2 52. Additional facts are set forth below, as pertinent to plaintiff's claims in light
3 of the pending motions for summary judgment.

4 V. DISCUSSION

5 A. Eighth Amendment Sexual Misconduct Claim Against Defendant Brockett

6 Defendant Brockett moves for summary judgment on plaintiff's only claim
7 against her. In his First Cause of Action, plaintiff alleges that defendant Brockett engaged in
8 "[t]he unjustified and penologically unnecessary Use of Excessive Force upon plaintiff . . . in
9 December 2003, through January 2004, [and thereby] violated his rights under the Eighth
10 Amendment to the United States Constitution in that it constituted Cruel and Unusual
11 Punishment." (FAC at 18.) As found by this court in denying Brockett's motion to dismiss this
12 claim, "[p]laintiff's explicit statements of Brockett's alleged sexual conduct toward plaintiff
13 support his claim under the Eighth Amendment's ban against cruel and unusual punishment."
14 (Dkt. No. 78 at 13 n.11 (internal citation omitted).)

15 Despite her disavowal of any sexual conduct with plaintiff, Brockett's principal
16 argument in support of her motion for summary judgment is that, because plaintiff allegedly
17 "voluntarily and willfully consented to the alleged sexual encounters, and in fact initiated them,"
18 the evidence fails to establish that Brockett's alleged conduct was "objectively, sufficiently
19 serious," or that Brockett "acted with a sufficiently culpable state of mind to cause Mr. Manago
20 harm." (Dkt. No. 183 at 2.) Brockett also contends that any evidence she made sexually
21 inappropriate comments to plaintiff fails to state an Eighth Amendment claim. (Id.)

22 1. Legal Standards for Excessive Force/Sexual Misconduct Claim

23 The legal standards for sustaining an inmate's Eighth Amendment claim for cruel
24 and unusual punishment, premised on alleged sexual misconduct by a correctional officer, are as
25 follows:

26 ///

1 The Eighth Amendment prohibits cruel and unusual punishment in
2 penal institutions. Whether a specific act constitutes cruel and
3 unusual punishment is measured by “the evolving standards of
4 decency that mark the progress of a maturing society.” Hudson v.
5 McMillian, 503 U.S. 1, 8 (1992).

6 Sexual harassment or abuse of an inmate by a corrections officer is
7 a violation of the Eighth Amendment. See Schwenk v. Hartford,
8 204 F.3d 1187, 1197 (9th Cir. 2000) (“In the simplest and most
9 absolute of terms ... prisoners [have a clearly established Eighth
10 Amendment right] to be free from sexual abuse. . . .”); see also
11 Women Prisoners of the Dist. of Columbia Dep’t of Corr. v.
12 District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994)
13 (“[U]nsolicited touching of ... prisoners’ [genitalia] by prison
14 employees are ‘simply not part of the penalty that criminal
15 offenders pay for their offenses against society’” (quoting Farmer
16 v. Brennan, 511 U.S. 825, 834 (1994))), aff’d in part and vacated in
17 part, 93 F.3d 910 (D.C. Cir. 1996).

18 In evaluating a prisoner’s claim, courts consider whether “the
19 officials act[ed] with a sufficiently culpable state of mind” and if
20 the alleged wrongdoing was objectively “harmful enough” to
21 establish a constitutional violation. Hudson, 503 U.S. at 8.

22 Wood v. Beauclair, 692 F.3d 1041, 1045-46 (9th Cir. 2012).

23 In Wood, the Ninth Circuit Court of Appeals addressed, as a matter of first
24 impression in this circuit, whether a prisoner can state a cognizable Eighth Amendment claim
25 against a correctional officer for sexual conduct in which the prisoner voluntarily participated.
26 The Court of Appeals noted a conflict in the circuit courts on this question. Some circuit courts
have held that a consensual sexual relationship between an inmate and a correctional officer,
where the “interactions were welcome and voluntary,” fails to state an Eighth Amendment claim.
Id. at 1048, citing Freitas v. Ault, 109 F.3d 1335, 1338 (8th Cir.1997); also citing Hall v. Beavin,
202 F.3d 268, 1999 WL 1045694, at *1 (6th Cir. 1999); Fisher v. Goord, 981 F. Supp. 140, 174
(W.D.N.Y. 1997). Other circuit courts have found that a prisoner is incapable of consenting to
an intimate relationship with a correctional officer, because of the underlying power disparity in
the relationship. Wood, 692 F.3d at 1046-47, citing, inter alia, Lobozzo v. Colorado Dep’t of
Corr., 429 Fed. Appx. 707, 711 (10th Cir. 2011); Carrigan v. Davis, 70 F. Supp. 2d 448 (D. Del.
1999); Cash v. County of Erie, 2009 WL 3199558 at *2 (W.D.N.Y. 2009).

1 Noting that the inherent “power dynamics between prisoners and guards make it
2 difficult to discern consent from coercion,” id. at 1047, yet rejecting “a per se rule that would
3 make prisoners incapable of legally consenting to sexual relationships with prison officials,” id.
4 at 1048, the Ninth Circuit concluded that the “better approach” requires application of a
5 rebuttable presumption that the challenged conduct was not consensual, id. at 1049. As
6 described in Wood, this approach requires that the district court make the following analysis:

7 [W]hen a prisoner alleges sexual abuse by a prison guard, we
8 believe the prisoner is entitled to a presumption that the conduct
9 was not consensual. The state then may rebut this presumption by
10 showing that the conduct involved no coercive factors. We need
11 not attempt to exhaustively describe every factor which could be
12 fairly characterized as coercive. Of course, explicit assertions or
13 manifestations of non-consent indicate coercion, but so too may
14 favors, privileges, or any type of exchange for sex. Unless the state
15 carries its burden, the prisoner is deemed to have established the
16 fact of non-consent.

17 Wood, 692 F.3d at 1049.

18 In contrast, inmate claims premised only on alleged verbal sexual harassment are
19 generally found to be noncognizable. “Although the Ninth Circuit has recognized that sexual
20 harassment may constitute a cognizable claim for an Eighth Amendment violation, the Court has
21 specifically differentiated between sexual harassment that involves verbal abuse and that which
22 involves allegations of physical assault, finding [only] the later to be in violation of the
23 constitution.” Minifield v. Butikofer, 298 F. Supp. 2d 900, 904 (N.D. Cal. 2004), citing
24 Schwenk, supra, 204 F.3d at 1198. “[T]he Eighth Amendment’s protections do not necessarily
25 extend to mere verbal sexual harassment.” Austin v. Terhune, 367 F.3d 1167, 1172 (9th Cir.
26 2004), citing Blueford v. Prunty, 108 F.3d 251, 254-55 (9th Cir. 1997) (prison guard who
allegedly engaged in “vulgar same-sex trash talk” with inmates entitled to qualified immunity);
and Somers v. Thurman, 109 F.3d 614, 624 (9th Cir. 1997) (female correctional officers who
allegedly made improper statements about plaintiff while he showered entitled to qualified
immunity).

1 2. Analysis

2 Plaintiff and defendant Brockett dispute nearly all material facts concerning
3 Brockett’s allegedly sexually harassing statements to plaintiff, which allegedly occurred from
4 summer 2003 through January 17, 2004, and Brockett’s alleged sexual misconduct toward
5 plaintiff, which allegedly occurred in December 2003 and January 2004. Moreover, most of the
6 evidence on these matters that is currently before the court was submitted under seal and remains
7 confidential. In any case, even prior findings of fact in the underlying administrative proceedings
8 are not dispositive in the instant action -- it is reasonable to infer that a trier of fact in this federal
9 civil rights action may, based on the same evidence, make different factual findings than those
10 reached by CDCR’s investigators and the State Personnel Board, each of which had the limited
11 goal of assessing Brockett’s suitability for continued employment with CDCR.

12 As a result, there remain significant issues of material fact whether Brockett made
13 sexually inappropriate comments to plaintiff, or engaged in sexually inappropriate conduct,
14 including the dates, context and content of each alleged misconduct.

15 Nevertheless, the court finds that summary judgment should be granted for
16 Brockett on plaintiff’s claims of verbal sexual harassment prior to December 20, 2003, based on
17 plaintiff’s deposition testimony that he had no physical contact with Brockett prior to that date.
18 (Pltf. Depo. at 155-56; 158.) Although plaintiff testified that Brockett attempted to touch him in
19 a sexual manner prior to December 20, 2003, he also testified that he “ke[pt] moving it where she
20 can’t touch me.” (*Id.* at 157.) Sexually inappropriate statements and/or conduct that does not
21 include touching have routinely been found “not sufficiently serious” to sustain an Eighth
22 Amendment claim. Austin v. Terhune, 367 F.3d 1167, 1172 (9th Cir. 2004) (sexually explicit
23 conduct and statement that did not involve touching); accord Watson v. Carter, 668 F.3d 1108,
24 1114 (9th Cir. 2012) (brief sexually suggestive touching combined with laughter “not objectively
25 harmful enough to establish a constitutional violation”) (citation and internal punctuation
26 omitted); see also Johnson v. Carroll, 2012 WL 2069561, *28-31 (E.D. Cal. 2012) (summary of

1 pertinent cases). Plaintiff's similar claims against Brockett commencing December 20, 2003 are
2 too intermingled with his claims of sexual misconduct to draw any independent legal conclusions
3 at this time.¹⁶

4 In contrast, application of the rebuttable presumption analysis articulated in Wood
5 requires a ruling adverse to Brockett on plaintiff's sexual misconduct claims, commencing
6 December 20, 2003. Plaintiff is entitled to an initial presumption that any sexual contact
7 between plaintiff and Brockett was non-consensual. The burden then shifts to Brockett to
8 demonstrate that the challenged conduct was consensual. Brockett has failed to meet her burden.
9 In addition to the inherent power disparity between plaintiff and Brockett, plaintiff's interactions
10 with Brockett, in December 2003 and January 2004, were facilitated and encouraged by OIA
11 investigators. Because plaintiff was allegedly intent on snaring Brockett in official misconduct,
12 at the direction of other correctional officials, his alleged sexual interactions with Brockett
13 cannot be said to lack official coercion, even if staff discouraged plaintiff from engaging in
14 sexual conduct. Any allegedly personal interest that plaintiff may have had in a consensual
15 sexual relationship with Brockett, which plaintiff denies, is overshadowed by OIA's reliance on
16 plaintiff, underscored by plaintiff's officially facilitated recording of his interactions with
17 Brockett. The court finds these factors "fairly characterized as coercive." Wood, 692 F.3d at
18 1049. Moreover, plaintiff testified that he engaged in sexual activity with Brockett solely for
19 purposes of the investigation; that he did not like Brockett; and that he asked Chapman to stop
20 the investigation before his relationship with Brockett became "too personal." Additionally, as
21 noted above, the IAU found plaintiff to be a "reliable informant," while it found Brockett to be
22 dishonest in her interview. (IAU Rpt. at 2-7.)

23 Defendants' numerous protests throughout their briefing that plaintiff
24 "volunteered" to participate in the OIA investigation, and was not "promised anything" for his

25 ¹⁶ Similarly, it will be up to the trial judge to determine whether the prior comments are
26 admissible to put the later alleged conduct in context.

1 participation, are immaterial, given the official imprimatur of the investigation. Also immaterial
2 are Brockett's protests that she was unaware of the OIA investigation against her, and of
3 plaintiff's participation in the investigation. Moreover, plaintiff's documented mental health
4 issues raise additional questions concerning plaintiff's ability to engage in a consensual sexual
5 relationship with a correctional officer, as well as plaintiff's ability to "volunteer" in an
6 investigation of official misconduct.

7 For these several reasons, the undersigned finds that Brockett has failed to meet
8 her burden of demonstrating that her alleged sexual interactions with plaintiff were consensual.
9 This issue, and the further determinations whether Brockett acted with a "sufficiently culpable
10 state of mind," and whether plaintiff was objectively harmed, must await trial.

11 Application of defendant Brockett's qualified immunity defense does not dictate
12 a different result. Qualified immunity does not apply where the facts, construed in the light most
13 favorable to the party asserting the injury, show a violation of a clearly established constitutional
14 right of which a reasonable official should be aware. Anderson v. Creighton, 483 U.S. 635, 640
15 (1987). Brockett does not challenge clearly established law rendering it unconstitutional for a
16 prison official to engage in nonconsensual sexual activity with a prison inmate, of which a
17 reasonable correctional officer should have been aware. Schwenk, 204 F.3d at 1197-8; see also
18 Wood, 692 F.3d at 1045-47 (citing established law). Accepting as true plaintiff's allegations that
19 Brockett, against plaintiff's wishes, "French kissed" him, touched his genitals, slapped his butt,
20 and orally copulated plaintiff, Brockett's conduct violated clearly established law of which
21 Brockett should have been aware. Anderson v. Creighton, supra, 483 U.S. at 640. For these
22 reasons, the court finds that Brockett is not entitled to qualified immunity on plaintiff's Eighth
23 Amendment sexual misconduct claim.

24 B. Eighth Amendment Claims Against Defendants Kelly, Jaffe and Martin

25 1. Introduction

26 As earlier noted, defendants Kelly, Jaffe and Martin were all mental health

1 professionals at CSP-SAC during the relevant periods. (Dkt. No. 164 at 22-5.) Defendant K.
2 Kelly, Ph.D., worked as CSP-SAC's Chief Psychologist from January 2000 through June 2009.
3 Defendant Jaffe, M.D., worked as CSP-SAC's Chief Psychiatrist from January 1998 to August
4 2011. Defendant J. Martin, Ph.D., worked as a Senior Supervising Psychologist at CSP-SAC
5 from March 2002 to September 2008 (with the exception of May to November 2006).¹⁷

6 Pursuant to ruling on defendants' motions to dismiss, the court found that plaintiff
7 states cognizable Eighth Amendment claims against defendants Kelly, Jaffe and Martin for
8 alleged: (1) failure to provide plaintiff with constitutionally adequate mental health care; (2)
9 failure to protect plaintiff from a substantial risk of harm; and (3) against Kelly and Jaffe only,
10 supervisory liability premised on the first two theories (See Dkt. No. 78 at 18; Dkt. No. 89.)

11 These defendants move for summary judgment on the limited theory that the
12 relevant scope of their responsibility is limited to their respective participation in reviewing one
13 of plaintiff's administrative appeals (Log No. SAC 06-0783). Relying on established law that the
14 administrative processing of an inmate appeal cannot, in itself, serve as a basis for liability under
15 Section 1983, defendants' counsel argues that the involvement of Kelly, Jaffe and Martin in
16 processing plaintiff's subject appeal fails to state an actionable claim.

17 For the reasons set forth below, the undersigned finds that the involvement of
18 these defendants appears to be potentially far more integral to plaintiff's claims than counsel
19 asserts. However, in light of defendants' limited summary judgment theory, the court first
20 recounts each of the three administrative appeals exhausted by plaintiff in which defendants
21 Martin, Kelly and/or Jaffe participated.

22 ////

23 ////

24
25 ¹⁷ "At each institution, the MHSDS operates under the management of the Chief of
26 Mental Health or the Clinical Director. This individual is typically the Chief Psychiatrist, Chief
Psychologist, or Senior Psychologist." CDCR's Inmate Medical Services Policies & Procedures
Manual ("IMSP&P Manual"), vol. 12 ("Mental Health Services"), at 12-1-2.

1 2. Relevant Administrative Appeals

2 a. Log No. SAC 06-00783

3 This is the only administrative appeal cited by defendants Kelly, Jaffe and Martin
4 in support of their motion for summary judgment.

5 On March 26, 2006, less than one year after his return to CSP-SAC, plaintiff filed
6 an inmate appeal pursuant to which he “respectfully request[ed] that CSP-Sacramento prison
7 officials and mental health staff transfer appellant to Atascadero State Hospital (“ASH”) for
8 optimal treatment.” (Dkt. No. 35-2 at 4.) Plaintiff explained in pertinent part (id. at 4, 6):

9 Appellant has been diagnosed to have a serious post-traumatic
10 stress disorder, amongst other disorders. Appellant became the
11 victim of sexual abuse while he was housed in the CSP-
12 Sacramento EOP Program. As a direct result of appellant’s
13 complaint against former officer Mary Brockett[,] [her]
14 employment was terminated with the CDCR in response to
15 appellant reporting said misconduct. Appellant [was] subjected
16 [to] intermidiate (sic) sanctions in lieu of false rule violations and
17 illegal placement into ASU based on false inmate-manufactured
18 confidential information as a form of retaliation and retribution for
19 appellant’s cooperation with the Office of Internal Affairs.
20 Appellant continue[s] to experience significant stress and anxiety
21 as a result of the incidents surrounding his past events of sexual
22 abuse and ongoing events of retaliation and retribution by some
23 custody and mental health staff; since appellant’s arrival back to
24 CSP-SAC it has been extremely stressful circumstances, due to
25 appellant hearing unwanted voices and feeling depressed and
26 paranoid. Appellant is continuing to have unwanted flash backs of
these acts of sexual (sic) by former officer Mary Brockett.
Appellant continue[s] to have nightmares, vomiting and rage.
Appellant can not talk about his the (sic) sexual abuse, due to
custody staff[’s] ongoing violations of appellant’s confidential
patient rights.

21 Informal and formal level review were bypassed. (Id. at 4.)

22 On May 8, 2006, defendant Martin issued a First Level Response, pursuant to his
23 interview of plaintiff on April 20, 2006, and a discussion with plaintiff’s unidentified
24 Administrative Segregation Enhanced Outpatient Housing Correctional Counselor. Martin
25 addressed only plaintiff’s transfer request, denying the request on the ground that plaintiff was

26 ///

1 “ineligible for ASH placement.”¹⁸ (Id. at 8.) Despite noting plaintiff’s other allegations as his
2 contention that he had “posttraumatic stress disorder due to previous sexual abuse by an officer,
3 who was terminated,” with additional “stress and anxiety due to retaliation and retribution by
4 some Custody and Mental Health Staff,” Martin construed these matters as a “staff complaint”
5 that did not meet requisite criteria for further consideration. (Id.)

6 Plaintiff objected to this decision on the following grounds (id. at 5, 7):

7 Appellant is dissatisfied because No. 1 it appears that Dr. Martin
8 and other CSP-SAC staff are attempting to downplay the
9 seriousness of appellant’s mental health problems following the
10 sexual abuse of former officer Mary Brockett. CDCR officials has
11 (sic) subjected appellant to a series of retaliatory acts, including
12 false CDCR Rule Violation Reports, as a form of retaliation and
13 retribution for providing testimony against Officer Brockett, in the
14 matter of [State Personnel Board] Case No. 04-0655. Upon
15 information and belief, appellant has been subjected to sexual
16 abuse while confined in CSP-SAC EOP Program, which resulted
17 in Officer Brockett’s employment being terminated with CDCR.
18 Appellant continue[s] to suffer permanent and lasting injuries
19 including aggravation of serious mental disorder, including his post
20 traumatic stress disorder. So therefore, appellant request[s] to go
21 to Atascadero State Hospital, or to the Intermediate Care Facility
22 (ICF) at CMF [California Medical Facility] without further
23 retaliation and retribution.

24 Pursuant to the Second Level Review of plaintiff’s appeal, “M. Jaffe, M.D., Chief
25 Psychiatrist, reviewed this matter on behalf of Karen Kelly, Ph.D., Health Care Manager (A), at
26 California State Prison-Sacramento (SAC).” (Dkt. No. 35-2 at 12.) The Second Level Response,
apparently prepared by Jaffe, was issued on May 26, 2006, and signed by Kelly. (Id. at 12-3.)
Both Jaffe and Kelly signed the Second Level Response on the appeal form. (Id. at 3.) The
narrative Second Level Response noted consideration of plaintiff’s “Unit Health Record and all

¹⁸ Martin noted in pertinent part (Dkt. No. 35-2 at 8):

Specifically, your institutional history of: 1) Maximum Custody;
2) S-Suffix; 3) Escape Risk (Walk Away in 1978); and 4) Recent
history of Assault or Predatory Behavior (your High Desert State
Prison 115 for Conspiracy to Murder a Peace Officer in March of
2005) makes a transfer to ASH currently not possible.

1 submitted documentation and supporting arguments,” including plaintiff’s First Level interview,
2 and that these matters were “evaluated in accordance with SAC’s Operational Procedures and the
3 California Code of Regulations, Title 15.” (Id. at 12.) The appeal was denied at the Second
4 Level Review for the following reasons (id. at 13):

5 At the Second Level, you request to go to the ICF at CMF, which is
6 a new issue. The appeals process does not allow for you to add to
the “Actions Requested” in the original appeal.

7 Dr. Martin did not “downplay” your mental health issues. Instead,
8 he clearly addresses the reasons why your request to go to ASH
9 was not possible. Your post-traumatic stress disorder (PTSD)
10 claim is a self-reported one and not objectively documented in your
11 Unit Health Record. You are currently in the Enhanced Outpatient
Program and at a level of care sufficient to care for all of your
12 mental health needs. PTSD is not one of the accepted recognized
13 diagnoses treated in CDCR under the Coleman court mandate.

14 The medical care of inmates is one of the highest concerns of the
15 staff at SAC. You are encouraged to use the sick call system and
16 communicate with the medical staff via the normal procedures.
17 This institution endeavors to provide appropriate medical care and
18 treatment commensurate with the community standard for health
19 services.

20 Plaintiff thereafter sought Director’s Level Review, on the following grounds, and
21 with supporting documentation (Dkt. No. 35-2 at 5, 9-11):

22 In January 2000, Dr. Kelly agreed to accept appellant into
23 CSP-SAC-PSU for therapeutic reasons. According to a
24 CDC-128C, by Dr. Grimes, appellant has a diagnosis of
25 post-traumatic stress disorder. On June 8, 2006, appellant received
26 the Second Level Appeal Response from Dr. Jaffe and Dr. Kelly
denying appellant’s request to be transferred to Atascadero State
Hospital. Appellant’s request was based on the fact that appellant
has a long history of suffering from major mental illnesses,
including post-traumatic stress disorder due to being physically,
sexually and emotional[ly] abused as a child which is clearly
documented in appellant’s CDCR mental health records. . . . Dr.
Jaffe’s Second Level Response is based on fraud and falsification
of official state records, including perjury.

. . . It is appellant’s position that Dr. Jaffe and Dr. Kelly knew that
appellant has been diagnosed to have a serious PTSD by CDCR
psychologists and private court-appointed psychologists, including
CSP-Sacramento psychologists, which is clearly documented in
appellant’s mental health records. (Refer to confidential mental

1 health records dates January 26, 2000, May 14, 1996, March 25,
2 2004, June 28, 2004, and November 3, 2005.)¹⁹

3 ¹⁹ Plaintiff attached to his request for Director's Level Review copies of the following
4 records:

5 (1) January 27, 2000 report of the Pelican Bay State Prison Psychiatric Services
6 Unit ("PSU") ICC, approving plaintiff's transfer to CSP-SAC for therapeutic
7 reasons, based on the recommendation of Dr. W. Grimes, as set forth in his "128
8 C dated 1/26/00." The ICC report notes that the "Sr. Psychologist at SAC PSU
9 has agreed to accept [plaintiff] according to this 128 C." The report notes that
10 plaintiff "has a diagnosis of Posttraumatic Stress, which would be exacerbated at
11 Corcoran and is also associated with PBSP." The report further provides, with
12 emphasis: "Committee acts to refer this case to the Classification Staff
13 Representative (CSR) recommending transfer to SAC PSU with no alternate due
14 to SAC having the only other PSU facility." (Dkt. No. 35-2 at 14; see also Dkt.
15 No. 193 at 13.)

16 (2) Undated handwritten report by Pelican Bay psychologist Dr. William Grimes,
17 stating that plaintiff had been a patient at PBSP since May 1998; listing plaintiff's
18 prior diagnoses ("schizophrenia, paranoid; depression; bipolar disorder; cognitive
19 disorder, NOS; and personality disorder, NOS"); and noting that "[h]e is most
20 recently diagnosed as (sic) Post-Traumatic Stress Disorder, Schizoaffective
21 disorder and Personality disorder, NOS." The report notes plaintiff's prior violent
22 confrontations with custody officers at CSP-Corcoran and PBSP. Dr Grimes
23 noted that, "[b]ecause of the unique nature of his mental disorder, Mr. Manago
24 experiences 'flashbacks' when exposed to stimulus cues at PBSP which he
25 associates with past trauma, and it is believed he will experience similar
26 phenomena if returned to Corcoran." Dr. Grimes noted that plaintiff "has made
dramatic progress here at PBSP-PSU, but it is believed by both his treating
psychologist and psychiatrist that further progress is not possible unless a change
of environment can be effected." Dr. Grimes concludes that "[o]ur Senior
psychologist Dr. David Schwauber has communicated with Dr. Karen Kelly,
Senior Psychologist at SAC-4 PSU who has agreed to admit Mr. Manago to her
treatment unit for clinical care." (Dkt. No. 35-2 at 15; see also Dkt. No. 193 at 12
(indicated that date of this document is January 26, 2000).)

(3) March 25, 2004 Mental Health Assessment (Form MH 1), providing an "IDTT
[Interdisciplinary Treatment Team] Update for EOP," at Salinas Valley State
Prison, after plaintiff had been housed there for a period of 63 days. The Update
is signed by a psychiatrist and two psychologists, and provides in pertinent part
Axis I diagnoses is of "Schizoaffective Disorder, Posttraumatic Stress Disorder,
and Polysubstance Dependence in Institutional Remission," and an Axis V
(Global Assessment of Functioning or "GAF" score) of 55. (Dkt. No. 35-2 at 18.)

(4) June 28, 2004 Suicide Risk Evaluation (Form MH 3), noted June 4, 2004
suicide attempt, but current low imminent risk of same, with diagnoses including
PTSD. (Dkt. No. 35-2 at 19.)

(5) November 3, 2005 report (Form CDC 128C) of Clinical Psychologist D.

1 It is appellant's position that Dr. Jaffe, Dr. Kelly and Dr. Martin
2 did an absolutely pathetic and superficial job of investigating
3 appellant's serious claims in order to foster a code of silence
4 concerning the sexual abuse and retaliation and retribution.

5 The Director's Level Review, issued September 18, 2006 by Appeals Coordinator
6 Grannis, adopted the findings of the Second Level Review, noting that plaintiff's allegations
7 against Brockett were addressed in a separate administrative appeal (Log No. SAC-04-0946), and
8 that "[i]n this case, the institution has provided the appellant with a thorough response. The
9 appellant is encouraged to avail himself of the treatment available to him within the CDCR
10 Mental Health Services Delivery System. There is no basis to grant the appellant's request for a
11 transfer to ASH or cause to intervene at the DLR [Director's Level Review]." (Dkt. No. 35-2 at
12 2.)

13 b. Log No. SAC 06-1729

14 On June 12, 2006, plaintiff filed an appeal alleging perjury, "fraud and
15 falsication (sic) of official state records" by "M. Jaffe, M.D., Chief Psychiatrist, R. Kelly, Ph.D.,
16 Health Care Manager, and J. Martin, Ph.D., Senior Psychologist at CSP-Sacramento." (Dkt. No.
17 35-2 at 23.) Plaintiff challenged the representations of these officials, pursuant to plaintiff's
18 prior appeal (Log No. SAC 06-00783), that they had reviewed all of plaintiff's mental health
19 records and concluded that plaintiff did not suffer from PTSD, either historically or "due [to]
20 sexual abuse by former officer Mary Brockett;" nor did they recognize plaintiff's "further
21 alle[gation] that he has stress and anxiety due to ongoing retaliation and retribution by some
22 custody and mental health staff." (Id. at 30.) Plaintiff alleged (id. at 31):

23 Wheeler, Psy.D., "Ad Seg EOP Case Manager," stating in pertinent part that
24 "PTSD symptoms remain a feature of [plaintiff's] presentation" and "often appear
25 to exacerbate his condition." Dr. Wheeler concluded that, "[f]or that reason, it is
26 felt that the previous chrono by Dr. Grieves (sic) should still be considered in
making a potential placement decision for this inmate." The remainder of the
CDC 128C indicates that the chrono of PBSP's Dr. Grimes (not Dr. Grieves) is
referenced. (Dkt. No. 35-2 at 16-17.)

1 It is appellant's position that Dr. Jaffe, Dr. Kelly and Dr. Martin
2 knew that appellant has been diagnosed to have a serious PTSD by
3 CDCR mental health staff at Pelican Bay, CSP-Sacramento,
4 Salinas Valley and outside private psychologists which is clearly
5 documented in appellant's mental health records. It is appellant's
6 position that Dr. Jaffe, Dr. Kelly and Dr. Martin did an 'absolutely
7 pathetic and superficial job of investigating appellant's inmate
8 appeal log No. SAC-H-06-00783, in order to foster a code of
9 silence concerning the sexual abuse and retaliation and retribution.

6 Plaintiff requested "that this matter be fully investigated by state and federal officials and that
7 criminal charges be filed against the mentally unstable supervisors named herein." (Id. at 23.)

8 Informal level review was bypassed. (Id. at 23.) On October 11, 2006, after
9 interviewing plaintiff on September 20, 2006, Dr. Martin issued the First Level Response.
10 Martin again ignored plaintiff's challenges to his mental health care, again finding that plaintiff's
11 grievance did not qualify as a staff complaint, and that plaintiff's request for transfer to ASH had
12 already been denied. (Id. at 25.) Martin "again denied" plaintiff's request for a transfer to ASH,
13 for the reasons noted in response to plaintiff's appeal designated Log No. SAC-06-0783, with the
14 exception that Martin withdrew his prior finding that plaintiff "has a history of 'recent' predatory
15 behavior." (Id.)

16 Plaintiff requested Second Level Review, noting that he was "dissatisfied because
17 Dr. Martin did not address all the issues at hand, including the documentation at hand concerning
18 the (PTSD) and the documents in my Unit Health Records clearly show that Drs. Jaffe and Kelly
19 lied. I want this fully investigated." (Id. at 24.)

20 Dr. Kelly issued the Second Level Response on November 30, 2006, noting that
21 Dr. Jaffe had "reviewed his matter of behalf of" Kelly. (Id. at 26). Both Kelly and Jaffe signed
22 the Second Level Response on the appeal form. (Id. at 24.) The narrative Second Level
23 Response provided in full (id. at 27):

24 You indicate that Dr. Jaffe and Dr. Martin lied in that they did not
25 recognize your claim for PTSD and did not refer you to Atascadero
26 State Hospital. Parenthetically speaking, PTSD is not a disorder
recognized to be treated in the CDCR when it is, in fact diagnosed.
Your request for consideration to Atascadero State Hospital is not

1 granted for the reasons stated by Dr. Martin.

2 The medical care of inmates is one of the highest concerns of the
3 staff at SAC. You are encouraged to use the sick call system and
4 communicate with the medical staff via the normal procedures.
5 This institution endeavors to provide appropriate medical care and
6 treatment commensurate with the community standard for health
7 services.

8 Thereafter, in seeking Director's Level Review, plaintiff alleged that "Drs. Kelly
9 and Jaffe are engaged in criminal corruption at CSP-Sacramento and attempting to cover up staff
10 sexual misconduct relating to this appeal," and requested "that the Director order a full
11 investigation." (*Id.* at 24.) Chief of Inmate Appeals, N. Grannis, denied this appeal at the
12 Director's Level on February 6, 2007. The Director's Level Decision provided in full (*id.* at 21):

13 It appears that SAC mental health staff provided the appellant with
14 the appropriate response in a previous appeal (SAC 06-00783),
15 when he requested to be transferred to ASH. The appellant was
16 advised his classification level and prior escape history did not
17 warrant such a transfer, nor did his misleading self-assertion of
18 predatory behavior. Although the appellant claims he has PTSD,
19 he was advised this condition is not treated in the Mental Health
20 Services Delivery System (MHSDS). There is no indication that
21 Dr. Jaffe, Dr. Kelly and/or Dr. Martin provided fraudulent
22 information to the appellant regarding his request for a transfer to
23 ASH. The appellant is appropriately housed at SAC, Psychiatric
24 Services Unit and is receiving the appropriate mental health
25 intervention commensurate with his level-of-care, as outlined in
26 the MHSDS Guidelines (1997). After review, there is no
compelling evidence that necessitates intervention at the Director's
Level of Review.

27 c. Log No. SAC 06-0264

28 On October 23, 2006, plaintiff filed an appeal alleging that he was not
29 receiving adequate mental health treatment at CSP-SAC. Plaintiff recounted his alleged
30 interactions with Brockett, and his allegations of staff retaliation due to plaintiff's participation in
31 the Brockett investigation, including being "subjected to intermediate sanctions in lieu of false
32 rule violation reports and illegal placement in (PSU) based on false inmate manufactured
33 confidential information"; he identified symptoms of PTSD, stress, anxiety, hearing unwanted

1 voices, feeling depressed and paranoid, having flashbacks of the alleged sexual abuse,
2 nightmares, vomiting, and rage; and stated that he was unable to confide in the CSP-S mental
3 health staff. (Dkt. No. 35-3 at 13, 15.) Plaintiff “respectfully request[ed] a transfer to the
4 intermediate care facility at Vacaville [CMF] or Atascadero State Hospital for Mental Health
5 Treatment” and that he “be provided with all reports related to this request.” (Id. at 13.)

6 Pursuant to their prior motion to dismiss, defendants provided only the Director’s
7 Level Decision on this administrative appeal. Review of that decision, and the pertinent 602
8 form, indicates that informal level review was bypassed. At the First Level Review, CSP-SAC
9 Senior Psychologist Henry Raming, Ph.D., partially granted plaintiff’s appeal on January 3, 2007,
10 based in part on his interview of plaintiff. As recounted at the Director’s Level Review (id. at
11 11):

12 Dr. Raming states that the appellant is correct in his contention that
13 he has been previously diagnosed as having PTSD and clinicians
14 have included that diagnosis in the clinical record. However,
15 clinical staff currently report no symptoms of PTSD in the
16 appellant’s functioning and presentation in the PSU program.
17 Further, the primary reason for the first denial regarding safety
18 issues at the DLR, still remain valid. Neither the CMF or ASH
19 will accept maximum security (Level IV) inmates with histories of
20 violence because of safety and security issues in their less
21 structured settings, which include dormitory living. Therefore, a
22 referral to these institutions is not feasible.

18 Dr. Raming indicates that the appellant was correctly informed by
19 mental health staff that PTSD is not accepted as the primary
20 diagnosis or focus of treatment in the CDCR. However, any stress
21 related issue can be addressed in his overall treatment plan and the
22 appellant can discuss his PTSD-related problems with his primary
23 clinician. As a secondary problem, PTSD can be included in the
24 appellant’s treatment plan. Dr. Raming noted that the appellant is
25 currently stating that he cannot confide in his primary clinician,
26 whom he believes is part of a custody conspiracy against him.

23 Plaintiff expressed dissatisfaction with Dr. Raming’s First Level decision,
24 asserting in part that CMF had adequate facilities to meet plaintiff’s needs, specifically, single
25 cells for high security (“Level IV”) inmates. (Id. at 11, 16.)

26 ///

1 Dr. Jaffe rendered the Second Level Review decision, denying plaintiff's appeal
2 on February 22, 2007. The denial on the appeal form indicates "See Attached Letter" (id. at 14),
3 but this letter has not been included in the parties' exhibits. As recounted at the Director's Level
4 Review, plaintiff "was informed that the appeals process does not allow him to add the 'Actions
5 Requested' in the original appeal. Therefore, any additional actions requested in the instant
6 appeal cannot be considered at this time. (Id. at 11.)

7 Plaintiff thereafter sought Director's Level Review, stating, "Appellant is
8 dissatisfied because prison officials are playing word games and attempted to cover up their
9 ongoing retaliation and retribution." (Id.)

10 The Director's Level Decision, issued by Grannis on June 11, 2007, denied
11 plaintiff's appeal, and reaffirmed the findings and conclusions of the prior levels of review. The
12 Director's Level Decision provided in full (id. at 12):

13 The DLR reviewed the issues of the appellant's appeal and
14 reaffirms the institution's examination and conclusions as
15 addressed within the SLR [Second Level Review]. In this case, the
16 institution has provided the appellant with a thorough response.
17 The appellant is encouraged to avail himself of the treatment
18 available to him within the CDCR Mental Health Services
19 Delivery System. There is no basis to grant the appellant's request
20 for a transfer to the CMF or ASH. There is no cause to intervene at
21 the DLR.

18 3. Processing of Plaintiff's Administrative Appeals

19 In general, a defendant's participation in the administrative review or denial of a
20 plaintiff's inmate appeal does not give rise to a cause of action, particularly one premised on due
21 process rights. See, e.g., Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988), cert. denied, 488
22 U.S. 898 (1988) (no constitutional right to an inmate appeal or grievance process). Thus,
23 "participation in the prison grievance process does not give rise to a cause of action." Lewis v.
24 Ollison, 571 F. Supp. 2d 1162, 1170 (C.D. Cal. 2008) (dismissing corrections personnel who
25 participated in the review and denial of plaintiff's inmate appeals); Buckley v. Barlow, 997 F.2d
26 494, 495 (8th Cir. 1993) (prison official's involvement in administrative appeals process cannot

1 serve as a basis for liability in a Section 1983 action); Azeez v. DeRobertis, 568 F. Supp. 8, 10
2 (N.D. Ill. 1982) (“[A prison] grievance procedure is a procedural right only, it does not confer
3 any substantive right upon the inmates.”) These authorities support defendants’ contention that
4 plaintiff is unable to state a cause of action against a prison official, under federal due process
5 law, based on the official’s unfavorable action in processing one of plaintiff’s administrative
6 appeals.

7 However, prison officials, particularly those in administrative positions, may be
8 “liable for deliberate indifference when they knowingly fail to respond to an inmate’s requests
9 for help.” Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006), citing Estelle v. Gamble, 429 U.S.
10 97, 104 (1976); and Greeno v. Daley, 414 F.3d 645, 652-3 (7th Cir. 2005). A correctional
11 official, particularly one with supervisory authority, who is informed of an alleged constitutional
12 violation (e.g. pursuant to reviewing an inmate’s administrative appeal), may be responsible for
13 remedying such violation. Jett at 1098. “A supervisor may be liable for an Eighth Amendment
14 violation if he or she was made aware of the problem and failed to act or if he or she promulgated
15 or enforced a policy under which unconstitutional practices occurred.” Valley v. Director of
16 Prisons, 2008 WL 436954, *5 (E.D. Cal. 2008), citing Jett, 439 F.3d at 1098; and Black v.
17 Coughlin, 76 F.3d 72, 74 (2d Cir. 1996).

18 Two of the mental health professionals who are defendants in this action held
19 supervisory positions during the relevant periods: Kelly was CSP-SAC’s Chief Psychologist
20 from January 2000 through June 2009; and Jaffe was CSP-SAC’s Chief Psychiatrist from
21 January 1998 to August 2011. Although Martin states that was employed at CSP-SAC as a
22 Senior Supervising Psychologist at CSP-SAC (Martin Decl., Dkt. No. 180-5 at 2), he is
23 designated only as a “Staff Psychologist” in his First Level Decisions denying plaintiff’s subject
24 administrative grievances. (See Dkt. No. 35-2 at 8, 25.) In contrast, defendants Kelly and Jaffe
25 had significant roles in the provision and oversight of CSP-SAC mental health services during
26 the events underlying this action. Moreover, each of these defendants was put on notice,

1 pursuant to the above-noted administrative appeals, of plaintiff’s mental health treatment
2 concerns and his request for assistance. For these reasons, and the additional reasons noted
3 below, the court finds that plaintiff’s Eighth Amendment claims against mental health defendants
4 Kelly and Jaffe remain cognizable, but not his claims against Martin.

5 4. Legal Standards for Eighth Amendment Deliberate Indifference Claims

6 a. Common Deliberate Indifference Analysis

7 The court previously found, pursuant to ruling on defendants’ motion to dismiss,
8 that plaintiff’s Eighth Amendment claims against defendants Kelly, Jaffe and Martin are
9 premised on theories of deliberate indifference to plaintiff’s mental health treatment needs,
10 failure to protect, and supervisory liability. (Dkt. No. 78 at 18.) Review of plaintiff’s claims in
11 light of the expanded factual record demonstrates that, as to the mental health defendants, these
12 claims are virtually identical.

13 The Fourth Circuit Court of Appeals has noted that “the standard of liability is the
14 same” for assessing overlapping failure to protect claims, and deliberate indifference to serious
15 medical needs claims, “and therefore independent analysis of each count is unnecessary.” Parrish
16 ex rel. Lee v. Cleveland, 372 F.3d 294, 302 (4th Cir. 2004), citing Young v. City of Mount
17 Ranier, 238 F.3d 567, 575 (4th Cir. 2001). As explained in Young:

18 [A failure to protect] claim is no different in any meaningful
19 respect from the indifferent-to-medical-needs claim and is
20 governed by the same standard of deliberate indifference. See
21 Wilson v. Seiter, 501 U.S. 294, 303 (1991) (finding “no significant
22 distinction between claims alleging inadequate medical care and
23 those alleging inadequate ‘conditions of confinement’” and
24 concluding that an inmate’s failure-to-protect claim must be
measured under the deliberate indifference standard); Hare v. City
of Corinth, 74 F.3d 633, 644 (5th Cir.1996) (en banc) (noting “the
absence of a constitutionally significant distinction between
failure-to-protect claims and medical care claims”). We therefore
conclude that the [plaintiffs’] claims must be measured under a
standard of deliberate indifference.

25 Young v. City of Mount Ranier, supra, 238 F.3d at 575. The Fourth Circuit’s reliance on a
26 common deliberate indifference analysis to assess factually similar claims alleging both a failure

1 to protect and deliberate indifference to serious medical needs, is consistent with Ninth Circuit
2 legal standards.

3 b. Deliberate Indifference to Serious Mental Health Needs

4 Prisoners have a constitutional right to adequate mental health care. “The
5 obligation to provide for the basic human needs of prisoners includes a requirement to provide
6 access to adequate mental health care.” Coleman v. Wilson, *supra*, 912 F. Supp. at 1298, citing
7 Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994) (holding “that the requirements for
8 mental health care are the same as those for physical health care needs”); and Hoptowit v. Ray,
9 682 F.2d 1237, 1253 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S.
10 472 (1995). “If the state fails to meet this obligation, ‘it transgresses the substantive limits on
11 state action set by the Eighth Amendment.’” Coleman, 912 F. Supp. at 1298, quoting Helling v.
12 McKinney, 509 U.S. 25, 32 (1993) (internal citation omitted).

13 An Eighth Amendment claim of deliberate indifference to serious mental health
14 needs may be actionable against both medical and correctional staff. “This is true whether the
15 indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison
16 guards in intentionally denying or delaying access to medical care or intentionally interfering
17 with the treatment once prescribed.” Estelle, 429 U.S. at 104-05 (internal quotations, citations,
18 and footnotes omitted).

19 “In the Ninth Circuit, the test for deliberate indifference consists of two parts.
20 First, the plaintiff must show a serious medical need by demonstrating that failure to treat a
21 prisoner’s condition could result in further significant injury or the unnecessary and wanton
22 infliction of pain. Second, the plaintiff must show the defendant’s response to the need was
23 deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or
24 failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the
25 indifference.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations, punctuation
26 and quotation marks omitted).

1 To establish deliberate indifference to an inmate’s serious mental health needs, the
2 plaintiff must show that the defendant both knew of, and disregarded, an excessive risk to
3 plaintiff’s health or safety. Farmer v. Brennan, 511 U.S. 825, 837 (1994). As summarized by
4 this court in Coleman:

5 The question . . . whether a defendant charged with violating
6 rights protected by the Eighth Amendment has the requisite
7 knowledge is “a question of fact subject to demonstration in the
8 usual ways, including inference from circumstantial evidence
9 [citation omitted], and a factfinder may conclude that a prison
10 official knew of a substantial risk from the very fact that the risk
11 was obvious.” [Farmer] at 114 S. Ct. at 1981. The inference of
12 knowledge from an obvious risk has been described by the
13 Supreme Court as a rebuttable presumption, and thus prison
14 officials bear the burden of proving ignorance of an obvious risk.
15 [Id.] at 1982. It is also established that defendants cannot escape
16 liability by virtue of their having turned a blind eye to facts or
17 inferences “strongly suspected to be true.” [Id.] at 1982 n. 8, and
18 that “[i]f ... the evidence before the district court establishes that an
19 inmate faces an objectively intolerable risk of serious injury, the
20 defendants could not plausibly persist in claiming lack of
21 awareness.” [Id.] at 1984 n.9.

22 Coleman v. Wilson, 912 F. Supp. at 1316.

23 Prisons officials defending a deliberate indifference claim may avoid liability by
24 demonstrating “that they did not know of the underlying facts indicating a sufficiently substantial
25 danger and that they were therefore unaware of a danger, or that they knew the underlying facts
26 but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or
nonexistent.” Farmer, 511 U.S. at 844. Thus, a prison official may avoid liability by presenting
evidence that he lacked knowledge of the risk and/or that his response was reasonable in light of
all the circumstances. Id. at 844-45; see also Wilson v. Seiter, 501 U.S. 294, 298 (1991);
Thomas v. Ponder, 611 F.3d 1144, 1150-51 (9th Cir. 2010).

27 c. Failure to Protect

28 “[A] prison official may be held liable under the Eighth Amendment for denying
29 humane conditions of confinement only if he knows that inmates face a substantial risk of serious
30 harm and disregards that risk by failing to take reasonable measures to abate it.” Farmer, 511

1 U.S. at 847. The duty to protect a prisoner from serious harm requires that prison officials take
2 reasonable measures to guarantee the safety and well being of the prisoner. Id. at 832–33; Frost
3 v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). To sustain a failure to protect claim on summary
4 judgment, the inmate must demonstrate that he was incarcerated under conditions posing a
5 substantial risk of harm and that prison officials were deliberately indifferent to those risks.
6 Farmer, 511 U.S. at 834; Frost, 152 F.3d at 1128; Redman v. County of San Diego, 942 F.2d
7 1435, 1443 (9th Cir. 1991).

8 d. Supervisory Liability

9 Supervisory liability may be imposed in an individual capacity only when the
10 supervisor participated in or directed the violations, or knew of the violations of subordinates and
11 failed to act to prevent them. Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009). “Under
12 Section 1983, supervisory officials are not liable for actions of subordinates on any theory of
13 vicarious liability. A supervisor may be liable if there exists either (1) his or her personal
14 involvement in the constitutional deprivation, or (2) a sufficient causal connection between the
15 supervisor’s wrongful conduct and the constitutional violation.” Hansen v. Black, 885 F.2d 642,
16 645-46 (9th Cir. 1989) (citations omitted). Thus, “[a]lthough there is no pure respondeat
17 superior liability under § 1983, a supervisor is liable for the acts of his subordinates ‘if the
18 supervisor participated in or directed the violations, or knew of the violations [of subordinates]
19 and failed to act to prevent them.’” Preschooler II v. Clark County School Bd. of Trustees, 479
20 F.3d 1175, 1182 (9th Cir. 2007), quoting Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).
21 Facts consistent with at least one of these scenarios must be presented in order to sustain the
22 claim against a supervisory defendant on summary judgment. Officials can be held liable for
23 their failure to implement a proper mental health care program or failure to adequately train or
24 supervise subordinates. Greason v. Kemp, 891 F.2d 829, 836–37 (11th Cir.1990).

25 In addition, as earlier noted, a supervisor who is informed of an alleged Eighth
26 Amendment violation, e.g. pursuant to reviewing an inmate’s administrative grievance, may be

1 liable if he or she failed to remedy it. Jett v. Penner, supra, 439 F.3d at 1097-98.

2 5. Analysis

3 a. Serious Mental Health Needs

4 The undersigned finds, for purposes of summary judgment, that plaintiff's mental
5 health needs, during all relevant periods, were "serious" within the meaning of the Eighth
6 Amendment.

7 Based on a review of plaintiff's mental health records, Defendant K. Kelly, CSP-
8 SAC Chief Psychologist, states that plaintiff had the following psychological diagnoses while
9 incarcerated at CSP-SAC (Kelly Decl., Dkt. No. 166 at 2-3):

10 [Plaintiff was] primarily diagnosed with Schizophrenia, paranoid
11 type; Schizoaffective Disorder, and Polysubstance Dependence, in
12 institutional remission. For a brief period of time, he also received
13 a second diagnosis of Post Traumatic Stress Disorder. Throughout
the review period, Manago was also diagnosed (not inclusive) with
Malingering, Intermittent Explosive Disorder, Psychotic Disorder
NOS, and with No Severe Mental Disorder.

14 No defendant disputes that these diagnoses represent serious psychological conditions, which
15 significantly impacted plaintiff's daily activities; nor does any defendant dispute that failure to
16 treat or accommodate these conditions could result in significant harm, or a significant risk of
17 harm, to plaintiff. Estelle, 429 U.S. at 104.

18 As a result, the following Eighth Amendment analyses are limited to assessing
19 whether defendants responded to plaintiff's serious mental health needs with deliberate
20 indifference.

21 b. Demonstration of Harm

22 To survive summary judgment on a deliberate indifference claim, plaintiff must
23 demonstrate that he was harmed by the alleged indifference. See, e.g., Shapley v. Nevada Bd. of
24 State Prison Com'rs, 766 F.2d 404, 407 (9th Cir. 1985), citing Estelle, 429 U.S. at 106; see also
25 Hallett v. Morgan, 296 F.3d 732, 746 (9th Cir. 2002). The undersigned finds, for purposes of
26 summary judgment, based on plaintiff's numerous allegations of intensified psychiatric

1 symptoms as set forth in his administrative appeals and recounted by the Prison Law Office, that
2 plaintiff suffered serious psychological harm due to his involvement in the Brockett
3 investigation; the alleged failure of CSP-SAC mental health staff to acknowledge this reality and
4 provide appropriate treatment; and plaintiff's resulting transfers to other institutions.

5 c. Defendant Kelly

6 Dr. K. Kelly, Ph.D., is a licensed clinical psychologist who worked as the Chief
7 Psychologist at CSP-SAC from January 2000 through June 2009; she also served as the CSP-
8 SAC Health Care Manager (Acting) from January 2006 through June 2007. Kelly avers that she
9 "did not typically provide direct patient (inmate) treatment and . . . do[es] not recall providing
10 direct mental health treatment to inmate Stewart Manago." (Kelly Decl., Dkt. No. 166 at 2-3.)
11 Kelly states that she has no recollection of plaintiff "personally informing me of an incident of a
12 sexual nature involving an officer," and, in any case, "was not responsible for conducting
13 investigations of allegations against custody staff." (Id. at 3.)

14 Plaintiff testified at his deposition that he never received mental health treatment
15 from Dr. Kelly, but talked with her "numerous times," the first time in June 2000, right after
16 plaintiff was transferred to CSP-SAC. (Manago Depo. at 134, 136.) Plaintiff testified that, prior
17 to his transfer from PBSP, Dr. Kelly assured PBSP staff that plaintiff's care at CSP-SAC's EOP
18 unit would comply with the requirements of the Madrid decision. (Id. at 136-37.) Plaintiff stated
19 that when he first arrived at CSP-SAC, "everything was fine -- my PTSD, my diagnosis, my
20 medication. . . . [E]very time the special master[s] . . . from the Coleman and Madrid [cases]
21 came to CSP-SAC to tour [], Dr. Kelly asked where I'm at, so she'd come and find me on the
22 yard and say, Hey, look. The special master want[s] to talk to you." (Id. at 137.)

23 While not referenced in her declaration, Dr. Kelly does not dispute plaintiff's
24 allegations and evidence that Kelly, as CSP-SAC Chief Psychologist, was instrumental in
25 effecting plaintiff's 2000 transfer from PBSP to CSP-SAC, for therapeutic reasons. This
26 apparently instrumental role in accepting responsibility for plaintiff's mental health care at CSP-

1 SAC, together with the fact that Kelly continued to work as CSP-SAC's Chief Psychologist
2 throughout all relevant periods, as well as CSP-SAC Health Care Manager (Acting) from January
3 2006 through June 2007, support an inference that Kelly was uniquely aware of plaintiff's
4 specific mental health needs. While Kelly denies any direct role in providing treatment to
5 plaintiff, it is reasonable to infer that Kelly's responsibilities included oversight of plaintiff's
6 direct care, as well as any therapeutic considerations attendant to plaintiff's transfer to SVSP, and
7 ultimately back to CSP-SAC.

8 Plaintiff testified that "my diagnosis never was changing until I made allegations
9 against Brockett." (Id.) "[T]hey [mental health staff] failed to provide adequate supervision
10 which resulted [in] me being sexually harassed and eventually sexually assaulted." (Id. at 134.)
11 "[W]hen I reported . . . that I was a victim of sexual assault and sexual harassment by Defendant
12 Brockett, they failed to provide me with a treatment plan, and then they allowed me to be
13 transferred to a place where they knew I wasn't going to get treatment to cover up those facts . . .
14 ." (Id. at 135.) Plaintiff testified that, instead of addressing the issues, Kelly "tried to conceal the
15 wrongdoings and cover up the staff misconduct." (Id. at 134.)

16 Plaintiff testified that he is also suing Kelly for her "direct supervision of a senior
17 psychologist" (Dr. Martin), by rejecting plaintiff's allegation that Dr. Martin had "downplayed"
18 plaintiff's mental health needs, and by finding that plaintiff's alleged PTSD was self-reported and
19 unsupported by plaintiff's health care records. (Id. at 136, 138-39.) Plaintiff testified that
20 Kelly's "own doctors diagnosed me with PTSD, but it was only after I reported that I was having
21 difficulty as a result of what Brockett subjected me to, now all of a sudden my PTSD don't
22 exist." (Id. at 139.) "[W]hen . . . I reported this case, all of a sudden in my appeals they say my
23 PTSD don't exist no more . . . and that I never had PTSD and there's nothing in my mental health
24 records that identify me as having PTSD." (Id. at 135.)

25 As previously noted, Kelly seeks to limit her role in plaintiff's care to her
26 processing of one of plaintiff's administrative appeals (Log No. SAC-06-0783), pursuant to

1 which Kelly denied plaintiff's request to be transferred to Atascadero State Hospital, and
2 defended Dr. Martin's findings. (Dkt. No. 35-2 at 13.) Kelly asserts that her denial of plaintiff's
3 request for a transfer to ASH was supported by the criteria set forth in a Memorandum of
4 Understanding between CDCR and ASH, and that her findings concerning plaintiff's PTSD were
5 based on her opinion "[a]t the time," noting that "[a] patient's mental health diagnosis can vary
6 based on mental health providers' individual opinions[,] and diagnoses can also change over time
7 as the patient's symptoms change." (Kelly Decl., Dkt. No. 166 at 3.) Interestingly, Kelly seeks
8 to explain that "I did not state or suggest that Manago had never been diagnosed with PTSD by
9 some other mental [health] provider during his time in prison." (*Id.*) However, Kelly also does
10 not address her summary denial of plaintiff's subsequent administrative appeal (Log No. SAC
11 06-1729), challenging the actions of Kelly, Jaffe and Martin in denying plaintiff's prior appeal,
12 wherein Kelly stated only that "PTSD is not a disorder recognized to be treated in the CDCR
13 when it is, in fact[,] diagnosed." (Dkt. No. 35-2 at 27.)

14 The court finds the narrow construction of their participation in only one of
15 plaintiff's appeals, by Kelly, Jaffe and Martin, to be self-serving. This grievance was not filed
16 until 2006, during plaintiff's second incarceration at CSP-SAC. Although plaintiff requested a
17 transfer to ASH, based in part on his PTSD, plaintiff also expressly sought "optimal treatment."
18 (Dkt. No. 35-2 at 4.) Plaintiff explained that he was "experienc[ing] significant stress and
19 anxiety," and described symptoms including auditory hallucinations, depression, paranoia,
20 flashbacks, nightmares, vomiting and rage. (*Id.*) As demonstrated by the exhibits to plaintiff's
21 subsequent appeal (Log. No. SAC 06-1729) (supported by defendants' submission of plaintiff's
22 mental health records (see Defendants' Exh. N, Dkt. Nos. 166-80)), plaintiff was previously
23 diagnosed with PTSD, including, significantly, in the April 2000 "Discharge Psychological
24 Evaluation" prepared by PBSP psychologist Dr. Grimes, to facilitate plaintiff's mental health
25 treatment upon his transfer to CSP-SAC. (Dkt. No. 193 at 16.) Moreover, as found by CSP-
26 SAC Senior Psychologist Dr. Raming, pursuant to plaintiff's third relevant appeal (Log No. SAC

1 06-0264), while clinical staff reported no current symptoms of PTSD, plaintiff “is correct in his
2 contention that he has been previously diagnosed as having PTSD and clinicians have included
3 that diagnosis in the clinical record.” (Dkt. No. 35-3 at 11.) Dr. Raming further noted that, while
4 “PTSD is not accepted as the primary diagnosis or focus of treatment in the CDCR . . . [a]s a
5 secondary problem, PTSD can be included in the appellant’s treatment plan.” (Id.)

6 Finally, the court notes that the current record contains no evidence of direct
7 communication between custodial and mental health staff regarding the appropriateness of
8 plaintiff’s participation in the Brockett investigation, or any assessment of the psychological risks
9 to plaintiff by such participation. No custodial or OIA defendant concedes awareness of
10 plaintiff’s mental status in December 2003 and January 2004, and no mental health defendant
11 acknowledges awareness of the Brockett investigation at the time it occurred.²⁰ The court finds
12 this lack of communication improbable but, if true, a significant failing by OIA staff, as well as
13 by mental health and custodial staff. Such communications and considerations on behalf of any
14 inmate sought to be used to facilitate an internal investigation of staff misconduct would appear
15 to be imperative.

16 These several matters demonstrate the existence of material factual disputes
17 concerning Kelly’s subjective state of mind in providing, and supervising other mental health
18 staff in providing constitutionally adequate mental health care and placements for plaintiff, and
19 protecting plaintiff from psychological harm. For these reasons, the undersigned recommends

20
21 ²⁰ However, the record demonstrates that plaintiff’s CSP-SAC Clinical Case Manager,
22 Dr. A. Gaerlan, Ph.D. (not a defendant in this action), was aware of plaintiff’s OIA involvement
23 during the investigation. (See, e.g., Dkt. No. 167-2 at 3 (Dec. 22, 2003 entry, noting plaintiff’s
24 statement that “Tomorrow, he said, he will meet with people from ‘Office of Internal Affairs.’”);
25 (Dec. 22, 2003 entry, noting plaintiff’s statement that he would not attend the Dec. 23, 2003
26 UCC meeting; “Besides, he’ll be with the ‘Office of Internal Affairs.’”); Dkt. No. 167-1 at 8
(Jan. 9, 2004 entry, noting that plaintiff “says he’s doing alright. He met with the people from
the Office of Internal Affairs today.”); Dkt. No. 166-5 at 8 (Jan. 14, 2004 entry noting, in context
of plaintiff’s anticipated transfer to SVSP, that the “Office of Internal Affairs will talk to him
tomorrow or Friday”).) Moreover, it appears that Dr. Gaerlan routinely communicated with
custodial defendants Vance and Kennedy, although no reference is made to the OIA investigation
in this context. (See, e.g., Dkt. Nos. 167-2 at 1; 167-3 at 9; 166-5 at 7-9.)

1 denial of defendants' motion for summary judgment on plaintiff's Eighth Amendment claims
2 against defendant Kelly, based on theories of deliberate indifference to serious mental health
3 needs, failure to protect, and supervisory liability.

4 d. Defendant Jaffe

5 Defendant M. Jaffe, M.D., worked as Chief Psychiatrist at CSP-SAC from
6 approximately January 1998 to August 2011. Jaffe avers that, in this capacity, he "was primarily
7 a supervisor of mental health staff and did not typically provide direct patient (inmate) treatment.
8 . . ." (Jaffe Decl., Dkt. No. 180-6 at 1.) Plaintiff does not allege that Dr. Jaffe was responsible
9 for directly providing mental health services to plaintiff. (Pltf. Depo. at 140.)

10 Plaintiff testified at his deposition that he named defendant Jaffe in this action
11 based on his failure to investigate plaintiff's administrative claims of anxiety and retaliation
12 stemming from the Brockett investigation, and refusal to recognize plaintiff's PTSD. (Id. at 140-
13 41.) Thus, Jaffe's challenged conduct is limited to his participation in the Second Level Review
14 of two of plaintiff's appeals (Log No. SAC 06-0783 and Log No. SAC 06-1729).

15 Jaffe recalls limited contact with plaintiff, stating (Jaffe Decl. at 3):

16 I do not recall personal interactions with Plaintiff Stewart Manago
17 and did not provide him with mental health care or treatment. I
18 recall seeing Manago on one occasion while he was an inpatient,
19 but I do not recall any conversations with him.

19 In his responses to plaintiff's First Set of Interrogatories, Jaffe conceded that he
20 recalled plaintiff's allegations, pursuant to his March 26, 2006 appeal (Log No. SAC 06-0783),
21 that he "was having flash backs of acts of sexual (sic) by officer Brockett," and "that he was
22 continuing to have nightmares, stress and rage over the sexual misconduct by officer Brockett."
23 (Dkt. No. 194-3 at 53-4.) Asked if plaintiff had a "long history of suffering from major mental
24 illness, including Post Traumatic Stress Disorder, due to him being physically, sexually and
25 emotionally abused as a child by a[n] older female," Jaffe responded, "No. Plaintiff claims more
26 illness than actually exists." (Dkt. No. 194-3 at 54.) Jaffe denied that plaintiff had a record of

1 being diagnosed with PTSD, or that any CSP-SAC mental health staff reported such diagnosis.
2 (Id. at 56, 57.) Jaffe also opined that plaintiff “received appropriate [mental health] treatment to
3 his issues but the sexual abuse has never, as far as I know, been substantiated.” (Id. at 55.)
4 Nevertheless, Jaffe avers that he never knowingly denied or delayed plaintiff access to mental
5 health treatment, or disregarded any known risk of injury to plaintiff. (Id. at 3.)

6 For the reasons previously stated, particularly because plaintiff’s mental health
7 records and the express findings of Dr. Raming support plaintiff’s complaints of PTSD, as well
8 as other serious mental disorders, the court finds that Jaffe’s persistent discrediting of these
9 matters demonstrates the existence of material factual disputes concerning Jaffe’s subjective state
10 of mind, particularly whether Jaffe knowingly disregarded any obvious risks to plaintiff’s mental
11 health. It is also reasonable to infer, given Jaffe’s position as CSP-SAC Chief Psychiatrist at all
12 relevant times, that Jaffe had additional opportunities to evaluate plaintiff’s mental health
13 services and potential risks to plaintiff’s mental health, viz., plaintiff’s 2000 transfer from PBSP,
14 plaintiff’s 2003-04 participation in the Brockett investigation, plaintiff’s 2004 transfer to SVSP,
15 and plaintiff’s 2005 return to CSP-SAC. For these reasons, the undersigned recommends denial
16 of defendants’ motion for summary judgment on plaintiff’s Eighth Amendment claims against
17 defendant Jaffe, based on theories of deliberate indifference to serious mental health needs,
18 failure to protect, and supervisory liability.

19 e. Defendant Martin

20 Dr. J. Martin, Ph.D., worked at CSP-SAC from March 2002 to September 2008.
21 Although Martin states that he worked as a Senior Supervising Psychologist who “did not
22 typically provide direct patient (inmate) treatment,” and does “not recall providing direct mental
23 health treatment to inmate Stewart Manago” (Martin Decl., Dkt. No. 180-5 at 1), Martin is
24 designated as a “Staff Psychologist” in his First Level Decisions denying plaintiff’s subject
25 administrative grievances (Dkt. No. 35-2 at 8, 25).

26 ///

1 Plaintiff testified at his deposition that he was suing defendant Martin because of
2 his “active role in trying to cover up the sexual misconduct of defendant Brockett, including
3 manipulating and falsifying state official documents.” (Pltf. Depo. at 139.) This charge is
4 premised on Martin’s repeated refusal to construe the allegations of plaintiff’s subject grievances
5 as a challenge to the quality of plaintiff’s mental health care, instead construing plaintiff’s
6 allegations as a “staff complaint” against Brockett not subject to review. Rather, Martin focused
7 on plaintiff’s request for a transfer to ASH, and repeatedly denied the request. (See Dkt. No. 35-
8 2 at 8 (Martin’s First Level Response to Log No. 06-0783), and 25 (Martin’s First Level
9 Response to Log No. 06-1729).)

10 Consistently, in his declaration, Martin “recalls” only that plaintiff informed him
11 “of an incident of a sexual nature involving an officer; it was my understanding that the matter
12 was already under investigation. As a Senior Supervising Psychologist at CSP-SAC, I was not
13 responsible for any investigation of allegations against custodial staff.” (Martin Decl., Dkt. No.
14 180-5 at 3.) Moreover, Martin notes that “the records” demonstrate his participation in only one
15 of plaintiff’s appeals (Log No. SAC 06-0783). (Id.) Finally, Martin states that he never
16 knowingly denied or delayed plaintiff’s access to mental health treatment, or disregarded any
17 known risk of injury to plaintiff. (Id. at 3.)

18 As previously noted, the undersigned declines to narrowly construe plaintiff’s
19 March 26, 2006 grievance (Log No. SAC 06-0783) as solely a requested transfer to ASH; rather,
20 plaintiff’s description of his psychological symptoms, and express goal of obtaining “optimal
21 treatment” (Dkt. No. 35-2 at 4, 6), reasonably required reviewing mental health staff to assess the
22 quality of plaintiff’s mental health care at CSP-SAC and his rationale for requesting a transfer to
23 another facility’s treatment program. Therefore, the undersigned finds the existence of material
24 factual disputes concerning Martin’s subjective state of mind in failing to consider the merits of
25 plaintiff’s treatment allegations. For this reason, the undersigned recommends denial of
26 defendants’ motion for summary judgment on plaintiff’s Eighth Amendment claims against

1 defendant Martin, based on theories of deliberate indifference to serious mental health needs, and
2 failure to protect, but not on a theory of supervisory liability.

3 C. Eighth Amendment Claims Against Defendants Chapman and Williams

4 Defendants Chapman and Williams were each employed as “Special Agents” by
5 CDCR’s Office of Internal Affairs-Northern Region. Neither defendant is trained as a medical or
6 mental health provider. Both defendants aver that they “had no authority to administer . . .
7 mental health services” to plaintiff; were “not responsible for the supervision of any person(s) at
8 the prisons that could affect Manago’s care and treatment at the prison;” had “no supervisory
9 responsibility or authority over staff at CSP-SAC;” “never intentionally or deliberately
10 disregarded any known risk and/or serious injury” to plaintiff; and “never at any time attempted
11 to cause harm or incite or direct others to cause harm” to plaintiff. (See Chapman Decl., Dkt.
12 No. 165-2 at 3; Williams Decl., Dkt. No. 165-6 at 3-4.)

13 As addressed below, and applying the legal standards set forth above, the
14 undersigned finds that plaintiff’s Eighth Amendment claims, premised on the alleged deliberate
15 indifference to plaintiff’s serious mental health needs, should proceed against Chapman, but not
16 Williams.

17 1. Defendant Chapman

18 Chapman’s integral role in the Brockett investigation, and her related interactions
19 with plaintiff, have been detailed above. While it is clear that Chapman had no responsibility for
20 providing mental health services to plaintiff, nor is there an indication that she had any
21 supervisory role (other than over plaintiff), it is equally clear that Chapman, as the OIA agent
22 principally assigned to the Brockett investigation in December 2003 and January 2004, had some
23 responsibility for ensuring that plaintiff was not harmed due to his participation in the
24 investigation. The record supports limited inferences that Chapman may have attempted to
25 assume this role after the conclusion of the investigation, pursuant to Chapman’s apparent
26 representations to plaintiff that she would facilitate his transfer to the California Medical Facility.

1 (See Dkt. No. 193-4 at 20-1 (plaintiff's August 2004 letter to Chapman allegedly reminding her
2 that, "You said that I would be transferred to (CMF) to assure me that I would not be subjected
3 the retaliation."); Dkt. No. 165-2 at 3 (Chapman's declaration statement that, "I do not recall the
4 date, but I recall making arrangements for Manago's transfer from Salinas Valley State Prison to
5 California Medical Facility (CMF). I believe that I spoke with the warden at CMF requesting
6 inmate Manago to be transferred there from Salinas Valley State Prison.").)

7 As earlier noted, the court finds the apparent lack of communication among OIA,
8 custodial and mental health staff, relative to plaintiff's participation in the Brockett investigation,
9 particularly troubling. In the absence of any concessions or acknowledgments by defendants that
10 someone bore the responsibility for inter-staff communication on this matter, the court finds that
11 Chapman was uniquely positioned to assume that role. It is reasonable to hold Chapman
12 responsible for failing to assess whether plaintiff's participation in the Brockett investigation
13 posed a substantial risk of serious harm to plaintiff's mental health. The existing record
14 demonstrates material factual disputes concerning whether Chapman deliberately disregarded
15 these matters by failing to take appropriate measures to minimize harm to plaintiff. Farmer, 511
16 U.S. at 847.

17 Accordingly, the undersigned recommends that plaintiff's Eighth Amendment
18 failure to protect claim should proceed against Chapman.

19 2. Defendant Williams

20 Defendant B. Williams, OIA Special Agent during all relevant times, avers in
21 pertinent part (Williams Decl., Dkt. No. 165-6 at 2-3):

22 I began working for the California Department of Corrections and
23 Rehabilitation in November 2003, and worked at the Headquarters
24 Division of the Office of Internal Affairs as a Senior Special Agent
25 where I ran a special investigations unit and a retaliation intake and
26 investigations unit until May 2004. On May 24, 2004, I was

25 ///

26 ///

1 assigned to the Office of Internal Affairs-Northern Region.²¹

2 Thus, Williams avers, because he was not assigned to the Northern Region until
3 May 2004, he “was never directly involved in an investigation of Officer Mary Brockett,” or the
4 “‘sting operation’ involving Officer Brockett and Stewart Manago.” (Id.) Moreover, Williams
5 states that when he was assigned to Headquarters during the Brockett investigation, from
6 November 2003 to May 2004, “an investigation of a correctional officer involving sexual
7 misconduct [was] not the type of investigation that my staff typically would have handled,” and
8 “at most, I would sometimes receive briefings on investigations if there was anything unusual
9 about the investigation.” (Id.)

10 Williams avers that he “never met or spoke[] with Stewart Manago to my
11 recollection” (id. at 4), but acknowledges his participation in reviewing one of plaintiff’s inmate
12 appeals (Log No. SAC-04-0946), in which plaintiff alleged that he’d been a victim of sexual
13 assault by Brockett, alleged that his transfer to SVSP was retaliatory, and alleged that defendants
14 Vance and Kennedy, through inmate Hackett, had threatened to retaliate against plaintiff for his
15 participation in the Brockett investigation. Administrative review was bypassed at the informal
16 and first formal levels, and the grievance was forwarded to the OIA-Northern Region for a
17 Second Level Response; Williams provided that response. (Dkt. No. 35-1 at 23-24.) Williams
18 explained (id.):

19
20 ²¹ Defendant Williams further avers (Dkt. No. 165-6 at 2-3):

21 I served as the Acting Special Agent in Charge (a management/
22 supervisory position) in the Office of Internal Affairs-Northern
23 Region from May 24, 2004 to January 2, 2005 and from June 6,
24 2006 to August 31, 2006. From January 3, 2005 to June 5, 2006
25 and from September 1, 2006 to November 26, 2006, I served as a
26 Senior Special Agent at the Office of Internal Affairs-Northern
Region. From November 27, 2006 to February 8, 2007, I was
Acting Special Agent in Charge (a management/supervisory
position) of the central intake unit at the Office of Internal Affairs
Headquarters division. From February 9, 2007 to August 31, 2008,
I returned to the Office of Internal Affairs-Northern Region as a
Senior Special Agent until I retired in August 2008.

1 As part of the inmate appeals process, I responded to inmate
2 Stewart Manago's CDC 602 appeal, Log #SAC-A-04-00946, on
3 June 21, 2004. In my response to inmate Manago, I indicated that
4 his CDC 602 appeal (requesting (1) CO Brockett be ordered to take
5 a blood test for any type of sexual diseases, including HIV and
6 AIDS, and (2) that he (Manago) be provided with a copy of all
7 investigative reports regarding the investigation) was denied, as all
8 internal affairs investigations were confidential in nature and
9 Brockett no longer worked for the Department of Corrections.
10 This was the extent of my involvement in Manago's appeal, and I
11 did not personally participate in the investigation of claims
12 regarding [Manago] or his claims that staff were retaliating against
13 him for reporting Brockett.

14 In addition, defendant Williams noted that plaintiff had been a "voluntary
15 participant" in the Brockett investigation, while plaintiff's allegations of retaliation were
16 "currently under review." (Dkt. No. 35-1 at 26.) The appeal was denied at the Director's Level
17 on October 12, 2004, on the ground that "the primary complaint against CO Brockett has been
18 resolved and closed," while the "secondary allegation of threats of reprisal has been actively
19 pursued and the investigation remains open." (Id. at 22.) The response further provided that,
20 "[u]pon completion of final review, or culmination of an investigation, the appellant will be
21 notified by the investigative body that an inquiry was completed and whether the complaint was
22 unsubstantiated or substantiated." (Id.) On October 11, 2005, Williams issued a follow-up
23 response which reportedly stated that the IAU's review of Hackett's central file found no
24 collaborative evidence to substantiate Hackett's allegations.²² (See Dkt. No. 193-4 at 22, and
25 Dkt. No. 165-8 at 14.) Williams' conclusions were reinforced by the October 12, 2005 and
26 October 28, 2005 memoranda prepared by defendant Sergeant B. Joseph, at the request of CSP-
SAC Warden Kernan, which concluded that there was no evidence of retaliation against plaintiff.
(Dkt. No. 165-8 at 7-8, 13-4.)

The court finds that Williams' limited role in this action fails to support plaintiff's
Eighth Amendment claims against him. There is no evidence to support a reasonable inference

²² Hackett's allegations involving this matter are addressed in greater detail below.

1 that Williams was involved in the Brockett investigation, or in plaintiff's transfer to SVSP.
2 While the undersigned remains troubled by the characterization of plaintiff's participation in the
3 Brockett investigation as "voluntary," Williams' reliance on this term does not alter his limited
4 role in the relevant matters. Moreover, at his deposition, plaintiff conceded that his claims
5 against Williams were premised on plaintiff's retaliation claims, that plaintiff "didn't work with
6 him personally," but contested only Williams "response to my staff complaint." (Pltf. Depo. at
7 83, 86, 88.)

8 For these reasons, the undersigned recommends that summary judgment be
9 granted for defendant Williams on plaintiff's Eighth Amendment claims.

10 D. Eighth Amendment Claims Against Defendants Vance and Kennedy

11 Plaintiff's remaining Eighth Amendment claims are against correctional staff
12 defendants S. Vance, CSP-SAC/EOP Facility A Correctional Captain, and P. Kennedy, CSP-
13 SAC/EOP Correctional Counselor. Plaintiff alleges that both defendants were deliberately
14 indifferent to plaintiff's serious mental health needs when they supported the December 23, 2003
15 decision to transfer plaintiff to SVSP. Plaintiff also alleges that Vance was deliberately
16 indifferent when, on December 10, 2003, he declined to follow the alleged decision of mental
17 health staff to place plaintiff in the Outpatient Housing Unit ("OHU"), and instead ordered
18 plaintiff's cell extraction and placement in AdSeg.

19 1. December 10, 2003 Cell Extraction

20 As recounted in the summary of facts herein, in a staff complaint plaintiff filed on
21 December 14, 2003 (Log No. SAC-03-2823), plaintiff alleged that, on December 10, 2003,
22 despite the approval of Kennedy and Dr. Frishman that plaintiff be moved to the OHU due to his
23 threats of suicide, Vance used unlawful influence on other employees to deny plaintiff's request
24 for suicide intervention, extract plaintiff from his cell with pepper spray, and place plaintiff in
25 AdSeg. Plaintiff requested that an investigation be conducted. (Dkt. No. 35-1 at 15-7; see also
26 Pltf. Depo. at 64-5.) On December 18, 2003, CSP-SAC Warden Knowles partially granted

1 plaintiff's complaint at the Second Level, based on the referral of plaintiff's complaint against
2 Vance for investigation. (Dkt. No. 35-1 at 16, 18, 20.) On February 3, 2004, plaintiff was
3 notified by Knowles that the challenged "incident was evaluated by the Executive Review
4 Committee which determined it did not warrant further review." (Id. at 18.) Nevertheless, the
5 Director's Level Response, issued April 8, 2004, denied plaintiff's appeal but noted that
6 plaintiff's allegations of staff misconduct were still "being reviewed and evaluated by the
7 institution's review committee." (Id. at 14.)

8 Vance does not address plaintiff's December 10, 2003 cell extraction in his
9 declaration. (See generally Dkt. No. 165-4 at 2-5.) However, in his answers to plaintiff's
10 interrogatories, Vance asserts that plaintiff was extracted from his cell and placed in AdSeg
11 because he "was a threat to the safety and security of the institution."²³ Vance's account is
12 supported by evidence submitted by plaintiff, specifically a December 10, 2003 Rules Violation
13 Report (Form CDC 115), which was issued pursuant to the report of correctional officer Moriarty
14 that plaintiff had challenged her authority by calling her names in front of other inmates,
15 challenged Moriarty's confiscation of plaintiff's raincoat several months before, and refused to
16 be placed in handcuffs by Moriarty. (See Dkt. No. 194-6 at 31-7.) The RVR and related
17 Interdisciplinary Progress Notes prepared by psychologist Dr. Gaerlan (plaintiff's case manager),
18 and Dr. Frishman, indicate that several staff members, including Gaerlan, Frishman, Kennedy
19 and Vance, attempted to persuade plaintiff to cooperate with his placement in AdSeg, based on

20
21 ²³ In his answers to interrogatories, Vance stated (Dkt. No. 194-4 at 28):

22 I recall that plaintiff Manago was placed in administrative segregation; my review
23 of plaintiff's records indicates that plaintiff was found guilty of a Rules Violation
24 for conduct that could lead to violence regarding an incident on the A Facility
25 yard involving Officer Moriarty. Later the same day, on December 20, 2003,
26 Plaintiff was served with the administrative segregation placement notice by Lt.
Ventimiglia and plaintiff refused to comply with orders to return a pen, paper and
clipboard resulting in a delay of 2 ½ hour[s] and requiring cell extraction; as a
result, plaintiff was written up for delaying a peace officer resulting in a holding
cell extraction. Therefore, plaintiff was a threat to safety and security of the
institution and was placed in administrative segregation.

1 the RVR, without resorting to a cell extraction. (Id. at 35, 37; see also Dkt. No. 167-3 at 6-11.)

2 This evidence fails to sustain plaintiff's claim that Vance's participation in
3 plaintiff's December 10, 2003 cell extraction and AdSeg placement demonstrated deliberate
4 indifference to plaintiff's serious mental health needs. Staff, including mental health staff,
5 engaged in prolonged efforts to persuade plaintiff to cooperate with his AdSeg placement, prior
6 to implementing his cell extraction. Moreover, plaintiff was provided mental health services
7 shortly thereafter -- on December 14, 2003, plaintiff was transferred from CSP-SAC's EOP unit
8 (AdSeg), to its Correctional Treatment Center ("CTC"), for suicide precautions (Dkt. No. 166-1
9 at 3), and thereafter, on December 18, 2003, discharged from CTC, and readmitted to the EOP
10 unit (Dkt. No. 166 at 15.) Taken together, these events fail to make a prima facie showing that
11 Vance was deliberately indifferent to conditions posing a substantial risk of harm to plaintiff
12 when he authorized plaintiff's December 10, 2003 cell extraction and AdSeg placement. Farmer,
13 511 U.S. at 834. Rather, the pertinent facts support the reasonable inference that Vance's
14 challenged conduct was reasonable in light of all the circumstances. Farmer, 511 U.S. at 844-45.

15 For these reasons, the undersigned recommends summary judgment for Vance on
16 plaintiff's Eighth Amendment claim premised on plaintiff's December 10, 2003 cell extraction
17 and placement in AdSeg.

18 2. December 23, 2003 Transfer Decision

19 Plaintiff challenges the December 23, 2003 decision, authorizing his January 21,
20 2004 transfer to SVSP, on both deliberate indifference and retaliation grounds. The former is
21 addressed herein. The initial decision to transfer plaintiff from CSP-SAC to SVSP was made at a
22 Unit Classification Committee ("UCC") meeting. (Exh. 2 to Kennedy Decl., Dkt. No. 165-5 at
23 6.) The December 23, 2003 decision (Form CDC 128G), which notes plaintiff's refusal to
24 appear before the committee, provides in pertinent part (id.):

25 UCC notes RVR dated 12/10/03[,] Confidential Memorandum
26 dated 12/18/03[,] and CDC 128-B dated 12/18/03 which indicates
[Manago's] Obsessive and Harassing behavior towards a particular

1 Staff Member that is currently assigned to the EOP Unit.
2 [Manago's] fixation on this Staff member has created a hostile
3 work environment and UCC notes transfer to alternate Level IV
4 institution is appropriate. Also noted is CDC 128B dated 12/23/03
5 authored by A. Gaerlan, [Manago's] Case Manager which indicates
6 [Manago's] claims that due to prior investigations with three
7 Officers currently working EOP 3 Block [none are defendants
8 herein] he feels that there is a conflict with him being housed in A
9 FAC EOP 3 Block.

6 . . . Committee acts to refer [Manago] to the CSR RX TX SVSP-IV
7 EOP /2nd choice CMC [California Men's Colony]-E-III EOP.
8 UCC notes [plaintiff] is a Level-IV however based upon no other
9 alternative level-IV EOP institutions, due to enemy situation, UCC
10 elects to refer for an override to a Level-III EOP. . . . This is a non-
11 adverse transfer.

10 The UCC decision is signed by defendant Vance, as Chairperson, with the
11 concurrence of defendant Kennedy, CCI and committee recorder, and Dr. Gaerlan, plaintiff's
12 case manager. (Exh. 2 to Kennedy Decl., Dkt. No. 165-5 at 6; see also Dkt. No. 167-2 at 1.) Dr.
13 Gaerlan's Interdisciplinary Progress Notes for December 23, 2003, are consistent with the
14 decision in noting that plaintiff had conflicts with three correctional officers in A3 Block (none
15 are defendants herein), and had recently received two RVRs for conflict with staff. (Dkt. No.
16 167-2 at 1, 3.) In addition, Kennedy avers that there was discussion at the meeting that plaintiff
17 was "fixated on a correctional officer which created a hostile work environment for that staff
18 member; I recall that the staff member was Officer Moriarty." (Kennedy Decl., Dkt. No. 165-5
19 at 3.) It was decided that Kennedy would refer plaintiff for transfer to another institution
20 provided there was no change in plaintiff's EOP LOC. (Dkt. No. 167-2 at 1.) Significantly, Dr.
21 Gaerlan's notes indicate that this decision was endorsed by psychiatrist Dr. Frishman, who opined
22 that "[i]t is in client's best interest to be transferred," and by Senior Psychologist Dr. Vasquez,
23 who "agreed the plan was clinically indicated." (Id.)

24 The UCC decision was endorsed at a January 14, 2004 Interdisciplinary Treatment
25 Team ("IDTT") meeting. (Dkt. No. 166-5 at 7-9.) Plaintiff attended the meeting, as did
26 defendants Vance and Kennedy, as well as Drs. Gaerlan, Vasquez, Frishman, and Perry, and

1 other team members. (Id. at 7.) Plaintiff questioned why he needed to be retained in an EOP
2 program; expressed his preference to be transferred to a “mainline CCCMS” program, either at
3 CSP-SAC or CSP-LAN; and stated that “SVSP is not okay because he claims he has a relative
4 working there.” (Id. at 9.) Nevertheless, plaintiff was transferred to SVSP’s EOP unit on
5 January 21, 2003.

6 Because the decision to transfer plaintiff was unanimously supported by plaintiff’s
7 mental health providers, the involvement of Vance and Kennedy in this decision appears to be
8 both reasonable and proactive. Farmer, 511 U.S. at 844-45. However, additional evidence of
9 record, submitted by defendants, indicates that “[d]etermining factors in deciding inmate
10 **Manago’s transfer** from SAC IV to SVSP IV on 1/21/04 [the IDTT meeting] was based on
11 Confidential Information dated 12/18/03 and a CDC 128-B dated 12/18/03, **Manago’s**
12 **participation with the Internal Affairs Investigation into staff misconduct** as well as
13 consideration of Classification Issues, Medical needs (EOP), and prison availability.” (Dkt. No.
14 165-8 at 12; see also id. at 6) (emphasis added.) This information is contained in the October
15 2005 memoranda prepared by Correctional Sergeant B. Joseph, the Criminal Prosecution
16 Coordinator in CSP-SAC’s Investigative Services Unit (“ISU”), at the request of CSP-SAC
17 Warden Kernan, who sought an ISU investigation into plaintiff’s claims that he had been
18 subjected to retaliatory transfers, false RVRs and unsupported AdSeg placements, threats to his
19 life, and a conspiracy of correctional staff to remove plaintiff from SVSP and HDSP yards based
20 on false confidential information. (Id. at 5-17.) Joseph found no support for the remainder of
21 plaintiff’s claims.

22 This evidence demonstrating that the decision to transfer plaintiff to SVSP was
23 based, at least in part, on plaintiff’s participation in the Brockett investigation, is underscored by
24 the fact that Brockett remained working at CSP-SAC until her termination on March 31, 2004.
25 Moving plaintiff out of CSP-SAC only four days after his January 17, 2004 recording of his
26 interactions with Brockett allowed officials to continue the investigation without any potential

1 disclosure or interference by plaintiff. Moreover, the December 23, 2003 UCC decision was
2 reached only five days after plaintiff was discharged from the CTC, where he was on suicide
3 watch; six days after plaintiff first met with Chapman; and three days after plaintiff's allegedly
4 first intimate contact with Brockett. The January 14, 2004 IDTT decision was reached only five
5 days after Chapman presented the "operation plan" to plaintiff; four days after plaintiff gave
6 Brockett the putative letter to mail; and two days before plaintiff was supplied with the subject
7 voice recorder.

8 The declaration of Vance, who was Facility A Correctional Captain at all relevant
9 times, supports a reasonable inference that he was aware of plaintiff's participation in the
10 Brockett investigation as it transpired, and was uniquely positioned to facilitate both plaintiff's
11 participation in the investigation and plaintiff's transfer. Vance avers in pertinent part (Vance
12 Decl., Dkt. No. 165-4 at 3):

13 I first came into contact with inmate Stewart Manago when I
14 transferred to A Facility at CSP-SAC as the Facility Captain. [¶]
15 When I was first transferred to A Facility where inmate Manago
16 was housed, I recall the outgoing Facility Captain, Captain J.
17 Walker, briefly telling me that an investigation had been going on
18 involving Manago and an officer in the dining room and he
19 informed me that the investigation was winding down. I did not
20 know any more information about this investigation, was not
21 involved in the investigation and never read any reports about the
22 investigation. I did not learn until later that the officer involved
23 was Officer Brockett.

19 Although Vance does not provide the date of his transfer to A Facility,²⁴ the record supports an
20 inference that it was sometime before December 10, 2003, when Vance ordered plaintiff's cell
21 extraction. The relevant events between plaintiff and Brockett took place shortly thereafter.

22 This evidence, together with Vance's role in making custodial decisions in
23 consultation with Dr. Gaerlan (see e.g. Dkt. Nos. 167-2 at 1; 167-3 at 9; 166-5 at 7-9) (who was,

24
25 ²⁴ Similarly, Vance does not provide the date when he learned that the subject
26 investigation was about defendant Brockett. However, in his responses to plaintiff's
interrogatories, Vance conceded that he learned about Brockett's alleged misconduct and related
investigations "in the early 2000s." (Dkt. No. 194-4 at 29.)

1 in turn, expressly aware of plaintiff's interactions with the OIA (see n.20, supra), supports an
2 inference that Vance was not only contemporaneously aware of plaintiff's participation in the
3 Brockett investigation but, as Facility Captain, authorized and facilitated such participation, e.g.,
4 by allowing plaintiff to meet with OIA officials, enter the dining room unescorted, and wear a
5 recording device. No other correctional defendant apparently had such access to, and influence
6 regarding, both plaintiff's custodial and mental health care status. Vance has presented no
7 evidence to rebut these reasonable inferences.

8 While the available evidence supports a reasonable inference that Vance had a
9 greater awareness of these matters than did Kennedy,²⁵ the fact that the challenged UCC decision
10 was made only by Vance, Kennedy and Gaerlan, supports a reasonable inference that Kennedy
11 was aware of all pertinent factors supporting that decision. Moreover, while Sergeant Joseph's
12 memoranda states that the Brockett investigation was a factor in the IDTT's transfer decision (not
13 the UCC decision), that meeting was also attended by Vance, Kennedy and Gaerlan.

14 For these reasons, the undersigned finds that this action should proceed on
15 plaintiff's Eighth Amendment claims that Vance and Kennedy failed to protect plaintiff, pursuant
16 both to plaintiff's active participation in the Brockett investigation, and plaintiff's transfer to
17 SVSP.

18 E. No Qualified Immunity on Plaintiff's Cognizable Eighth Amendment Claims

19 For the foregoing reasons, and as summarized at the conclusion of these findings
20 and recommendations, the court finds that this action should proceed on plaintiff's narrowed
21 Eighth Amendment claims against defendants Chapman, Kelly, Jaffe, Martin, Vance and
22 Kennedy, as well as Brockett. None of these defendants are entitled to qualified immunity on
23

24 ²⁵ Kennedy avers that she "was not involved in the investigation of Officer Mary
25 Brockett's alleged misconduct involving Plaintiff Manago . . . [and] only heard that there had
26 been an investigation of Brockett after the fact. . . . At the time of the UCC meeting on 12/23/03,
I had no knowledge of the Brockett investigation involving Manago" (Kennedy Decl., Dkt.
No. 165-5 at 3.)

1 these claims. Construing the relevant facts in the light most favorable to plaintiff, no defendant
2 can reasonably assert that plaintiff did not, at all relevant times, have a clearly established right to
3 constitutionally adequate mental health care which, allegedly, defendants knowingly violated
4 pursuant to their challenged conduct. Anderson, *supra*, 483 U.S. at 640; Farmer, 511 U.S. at 834.

5 F. First Amendment Retaliation Claims

6 Pursuant to ruling on defendants’ motions to dismiss, the court found that
7 plaintiff’s First Amended Complaint states cognizable First Amendment retaliation claims
8 against defendants Vance, Kennedy, Williams, Chapman, Shannon, Joseph, Garcia, Tinseth,
9 Wachter, Morrow, Hill and Gold. The court also found that plaintiff states related supervisory
10 liability claims against defendants Vance, Williams, Chapman, Kelly, Jaffe, Shannon, Joseph,
11 Hill and Gold. (Dkt. No. 78 at 24.)

12 Defendants move for summary judgment on each of these claims. For the reasons
13 that follow, the undersigned recommends summary judgment for defendants on each of
14 plaintiff’s First Amendment retaliation claims.

15 1. Legal Standards

16 “[A] viable claim of First Amendment retaliation entails five basic elements: (1)
17 An assertion that a state actor took some adverse action against an inmate (2) because of (3) that
18 prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First
19 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”
20 Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005). Moreover, direct and tangible harm will
21 support a First Amendment retaliation claim even without demonstration of chilling effect on the
22 further exercise of a prisoner’s First Amendment rights. *Id.* at 568, n.11. “[A] plaintiff who fails
23 to allege a chilling effect may still state a claim if he alleges he suffered some other harm” as a
24 retaliatory adverse action. Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009), citing
25 Rhodes, 408 F.3d at 568, n.11.

26 ///

1 Subject to these standards, the court is nevertheless required to “avoid excessive
2 federal judicial involvement in prison administration,” and to “afford appropriate deference and
3 flexibility to state officials trying to manage a volatile environment.” Pratt v. Rowland, 65 F. 3d
4 802, 807 (9th Cir. 1995), quoting Sandin v. Connor, 515 U.S. 472, 482 (1995).

5 2. Analysis

6 a. Claim of Allegedly Retaliatory Transfer of Plaintiff Against
7 Defendants Chapman, Williams, Vance, Kennedy and Hill

8 Plaintiff alleges that his transfer to SVSP’s EOP program, on January 21, 2004,
9 was an act of retaliation by defendants Chapman, Williams, Vance, Kennedy and Hill, due to
10 plaintiff’s participation in the Brockett investigation. Plaintiff testified that no one explained the
11 reason for his transfer, which was made over his objections. (SAC, Dkt. No. 20 at 7, 9-10; Pltf.
12 Depo. at 56, 106-7.)

13 While plaintiff’s challenge to his 2004 transfer supports a deliberate indifference
14 claim, it fails to satisfy one element necessary to sustain a retaliation claim. Because all involved
15 mental health professionals found plaintiff’s transfer to be in his best interests, from a mental
16 health treatment perspective, plaintiff cannot demonstrate that his transfer “did not reasonably
17 advance a legitimate correctional goal.” Rhodes, supra, 408 F.3d at 568. Thus, plaintiff fails to
18 demonstrate a cognizable retaliation claim against defendants Vance and Kennedy on this basis,
19 despite their direct involvement in the challenged transfer.

20 Additional reasons support summary judgment for defendants Chapman,
21 Williams, and Hill (CSP-SAC Associate Warden from 2006 to January 2009), on this claim.
22 There is no evidence of record to support a finding that defendant Williams had any role in the
23 December 23, 2003 transfer decision. Williams’ participation in this action commenced with his
24 May 24, 2004 assignment to the OIA-Northern Region. Plaintiff conceded this fact in his
25 deposition, stating that Williams was not “initially” involved in the Brockett investigation, but
26 became involved when he investigated plaintiff’s inmate appeal (Log No. 04-0946), which

1 plaintiff filed in May 2004, and to which Williams responded in June 2004. Similarly, there is
2 no evidence of record to support defendant Hill's participation in the subject transfer. Hill's
3 involvement with this action commenced in October 2006, pursuant to his participation in
4 reviewing plaintiff's administrative grievances. Finally, the only evidence that Chapman had any
5 involvement in plaintiff's transfers is her concession that she sought, unsuccessfully, to have
6 plaintiff transferred from SVSP to CMF. (Dkt. No. 165-2 at 3.)

7 For these reasons, summary judgment should be granted for defendants Chapman,
8 Williams, Vance, Kennedy and Hill, on plaintiff's claim that these defendants violated his First
9 Amendment rights by transferring him to SVSP in retaliation for plaintiff's participation in the
10 Brockett investigation.

11 b. Alleged Threat of Harm by Defendants Vance and Kennedy

12 While housed at SVSP, plaintiff filed an administrative grievance on May 11,
13 2004 (Log No. SAC 04-0946), alleging sexual misconduct by Brockett, as well as alleged
14 retaliation against plaintiff by correctional staff for plaintiff's participation in the Brockett
15 investigation. In support of the latter claim, plaintiff attached two notes allegedly written by
16 SVSP inmate Brian Hackett. (Dkt. No. 35-1 at 27.) The first attachment is a handwritten note,
17 addressed to "Eight-Ball" (plaintiff's nickname), and allegedly signed by Hackett, which states
18 that, on February 9, 2004, when Hackett was at CSP-SAC's "CTC" [Correctional Treatment
19 Center] ("because I fell down the stairs and was on suicide watch"), "Vance and Ms. P. Kennedy
20 . . . came to me and . . . said if I delivered this message to you that they'd make sure I received
21 my proper medical treatment, man I was in bad shape and still is but I said I'd deliver the
22 message because I was in severe pain and under duress. I wasn't even suppose to come to this
23 prison [SVSP] I was put up for Lancaster and CSP Corcoran due to my medical situation I even
24 got the ADA complaint to show you." (Id. at 29.) Hackett passed along the following message:

25 They said they would make sure I was placed where you were at
26 Salinas Valley and to tell you that if you get at that bitch from the
kitchen again or try to make further problems for her by testifying

1 against her, it's gonna be all bad for you folks, They gonna send
2 somebody to kill you or you kill them either way you'd never see
3 day light or the streets again. So whatever it is you got going on
4 folks, you need to drop it or watch your back! That's the message,
5 I was sent here to specifically deliver you this message so take it
6 for what its worth, on a heads up!

7 (Id.) These allegations are repeated in Hackett's formal declaration, dated May 7, 2004, also
8 attached to plaintiff's subject grievance.²⁶ (Id. at 30-31.)

9 At his deposition, plaintiff read aloud Hackett's handwritten note, and observed
10 that, upon Hackett's transfer to SVSP, he was placed only "two doors down" from plaintiff,
11 allegedly for the purpose of providing plaintiff with the alleged message from Vance and
12 Kennedy (Pltf. Depo. at 88; see generally id. at 88-96.) Moreover, plaintiff testified, although
13 Vance and Kennedy had originally put Hackett up for transfer to Lancaster or Corcoran, they
14 instead transferred him to SVSP, in order to give plaintiff their subject message.

15 Plaintiff testified that further evidence in support of this claim is the fact that
16 plaintiff was subject to a cell extraction at SVSP, on allegedly false charges, two weeks after his
17 June 2, 2004 testimony in the Brockett matter. Plaintiff testified that, on June 16 or 17, 2004,
18 staff came to plaintiff's cell and told him to "cuff up" because he was going to AdSeg for
19 conspiracy to assault staff. When plaintiff declined to cooperate, his cell was pepper sprayed,

20 ²⁶ Hackett's undated handwritten note and May 7, 2004 declaration, as well as a
21 subsequent declaration dated May 22, 2004, are also included in plaintiff's exhibits. (See Dkt.
22 Nos. 193-1 at 2-4; 193-4 at 23-24; 193-5 at 2.) Defendants object to the court's reliance on these
23 documents on grounds of foundation, authentication and hearsay. (See Dkt. No. 222 at 3.)
24 Defendants' objections are overruled for purposes of summary judgment; this court offers no
25 opinion on the admissibility of these documents at trial. This court does not accept as true the
26 allegations contained in Hackett's note and declaration, only the apparent fact that these
27 documents were written by Hackett and communicated to plaintiff. These documents were
28 deemed sufficiently reliable by prison officials to evoke formal responses to plaintiff's related
29 administrative grievance, as well as a further investigation by the IAU, at the CSP-SAC
30 Warden's request, and as conducted by defendant Joseph. Moreover, the docket indicates that
31 inmate Hackett is now deceased (see Dkt. No. 210), which may support an unavailability
32 exception to the hearsay rule, see Fed. R. Evid. 804(a)(4), (b)(3). Consideration of these
33 documents is also warranted by the undersigned's task to review the record on summary
34 judgment in the light most favorable to plaintiff. Matsushita, 475 U.S. at 587; Saucier v. Katz,
35 533 U.S. 194, 201 (2001).

1 and plaintiff moved to AdSeg. Plaintiff avers that he was cleared of all charges on August 9,
2 2004. (On August 19, 2004, plaintiff was moved from AdSeg to B Facility, where he remained
3 until his transfer to HDSP on September 14, 2004.) It is plaintiff's contention that this incident
4 represented follow-through on the threats made by Vance and Kennedy, as communicated to
5 plaintiff by inmate Hackett. (FAC at 10-1; Pltf. Depo. at 109-11.)

6 Plaintiff's exhibits include a Director's Level Review decision and related filings
7 in response to defendant Hackett's November 24, 2003 ADA request (on a Form CDC 1824), for
8 transfer from CSP-SAC to another institution better equipped to accommodate Hackett's
9 mobility impairments. (See Dkt. No. 194-7 at 64-8.)²⁷ Kennedy reviewed Hackett's request, and
10 wrote that Hackett "was seen on 12/23/03 by UCC and referred to CSRT for transfer to COR
11 [CSP-Corcoran] IV EOP, LAC [CSP-Los Angeles, in Lancaster]." (Id. at 66.) The
12 recommended transfer was approved by CSP-SAC Warden Stiles on January 5, 2003. (Id.)
13 However, pursuant to the Second Level Review of Hackett's request, Associate Warden Knowles
14 informed Hackett that he had instead been "endorsed to Salinas Valley State Prison Level IV, a
15 non-impacting designated institution whose physical structure will better accommodate your
16 physical needs and aids." (Id. at 68.) The Director's Level Review, issued March 19, 2004, by
17 Appeals Chief Grannis, affirmed the Second Level decision, noting that Hackett was transferred
18 to SVSP on February 24, 2004. (Id. at 66.)

19 In addition to Hackett's notes and affidavits, plaintiff has submitted the affidavits
20 of inmates Robinson, Ware, Scruggs, Sanders, Taylor, Bibbs, Blevens and Chappell, in support
21 of the instant retaliation claims against Vance and Kennedy. (Pltf. Depo. at 95-6; Affidavits are
22

23 ²⁷ Defendants' objections to this court's review of these documents (Dkt. No. 222 at 17-
24 18), are overruled. In addition to the reasons stated in the prior footnote, there is no apparent
25 reason for questioning, on summary judgment, the authenticity of these formal administrative
26 documents. Documents not authenticated at summary judgment may nonetheless be admissible
at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003) (evidence which could be
made admissible at trial may be considered on summary judgment); see also Aholelei v. Hawaii
Dept. of Public Safety, 220 Fed. Appx. 670 (9th Cir. 2007).

1 at Dkt. No. 193-5 at 3-16.) Defendants' objections to these affidavits on grounds of foundation,
2 authentication, hearsay and relevance (Dkt. No. 222 at 7-11, 15, 19-21), are duly noted and
3 sustained.

4 The undersigned has carefully reviewed plaintiff's admissible evidence in support
5 of his retaliation/threat of harm claim against defendants Vance and Kennedy. However, like
6 plaintiff's previous retaliation claim, the instant claim fails to contain all of the necessary
7 elements. Lacking in the present claim is evidence that defendants' alleged threat "chilled
8 [plaintiff's] exercise of his First Amendment rights." Rhodes, 408 F.3d at 568. On the contrary,
9 plaintiff defied defendants' alleged threat by testifying in the Brockett matter, and has presented
10 no evidence to demonstrate that he was an unwilling or uncooperative witness. Plaintiff alleges
11 an alternative harm, see id. at 568, n.11; Brodheim, 584 F.3d at 1269, specifically, his cell
12 extraction executed two weeks after his testimony before the State Personnel Board, on charges
13 that were later dismissed. However, plaintiff has submitted no evidence demonstrating a
14 connection between the alleged threat made by defendants Vance and Kennedy, and plaintiff's
15 SVSP cell extraction. This omission is underscored by plaintiff's only pertinent (and apparently
16 immaterial) deposition testimony, viz., that "Lieutenant C. Donahue, the one that ordered me
17 locked up, is a known convicted felon. Okay. He got several convictions -- got four aka names
18 while working as s corrections officer. He was the one who solicited these inmates to fabricate
19 the charges on [me]." (Pltf. Depo. at 110-11.)

20 For these reasons, the court finds plaintiff has failed to demonstrate a cognizable
21 retaliation claim against defendants Vance and Kennedy based on their alleged threat delivered
22 by inmate Hackett. Summary judgment should be granted for defendants Vance and Kennedy on
23 plaintiff's claim that these defendants threatened physical harm to plaintiff if he testified in the
24 Brockett matter.

25 c. Alleged Retaliatory Misconduct After April 6, 2005 Against
26 Defendants Vance, Shannon, Joseph, Garcia, Tinseth, Wachter,

1 Morrow, Hill and Gold

2 Following his incarceration at SVSP, plaintiff was incarcerated at HDSP from
3 September 14, 2004, until April 6, 2005, then transferred back to CSP-SAC. Plaintiff alleges
4 that, upon his return to CSP-SAC, he was subjected to retaliatory misconduct by prison officials
5 due to plaintiff's participation in the Brockett investigation. Pursuant to his administrative
6 grievance filed October 15, 2006, plaintiff alleged that defendants Vance, Shannon, Joseph,
7 Garcia, Tinseth, Wachter, and Morrow spread rumors that plaintiff was a "snitch" for
8 participating in the Brockett investigation, and announced that it was "open season" against
9 plaintiff, thus "conspiring or inciting other inmates to assault appellant, . . . working hand to hand
10 in order to have additional false confidential information placed in appellant's C-file, . . .
11 granting special privileges to some inmates who assist them with their retaliatory actions [against
12 plaintiff] . . . paying some inmates tobacco and coffee in order to have some well known
13 mentally ill inmate patients to file false confidential information against me as a favor (sic) for
14 Captain S. Vance and other corrupted staff on 'A' Facility." (Log No. SAC 06-0783.) (Dkt. No.
15 35-3 at 4-6.) Plaintiff requested that an unbiased investigation be conducted by the OIA. (Id. at
16 4.) These allegations are reiterated in plaintiff's amended complaint. (FAC, Dkt. No. 20 at
17 12-18.)

18 Associate Warden Hill issued the First Level Response on November 15, 2006,
19 noting that plaintiff had been interviewed on October 31, 2006, by Sergeant Gold, and that
20 plaintiff's grievance was therefore partially granted insofar as "an inquiry into your allegation has
21 been conducted." (Dkt. 35-3, at 8.) Plaintiff thereafter complained that Sergeant Gold failed to
22 ask him for the inmate witness evidence he offered. (Id. at 5.) Warden J. Walker issued the
23 Second Level Response on December 26, 2006, stating that the inquiry into plaintiff's allegations
24 had been completed and no further inquiry was warranted. (Id. at 9.) In response to plaintiff's
25 statement of dissatisfaction that staff failed to interview his witnesses (id. at 5), the Director's
26 Level Appeal Decision, issued April 12, 2007, granted in part plaintiff's appeal, stating (id. at 2):

1 On April 10, 2007, the written report of appeal inquiry of the staff
2 complaint was obtained and examined at the DLR. The inquiry does
3 nothing to investigate the appellant's allegations. For example, the
4 investigator states that he does not have to interview witnesses, if the
5 appellant does not provide the names before the interview. The DLR
6 maintains that this statement is inaccurate and not consistent with effective
7 misconduct investigative standards. Based on the above, the institution
8 shall redo the inquiry addressing any and all facts that support their
9 eventual finding. The appellant shall be notified of its completion. . . .
10 This decision exhausts the administrative remedy available to the appellant
11 within the CDCR.

12 Pursuant to ruling on defendants' motions to dismiss, this court found that this
13 administrative appeal demonstrated exhaustion of plaintiff's retaliation claim against defendants
14 Vance, Shannon, Joseph, Garcia, Tinseth, Wachter, and Morrow. In addition, the court found
15 that plaintiff's retaliation claims against defendants Hill and Gold were exhausted by this appeal,
16 because the Director's Level Review found the actions of Hill and Gold inconsistent with
17 effective misconduct investigative standards. Inclusion of all of these defendants was also found
18 to be consistent with plaintiff's claim that a "code of silence" ("Green Wall") surrounded the
19 alleged retaliatory misconduct of these defendants. The court further found that plaintiff had
20 stated cognizable retaliation claims against defendants Vance, Shannon, Joseph, Hill and Gold, in
21 their respective supervisory roles.²⁸

22 In support of these claims, plaintiff has submitted the affidavits and completed
23 questionnaires²⁹ of several CSP-SAC inmates, dated 2005 to 2009.³⁰ Defendants' objections to

24 ²⁸ The amended complaint identifies these defendants' supervisory roles as follows:
25 Hill is the Associate Warden at CSP-Sacramento, Vance is Facility Captain, Shannon is
26 Correctional Lieutenant, and Joseph and Gold are both Correctional Sergeants. (Dkt. No. 20, at
27 3.)

28 ²⁹ In pertinent part, the questionnaire prepared by plaintiff sought to ascertain whether the
29 reporting inmates had witnessed CSP-SAC correctional officers "manipulating mentally ill
30 inmates to get themselves involved in violence," or "to engage into any type of serious
31 misconduct;" whether the inmates had been denied proper mental health care; whether "any
32 mental health staff . . . ever committed fraud and Falsification of your mental health records, in
33 order to cover up staff misconduct;" whether the inmates had witnessed any correctional officers
34 "attempt to intimidate inmates, who report . . . staff criminal misconduct;" whether inmates had
35 information concerning any CSP-SAC correctional staff "setting up some inmates to be assaulted
36 and murdered, as a form of retaliation and retribution for reporting staff criminal behavior," or

1 this evidence (see Dkt. No. 22 at 7-11), on grounds of authentication, foundation, hearsay and
2 relevance, are sustained. The court finds that, even if these questionnaires could be properly
3 authenticated, they are of very limited relevance to plaintiff's own retaliation claims. Moreover,
4 the wide-ranging and anecdotal averments of plaintiff's witnesses are rebutted by the declarations
5 of each defendant that none has ever "at any time attempted to cause harm or incite or direct
6 others to cause harm" to plaintiff; at no time referred to plaintiff as a "snitch"; never told anyone
7 that it was "open season" against plaintiff; and never associated with a "Green Wall."³¹

8 For these reasons, the undersigned recommends that summary judgment be
9 granted on plaintiff's claims of retaliatory misconduct, allegedly commencing with plaintiff's
10 return to CSP-SAC in April 2005, against defendants Vance, Shannon, Joseph, Garcia, Tinseth,
11 Wachter, Morrow, Hill and Gold.

12 ////

14 "having false charges filed against some inmates, who report staff serious criminal behavior;" or
15 whether inmates had information about "Mental Health Staff, working in concert to cover up []
16 some Correctional officers wrongdoing;" whether any inmate had experienced prison officials
17 doing "an absolutely pathetic and superficial job investigating your complaints" as set forth in an
18 inmate appeal; whether the inmates had heard rumors that plaintiff was a "snitch" for reporting
19 staff sexual misconduct, particularly whether any inmate had heard that any of the following
20 correctional staff had spread such rumors about plaintiff, listing defendants herein Vance,
21 Shannon, Joseph, Gold, Garcia, Tenseth, Wachter and Morrow, as well as non-defendant Laffitte.
22 (See e.g. Dkt. No. 193-5 at 17-25.)

19 ³⁰ The questionnaires were completed by inmate A. Robinson on July 28, 2009; inmate
20 K. Avery on June 28, 2009; inmate A. Scruggs on July 3, 2009; inmate R. Lay Jr. on February
21 26, 2008; inmate K. Taylor on July 2, 2009; inmate R. Bibbs on June 26, 2009; inmate K.
22 Candler on November 12, 2008; inmate D. Bass on November 27, 2009; inmate P. Blevins on
23 July 14, 2009; inmate G. Wheaton on July 13, 2009; inmate R. Chappell on October 3, 2009; and
24 inmate B. Fuller on September 29, 2009. (See Dkt. Nos. 193-5 at 17 through 193-6 at 94.) The
pertinent affidavits were completed by inmate A. Robinson, dated September 28, 2005; inmate
K. Avery, dated November 28, 2005; two affidavits by inmate A. Scruggs, dated December 11,
2005 and March 1, 2006; inmate M. Sanders, dated July 29, 2006; and inmate A. Tarkington,
dated August 3, 2009. (See Dkt. No. 193-5 at 3-16.)

25 ³¹ See Vance Decl. (Dkt. No. 165-4 at 4); Shannon Decl. (Dkt. No. 165-10 at 3); Joseph
26 Decl. (Dkt. No. 165-8 at 3-4); Garcia Decl. (Dkt. No. 165-3 at 3); Tinseth Decl. (Dkt. No. 165-
12 at 2-3); Wachter Decl. (Dkt. No. 165-13 at 3); Morrow Decl. (Dkt. No. 165-11 at 2-3); Hill
Decl. (Dkt. No. 165-9 at 3); and Gold Decl. (Dkt. No. 165-7 at 3).

1 VI. CONCLUSION

2 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

3 1. Defendant Brockett’s motion for summary judgment (Dkt. No. 183), be denied.

4 2. The motion for summary judgment filed by the remaining defendants (Dkt. No.
5 164), be granted in part and denied in part.

6 3. Summary judgment be granted for defendants Williams, Shannon, Joseph,
7 Garcia, Tinseth, Wachter, Morrow, Hill and Gold.

8 4. Summary judgment be granted for defendants on each of plaintiff’s First
9 Amendment retaliation claims.

10 5. Summary judgment be denied, and this action proceed, on the following Eighth
11 Amendment claims:

12 a. Plaintiff’s claims against defendant Brockett, for alleged sexual misconduct;

13 b. Plaintiff’s claims against defendants Kelly and Jaffe, based on theories of
14 deliberate indifference to serious mental health needs, failure to protect, and supervisory liability.

15 c. Plaintiff’s claims against defendant Martin, based on theories of deliberate
16 indifference to serious mental health needs, and failure to protect, but not supervisory liability.

17 d. Plaintiff’s claims against defendants Chapman, Vance and Kennedy, based on
18 an alleged failure to protect.

19 These amended findings and recommendations are submitted to the United States
20 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
21 14 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 “Objections to Magistrate Judge’s Amended Findings and Recommendations.” Any response to
24 the objections shall be filed and served within 14 days after service of the objections. The parties


25 ///

26 ///

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

3 DATED: March 13, 2013

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


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

mana2290.msg.amd