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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RANDY M. CORDERO,
Plaintiff,
v.
NICK GUZMAN, et al.,
Defendants.

No. 2:13-cv-1551 JAM KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion for summary judgment. (ECF No. 50.) Defendants move for summary judgment as to the merits of plaintiff’s claims, but also on the grounds that plaintiff failed to exhaust administrative remedies.

On February 2, 2015, plaintiff filed an opposition. (ECF No. 60.) On February 9, 2015, defendants filed a motion for an extension of time to file their reply to plaintiff’s opposition. (ECF No. 61.) On February 17, 2015, defendants filed the reply. (ECF No. 62.) Good cause appearing, defendants’ motion for extension of time to file the reply is granted and the reply is deemed timely filed.

Also pending is plaintiff’s motion to file an amended complaint. (ECF No. 59.)

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1 After carefully reviewing the record, the undersigned recommends that defendants'
2 summary judgment motion be granted in part and denied in part. Plaintiff's motion to amend is
3 denied.

4 II. Legal Standard for Summary Judgment

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

9 Under summary judgment practice, the moving party always bears the initial responsibility of
10 informing the district court of the basis for its motion, and identifying those portions of "the
11 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.
13 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
14 56(c)).

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

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

1 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
2 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 return
10 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
11 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d
12 1564, 1575 (9th Cir. 1990).

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

20 In resolving a summary judgment motion, the court examines the pleadings, depositions,
21 answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R.
22 Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at
23 255. All reasonable inferences that may be drawn from the facts placed before the court must be
24 drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences
25 are not drawn out of the air, and it is the opposing party’s obligation to produce a factual
26 predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F.
27 Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
28 demonstrate a genuine issue, the opposing party “must do more than simply show that there is

1 some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could
2 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for
3 trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

4 By contemporaneous notice provided on November 23, 2013, (ECF No. 26), plaintiff was
5 advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal
6 Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*);
7 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

8 III. Plaintiff’s Claims

9 This action is proceeding on the original complaint filed July 16, 2013, as to defendants
10 Bugarin, Guzman, Mejia, Parra, Smith and Vincent. (ECF No. 4.) Plaintiff’s complaint is not
11 verified.

12 Plaintiff alleges that all defendants violated his constitutional rights. Plaintiff also alleges
13 a state law claim for negligence against defendant Guzman.

14 *Defendant Mejia*

15 Plaintiff alleges that on November 8, 2011, at approximately 1040 hours, inmate Bonner,
16 who is African-American, assaulted plaintiff at High Desert State Prison (“HDSP”). (Id. at 4.) In
17 response, Correctional Officer Boyd ordered the yard to “get down.” (Id.) After the “get down”
18 order, inmate Bates, who is African-American, joined in the assault on plaintiff. (Id.) Inmate
19 Amparo also joined the skirmish, attempting to assist plaintiff. (Id.)

20 In response to the altercation, Correctional Officer Gardiner aimed his 40 mm launcher at
21 the right thigh of inmate Bonner and discharged one impact round. (Id.) This round did not
22 strike anyone. (Id.)

23 The skirmish continued until plaintiff was knocked to the ground and did not get up. (Id.)
24 Inmates Bonner and Bates then directed their aggression toward inmate Amparo. (Id.) Inmate
25 Bonner then suddenly stopped fighting and laid in the prone position. (Id.) Inmate Bates
26 continued to strike inmate Amparo. (Id.)

27 Officer Gardiner then aimed his 40 mm launcher at the lower calf of inmate Bates, who
28 was approximately 80 feet away, and discharged one round. (Id.) The round struck inmate Bates

1 in his right foot. (Id.) Inmate Bates then laid in the prone position. (Id.)

2 As a result of the altercation, plaintiff suffered injuries to his nose, left ear, head and neck.
3 (Id.) Plaintiff was taken to Banner Lassen Hospital in Susanville, California for treatment. (Id.)
4 While at the hospital, plaintiff told the two correctional officers escorting him that he could not
5 return to B yard because he would be assaulted by the same inmates or their associates. (Id. at 5.)

6 Sometime later, plaintiff returned to HDSP. (Id.) Prior to returning to his cell, plaintiff
7 told defendant Mejia that he could not return to B yard because his safety was in jeopardy. (Id.)
8 Defendant Mejia denied this request. (Id.) Defendant Mejia told plaintiff that it was getting late,
9 that it was almost shift change, and that they had been ordered to return plaintiff to B yard. (Id.)

10 On November 9, 2011, an unidentified correctional officer came to plaintiff's cell and
11 instructed plaintiff to sign compatibility/liability waiver chronos regarding the November 8, 2011
12 incident involving inmates Bates and Bonner. (Id.)

13 *Defendant Guzman*

14 On November 9, 2011, as plaintiff returned to his cell from medical, he was assaulted by
15 his cellmate, inmate Haxton. (Id.) Inmate Haxton is African-American and a known associate of
16 inmates Bates and Bonner. (Id.) Plaintiff and inmate Haxton were exchanging blows when
17 defendant Guzman, the Control Booth Officer, ordered the inmates in the dayroom to "get down."
18 (Id.) Defendant Guzman was either on the telephone or distracted by the telephone at the time
19 inmate Haxton began assaulting plaintiff. (Id.)

20 Defendant Guzman, who was approximately 45 feet away from the altercation, then aimed
21 his 50 mm launcher at plaintiff and discharged one round. (Id.) The round struck plaintiff in the
22 right side of plaintiff's head. (Id.) Plaintiff alleges that defendant Guzman intentionally aimed at
23 plaintiff's head or failed to discharge his weapon in accordance with California Department of
24 Corrections and Rehabilitation ("CDCR") policy, which mandates that officers aim for the "lower
25 zone." (Id.)

26 As a result of being shot, plaintiff allegedly suffered a depressed cranial fracture and
27 intracranial hemorrhage, as well as brain damage that impacts plaintiff's ability to use his left
28 hand and causes vision and speech impairment. (Id.)

1 *Defendant Smith*

2 Plaintiff alleges that on December 12, 2011, defendant Smith refused to process plaintiff's
3 outgoing legal mail. (Id. at 6.) Defendant Smith returned to plaintiff's cell and told him, "you're
4 lucky Rainey is nice to you, dumbass." (Id.) Plaintiff alleges that defendant Smith's refusal to
5 process his mail and derogatory statement were made in retaliation for plaintiff filing a staff
6 complaint against defendant Guzman. (Id.)

7 *Defendant Vincent*

8 Plaintiff alleges that on January 24, 2012, defendant Vincent was stationed outside the
9 HDSP law library. (Id.) Plaintiff was using the law library in connection with his staff complaint
10 against defendant Guzman. (Id.) During this time, defendant Vincent read plaintiff's confidential
11 legal papers, and then began making uneducated guesses regarding plaintiff's litigation strategy.
12 (Id.) Plaintiff asked defendant Vincent to make copies of an investigative report. (Id.)
13 Defendant Vincent refused to make the requested copies. (Id.) Plaintiff alleges that defendant
14 Vincent acted in retaliation against plaintiff for filing a staff complaint against defendant
15 Guzman. (Id.)

16 *Defendant Bugarin*

17 On February 14, 2012, plaintiff was transferred to California State Prison-Corcoran
18 ("Corcoran"). (Id. at 6.) On February 28, 2013, plaintiff informed defendant Bugarin, a
19 Correctional Counselor, that he was in danger of being assaulted by the Two-Five prison gang
20 and/or disruptive group. (Id.) Plaintiff attempted to give defendant Bugarin copies of CDCR
21 128-B chronos documenting his safety concerns with the Two-Five gang, but defendant Bugarin
22 refused to accept them. (Id.)

23 *Defendant Parra*

24 On March 5, 2013, plaintiff telephoned his attorney to discuss filing a civil suit against
25 HDSP and defendant Guzman. (Id.) While on the telephone, plaintiff became aware that
26 defendant Parra was monitoring the call. (Id. at 6-7.) Plaintiff also heard a distinct "click," which
27 meant that the call was being monitored by CDCR staff. (Id. at 7.)

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1 On March 5, 2013, plaintiff was assaulted by inmates Valdivia and Trejo of the Two-Five
2 gang. (Id.) Inmates Valdivia and Trejo later told plaintiff that they had conspired with defendant
3 Parra to assault plaintiff. (Id.) They explained that defendant Parra told them that plaintiff was
4 “dropping kites” on the Two-Five gang. (Id.) “Dropping kites” is prison slang for providing
5 prison staff with information about the members of the gang. (Id.) Plaintiff alleges that
6 defendant Parra conspired with inmates Valdivia and Trejo to assault him in retaliation for filing a
7 staff complaint against defendant Guzman. (Id.)

8 IV. Exhaustion of Administrative Remedies

9 *Legal Standard*

10 The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be
11 brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a
12 prisoner confined in any jail, prison, or other correctional facility until such administrative
13 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “[T]he PLRA’s exhaustion
14 requirement applies to all inmate suits about prison life, whether they involve general
15 circumstances or particular episodes, and whether they allege excessive force or some other
16 wrong.” Porter v. Nussle, 534 U.S. 516, 532 (2002).

17 Proper exhaustion of available remedies is mandatory, Booth v. Churner, 532 U.S. 731,
18 741 (2001), and “[p]roper exhaustion demands compliance with an agency’s deadlines and other
19 critical procedural rules[.]” Woodford v. Ngo, 548 U.S. 81, 90 (2006). The Supreme Court has
20 also cautioned against reading futility or other exceptions into the statutory exhaustion
21 requirement. See Booth, 532 U.S. at 741 n.6. Moreover, because proper exhaustion is necessary,
22 a prisoner cannot satisfy the PLRA exhaustion requirement by filing an untimely or otherwise
23 procedurally defective administrative grievance or appeal. See Woodford, 548 U.S. at 90-93.
24 “[T]o properly exhaust administrative remedies prisoners ‘must complete the administrative
25 review process in accordance with the applicable procedural rules,’ [] - rules that are defined not
26 by the PLRA, but by the prison grievance process itself.” Jones v. Bock, 549 U.S. 199, 218
27 (2007) (quoting Woodford, 548 U.S. at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027
28 (9th Cir. 2009) (“The California prison system’s requirements ‘define the boundaries of proper

1 exhaustion.”) (quoting Jones, 549 U.S. at 218).

2 In California, prisoners may appeal “any policy, decision, action, condition, or omission
3 by the department or its staff that the inmate or parolee can demonstrate as having a material
4 adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a).
5 On January 28, 2011, California prison regulations governing inmate grievances were revised.
6 Cal. Code Regs. tit. 15, § 3084.7. Now inmates in California proceed through three levels of
7 appeal to exhaust the appeal process: (1) formal written appeal on a CDC 602 inmate appeal
8 form, (2) second level appeal to the institution head or designee, and (3) third level appeal to the
9 Director of the California Department of Corrections and Rehabilitation (“CDCR”). Cal. Code
10 Regs. tit. 15, § 3084.7. Under specific circumstances, the first level review may be bypassed. Id.
11 The third level of review constitutes the decision of the Secretary of the CDCR and exhausts a
12 prisoner’s administrative remedies. See id. § 3084.7(d)(3). Since 2008, medical appeals have
13 been processed at the third level by the Office of Third Level Appeals for the California
14 Correctional Health Care Services. A California prisoner is required to submit an inmate appeal
15 at the appropriate level and proceed to the highest level of review available to him. Butler v.
16 Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir.
17 2002). Since the 2011 revision, in submitting a grievance, an inmate is required to “list all staff
18 members involved and shall describe their involvement in the issue.” Cal. Code Regs. tit. 15,
19 § 3084.2(3). Further, the inmate must “state all facts known and available to him/her regarding
20 the issue being appealed at the time,” and he or she must “describe the specific issue under appeal
21 and the relief requested.” Cal. Code Regs. tit. 15, §§ 3084.2(a)(4). An inmate now has thirty
22 calendar days to submit his or her appeal from the occurrence of the event or decision being
23 appealed, or “upon first having knowledge of the action or decision being appealed.” Cal. Code
24 Regs. tit. 15, § 3084.8(b).

25 Failure to exhaust is “an affirmative defense the defendant must plead and prove.” Bock,
26 549 U.S. at 204, 216. In Albino, the Ninth Circuit agreed with the underlying panel’s decision¹

27 _____
28 ¹ See Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The three judge panel noted that “[a]
defendant’s burden of establishing an inmate’s failure to exhaust is very low.” Id. at 1031.

1 “that the burdens outlined in Hilao v. Estate of Marcos, 103 F.3d 767, 778 n.5 (9th Cir. 1996),
2 should provide the template for the burdens here.” Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir.
3 2014) (en banc). A defendant need only show “that there was an available administrative remedy,
4 and that the prisoner did not exhaust that available remedy.” Albino, 747 F.3d at 1172. Once the
5 defense meets its burden, the burden shifts to the plaintiff to show that the administrative
6 remedies were unavailable. See Albino, 697 F.3d at 1030-31.

7 A prisoner may be excused from complying with the PLRA’s exhaustion requirement if
8 he establishes that the existing administrative remedies were effectively unavailable to him. See
9 Albino, 747 F.3d at 1172-73. When an inmate’s administrative grievance is improperly rejected
10 on procedural grounds, exhaustion may be excused as effectively unavailable. Sapp v. Kimbrell,
11 623 F.3d 813, 823 (9th Cir. 2010); see also Nunez v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir.
12 2010) (warden’s mistake rendered prisoner’s administrative remedies “effectively unavailable”);
13 Ward v. Chavez, 678 F.3d 1042, 1045 (9th Cir. 2012) (exhaustion excused where futile); Brown
14 v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required to proceed to third level where
15 appeal granted at second level and no further relief was available).

16 Where a prison system’s grievance procedures do not specify the requisite level of detail
17 for inmate appeals, Sapp, 623 F.3d at 824, a grievance satisfies the administrative exhaustion
18 requirement if it “alerts the prison to the nature of the wrong for which redress is sought.” Griffin
19 v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). “A grievance need not include legal terminology
20 or legal theories unless they are in some way needed to provide notice of the harm being grieved.
21 A grievance also need not contain every fact necessary to prove each element of an eventual legal
22 claim. The primary purpose of a grievance is to alert the prison to a problem and facilitate its
23 resolution, not to lay groundwork for litigation.” Griffin, 557 F.3d at 1120.

24 If under the Rule 56 summary judgment standard, the court concludes that plaintiff has
25 failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice.
26 Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003), overruled on other grounds by Albino,

27 Relevant evidence includes statutes, regulations, and other official directives that explain the
28 scope of the administrative review process. Id. at 1032.

1 747 F.3d 1162.

2 *Background*

3 Defendants argue that plaintiff failed to exhaust his administrative remedies with respect
4 to his claims against defendant Bugarin, Mejia, Parra, Smith and Vincent, i.e., all defendants but
5 for defendant Guzman.

6 Defendants argue that between November 8, 2011, and July 16, 2013, plaintiff submitted
7 two appeals that were accepted for third level review, HDSP 11-1606 and HDSP 12-0043. (ECF
8 No. 50-11 at 2.) HDSP 11-1606 pertained to the November 9, 2011 incident involving defendant
9 Guzman. (ECF No. 50-13 at 37-40.). In HDSP 12-0043, plaintiff challenged the finding of guilty
10 in a disciplinary action based on the November 9, 2011 incident. (*Id.* at 46-47.)

11 Defendants state that on March 10, 2013, plaintiff submitted appeal CSPC 13-2073
12 concerning the March 5, 2013 assault and his claims that defendant Bugarin ignored his safety
13 concerns and defendant Parra ordered his assault. (*Id.* at 52-55.) Defendants state that this appeal
14 was rejected at the Director’s Level because plaintiff did not submit the necessary supporting
15 documents. (*Id.* at 75.) The appeal identifies the missing documents as “CDCR Form 837
16 Crime/Incident Report (parts A, B, & C) –all pages.” (*Id.*) Defendants state that despite being
17 informed of the reasons this appeal was rejected, plaintiff did not cure the defect and resubmit the
18 appeal.

19 *Analysis—Defendants Smith and Vincent*

20 In his opposition, plaintiff argues that he was not required to file separate administrative
21 appeals with respect to his claims against defendants Smith and Vincent because his claims
22 against these defendants “derive from the same nucleus of fact” as his claim against defendant
23 Guzman. (ECF No. 60 at 13-14, 15)

24 Administrative remedies may not be exhausted where the grievance, liberally construed,
25 does not have the same subject and same request for relief. *See Morton v. Hall*, 599 F.3d 942,
26 946 (9th Cir. 2010) (grievance that complained of visitation restrictions, and did not mention an
27 assault or theorize that the visitation restriction imposed was related to the assault, was
28 insufficient to put prison officials on notice that staff conduct contributed to the assault). HDSP

1 11-1606, the grievance challenging the shooting by defendant Guzman, did not raise plaintiff's
2 claims against defendants Smith and Vincent. HDSP 11-1606 did not give prison officials notice
3 that plaintiff was complaining that on December 12, 2011, defendant Smith allegedly refused to
4 process his legal mail or that on January 24, 2012, defendant Vincent allegedly read plaintiff's
5 confidential legal papers and refused to make copies. For these reasons, the undersigned finds
6 that plaintiff failed to exhaust his administrative remedies with respect to his claims against
7 defendants Smith and Vincent.

8 *Analysis—Defendant Mejia*

9 In his opposition, plaintiff argues that HDSP 11-1606 raised his claim against defendant
10 Mejia. In his response to the denial of HDSP 11-1606 at the second level, in addition to his
11 claims against defendant Guzman, for the first time plaintiff argued that defendant Mejia and
12 another guard denied his November 8, 2011 request to be removed from B yard. (ECF No. 50-13
13 at 40.)

14 “Administrative remedies shall not be considered exhausted relative to any new issue,
15 information, or person later named by the appellant that was not included in the originally
16 submitted [appeal] and addressed through all required levels of administrative review up to and
17 including the third level.” Cal.Code Regs. tit. 15, § 3084.1(b). In other words, the addition of
18 plaintiff's claim against defendant Mejia in his third level appeal did not exhaust this claim
19 because new claims are not permitted as the appeal moves through the levels of review. A
20 prisoner does not exhaust administrative remedies when he includes new issues from one level of
21 review to another. See Sapp, 623 F.3d at 825 (concluding that it was proper for prison officials to
22 “declin[] to consider a complaint about [prisoner's] eye condition that he raised for the first time
23 in a second-level appeal about medical care for a skin condition.”); Dawkins v. Butler, 2013 WL
24 2475870, *8 (S.D. Cal. 2013) (a claim made for the first time in plaintiff's request for Third Level
25 review was insufficient to exhaust the issue where it was not included in the original appeal). For
26 these reasons, the undersigned finds that plaintiff failed to exhaust his administrative remedies
27 with respect to his claims against defendant Mejia.

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1 *Analysis—Defendant Bugarin*

2 Plaintiff filed two grievances raising his claims against defendants Bugarin, i.e., grievance
3 nos. 13-2852 and 13-2073. For the following reasons, the undersigned finds that these grievances
4 did not exhaust plaintiff’s administrative remedies with respect to his claims against defendant
5 Bugarin.

6 On April 24, 2013, plaintiff submitted grievance no. 13-2852 as a staff complaint. (ECF
7 No. 57 at 55.) In this grievance, plaintiff alleged that on February 28, 2013, defendant Bugarin
8 conducted plaintiff’s pre-committee conference for his annual review. (Id.) Plaintiff alleged that
9 he told defendant Bugarin about his safety concerns regarding the Two-Five gang. (Id. at 57.)
10 Plaintiff alleged that defendant Bugarin refused to accept his documentation in support of his
11 security concerns. (Id.) Plaintiff alleged that on March 5, 2013, he was attacked by two members
12 of the Two-Five gang. (Id.)

13 On April 30, 2013, grievance 13-2852 was screened out at the first level of review as
14 untimely. (Id. at 60.) The response stated that plaintiff’s appeal was dated April 24, 2013, but
15 plaintiff was attempting to appeal an ICC action which occurred on February 28, 2013. (Id.) “If
16 so, you have failed to meet the allotted time constraints. Your appeal will not be processed at this
17 time.” (Id.)

18 Plaintiff appears to have resubmitted grievance 13-2852 at the first level, arguing that his
19 appeal was intended as a “staff complaint.” (Id.) Plaintiff argued that his grievance was not
20 untimely because he had one year from the alleged misconduct to file a staff complaint. (Id.) On
21 May 16, 2013, grievance 13-2852 was again rejected at the first level of review as untimely. (Id.)

22 The undersigned considers whether prison officials should have treated grievance 13-2852
23 as a staff complaint, thus rendering it timely. California Code of Regulations Title 15, §
24 3084.5(b)(4) describes staff complaints as appeals that allege “staff behavior or activity in
25 violation of a law, regulation, policy, or procedure or appears contrary to an ethical or
26 professional standard that could be considered misconduct as defined in subsection 3084(g)...”
27 Subsection 3084(g) describes staff misconduct as “staff behavior that violates or is contrary to
28 law, regulation, policy, procedure, or an ethical professional standard.”

1 Based on the description of staff complaints in section 3084.5(b)(4), the undersigned finds
2 that grievance 13-2852 was properly classified as a “regular” grievance rather than a staff
3 complaint. Plaintiff’s claims against defendant Bugarin did not involve a violation of law,
4 regulation, policy or procedure or a violation of ethical professional standard.² Accordingly,
5 grievance 13-2852 was properly rejected as untimely. For these reasons, the undersigned finds
6 that grievance 13-2852 did not administratively exhaust plaintiff’s claims against defendant
7 Bugarin.

8 Plaintiff’s first level grievance filed in grievance 13-2073 raised only his claims against
9 defendant Parra. (ECF. No. 50-13 at 52, 54.) Plaintiff included his claims regarding defendant
10 Bugarin in his appeal from the second level response to grievance 13-2073. (Id. at 55.) Because
11 plaintiff did not include his claims regarding defendant Bugarin in the first level appeal he filed in
12 grievance 13-2073, this grievance did not exhaust his claims against defendant Bugarin. See
13 Cal.Code Regs. tit. 15, § 3084.1(b); Sapp, 623 F.3d at 825.

14 Accordingly, for the reasons discussed above, the undersigned finds that plaintiff did not
15 exhaust his administrative remedies with respect to his claims against defendant Bugarin.

16 *Defendant Parra*

17 On March 10, 2013, plaintiff filed grievance 13-2073 raising his claims against defendant
18 Parra. (ECF No. 57 at 75.) This grievance was processed as a staff complaint apparently based
19 on plaintiff’s allegations that defendant Parra facilitated the attack by the other inmates on
20 plaintiff. The first level response is unclear. (Id. at 81.) However, it appears to have been
21 granted in part. (Id.) Plaintiff’s appeal was accepted at the second level of review and also
22 granted in part. (Id. at 82.) The second level response states that on March 5, 2013, Sergeant
23 Nadel conducted a videotaped interview with plaintiff. (Id.) The response describes plaintiff’s
24 statements made during the interview. (Id.) The response further states that the following
25 witnesses were questioned regarding the grievance: inmate Trejo, inmate Valdivia, Officer Uribe,
26 Officer Trevino. (Id. at 87.) The response states that the following information was reviewed as

27 ² In contrast, plaintiff’s grievance against defendant Guzman alleging that he violated CDCR
28 regulations when he fired his weapon, was processed as a staff complaint. (ECF No. 57 at 47.)

1 a result of plaintiff's allegations: plaintiff's 602 and 602A, plaintiff's disability and effective
2 communication report, sign-in/out sheets for Facility 3B, and Incident Package 837 Log # COR
3 03B-13-03-0129. (Id.)

4 Plaintiff's third level appeal of grievance 13-2073 was rejected at the third level of review
5 because the appeal was missing the 837 Crime Report. (Id. at 85.)

6 In his opposition, plaintiff argues that he submitted requests to prison staff for the CDCR
7 837 incident report but received no response. (ECF No. 60 at 40.) Plaintiff also argues that he,
8 plaintiff, was not charged with a prison disciplinary for the altercation involving inmates Valdivia
9 and Trejo. (ECF No. 60. at 41.) Plaintiff argues that he would have received the CDCR 837
10 incident report had he, plaintiff, been charged with a rules violation involving that incident. (Id.)

11 The undersigned is puzzled by the fact that grievance 13-2073 was considered on the
12 merits at the second level of review, which included review of the 837 Crime Report, but rejected
13 at the third level of review based on plaintiff's failure to include the 837 Crime Report.

14 Plaintiff's statements in his opposition indicate that plaintiff did not possess a copy of the 837
15 Crime Report, suggesting that the second level reviewer independently obtained the 837 Crime
16 Report in order to evaluate plaintiff's grievance. If the second level reviewer was able to obtain
17 this report, then it is unclear why the third level reviewer could also not obtain this report, which
18 was apparently not readily available to plaintiff. Without further explanation of these apparent
19 discrepancies in review procedures between the second and third level of review, the undersigned
20 cannot determine whether 13-2073 was properly rejected at the third level of review on
21 procedural grounds. Accordingly, defendant Parra should not be granted summary judgment on
22 the grounds that plaintiff failed to exhaust administrative remedies.

23 V. Motion for Summary Judgment on the Merits

24 Because the undersigned finds that plaintiff failed to exhaust his administrative remedies
25 with respect to his claims against Bugarin, Mejia, Smith and Vincent, the undersigned does not
26 address defendants' motion for summary judgment as to plaintiff's substantive constitutional
27 claims against these defendants. The undersigned herein addresses defendants' arguments that
28 defendants Guzman and Parra are entitled to summary judgment as to plaintiff's substantive

1 constitutional and state law claims.

2 A. Defendant Guzman

3 Plaintiff alleges that defendant Guzman used excessive force when he intentionally shot
4 plaintiff in the head during plaintiff's November 9, 2011 altercation with inmate Haxton.

5 Where prison officials are accused of using excessive physical force, the issue is "whether
6 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and
7 sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley v.
8 Albers, 475 U.S. 312, 320–321 (1986)). Factors to consider in evaluating a claim of excessive
9 force in the prison context are: (1) the extent of the injury suffered by an inmate; (2) the need for
10 the application of force; (3) the relationship between that need and the amount of force used; (4)
11 the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper
12 the severity of a forceful response. Hudson, 503 U.S. at 7; Martinez v. Stanford, 323 F.3d 1178,
13 1184 (9th Cir. 2003).

14 Moreover, under Eighth Amendment standards, the defendant's subjective intent
15 comprises an essential element of the affirmative case. See Wilson v. Seiter, 501 U.S. 294, 303
16 (1991); Hudson, 503 U.S. at 7. Thus, the assertion of an excessive force claim requires the
17 plaintiff to "put forward specific, nonconclusory factual allegations' that establish improper
18 motive." Crawford–El v. Britton, 523 U.S. 574, 598 (1998) (quoting Siegert v. Gilley, 500 U.S.
19 226, 236 (1991) (Kennedy, J., concurring in judgment)); Jeffers v. Gomez, 267 F.3d 895, 911 (9th
20 Cir. 2001). In other words, plaintiff must put forward evidence that the defendant was motivated
21 to cause him harm. Jeffers, 267 F.3d at 906; see also Hudson, 503 U.S. at 7 (force is excessive if
22 it is applied "maliciously and sadistically" to cause harm but not if is "applied in a good faith
23 effort to restore discipline.")

24 Defendants move for summary judgment on the grounds that defendant Guzman did not
25 intentionally shoot plaintiff in the head. The undersigned begins by summarizing the evidence
26 submitted by both parties regarding this claim.

27 In support of their motion as to this claim, defendants rely on the declaration of defendant
28 Guzman, quoted herein:

1 2. On November 9, 2011, I was the Control Booth Officer in
2 Building 3 on Facility B at HDSP. I was responsible for
3 supervising the inmates in Building 3, providing gun coverage and
4 operating the cell and building doors.

5 3. Building 3 is a 270-design housing unit. Meaning, the building
6 is shaped like a square, with cells on three of the four sides
7 (Sections A to C) of the building, and a dayroom area in the center.
8 Each section has two tiers (floors) of cells. The control booth,
9 which is on the second level, has a view into the dayroom and all
10 three sections. The control booth is about fifteen to twenty feet
11 above the ground. The doors to the cells and building are
12 electronically operated from the control booth. The housing
13 officers are usually stationed in the office below the control booth.

14 4. At approximately 11:31 a.m., on November 9, 2011, I opened
15 the entrance door to Building 3 for inmate Cordero (T-37551), who
16 was returning from medical. Cordero was assigned to cell 121, and
17 inmate Haxton was his cellmate.

18 5. Cell 121 is in Section B of Building 3 and is the section directly
19 across from the control booth.

20 6. I opened the door to cell 121. As the door was opening, Cordero
21 stepped in front of cell 122 and was talking to the occupants. The
22 telephone in the control booth rang, and I briefly turned my
23 attention to the phone to pick it up, but the phone stopped ringing
24 before I picked up the receiver. I looked away from the area where
25 Cordero was standing for only a matter of seconds.

26 7. When I turned my attention back to B-section, I saw Cordero
27 and Haxton punching each other in the head and upper-body areas
28 in front of cell 124.

8. I immediately activated my personal alarm and ordered the
inmates to get down. To the best of my recollection, Cordero and
Haxton were the only inmates in the dayroom area. Neither inmate
complied with my order. I grabbed the 40 mm launcher that was a
couple of feet from me, went to the front left window of the control
booth, and again yelled for the inmates to get down.

9. Cordero and Haxton were still striking and punching each other,
and had now moved to the area in front of the sink in B section.
The inmates did not comply with my second order to get down.

10. Despite having sounded the alarm, I did not see or hear an
officer in the dayroom or respond to the incident. Given the
viciousness with which Cordero and Haxton were striking each
other and their refusal to comply with my orders to get down, I
aimed the launcher at Cordero's left calf and fired a single round.

11. As I fired the round, Cordero and Haxton simultaneously fell to
the ground, with Haxton landing on top of Cordero. The round
struck Cordero in the head.

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12. As I reloaded the launcher, I saw Haxton sit on Cordero's back and punch him in the back of the head. I ordered Haxton to get down, and saw Officers Green and Greer respond to the area of the incident. The officers also ordered Haxton to get down, but Haxton did not comply and continued to punch Cordero in the back of the head. The officers pepper sprayed Haxton in the facial area.

13. Haxton got off of Cordero and complied with the officers' orders to get down. He laid face down near the staircase in front of the area of cell 124.

14. Cordero crawled to the front of the B-section shower, near cell 126, and laid his face down.

15. Additional responding staff arrived and restrained both inmates. Cordero appeared to be bleeding from the head, and medical staff attended to him. He was secured to a backboard, placed on a gurney, and taken out of the building.

16. I did not aim for Cordero's head, nor did I purposefully shoot him in the head. As required by prison regulations, I aimed for Cordero's left calf.

17. Based on my observation and training, I determined it was necessary to use the launcher to stop the inmates' fighting, restore order, and prevent any inmate from getting seriously hurt even though the entire incident last[ed] about a minute. Cordero and Haxton appeared to be forcefully and viciously striking each other in the head and upper body areas. They failed to comply with my orders to get down. And I did not see or hear any staff in the dayroom. I did not fire the launcher on impulse or while I was distracted. Nor did I shoot the launcher with the intention of striking Cordero.

18. Before the incident on November 9, 2011, I was unaware of any problems or animosity between Haxton and Cordero, and Cordero never complained to me about any concerns he had about being celled with Haxton.

19. After the incident, I was informed that the front-bead sight of the launcher was slightly bent to the left. The front-bead sight is used to assist in marking and hitting the intended target. I did not know that the front-bead sight was slightly bent before I shot the launcher on November 9, 2011.

20. Based on my customary practice, I inspect all weapons and munitions in a control booth when I begin my shift. I have no reason to believe that I did not follow my customary practice on November 9, 2011, and inspected the weapons and munitions in the control booth of Building 3. Had I noticed that the front-bead sight was bent on November 9, 2011, I would have immediately informed my supervisor and the Armory staff, so that a replacement launcher could have been provided.

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1 21. I do not believe that the bent front-bead sight was a factor in
2 Cordero being shot in the head on November 9, 2011. I was
3 approximately 50-60 feet away from Cordero and Haxton when I
4 shot the launcher. I aimed for Cordero's left calf. Based on my
5 experience with the 40 mm launcher, even if the front-bead sight
6 was bent at the time I fired the launcher, it would have affected the
7 horizontal location of where the round impacted; it would not have
8 affected the vertical point of impact. I inadvertently shot Cordero
9 in the head because he and Haxton fell at the same time that I fired
10 the round while aiming at Cordero's left calf.

11 (ECF No. 50-4 at 1-4.)

12 In his verified declaration submitted in support of his summary judgment motion, plaintiff
13 states that he was shot by defendant Guzman while he was standing on his feet. (ECF No. 60 at
14 3.) In support of his opposition, plaintiff has provided verified declarations by several inmates
15 who make the same observation. Inmates Crosby, Keech, Steele, Mercado, Turner and Gonzalez
16 all state that they saw plaintiff shot by defendant Guzman when plaintiff was "erect on his feet..."
17 (ECF No. 57-3 at 112, 113, 114, 115, 116, 117.) These inmates state that they saw plaintiff fall to
18 the ground after he was shot in the head. (Id. at 112, 113, 114, 115, 116, 117.)

19 In his verified declaration, plaintiff also states that at no time did he strike inmate Haxton
20 back. (ECF No. 60 at 3.) Inmates Crosby, Keech, Steele, Mercado, Turner and Gonzalez also all
21 state that plaintiff "never struck the inmate back who attacked him, as Cordero was not the
22 aggressor." (ECF No. 57-3 at 112, 113, 114, 115, 116, 117.)

23 Inmates Crosby, Keech, Steele, Mercado, Turner and Gonzalez also all state that
24 defendant Guzman did not aim for plaintiff's lower zone, as required by CDCR policy. The
25 undersigned agrees with defendants that these inmates were not in a position to know where
26 defendant Guzman was aiming. Accordingly, the undersigned does not consider this portion of
27 their declarations.

28 At his deposition, plaintiff testified that he did not fight back when inmate Haxton
29 attacked him. (Plaintiff's deposition at 81-84.) Plaintiff testified that he was carrying soup and
30 ibuprofen when inmate Haxton first attacked him. (Id. at 83.) Plaintiff testified that he was
31 standing on his feet when defendant Guzman shot him. (Id. at 84.) Plaintiff also testified that he
32 felt the shot from defendant Guzman hit him almost immediately after inmate Haxton first hit

1 him. (Id. at 82, 83, 89.)

2 Plaintiff testified that the incident ended after plaintiff fell to the ground. (Id. at 89.)
3 Inmate Haxton continued to swing at plaintiff until the “cops” ran out of the office and pepper
4 sprayed both inmates. (Id.)

5 The undersigned now turns to consideration of the Hudson factors set forth above.

6 *Extent of Injury:* Defendants’ motion does not address the extent of plaintiff’s injuries.
7 However, at his deposition, plaintiff testified that he has a titanium plate covering his scalp or
8 skull where he was shot. (Plaintiff’s deposition at 92.) Plaintiff now has difficulty using his
9 hands. (Id. at 93.) The left side of plaintiff’s body was paralyzed for a couple of months after the
10 incident. (Id. at 94.) Thus, plaintiff suffered serious injuries as a result of being shot by
11 defendant.

12 *Need for Application of Force:* The parties do not dispute that no officer responded when
13 defendant Guzman rang the alarm. The parties do not dispute that plaintiff and inmate Haxton
14 were engaged in an altercation. Thus, some force was required to quell the altercation. However,
15 whether the force *needed* to be applied to *plaintiff* is disputed. Under defendant’s version of the
16 facts, force was justified on plaintiff because he was viciously striking inmate Haxton and refused
17 the get down order.

18 At his deposition and in his verified declaration submitted in support of his opposition,
19 plaintiff claims he did not fight back, although he does not dispute that he did not obey the order
20 to get down. Plaintiff’s inmate witnesses, in their verified declarations, also state that plaintiff did
21 not fight back. In his unverified complaint, plaintiff alleges that he was shot while he and inmate
22 Haxton were “exchange blows.” For purposes of summary judgment, the undersigned credits
23 plaintiff’s verified version of events. However, at trial, plaintiff may have to explain his
24 description of events in his complaint.

25 Based on plaintiff’s verified version of events, it is difficult to find that any use of force
26 on plaintiff was justified.

27 *Relationship Between Need for Force and Amount Used:* With respect to the amount of
28 force used, the parties dispute whether defendant intended to shoot plaintiff in the head.

1 Defendant claims that he aimed for plaintiff's left calf, and fired just as plaintiff fell to the
2 ground. Defendant claims that the shot accidentally hit plaintiff in the head as he fell.

3 Plaintiff and his witnesses claim that plaintiff was standing upright when defendant shot
4 him, i.e., not while he was falling. If defendant shot plaintiff while he was standing, it is not
5 unreasonable to infer that he intentionally shot plaintiff in the head.

6 *Perceived Threat:* As indicated above, the parties dispute the facts regarding the threat
7 perceived by defendant Guzman. Defendant claims that the plaintiff and inmate Haxton were
8 fighting each other. Plaintiff alleges that he did not fight back as inmate Haxton assaulted him.

9 *Efforts Made to Temper Severity*

10 The parties dispute whether defendant Guzman made efforts to temper the severity of the
11 force used. Defendant Guzman claims that he aimed at plaintiff's calf, whereas plaintiff alleges
12 that defendant Guzman shot him in the head while he was standing.

13 *Motive*

14 Defendants argue that no inference can be drawn that defendant Guzman's use of force
15 was malicious or sadistic because plaintiff's evidence of motive is weak. (ECF No. 50-1 at 20.)
16 Defendants state that the only reason plaintiff believes defendant intentionally, rather than
17 accidentally, shot him in the head is based on a "vibe" plaintiff got from defendant when he
18 returned from pill call. (*Id.*)

19 As discussed above, to demonstrate improper motive, plaintiff must show that defendant
20 acted maliciously and sadistically to cause him harm. Defendant acted maliciously and
21 sadistically to cause plaintiff harm if he intentionally shot plaintiff in the head while plaintiff was
22 being attacked by inmate Haxton. While plaintiff may not be able to demonstrate what motivated
23 defendant to intentionally shoot him in the head, plaintiff has put forward sufficient evidence to
24 create a dispute regarding whether defendant acted maliciously and sadistically to cause him
25 harm.

26 *Conclusion*

27 Whether defendant Guzman's use of force was applied in a good faith effort to maintain
28 or restore discipline, or maliciously or sadistically to cause plaintiff harm, is disputed. Because of

1 the disputed facts regarding this claim, the undersigned finds that defendant Guzman is not
2 entitled to summary judgment.³

3 B. Defendant Parra

4 Plaintiff argues that defendant Parra had inmates Valdivia and Trejo assault plaintiff in
5 retaliation for him filing a staff complaint against defendant Guzman.

6 “Within the prison context, a viable claim of First Amendment retaliation entails five
7 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
8 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
9 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
10 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005).

11 Retaliatory motive may be shown by the timing of the allegedly-retaliatory act and other
12 circumstantial evidence, as well as direct evidence. Bruce v. Ylst, 351 F.3d 1283, 1288–89 (9th
13 Cir. 2003). However, mere speculation that defendants acted out of retaliation is not sufficient.
14 Wood v. Yordy, 753 F.3d 899, 904 (9th Cir. 2014) (citing cases) (affirming grant of summary
15 judgment where there was no evidence that defendants knew about plaintiff’s prior lawsuit, or
16 that defendants’ disparaging remarks were made in reference to prior lawsuit).

17 To raise a triable issue as to motive, a plaintiff must offer evidence that the defendants
18 knew about the protected speech. Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009). In
19 addition, a plaintiff must show “either direct evidence of retaliatory motive or at least one of three
20 general types of circumstantial evidence [of that motive].” McCollum v. California Dept. of
21 Corrections and Rehabilitation, 647 F.3d 870, 882 (9th Cir. 2011) (quoting Allen v. Iranon, 283

22
23 3. The undersigned also notes another possible scenario suggested by the evidence, which is that
24 the bent front-bead sight caused the shot to hit plaintiff in the head, even though defendant aimed
25 at plaintiff’s calf. This issue has not been sufficiently addressed by the parties.

26 However, according to defendant Guzman, he inspected his weapon before his shift and
27 apparently did not notice the bent front-bead sight. Defendant Guzman also opines that the bent
28 front-bead sight did not affect his aim for plaintiff’s left calf.

Whether the bent front bead-sight affected the aim of the weapon may require the opinion
of an expert witness. Fed. R. Evid. 701, 702. The undersigned also notes that the prison official
who took possession of the weapon after the incident noticed that the front bead sight was slightly
bent during an inspection. (ECF No. 50-12 at 56.) If this official noticed the bent front-bead
sight, then it is unclear why defendant Guzman did not notice it during his inspection.

1 F.3d 1070, 1077 (9th Cir. 2002)). To survive summary judgment without direct evidence,
2 therefore, a plaintiff must “present circumstantial evidence of motive, which usually includes: (1)
3 proximity in time between protected speech and the alleged retaliation; (2) [that] the [defendant]
4 expressed opposition to the speech; [or] (3) other evidence that the reasons proffered by the
5 [defendant] for the adverse ... action were false and pretextual.” McCollum, 647 F.3d at 882
6 (internal quotation marks and citation omitted).

7 Defendants argue that there is no evidence that defendant Parra orchestrated the assault.

8 In support of this argument, defendants rely on the declaration of defendant Parra:

9 1. I am employed by the California Department of Corrections and
10 Rehabilitation (CDCR) and in March 2013, I was the Control Booth
11 Officer in Building 2 on Facility 3B at California State Prison-
Corcoran (COR).

12 2. As a Control Booth Officer, I supervised the inmates in Building
13 2, provided gun coverage and operated the cell and building doors.
14 Because weapons are stored in a control booth, the control booth is
15 locked, and the Control Booth Officer is not allowed to leave his
post unless there is an emergency and another officer provides
coverage. The control booth is located on the second level of a
housing unit.

16 3. On March 5, 2013, at about 12:40 p.m., I released a group of
17 inmates for yard. I saw two inmates, who I later identified as Trejo
18 and Valdivia, coming down the B section staircase. When they
reached the ground level, they ran into cell 121 that was occupied
by inmate Cordero (T-37551). I immediately activated my alarm
and yelled for the inmates to get down.

19 4. Counselor Bugarin responded and also ordered the inmates to
20 get down as he ran towards cell 121. Cordero exited the cell and
21 got down on the ground. Then Validivia exited the cell, followed
by Trejo and both inmates got down on the ground.

22 5. The entire incident lasted less than a minute. Because I did not
23 have a view into cell 121 from the control booth, I did not see what
occurred inside the cell.

24 6. I suspected that Trejo and Validivia were members of associates
25 of the Two-Five prison gang, that has its origins in the special
needs yard (SNY), and that Cordero was a victim of gang-ordered
26 or sanctioned hit. I stated my belief in my incident report (CDC
837) and informed my Sergeant.

27 7. Cordero alleged that I orchestrated his assault and that I ordered
28 Trejo and Valdivia to attack him on March 5, 2013, in retaliation
for his filing a lawsuit against CDCR staff at High Desert State
Prison (HDSP). This is not true. I did not order, request or incite

1 Trejo or Valdivia to assault Cordero. I was not aware of the assault
2 before it occurred. And I have no knowledge of why the inmates
3 attacked Cordero, other than my suspicion that this was a "hit" by
4 the Two-Five prison gang, as stated in my 837 report.

5
6 8. Before receiving the complaint in this case, I was unaware that
7 Cordero, and do not recall anyone informing me, that he was suing
8 HDSP staff.

9
10 9. Cordero alleged that I learned of his lawsuit against HDSP when
11 I listened in on a telephone call between him and his attorney. This
12 is not true. Based on my customary practice, I do not listen in on a
13 specific inmate's telephone conversation unless the inmate is the
14 target of an investigation.

15
16 10. The dayroom of Building 2 has four telephones that are
17 available to inmates. For safety and security reasons, the dayroom
18 telephones are monitored and recorded, except for telephone "D,"
19 which is designated for emergency calls. In the control booth, there
20 is a device that taps into the dayroom phones and records the
21 conversations (except for D) that are taking place.

22
23 11. As the Control Booth Officer, I had the capability of tapping
24 into a specific telephone to overhear an inmate's conversation. But
25 my customary practice was to place the device on the random
26 function, which tapped in the phones in a random order for a
27 specified amount of time. I would play the device in the
28 background while I performed other duties and would pay attention
to the conversation when I heard key words that were indicative of
illegal activity or when it sounded as though the inmate was on a
three-way call, which was not permitted.

12
13 12. Unless the Investigate Service Unit informed me that an inmate
14 was under investigation or the prison had received a complaint
15 about an inmate making harassing calls, I did not target a specific
16 inmate while he was on the dayroom telephone. To the best of
17 recollection, Cordero was not part of any investigation that would
18 have required me to listen in on his conversations, and I would have
19 had no reason or desire to do so.

20
21 (ECF No. 50-6 at 1-3.)

22 Plaintiff's opposition contains no direct evidence in support of his claim against defendant
23 Parra. At his deposition, plaintiff testified regarding his claim against defendant Parra.
24 Accordingly, the undersigned summarizes this testimony herein.

25 Plaintiff testified that sometime during the two months preceding March 5, 2013, although
26 he could not remember when, defendant Parra stopped plaintiff as he was on his way to a dental
27 appointment and said, "If you keep suing us, you're gonna have to put your boots on."

28 (Plaintiff's deposition at 183.) The only other lawsuit plaintiff had at the time concerned his

1 conviction. (Id. at 185-86.)

2 Plaintiff testified that there are three reasons why he knows that defendant Parra
3 orchestrated the attack. First, defendant let plaintiff's cellmate out of the cell last, i.e., after he
4 had let other inmates leave their cells. (Id.) Plaintiff argues that under these circumstances,
5 defendant Parra would had to have known that inmates Trevino and Validivia were waiting
6 outside his cell trying to get in, because the Control Booth Officer observes the cells he wants to
7 open. (Id. at 195-96.)

8 Plaintiff testified that the second reason he knows that Parra orchestrated the assault is that
9 he heard clicks on the phone when he was talking to the lawyer who was assisting him with his
10 lawsuit filed in Lassen County against defendant Guzman. (Id. at 199.) Plaintiff filed this lawsuit
11 on or about May 17, 2012. (ECF No. 60 at 5.) Plaintiff testified that approximately an hour or
12 two before the attack, he was talking on the phone with his lawyer. (Plaintiff's deposition at
13 199.) Plaintiff heard the "distinctive click sound" made when someone picks up the other line.
14 (Id.) At that time, plaintiff looked up and saw defendant Parra looking out of the control tower at
15 plaintiff. (Id.) Defendant had the phone to his ear. (Id. at 200.) Plaintiff was not using the
16 confidential attorney phone when he made this phone call. (Id.) After plaintiff hung up, he told
17 defendant Parra that he knew that he had been listening in on his conversation with his attorney
18 regarding his lawsuit against High Desert State Prison. (Id. at 202.)

19 Plaintiff testified that the third reason he knows that defendant Parra orchestrated the
20 attack is that inmates Valdivia and Trejo later told him that defendant Parra had instructed them
21 to assault plaintiff. (Id. at 203.) Inmate Trejo later told plaintiff that defendant Parra told Trejo
22 and Valdivia that plaintiff was informing on the Two-Five prison gang and that he was dropping
23 kites on them. (Id. at 204-05.)

24 For the following reasons, the undersigned finds that whether defendant Parra had
25 knowledge of plaintiff's lawsuit filed against defendant Guzman is disputed.

26 Defendant claims that he had no knowledge of the lawsuit. In contrast, plaintiff testified
27 that sometime during the two months prior to the attack, defendant Parra told plaintiff that he
28 would have to "put his boots on" if he kept suing CDCR. The only lawsuit plaintiff had at the

1 time concerning prison conditions was his lawsuit against defendant Guzman in Lassen County.
2 Based on these circumstances, it is reasonable to infer that defendant Parra was referring to
3 plaintiff's suit against defendant Guzman. Plaintiff also claims that defendant Parra knew about
4 his lawsuit after listening in on his telephone conversation with his lawyer just hours before the
5 assault. While plaintiff's deposition testimony does not clearly demonstrate that defendant Parra
6 listened to the phone conversation between plaintiff and his lawyer, plaintiff testified at his
7 deposition that after hanging up with his attorney, he told defendant Parra that he knew that he
8 had listened in on the conversation where he discussed his lawsuit.

9 Whether defendant Parra took an adverse action against plaintiff, i.e., orchestrated the
10 assault, is also disputed. Defendant Parra denies that he orchestrated the attack. In his
11 declaration, defendant Parra suggests that he opened all of the cell doors at one time to release the
12 inmates to yard. Defendant states that when he opened the cell doors, inmates Trejo and
13 Valdivia were coming down the B section staircase and then ran to plaintiff's cell.

14 In contrast, plaintiff alleges that defendant Parra opened his cell door last, and that when
15 he did so, defendant Parra could see inmates Trejo and Valdivia standing right outside his cell.
16 Based on these alleged circumstances, and defendant Parra's alleged earlier threat to plaintiff for
17 pursuing his lawsuit, plaintiff has presented sufficient facts to create a dispute regarding whether
18 defendant Parra orchestrated the assault on plaintiff by inmates Trejo and Valdivia in retaliation
19 for plaintiff's lawsuit against defendant Guzman.

20 Defendants also observe that plaintiff claims that inmates Trejo and Valdivia told him that
21 defendant Parra told them that plaintiff was informing on the Two-Five prison gang. Thus,
22 defendants argue, there is no evidence that defendant Parra ordered the assault on plaintiff
23 because of his protected activity, i.e., pursuing his lawsuit against defendant Guzman. Assuming
24 that informing on the Two-Five gang was not protected activity, plaintiff is claiming that
25 defendant Parra gave inmates Trejo and Valdivia a reason to attack plaintiff in order to pursue
26 defendant's goal of retaliating against plaintiff for filing his lawsuit against defendant Guzman.
27 That defendant Parra gave inmates Trejo and Valdivia a reason to attack plaintiff that was
28 inconsistent with his own retaliatory motive does not undermine plaintiff's retaliation claim.

1 Because of the disputed facts, the undersigned finds that defendant Parra should not be
2 granted summary judgment as to this claim.

3 C. Qualified Immunity

4 Defendants argue that they are entitled to qualified immunity.

5 In analyzing a claim of qualified immunity, a court must examine (1) whether the facts as
6 alleged, taken in the light most favorable to plaintiff, show that the defendant’s conduct violated a
7 constitutional right, and (2) if a constitutional right was violated, whether, “in light of the specific
8 context of the case,” the constitutional right was so clearly established that a reasonable official
9 would understand that what he or she was doing violated that right. See Saucier v. Katz, 533 U.S.
10 194, 201–02 (2001). If no constitutional right was violated, the inquiry ends and the defendant
11 prevails. Saucier, 533 U.S. at 201.

12 To meet the “clearly established” requirement, “[t]he contours of the right must be
13 sufficiently clear that a reasonable official would understand that what he is doing violates that
14 right.” Anderson v. Creighton, 483 U.S. 635, 640 (1987). This requires defining the right
15 allegedly violated in a “particularized” sense that is “relevant” to the actual facts alleged. Id.
16 “Because the focus is on whether the officer had fair notice that her conduct was unlawful,
17 reasonableness is judged against the backdrop of the law at the time of the conduct.” Brosseau v.
18 Haugen, 543 U.S. 194, 198 (2004).

19 Courts are not required to address the two inquiries in any particular order. Rather, courts
20 may “exercise their sound discretion in deciding which of the two prongs of the qualified
21 immunity analysis should be addressed first in light of the circumstances in the particular case at
22 hand.” Pearson v. Callahan, 555 U.S. 223, 243 (2009).

23 Turning first to defendant Guzman, taking the facts in the light most favorable to plaintiff,
24 the undersigned finds that defendant violated plaintiff’s Eighth Amendment rights. According to
25 plaintiff, defendant Guzman shot him in the head as he was attacked by inmate Haxton. Plaintiff
26 claims that he was standing at the time defendant shot him, i.e., not falling. Intentionally shooting
27 an inmate in the head, while he is being attacked by another inmate, is sadistic and malicious.
28 Turning to the second prong of the qualified immunity analysis, the undersigned finds that a

1 reasonable officer would know that shooting an inmate under these circumstances violates the
2 Eighth Amendment. Accordingly, defendant Guzman is not entitled to qualified immunity.

3 As for defendant Parra, taking the facts in the light most favorable to plaintiff, defendant
4 Parra violated plaintiff's constitutional right not to be retaliated against by having inmates Trejo
5 and Validivia attack him in retaliation for his filing a lawsuit against defendant Guzman. A
6 reasonable officer would know that setting plaintiff up to be attacked under these circumstances
7 violated plaintiff's constitutional rights. Accordingly, defendant Parra is not entitled to qualified
8 immunity.

9 C. Negligence Claim Against Defendant Guzman

10 Defendants argue that plaintiff's negligence claim against defendant Guzman is barred by
11 the applicable statute of limitations.

12 California's Tort Claims Act requires that a tort claim against a public entity or its
13 employees be presented to the California Victim Compensation and Government Claims Board
14 ("Board"), formerly known as the State Board of Control, no more than six months after the cause
15 of action accrues. Cal. Gov't. Code §§ 905.2, 910, 911.2, 945.4, 950–950.2. Presentation of a
16 written claim, and action on or rejection of the claim, are conditions precedent to suit. State v.
17 Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1245 (2004); Mangold v. Cal. Pub.
18 Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995). To state a tort claim against a public
19 employee, a plaintiff must allege compliance with the Tort Claims Act. Bodde, 32 Cal.4th at
20 1245; Mangold, 67 F.3d at 1477; Karim–Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627
21 (9th Cir. 1988). Generally, the lawsuit must be commenced within six months of the notice
22 rejecting the claim. Cal. Gov. Code §§ 913, 945.6; Cal. Code Civ. Proc. § 342; Shirk v. Vista
23 Unified School Dist., 42 Cal.4th 210, 209 (2007).

24 Defendants argue that plaintiff did not file the instant action within six months of the
25 rejection of his claim by the Board. Defendants state that the Board rejected plaintiff's claim on
26 February 24, 2012, and plaintiff was informed that he had six months from the date of the
27 rejection letter to file a civil lawsuit. (ECF No. 50-13 at 91.) Plaintiff had until August 24, 2012
28 to file a timely lawsuit. Defendants argue that plaintiff's negligence claim is not timely because

1 plaintiff did not file the instant action until July 16, 2013.

2 Defendants also argue that plaintiff's action filed in the Lassen Superior Court did not toll
3 the statute of limitations. Plaintiff filed this state court action on May 12, 2012. (ECF No. 50-13
4 at 103.) On April 4, 2013, plaintiff voluntarily dismissed this action. (Id. at 111.)

5 In her declaration filed in support of the summary judgment motion, defense counsel
6 describes the state proceedings:

7 I was the DAG assigned [to] defend CDCR staff and the prison in
8 plaintiff's earlier state action. During the course of the litigation,
9 including discovery, plaintiff asserted that he was pursuing an
10 excessive force claim under 42 U.S.C. § 1983 against Guzman and
11 a failure to protect claim against Officer Mejia. During the case
12 management hearings, the superior court informed plaintiff that his
13 complaint did not adequately allege a cause of action for excessive
14 force under 42 U.S.C. § 1983. Also, Mejia was never named or
15 served as a defendant. Despite being informed of these defects in
16 his pleadings, plaintiff did not seek to amend the complaint.
17 Instead, he continued to pursue his state action, including
18 propounding exhaustive discovery requests related to his cause of
19 action against Guzman. After several months of discovery,
20 plaintiff, through his then-attorney of record, dismissed the state
21 action without requesting a waiver of costs or an agreement to toll
22 the statute of limitations.

23 (ECF No. 50-12 at 3.)

24 California has developed a three-pronged test for invocation of the doctrine of equitable
25 tolling: there must be "(1) timely notice to the defendant in the first claim; (2) lack of prejudice to
26 [the] defendant in gathering evidence to defend against the second claim; and, (3) good faith and
27 reasonable conduct by the plaintiff in filing the second claim." Donoghue v. County of Orange,
28 848 F.2d 926, 931 (9th Cir. 1987) (citing Collier v. City of Pasadena, 142 Cal.App.3d 917, 922-
24 (1983)).

29 Defendants do not argue that they did not receive timely notice or were prejudiced. Citing
30 Martell v. Antelope Valley Hosp. Med. Ctr., 67 Cal.App.4th 978, 982 (1998), defendants argue
31 that, as a matter of law, actions voluntarily dismissed do not toll the statute of limitations.

32 In Estate of Blue v. County of Los Angeles, 120 F.3d 982 (9th Cir. 1997), the plaintiff
33 argued that the voluntary dismissal of its previously filed federal action tolled the statute of

1 limitations under California law. The defendants argued that plaintiff did not meet the “good
2 faith and reasonable conduct” requirement for equitable tolling.

3 In Estate of Blue, The Ninth Circuit stated that it did not decide whether the simple fact
4 that a plaintiff voluntarily dismissed a claim necessarily prevented the application of equitable
5 tolling under California law. Id. at 985 (citing Appalachian Ins. Co. v. McDonnell Douglas
6 Corp., 214 Cal.App.1 (1989) (holding that prompt and good faith voluntary dismissal of
7 improperly removed action did not preclude application of equitable tolling). “Nonetheless, we
8 do not believe the California Supreme Court would use Appalachian to apply equitable tolling in
9 cases where a claim had been pending for a long period and was then voluntarily dismissed and
10 refiled, e.g., Bacon, 843 F.2d at 374-75, or where the plaintiff delayed proceeding on the claim,
11 e.g., Ervin, 848 F.2d at 1020.” Id. “Those circumstances generally indicate that the plaintiff, as
12 here, was not acting reasonably and in good faith.” Id.

13 In finding that the plaintiff did not meet the “good faith and reasonable conduct
14 requirement,” the Ninth Circuit in Blue noted that the plaintiff had an opportunity to litigate its
15 civil rights claims in the voluntarily dismissed action. Id. at 984. “Neither the court nor the
16 defendants created barriers to obstruct a resolution of the claims on the merits.” Id.

17 In the instant case, plaintiff dismissed his state court action 11 months after he filed it, and
18 after conducting extensive discovery. Plaintiff also took no steps to amend his state court
19 complaint after being notified of the pleading defects. These circumstances do not demonstrate
20 that plaintiff acted reasonably or in good faith in filing the instant action. In his opposition,
21 plaintiff argues that he followed the advice of counsel in dismissing his state law action.
22 Plaintiff’s decision to follow counsel’s advice, without further explanation, does not warrant
23 tolling. For these reasons, plaintiff is not entitled to equitable tolling for the time his state court
24 action was pending. Plaintiff makes no other arguments in support of equitable tolling.

25 In his opposition, plaintiff also argues that his negligence claim against defendant Guzman
26 is timely because he filed this action within the more lengthy statute of limitations allowed for
27 section 1983 actions.⁴ Plaintiff’s argument is without merit. Unlike section 1983, which does not

28 ⁴ The statute of limitations for a § 1983 action, as well as any tolling of the limitations period, is

1 contain a limitations period, California has provided for a specific statute of limitations governing
2 claims brought against public entities or their employees. Lucchesi v. Bar-O Boys Ranch, 353
3 F.3d 691 (9th Cir. 2003) (citing Silva v. Crain, 169 F.3d 608, (9th Cir. 1999)) (Section 945.6 is a
4 special statute of limitations which governs claims under the Government Claims Act).

5 Plaintiff also argues that the period to file his state law claims was tolled under California
6 Code of Civil Procedure § 352.1, which provides for two years of tolling for actions filed by
7 incarcerated prisoners. Plaintiff is incorrect. Prisoners are not entitled to tolling based on their
8 incarceration for the limitations period provided for in California Government Code § 945.6. See
9 Moore v. Twomey, 120 Cal.App.4th 910 (2004).

10 Plaintiff's negligence claim against defendant Guzman is time barred because plaintiff did
11 not file this action within six months of the denial of his claim by the Board. For these reasons,
12 defendant Guzman should be granted summary judgment as to plaintiff's negligence claim.
13 Defendant Guzman also moves for summary judgment as to the merits of plaintiff's negligence
14 claim. The undersigned need not address this argument because the negligence claim is time-
15 barred.

16 VI. Plaintiff's Motion to Amend

17 In the motion to amend, plaintiff argues that defendants claim that defendant Mejia has
18 not appeared in this action. Plaintiff requests leave to file an amended complaint naming
19 defendant Mejia.

20 As observed by defendants in their opposition, defendant Mejia has appeared in this action
21 and defended against it. The motion for summary judgment was filed on defendant Mejia's
22 behalf. Because defendant Mejia has appeared in this action, plaintiff's motion to amend is
23 denied as unnecessary.

24 determined by state law. Wilson v. Garcia, 471 U.S. 261, 275 (1985), superseded by statute on
25 other grounds as stated in Pony v. County of Los Angeles, 433 F.3d 1138, 1143 (9th Cir. 2006).
26 In California, the statute of limitations for personal injury actions is two years. Cal. Civ. Proc.
27 Code § 335.1. Further, if the plaintiff is incarcerated, California law provides for tolling the
28 statute of limitations for up to two years. See Cal. Civ. Proc. Code § 352.1(a) ("If a person
entitled to bring an action ... is, at the time the cause of action accrued, imprisoned on a criminal
charge, or in execution under the sentence of a criminal court for a term less than for life, the time
of that disability is not a part of the time limited for the commencement of the action, not to
exceed two years.").

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Accordingly, IT IS HEREBY ORDERED that:

- 1. Defendants’ motion for an extension of time to file a reply (ECF No. 61) is granted;
- 2. Plaintiff’s motion to amend (ECF No. 59) is denied; and

IT IS HEREBY RECOMMENDED that defendants’ summary judgment motion (ECF No. 50) be granted as to defendants Mejia, Vincent, Smith and Bargarin, and as to plaintiff’s negligence claim against defendant Guzman; and denied as to plaintiff’s federal claims against defendants Guzman and Parra.

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

Dated: April 17, 2015


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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