UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD J. CRANE,

Plaintiff,

v.

RODRIGUEZ, et al.,

Defendants.

No. 2:15-cv-0208 TLN 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 the motion for summary judgment on behalf of defendants Barton, Davey, Probst, Robinette and Rodriguez. (ECF No. 236.) Also pending is the motion for summary judgment on behalf of defendant Weeks. (ECF No. 240.)

For the reasons stated herein, the undersigned recommends that the summary judgment motion on behalf of defendants Barton, etc. be granted in part and denied in part, and defendant Weeks' summary judgment motion be denied.

II. Procedural Background

On May 7, 2021, defendants Barton, Davey, Probst, Robinette and Rodriguez filed a summary judgment motion. (ECF No. 236.) On May 21, 2021, defendant Weeks filed a

summary judgment motion. (ECF No. 240.)

Following multiple extensions of time, plaintiff filed the following pleadings in response to defendants' summary judgment motions: 1) a response to the statement of undisputed facts filed by defendants Barton, etc. (ECF No. 283); 2) a response to the statement of undisputed facts filed by defendant Weeks (ECF No. 286); 3) an opposition to both summary judgment motions (ECF No. 289); 4) a supplemental opposition (ECF No. 298); and 5) a declaration (ECF No. 300).

Defendants Barton, etc., filed a reply to plaintiff's oppositions. (ECF No. 302.) Defendant Weeks filed a reply to plaintiff's oppositions. (ECF No. 311.)

III. Legal Standards for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil Procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[1]

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, 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.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c).) "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 Advisory Committee Notes to 2010 Amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment

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

should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

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

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

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at

255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

By notices issued on May 7 and 21, 2021 (ECF Nos. 236-1 & 240-1), plaintiff was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

IV. Operative Complaint

This action proceeds on plaintiff's verified second amended complaint against defendants Davey, Rodriguez, Robinette, Barton, Probst and Weeks. (ECF No. 16.)

Plaintiff alleges that on four occasions, between December 31, 2009, and March 1, 2013, defendants conspired to set him up for assault by inmates Washington, Smith, Dolihite, Parker and Williams in retaliation for plaintiff's litigation activities. (Id. at 3-9.) Plaintiff also alleges that defendants Robinette and Weeks used excessive force on March 1, 2013. (Id. at 7-8.)

February 5, 2010 Incident Involving Inmate Washington

Plaintiff alleges that on December 31, 2009, defendants Barton and Probst told plaintiff that they were going to move plaintiff into inmate Washington's cell. (Id. at 3.) Plaintiff told them that he could not live with inmate Washington because they were enemies. (Id.) Defendant Barton responded, "I don't care, I'm going to kill you." (Id.) On or around December 31, 2009, plaintiff moved into inmate Washington's cell. (Id.) Plaintiff alleges that from December 31, 2009, through February 5, 2010, plaintiff repeatedly asked defendants Barton, Robinette and Probst to move him away from inmate Washington because inmate Washington made daily

threats to beat plaintiff. (Id. at 4.) Defendants laughed at plaintiff's requests. (Id.) Plaintiff alleges that defendants Barton and Probst used inmate Washington to set plaintiff up for abuse and eventual assault. (Id.)

On February 5, 2010, plaintiff asked Correctional Officer Silva to move plaintiff away from inmate Washington because of inmate Washington's constant threats to beat plaintiff. (Id.) Correctional Officer Silva told Correctional Officer Sanchez about what plaintiff had said. (Id.) Correctional Officer Sanchez questioned inmate Washington about threatening plaintiff while plaintiff was at the law library. (Id.) When plaintiff returned to his cell, inmate Washington asked plaintiff who he talked to? (Id. at 5.) Inmate Washington threatened plaintiff. (Id.) During dinner tray pick-up, plaintiff asked to be moved out of the cell. (Id.) Thereafter, inmate Washington attacked plaintiff, breaking his nose and ribs. (Id.)

January 22, 2011 Incident Involving Inmate Smith

In October 2010, defendant Robinette walked by plaintiff's cell and said, "I have a new cellie for you!" (Id.) Prison officials moved inmate Smith into plaintiff's cell. (Id. at 6.) Inmate Smith began threatening plaintiff. (Id.) Plaintiff asked defendant Rodriguez and Correctional Officer Patton for a cell move away from inmate Smith. (Id.) Defendant Rodriguez and Correctional Officer Patton denied plaintiff's request to move away from inmate Smith. (Id.)

In January 2011, plaintiff asked defendant Rodriguez to move him out of the cell. (Id.) Defendant Rodriguez responded, "I'll drag you out of that cell and beat your ass and throw you back in there." (Id.) On January 22, 2011, inmate Smith attacked plaintiff in the cell. (Id.)

January 16, 2013 Incident Involving Inmate Dolihite

On January 16, 2013, as plaintiff entered "work change," defendant Probst said, "Watch out for Crane." (Id.) Inside the GED class, inmate Dolihite stabbed plaintiff in the neck with a pencil and punched and kicked plaintiff twenty times. (Id. at 6-7.) Inmate Dolihite was criminally prosecuted for this assault. (Id. at 7.)

March 1, 2013 Incident Involving Inmates Parker and Williams

Plaintiff was placed in administrative segregation ("ad seg") as a result of the January 16, 2013 assault by inmate Dolihite. (Id.) Upon his release from ad seg, plaintiff was set up to be

assaulted by two Black inmates, Parker and Williams. (Id.) Defendants Robinette and Weeks told inmates Parker and Williams to get ready to do the favor owed to them and that it is "Crane." (Id.)

On March 1, 2013, the yard announcer ordered plaintiff to report to the office to turn in his shoes. (Id.) Plaintiff went to the office to exchange his ad seg shoes for boots. (Id. at 7-8.) As plaintiff put the boots on, defendant Robinette said, "You're going to need them." (Id. at 8.)

Plaintiff began walking laps. (Id.) After walking a half lap, inmates Parker and Williams attacked plaintiff. (Id.) Plaintiff never met these inmates before. (Id.) The guards did not sound the alarm until plaintiff had been beaten for a long time. (Id.)

Defendants Robinette and Weeks finally came running. (Id.) They ordered plaintiff to get down while inmates Parker and Williams remained standing. (Id.) Once plaintiff was on the ground, defendants Robinette and Weeks and other prison guards handcuffed plaintiff behind his back and smashed his face into the ground, dragged plaintiff's face across the ground, and hit plaintiff over the head with batons rendering plaintiff unconscious. (Id.)

Defendant Davey

Plaintiff alleges that on September 25, 2012, defendant Davey was ordered to respond to a motion for a preliminary injunction filed in case 2:11-cv-663. (Id. at 9.) Plaintiff alleges that he served defendant Davey with affidavits by plaintiff regarding numerous in-cell murders and serious assaults occurring on the Sensitive Needs Yard where defendant Davey was the captain. (Id.) Plaintiff alleges that Warden McDonald was forced to resign under pressure from the Inspector General after plaintiff and other prisoners testified on a tape recorder to Michael Maddox, Inspector General. (Id.)

Plaintiff alleges that instead of ordering protection for plaintiff, defendant Davey sanctioned the January 16, 2013, and March 1, 2013 incidents in retaliation for plaintiff's legal activities. (Id.)

Calling Plaintiff a Snitch

Plaintiff alleges that defendants Barton and Rodriguez called plaintiff a snitch. (Id. at 5.)

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Plaintiff's Legal Claims

As stated in the October 20, 2015 order screening the second amended complaint, plaintiff alleges that defendants Rodriguez, Robinette, Weeks, Barton and Probst violated the Eighth and First Amendments and conspired to violate plaintiff's civil rights. (ECF No. 26 at 6.) In particular, the undersigned construes the second amended complaint to allege the following claims: 1) failure-to-protect and retaliation against defendants Barton, Probst and Robinette based on the February 5, 2010 incident; 2) failure-to-protect and retaliation against defendants Robinette and Rodriguez based on the January 22, 2011 incident; 3) failure to protect and retaliation against defendant Probst based on the January 16, 2013 incident; 4) failure-to-protect, excessive force and retaliation against defendants Robinette and Weeks based on the March 1, 2013 incident; 5) failure-to-protect and retaliation against defendant Davey for sanctioning the January 16, 2013, and March 1, 2013 incidents; 6) Eighth Amendment and retaliation against defendants Barton and Rodriguez for allegedly calling plaintiff a snitch; and 7) a conspiracy claim against all defendants for allegedly conspiring with each other to violate plaintiff's constitutional rights based on his legal activities.

Plaintiff's Exhibits

Plaintiff's previously-submitted exhibits were ordered filed with his pleading. (ECF No. 26 (ECF No. 16-1 (Exhibits).)

V. Motion for Summary Judgment on Behalf of Defendants Barton, Davey, Probst, Robinette and Rodriguez

Defendants move for summary judgment on the following grounds: 1) plaintiff's claims regarding the February 5, 2010 incident are barred by the statute of limitations; 2) plaintiff failed to administratively exhaust his claims regarding the January 16, 2013 incident; and 3) defendants are entitled to summary judgment as to the merits of plaintiff's claims regarding the four incidents alleged in the second amended complaint.

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A. Are Plaintiff's Claims Regarding the February 5, 2010 Incident Barred by the Statute of Limitations?

As discussed above, plaintiff alleges that defendants Barton, Probst and Robinette violated the Eighth Amendment by housing plaintiff with inmate Washington, who assaulted plaintiff on February 5, 2010. Plaintiff also alleges that these defendants housed plaintiff with inmate Washington in retaliation for plaintiff's legal activities. Plaintiff further alleges that these defendants engaged in a conspiracy with the other defendants to retaliate against plaintiff for his legal activities when they failed to protect plaintiff from inmate Washington, and this conspiracy included the other three incidents alleged in the second amended complaint.

Defendants argue that plaintiff's claims regarding the February 5, 2010 incident are barred by the statute of limitations.

For conspiracy claims arising under Sections 1983, the statute of limitations begins to run from "the last overt act alleged from which damage could have flowed." Zeleny v. Brown, 2019 WL 3430734, at *2 (N.D. Cal. July 30, 2019) (quoting Lambert v. Conrad, 308 F.2d 571, 571 (9th Cir. 1962)). "A plaintiff must allege a specific overt act occurring within the statutory period and cannot rest on a 'general allegation that the conspiracy continued to a date within the limitations period.'" Id. (quoting Lambert, 308 F.2d at 571).

As discussed above, plaintiff alleges a conspiracy by defendants to retaliate against him for his legal activities beginning with the February 5, 2010 incident and ending with the March 1, 2013 incident. Defendants do not argue that the March 1, 2013 incident is untimely. For the reasons stated herein, the undersigned finds that plaintiff's claims regarding the February 5, 2010 incident are barred by the statute of limitations unless plaintiff can demonstrate that the incident was part of the alleged conspiracy.

For claims brought under 42 U.S.C. § 1983, the applicable statute of limitations is California's statute of limitations for personal injury actions. See Wallace v. Kato, 549 U.S. 384, 387-88 (2007); Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004) ("[f]or actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions..."). In California, there is a two-year statute of limitations for personal injury actions such as § 1983

cases. See Cal. Civ. Proc. Code § 335.1; Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004).

State tolling statutes also apply to § 1983 actions. See Hardin v. Straub, 490 U.S. 536, 543-44 (1998). California Civil Procedure Code § 352.1(a) provides tolling of the statute of limitations for two years when the plaintiff is, at the time the cause of action accrued, an inmate serving less than a life sentence. See Cal. Code. Civ. P. 352.1(a). This tolling provision applies to all inmates except those sentenced to life without the possibility of parole. See Brooks v. Mercy Hospital, 204 Cal. Rptr. 3d 289, 291-92 (Cal. App. 2016) (holding § 352.1(a) is applicable to prisoners serving a sentence of life with the possibility of parole, but the statutory language excludes those sentenced to life without the possibility of parole). It is undisputed that plaintiff is serving a sentence of less than life with the possibility of parole. Therefore, plaintiff is entitled to two years of statutory tolling pursuant to section 352.1(a).

Plaintiff had at least four years from February 5, 2010, to file a timely civil rights action raising his claims challenging the February 5, 2010 incident not based on the alleged conspiracy, i.e., two years pursuant to § 335.1 and two years pursuant to § 352.1(a). Four years from February 5, 2010, is February 5, 2014. Plaintiff filed the original complaint on January 21, 2015.[2] (ECF No. 1 at 3 (plaintiff's dated signature in original complaint).)

Additionally, "the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process." Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (citations omitted). Defendants argue this action is not timely with tolling for administrative exhaustion. The undersigned considers this argument below.[3]

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[2] Pursuant to the mailbox rule, the undersigned infers the filing date of this action from the date plaintiff signed his complaint. Jenkins v. Johnson, 330 F.3d 1146, 1149 n.2 (9th Cir. 2003), overruled on other grounds, Pace v. DiGuglielmo, 544 U.S. 408 (2005).

[3] Defendants argue that the time plaintiff exhausts his administrative remedies runs concurrently with the time this action is statutorily tolled, to the extent they overlap. For purposes of these findings and recommendations, the undersigned finds that these two periods of tolling, i.e., statutory and administrative exhaustion, run consecutively. See Rodriguez v. Albonico, 2022 WL 4096085, at *5-6 (E.D. Cal. Sept. 7, 2022) (acknowledging that there is no binding authority of whether equitable tolling when a prisoner exhausts administrative remedies runs concurrently or consecutively with statutory tolling, and there is a split with district courts that have considered the matter; finding that the reasoning that these two periods run consecutively is persuasive and more consistent with Ninth Circuit authority).

Defendants contend that plaintiff filed administrative grievance no. HDSP-B-10-00278 regarding the February 5, 2010 incident, on February 15, 2010. (See ECF No. 238-10 at 2, 11.) Grievance no. HDSP-B-10-00278 was processed as a staff complaint. (Id. at 2.) On April 7, 2010, grievance no. HDSP-B-10-00278 was partially granted at the first level. (Id. at 2, 9-10.) There is no record of plaintiff submitting this grievance for further review. (Id. at 2.)

Defendants contend that plaintiff is thereby entitled to tolling for the 51 days grievance no. HDSP-B-10-00278 was pending, i.e., from February 15, 2010, to April 7, 2010. Four years and 51 days from February 5, 2010, is March 28, 2014. As discussed above, plaintiff filed this action on January 21, 2015.

Plaintiff suggests that he is entitled to tolling while his state habeas corpus petitions challenging the alleged failure of defendant Barton to process his second level grievance submitted in HDSP-B-10-00278 were pending. Plaintiff suggests that these petitions were part of the administrative exhaustion process. For the reasons stated herein, the undersigned finds that this argument is without merit.

The undersigned is aware of no case law providing that habeas petitions challenging the alleged failure of prison officials to process grievances is part of the administrative exhaustion process. If prison officials failed to process his second level grievance, as alleged in the state habeas petitions, plaintiff exhausted administrative remedies when the time passed for prison officials to respond to his second level grievance. Andres v. Marshall, 867 F.3d 1076, 1079 (9th Cir. 2017) (when prison officials fail to process an administrative grievance, the prisoner is deemed to have exhausted administrative remedies). Filing state habeas petitions challenging the failure of prison officials to respond to administrative grievances is not part of the administrative exhaustion process, as defined by Ninth Circuit case law.

In his habeas corpus petition filed in the California Supreme Court, plaintiff claimed that he submitted grievance HDSP-B-10-00278 for second level review on April 25, 2010. (ECF No. 236-4 at 7.) Plaintiff claimed that defendant Barton refused to respond to this grievance. (Id.) Prison officials had thirty working days to respond to the second level grievance allegedly submitted by plaintiff. Former Cal. Code Regs. tit. 15, § 3084.(c). Giving plaintiff the benefit of

the doubt, the undersigned finds that plaintiff exhausted administrative remedies thirty working days after April 25, 2010, i.e., on June 7, 2010. Andres v. Marshall, 867 F.3d at 1079.

Plaintiff is entitled to tolling from the date he submitted his first level administrative grievance in HDSP-B-10-00278 on February 15, 2010, until June 7, 2010, i.e., 112 days. Adding 112 days and four years to February 5, 2010, extends the statute of limitations for plaintiff's claims challenging the February 5, 2010 incident that are not based on the alleged conspiracy to May 28, 2014. Therefore, plaintiff's claims challenging the February 5, 2010 incident that are not based on the alleged conspiracy are not timely because plaintiff filed the instant action on January 21, 2015.

Equitable Tolling Based on State Habeas Petitions

In his opposition, plaintiff argues that he is entitled to equitable tolling for the time his state habeas petitions challenging the alleged failure of defendant Barton to process his second level grievance in HDSP-B-10-00278 were pending. (ECF No. 289 at 5-6.) For the reasons stated herein, the undersigned finds that plaintiff is not entitled to equitable tolling on these grounds.

Generally, federal courts apply the forum state's law regarding equitable tolling. Fink v. Shedler, 192 F.3d 911, 914 (9th Cir. 1999). "Broadly speaking," equitable tolling "applies [w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." McDonald v. Antelope Valley Cmty. Coll. Dist., 45 Cal.4th 88, 100 (2008) (internal quotation marks and citation omitted).

Under California law, equitable tolling is appropriate in a later suit when an earlier suit was filed and where the record shows: "'(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim.'" Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1137–38 (9th Cir. 2001) (en banc) (citing Collier v. City of Pasadena, 142 Cal.App.3d 917, 924 (1983)).

California has long refused to apply the equitable tolling doctrine to toll the statute of limitations on a claim for a distinct wrong that was not the basis of the earlier proceeding.

Daviton, 241 F.3d at 1141.

In his relevant state habeas petitions, plaintiff challenged defendant Barton's alleged failure to process plaintiff's second level grievance submitted in HDSP-B-10-00278. (ECF No. 236-4 at 5-43) (plaintiff's habeas petition filed in California Supreme Court).)[4] Plaintiff's state habeas petitions did not raise claims directly related to the February 5, 2010 incident. Therefore, plaintiff is not entitled to equitable tolling for the time his state habeas petitions were pending because they challenged a distinct wrong that was not the basis of the at-issue claims raised in the instant action. See Daviton, 241 F.3d at 1141 ("As the courts have explained for years, the equitable tolling doctrine requires that the same wrong serve as the predicate for the earlier and later proceedings to make sure defendant received proper notice.").[5]

Fraudulent Concealment

In his opposition, plaintiff argues for tolling based on the doctrine of fraudulent concealment, also known as equitable estoppel, because defendant Barton interfered with his administrative grievance regarding the February 5, 2010 incident. (ECF No. 289 at 7.) In his

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[4] The undersigned takes judicial notice of plaintiff's habeas corpus petition filed in the California Supreme Court. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); Harris v. County of Orange, 682 F.3d 1126, 1131–32 (9th Cir. 2012) (court may take judicial notice of "documents on file in federal or state courts"). Plaintiff's habeas corpus petition filed in the California Supreme Court reflects that plaintiff filed habeas corpus petitions in the Lassen County Superior Court and California Court of Appeal also challenging defendant Barton's alleged failure to process plaintiff's grievance. (ECF No. 236-4 at 10.)

[5] Defendants argue that even were plaintiff entitled to equitable tolling for the time his state habeas petitions were pending, the instant action would not be timely. Defendants argue that the time plaintiff's state habeas petitions were pending coexisted with the two year statutory disability based on imprisonment, which already tolled the statute of limitations. Defendants argue that plaintiff is not entitled to overlapping tolling. As discussed in footnote 2 above, there is no binding authority on this issue and district courts are split on this issue. The undersigned need not decide whether the tolling for the time plaintiff's state habeas petitions were pending is concurrent or consecutive to other tolling events because plaintiff does not qualify for equitable tolling for the time his state habeas petitions were pending. But see Lantzy v. Centex Homes, 31 Cal.4th 363, 370-71 (Cal. 2003) (when equitable tolling is applied, the statute of limitations "stops running during the tolling event, and begins to run again only when the tolling event has concluded," extending the deadline for filing the new action for the length of time of the tolling event, which is tacked on to the statute of limitations).

state habeas petitions, plaintiff alleged that Barton removed his grievance regarding the February 5, 2010 incident from the lock-box and failed to process it.

"Under California law equitable estoppel requires that: '(1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must reasonably rely on the conduct to his or her injury.'" Lukovsky v. City & Cty. of San Francisco, 535 F.3d 1044, 1051-52 (9th Cir. 2008) (quoting Honig v. San Francisco Planning Dep't, 127 Cal. App. 4th 520, 529 (2005)). "[T]he focus of the equitable estoppel analysis is not whether the plaintiff knew she had a cause of action ... but whether the defendant's fraudulent concealment or misrepresentation deprived the plaintiff of a full understanding of the true facts, and thus, dissuaded the plaintiff from filing the claim at issue within the limitations period." Estate of Amaro v. City of Oakland, 653 F.3d 808, 813 (9th Cir. 2011). In short, "[t]he doctrine 'focuses primarily on the actions taken by the defendant to prevent a plaintiff from filing suit.'" Id. (quoting Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000)).[6]

Defendant Barton's alleged failure to process plaintiff's grievance regarding the February 5, 2010 incident did not deprive plaintiff of a full understanding of his claims. For this reason, the doctrine of fraudulent concealment/equitable estoppel is not applicable.

Conclusion

For the reasons discussed above, the undersigned finds that plaintiff's Eighth Amendment and retaliation claims against defendants Barton, Probst and Robinette based on the February 5, 2010 incident, *which are not based on the alleged conspiracy*, are barred by the statute of

[6] As observed by the district court in Hidalgo v. Engle, 2021 WL 4341123, at *4 n.1 (Aug. 30, 2021), in unpublished opinions, Ninth Circuit panels have alternatively cited to federal law and state law when analyzing equitable estoppel in Section 1983 actions. See, e.g., Gibbs v. Farley, 723 F. App'x 458, 458 (9th Cir. 2018) (citing the California Court of Appeal for California law); Hunter v. Ballard, 627 F. App'x 612, 612 (9th Cir. 2015) (citing Lukovsky for California law); Estate of Amaro v. City of Oakland, 653 F.3d 808, 814 (9th Cir. 2011) (describing requirements under federal law); see also Marlowe v. City & Cty. of San Francisco, 753 F. App'x 479, 480 (9th Cir. 2019) ("[C]laims under § 1983 borrow the forum state's equitable defenses to the statute of limitations.")

limitations. If plaintiff can demonstrate that his claims regarding the February 5, 2010 incident are part of the alleged conspiracy, his claims regarding February 5, 2010 are not time-barred. Accordingly, the undersigned herein considers defendants' motion for summary judgment as to the merits of plaintiff's Eighth Amendment, retaliation and conspiracy claims based on the February 5, 2010 incident. Lacey v. Maricopa County, 693 F.3d at 935 (for a conspiracy claim, there must always be an underlying constitutional violation).

B. Did Plaintiff Administratively Exhaust His Claims Arising Out of the January 16, 2013 Assault?

Legal Standard for Administrative Exhaustion

Because plaintiff is a prisoner suing over the conditions of his confinement, his claims are subject to the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); Porter v. Nussle, 534 U.S. 516, 520 (2002) ("§ 1997e(a)'s exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences"). "[T]hat language is 'mandatory': An inmate 'shall' bring 'no action' (or said more conversationally, may not bring any action) absent exhaustion of available administrative remedies." Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) (citations omitted). However, "inmates are not required to specially plead or demonstrate exhaustion in their complaints." Jones v. Bock, 549 U.S. 199, 216 (2007). Instead, "the defendant in a PLRA case must plead and prove nonexhaustion as an affirmative defense," and it is the defendant's burden "to prove that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." Albino v. Baca, 747 F.3d 1162, 1171-72 (9th Cir. 2014) (en banc) (citations omitted).

Discussion

Defendants argue that plaintiff failed to exhaust administrative remedies regarding his claims arising out of the January 16, 2013 assault by inmate Dolihite. In support of this argument, in undisputed fact no. 10, defendants cite the declaration of High Desert State Prison

("HDSP") Appeals Coordinator Espinoza. (ECF No. 238-10.) Litigation Coordinator Espinoza states that after a diligent search of plaintiff's appeals, there is no record of plaintiff submitting an appeal, accepted for review, regarding an incident involving inmate Dohilite on January 16, 2013. (Id. at 2.) Defendants also cite the declaration of the Acting Chief of the Office of Appeals for the California Department of Corrections, J. Spaich. (ECF No. 238-6.) Acting Chief Spaich states that after a diligent search of plaintiff's appeals, there is no record of plaintiff submitting an appeal, accepted for third level review, regarding an incident involving inmate Dohilite on January 16, 2013. (Id. at 3.)

In his verified opposition, plaintiff contends that he did not file an administrative appeal regarding the January 16, 2013 assault out of fear for his life. (ECF No. 289 at 8.) In support of this argument, plaintiff cites McBride v. Lopez, 807 F.3d 982 (9th Cir. 2015). (Id.)

In his verified response to defendants' undisputed fact no. 58, plaintiff claims that defendants "committed all of these crimes against me" because of plaintiff's lawsuit in Crane v. McDonald, case 2:11-cv-663 KJM CKD P, filed against defendant Davey. (ECF No. 283 at 18.) In his verified response to defendants' undisputed fact no. 10, plaintiff also claims that he did not file an appeal regarding the assault by inmate Dohilite because he was "in grave fear of losing his life by HDSP prison officials." (Id. at 4.) Plaintiff claims, "Plaintiff lied to these officials to make them think I would not inform on what they did to me. I was literally terrified of these officials after they tried to have me killed." (Id.) Based on these allegations, plaintiff appears to claim that he did not file an appeal regarding the January 16, 2013 assault out of fear that defendants would retaliate against him for doing so, in further retaliation for pursuing case 11-cv-663.

A threat of retaliation may render the prison grievance system effectively unavailable, and excuse a prisoner's failure to exhaust administrative remedies. McBride v. Lopez, 807 F.3d at 984, 987–88. To avoid the exhaustion bar on the ground of a fear of retaliation, a prisoner must show both a subjective and objective basis for that fear. Id. To meet the subjective prong, the prisoner must "provide a basis for the court to find that he actually believed prison officials would retaliate against him if he filed a grievance" and that he was actually deterred from filing a

grievance. Id. at 987–88. To meet the objective prong, "there must be some basis in the record for the district court to conclude that a reasonable prisoner of ordinary firmness would have believed that the prison official's action communicated a threat not to use the prison's grievance procedure and that the threatened retaliation was of sufficient severity to deter a reasonable prisoner from filing a grievance." Id. at 987.

In the reply to plaintiff's opposition, defendants argue that plaintiff has not demonstrated that he actually believed that prison officials would retaliate against him if he filed a grievance regarding the January 16, 2013 incident involving inmate Dohilite. (ECF No. 302 at 4-5.) Defendants observe that on January 31, 2013, plaintiff filed a motion for a preliminary injunction in case 11-cv-663 regarding the January 16, 2013 incident.[7] (See 2: 11-cv-663 at ECF No. 55.) In this motion, plaintiff alleged that on January 16, 2013, an inmate stabbed him in the neck while plaintiff was using the computer in GED class. (Id.) Plaintiff alleged that this attempted murder was "very likely" staged by prison officials because corrupt guards were working, including some at the scene. (Id.) Plaintiff served this motion on defense counsel in case 11-cv-663. (Id.)

Defendants contend that plaintiff repeated the allegations made in the motion for injunctive relief filed on January 31, 2013, in case 11-cv-663, in a motion filed in Crane v. Hatton, N.D. Case No. 5-11-cv-3900, on February 1, 2013.[8] (ECF No. 236-4 at 61-62.) Plaintiff served this motion on defense counsel in that case. (Id. at 63.)

Defendants observe that while plaintiff alleges that he did not file a grievance regarding the January 16, 2013 incident out of fear of retaliation, plaintiff pursued several other appeals,

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[7] The undersigned takes judicial notice of the relevant pleadings filed in case 11-cv-663. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); Harris v. County of Orange, 682 F.3d 1126, 1131–32 (9th Cir. 2012) (court may take judicial notice of "documents on file in federal or state courts").

[8] The undersigned takes judicial notice of plaintiff's motion for preliminary injunction filed in 5-11-cv-3900. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); Harris v. County of Orange, 682 F.3d 1126, 1131–32 (9th Cir. 2012) (court may take judicial notice of "documents on file in federal or state courts").

including an appeal regarding the March 1, 2013 incident alleged in the second amended complaint. Defendants refer to the Inmate/Parolee Appeals Tracking System ("IATS") appeal history for plaintiff. (ECF No. 238-10 at 5-7.) This document indicates that prison officials received first and second level grievances from plaintiff in March 2013, April 2013, May 2013 and July 2013. (Id. at 7.) One of these grievances concerned the March 1, 2013 incident. (ECF No. 238-6 at 28-43.)

Plaintiff's filing of the motions for injunctive relief and submission of the grievances discussed above undermine plaintiff's claim that he actually believed prison officials would retaliate against him for filing a grievance regarding the January 16, 2013 incident. Accordingly, the undersigned finds that plaintiff has not demonstrated that he actually believed that prison officials would retaliate against him if he filed a grievance regarding the January 16, 2013 incident.

For the reasons discussed above, the undersigned finds that plaintiff failed to exhaust administrative remedies regarding the January 16, 2013 incident. Accordingly, defendants should be granted summary judgment as to plaintiff's Eighth Amendment, retaliation and conspiracy claims based on the January 16, 2013 incident, including the related claims against defendant Davey, on these grounds.

Because plaintiff failed to administratively exhaust his claims regarding the January 16, 2013 incident, the undersigned will not address defendants' motion for summary judgment as to the merits of plaintiff's claims regarding the January 16, 2013 incident.

C. Legal Standards re: Merits of Plaintiff's Claims

Failure to Protect

The Eighth Amendment protects prisoners from inhumane methods of punishment and from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Prison officials must provide prisoners with medical care and personal safety and must take reasonable measures to guarantee the safety of the inmates. Farmer v. Brennan, 511 U.S. 825, 832–33 (1994) (internal citations and quotations omitted). Prison officials have a duty under the Eighth Amendment to protect prisoners from violence at the hands of other prisoners because

being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society. Farmer, 511 U.S. at 833–34 (quotation marks omitted); Clem v. Lomeli, 566 F.3d 1177, 1181 (9th Cir. 2009); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005).

However, prison officials are liable under the Eighth Amendment only if they demonstrate deliberate indifference to conditions posing a substantial risk of serious harm to an inmate; and it is well settled that deliberate indifference occurs when an official acted or failed to act despite his knowledge of a substantial risk of serious harm. Farmer, 511 U.S. at 834, 841 (quotations omitted); Clem, 566 F.3d at 1181; Hearns, 413 F.3d at 1040.

Retaliation

To demonstrate First Amendment retaliation by prison officials, a plaintiff must show: (1) that a state actor took some adverse action against a prisoner (2) because of (3) that prisoner's protected conduct, and that such action (4) would chill or silence a person of ordinary firmness from future First Amendment activities, and (5) the retaliatory action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (citations omitted).

Excessive Force

The use of excessive force by a prison official violates the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 3-4 (1992). Determining whether there has been an Eighth Amendment violation turns upon "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Id. at 6 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).

To determine whether the use of force violates the Eighth Amendment, the court should consider the "extent of injury ..., the need for application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.'" Hudson, 503 U.S. at 7 (quoting Whitley, 475 U.S. at 321).

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Qualified Immunity

Government officials enjoy qualified immunity from civil damages unless their conduct violates clearly established statutory or constitutional rights. Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir. 2001) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). When a court is presented with a qualified immunity defense, the central questions for the court are: (1) whether the facts alleged, taken in the light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a statutory or constitutional right; and (2) whether the right at issue was "clearly established." Saucier v. Katz, 533 U.S. 194, 201 (2001), receded from, Pearson v. Callahan, 555 U.S. 223 (2009) (the two factors set out in Saucier need not be considered in sequence). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

"For the second step in the qualified immunity analysis—whether the constitutional right was clearly established at the time of the conduct—the critical question is whether the contours of the right were 'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Mattos v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) (quoting al-Kidd, 563 U.S. at 741) (some internal marks omitted). "The plaintiff bears the burden to show that the contours of the right were clearly established." Clairmont v. Sound Mental Health, 632 F.3d 1091, 1109 (9th Cir. 2011). "Whether the law was clearly established must be undertaken in light of the specific context of the case, not as a broad general proposition." Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050 (9th Cir. 2002) (citation and internal marks omitted).

Conspiracy

A conspiracy claim brought under section 1983 requires proof of "an agreement or meeting of the minds to violate constitutional rights," Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001) (quoting United Steel Workers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540–41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of constitutional right, Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989)). "Conspiracy is not itself a constitutional tort under § 1983,"

and it "does not enlarge the nature of the claims asserted by the plaintiff, as there must always be an underlying constitutional violation." Lacey v. Maricopa County f, 693 F.3d 896, 935 (9th Cir. 2012) (en banc). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Franklin, 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d at 1541). Plaintiff must allege that defendants conspired or acted jointly in concert and that some overt act was done in furtherance of the conspiracy. Sykes v. State of California, 497 F.2d 197, 200 (9th Cir. 1974).

Vague and conclusory allegations of a conspiracy with no supporting factual averments or evidence will not withstand an adequately supported motion for summary judgment. See Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998) (to survive summary judgment on a conspiracy claim, a party must provide material facts showing an agreement among the conspirators to deprive the party of their rights); Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (vague and conclusory allegations of officials participation in civil rights violations are not sufficient).

However, "[s]uch an agreement need not be overt, and may be inferred on the basis of circumstantial evidence such as the action of the defendants." Mendocino Env't Ctr. v. Mendocino County., 192 F.3d 1283, 1301–02 (9th Cir. 1999). "Whether defendants were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury, so long as there is a possibility that the jury can infer from the circumstances (that the alleged conspirators) had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." Id. at 1301 (citation and internal quotation marks omitted).

D. Preliminary Matters

Where appropriate, the undersigned herein considers the allegations in plaintiff's verified second amended complaint as evidence in support of plaintiff's opposition. Lopez v. Smith, 203 F.3d 1122, 1132 n. 14 (9th Cir. 2000) (en banc) (plaintiff's verified complaint may serve as an affidavit in opposition to summary judgment if based on personal knowledge and specific facts admissible in evidence).

Plaintiff's response to defendants' statement of undisputed facts is also verified.

Therefore, where appropriate, the undersigned considers the statements made by plaintiff in the response as an affidavit in opposition.

In the reply to several of plaintiff's responses to defendants' statement of 99 undisputed facts, defendants argue that plaintiff's responses are conclusory and fail to address the facts asserted. In light of the Ninth Circuit's directive that a document filed pro se be construed liberally, the undersigned shall strive to resolve defendants' summary judgment motion on the merits. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (document filed pro se is "to be liberally construed"); Erickson v. Pardus, 551 U.S. 89, 94 (2007); Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."). Therefore, while some of plaintiff's responses to defendants' undisputed facts may be conclusory and/or fail to directly address the undisputed facts alleged, the undersigned considers the evidence submitted by plaintiff in evaluating the merits of defendants' proposed undisputed facts.

E. Merits of Retaliation and Eighth Amendment Claims Regarding February 5, 2010 Incident: Defendants Barton, Probst and Robinette

As discussed above, plaintiff's claims regarding the February 5, 2010 incident are barred by the statute of limitations unless plaintiff demonstrates that the February 5, 2010 incident was part of the conspiracy alleged in the second amended complaint. Accordingly, the undersigned herein considers the merits of the claims regarding the February 5, 2010 incident. Hart v. Parks, 450 F.3d at 1071 (a conspiracy claim requires an actual deprivation of a constitutional right).

1. Disputed and Undisputed Facts

Defendants undisputed facts nos. 12-27 and 94-95 are directly relevant to plaintiff's clams regarding the February 5, 2010 incident.

Undisputed Facts

Undisputed Fact No. 12: Plaintiff and inmate Washington were celled together on December 31, 2009. (ECF No. 236-3 at 5; ECF No. 283 at 5 (plaintiff's response).)

Undisputed Fact No. 13: Inmate Washington was not documented as an enemy of plaintiff when they were celled together on December 31, 2009. (ECF No. 236-3 at 5; ECF No.

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238-15 at 2 (McConnell declaration); ECF No. 283 at 5 (plaintiff's response).)[9]

Undisputed Fact No. 17: Plaintiff and inmate Washington did not have a physical altercation prior to February 5, 2010. (ECF No. 236-3 at 6; ECF No. 238-4 at 2 (Probst declaration); ECF No. 238-5 at 2 (Barton declaration); ECF No. 283 at 6 (plaintiff's response); ECF No. 16 at 4 (plaintiff's verified second amended complaint)).[10]

Undisputed Fact No. 18: On February 5, 2010, plaintiff and inmate Washington had a physical altercation. (ECF No. 236-3 at 6; ECF No. 302-1 at 8 (defendants' reply to plaintiff's response to defendants' statement of undisputed facts); ECF No. 283 at 6 (plaintiff's response).)[11]

Undisputed Fact No. 20: Defendants Barton and Probst did not witness the altercation between plaintiff and inmate Washington on February 5, 2010. (ECF No. 302-1 at 8-9; ECF No. 238-5 at 2 (Barton declaration); ECF No. 238-4 at 2 (Probst declaration); ECF No. 283 at 7; ECF No. 283 at 7 (plaintiff's response).)

Undisputed Fact No. 22: There is no record of plaintiff submitting a written cell move request prior to the February 5, 2010 incident. (ECF No. 236-8 at 8; ECF No. 238-13 at 2 (McDonnell declaration); ECF No. 283 at 8 (plaintiff's response).)[12]

Undisputed Fact Nos. 23, 24: Under California Code of Regulations, title 15, section 3084.9, inmates can submit emergency appeals under certain circumstances, including threats of death or injury due to enemies or other placement concerns. (ECF No. 236-3 at 8; ECF No. 238-

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[9] In his response to defendants' undisputed fact no. 13, plaintiff alleges that on December 31, 2009, he told defendants Barton and Probst that he and inmate Washington were enemies. (ECF No. 283 at 5.) However, plaintiff does not dispute that he and inmate Washington were not documented as enemies on December 31, 2009. (Id.)

[10] In undisputed fact no. 17, defendants contend that plaintiff and inmate Washington celled together "without incident" until February 5, 2010. (ECF No. 236-3 at 6.) The term "without incident" is vague. For this reason, the undersigned finds that it is undisputed that plaintiff and inmate Washington did not have a physical altercation prior to February 5, 2010.

[11] In his response to defendants' undisputed fact no. 18, plaintiff alleges that inmate Washington attacked him on February 5, 2010. (ECF No. 283 at 6.)

[12] In response to defendants' undisputed fact no. 22, plaintiff does not dispute that he did not submit a written cell move request prior to the February 5, 2010 incident. (ECF No. 283 at 8.) Plaintiff contends that he made verbal requests for a cell move. (Id.)

10 (Espinoza declaration); ECF No. 283 at 8 (plaintiff's response).) Emergency appeals are responded to within 48 hours. (ECF No. 236-3 at 8; ECF No. 283 at 8 (plaintiff's response).)[13]

Undisputed Fact No. 25: There is no record of plaintiff submitting an emergency appeal, requesting a cell move or complaining in writing of safety concerns prior to the February 5, 2010 incident. (ECF No. 236-3 at 8-9; ECF No. 238-10 at 3 (Espinoza declaration); ECF No. 283 at 9 (plaintiff's response).)

Undisputed Fact No. 26: Plaintiff received a Rules Violation Report for fighting with inmate Washington. (ECF No. 283 at 9; ECF No. 238-13 at 29 (rules violation report); ECF No. 283 at 9 (plaintiff's response).)[14]

Undisputed Fact No. 27: Plaintiff and inmate Washington signed a compatibility chrono. (ECF No. 238-13 at 38 (compatibility chrono).) The compatibility chrono states that on February 5, 2010, they engaged in mutual combat with each other. (Id.) The compatibility chrono states that on February 5, 2010, separate interviews were conducted with plaintiff and inmate Washington. (Id.) The compatibility chrono states that subsequently, both inmates claimed they do not consider each other as enemies and could program together, without committing acts of violence against each other. (Id.) Plaintiff and inmate Washington wrote their signatures below lines stating that they did not consider the other to be an enemy.[15] (Id.)

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[13] In response to defendants' undisputed fact no. 23, plaintiff contends that "this was not happening at HDSP." (ECF No. 283 at 8.) Plaintiff contends that the OIG Special Review found that the appeals process was not functioning. (Id.) Plaintiff does not dispute that the regulations provided for emergency appeals that were supposed to be responded to within 48 hours. In addition, the undersigned previously declined to take judicial notice of the OIG report because the report does not specifically address the incidents plaintiff challenges in this action, does not include plaintiff's name, does not address the issue of retaliation and addresses use of force incidents after the incidents alleged in the second amended complaint. (ECF No. 160 at 4.)

[14] In response to defendants' undisputed fact no. 26, plaintiff does not dispute that he received a Rules Violation Report for fighting with inmate Washington, although he contends the report was false. (ECF No. 283 at 9.)

[15] In response to defendants' undisputed fact no. 27, plaintiff states that he signed the chrono because guards were threatening to place him in ad seg. (ECF No. 283 at 9.)

Disputed Facts

The undersigned finds that defendants' undisputed facts nos. 14, 15, 16, 19, 21, 94, 95 and 96 are disputed. Accordingly, the undersigned refers to these facts as disputed herein.

Disputed Fact No. 14: The parties dispute whether plaintiff told defendants Barton, Robinette and Probst that he and Washington were enemies when they were celled together. (ECF No. 236-3 at 5; ECF No. 238-5 at 1 (Barton declaration); 238-4 at 1 (Probst declaration); ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 5 (plaintiff's response to defendants' undisputed fact no. 14); ECF No. 16 at 3-4 (plaintiff's verified second amended complaint)[16]; ECF No. 300 at 2 (plaintiff's declaration).)

Disputed Fact No. 15: The parties dispute whether defendant Barton told plaintiff that he was going to kill him. (ECF No. 236-3 at 6; ECF No. 238-5 at 2 (Barton declaration); ECF No. 283 at 6 (plaintiff's response to defendants' undisputed fact no. 15); ECF No. 16 at 3 (plaintiff's verified second amended complaint).)

Disputed Fact No. 16: The parties dispute whether defendant Probst threatened plaintiff in response to a request to speak to the sergeant or at any time. (ECF No. 236-3 at 6; ECF No. 238-4 at 2 (Probst declaration); ECF No. 283 at 6 (plaintiff's response to defendants' undisputed fact no. 16); ECF No. 16 at 3 (plaintiff's verified second amended complaint).)

Disputed Fact No. 19: In undisputed fact no. 19, defendants contend that defendants Barton and Probst did not encourage inmate Washington to fight plaintiff, did not know that they would fight on February 5, 2010, and had no reason to know that these inmates would fight on that date. (ECF No. 302-1 at 8.)

For the following reasons, the undersigned finds that whether defendants Barton and Probst encouraged inmate Washington to fight plaintiff is disputed.

In their declarations, defendants Barton and Probst state that they did not encourage inmate Washington to fight plaintiff, they did not know that plaintiff and inmate Washington

[16] In his verified second amended complaint, plaintiff alleges that on December 31, 2009, he told defendants Barton and Probst, "I can't live with Washington, we are enemies!" (ECF No. 16 at 3.) Plaintiff alleges that defendant Barton responded, "I don't care, I'm going to kill you!" (Id.)

would fight on February 5, 2010, and had no reason to know that these inmates would fight on that date. (ECF No. 238-4 at 2 (Probst declaration); ECF No 238-5 at 2 (Barton declaration).)

Plaintiff submitted the verified declaration of inmate Washington. Inmate Washington states that on December 31, 2009, defendant Barton approached him and said, "You are getting a new cellie." (ECF No. 16-1 at 2.) Defendant Barton told inmate Washington that the move had nothing to do with him. (Id.) Defendant Barton told inmate Washington, "It's this asshole moving in with you…He needs to learn a lesson about filing all this paperwork….we know you're not going to tolerate an asshole!" (Id.) Inmate Washington states that defendant Barton was referring to plaintiff. (Id.)

As discussed above, in the verified second amended complaint, plaintiff alleges that defendants Barton and Probst told him that they were moving him in with inmate Washington. (ECF No. 16 at 3.) In his declaration, inmate Washington alleges that defendant Barton told him, "[w]e know you're not going to tolerate an asshole!" (ECF No. 16-2 at 2.) By "we," it appears that defendant Barton referred to himself and defendant Probst. The alleged statement, "[w]e know you're not going to tolerate an asshole," could be interpreted as encouragement by defendants Barton and Probst for inmate Washington to assault plaintiff. Accordingly, based on this evidence, the undersigned finds that whether defendants Barton and Probst encouraged inmate Washington to fight plaintiff is a disputed fact.

In his declaration, inmate Washington states that on February 5, 2010, he and plaintiff had a disagreement and argument. (Id. at 3.) This argument escalated into violence. (Id.) Plaintiff provides no evidence suggesting that either defendant Barton or Probst were aware of the disagreement between plaintiff and inmate Washington on February 5, 2010, that led to the physical altercation on that date. Accordingly, the undersigned finds that it is undisputed that defendants Barton and Probst did not know that plaintiff and inmate Washington would have a physical altercation on February 5, 2010.

Disputed Fact No. 21: In undisputed fact no. 21, defendants contend that defendants Barton, Probst and Robinette had no knowledge of plaintiff requesting a cell move away from inmate Washington before the February 5, 2010 incident. (ECF No. 236-3 at 7.) For the

following reasons, the undersigned finds that defendants' undisputed fact no. 21 is disputed.

In their declarations, defendants Barton, Probst and Robinette state that they had no knowledge of plaintiff requesting a cell move away from inmate Washington before the February 5, 2010 incident. (ECF No. 238-5 at 2 (Barton declaration); ECF No. 238-4 at 2 (Probst declaration); ECF No. 238-1 at 2 (Robinette declaration).)

In his verified second amended complaint, plaintiff alleges that from December 31, 2009, until February 5, 2010, he repeatedly asked defendants Barton, Robinette and Probst and other prison guards to move him away from inmate Washington because inmate Washington was making daily threats to beat plaintiff. (ECF No. 16 at 4.) Plaintiff alleges that defendants repeatedly laughed at his requests and defendants Barton and Robinette called plaintiff a bitch. (Id.)

Based on the conflicting evidence set forth above, the undersigned finds that whether defendants Barton, Probst and Robinette had knowledge of plaintiff requesting a cell move away from inmate Washington before February 5, 2010, is disputed.

Disputed Fact No. 94: The parties dispute whether defendants Probst, Barton and Robinette ever threatened plaintiff. (ECF No. 302-1 at 29 (defendants' reply to plaintiff's response to undisputed fact no. 94).)

Disputed Fact No. 95: The parties dispute whether defendants Probst, Barton and Robinette ever called plaintiff names. (ECF No. 302-1 at 29 (defendants' reply to plaintiff's response to undisputed fact no. 95).)

2. Discussion—Eighth Amendment Claim

For the following reasons, defendants Barton, Probst and Robinette should be denied summary judgment as to plaintiff's Eighth Amendment failure-to-protect claim regarding the February 5, 2010 incident. Whether defendants Barton and Probst knew that inmate Washington posed a substantial risk of serious harm to plaintiff's safety when they moved plaintiff into inmate Washington's cell on December 31, 2009, is disputed. As discussed above, in his declaration, inmate Washington states that on December 31, 2009, defendant Barton told him, "We know you're not going to tolerate an asshole…he needs to learn a lesson about filing all this

paperwork." (ECF No. 16-1 at 2.) Inmate Washington's declaration suggests that defendants Barton and Probst set plaintiff up to be assaulted by inmate Washington.

In his verified second amended complaint, plaintiff alleges that from December 31, 2009, to February 5, 2010, he repeatedly asked defendants Barton, Robinette and Probst to move him away from inmate Washington because inmate Washington threatened to beat plaintiff. (ECF No. 16 at 4.) Plaintiff alleges that defendants laughed at his requests. (Id.) Based on this evidence, the undersigned finds that whether defendants knew that inmate Washington posed a substantial risk of serious harm to plaintiff and disregarded this knowledge is disputed.

The undersigned observes that several facts undermine plaintiff's claim that he faced a substantial risk of serious harm from inmate Washington. For example, plaintiff received a Rules Violation Report for fighting based on the February 5, 2010 incident, and also signed the compatibility chrono.[17] The court cannot make credibility determinations regarding plaintiff based on this evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (on summary judgment, the court cannot decide credibility). However, plaintiff may have to address this evidence at trial.

Defendants argue that they are entitled to qualified immunity as to plaintiff's Eighth Amendment claim. Taking the facts in the light most favorable to plaintiff, the undersigned finds that defendants violated the Eighth Amendment when they moved plaintiff into inmate Washington's cell and refused plaintiff's requests to be moved away from inmate Washington. The undersigned also finds that the law was clearly established such that a reasonable officer would know that their conduct, as alleged by plaintiff, violated the Eighth Amendment. Accordingly, defendants are not entitled to qualified immunity as to this claim.

3. Discussion—Retaliation Claim

Defendants move for summary judgment as to plaintiff's retaliation claim based on the February 5, 2010 incident on the grounds that they took no adverse action against plaintiff. (ECF No. 236-2 at 22.) In support of this argument, defendants cite Watison v. Carter, 668 F.3d 1108,

[17] As discussed above, plaintiff claims that the Rules Violation Report was based on false charges and that he signed the compatibility chrono to avoid being placed in ad seg.

1114-15 (9th Cir. 2012), for the proposition that a retaliation claim requires an adverse action by defendants against the plaintiff. (Id.)

Defendants' alleged adverse actions were housing plaintiff with inmate Washington and denying plaintiff's requests to be moved away from inmate Washington, despite having knowledge that inmate Washington posed a substantial risk of harm to plaintiff's safety. As discussed above, whether defendants committed the alleged adverse actions against plaintiff is disputed. For this reason, defendants' motion for summary judgment as to this retaliation claim should be denied.

The undersigned observes that in their declarations, defendants Robinette, Barton and Probst state that they "have never taken or encouraged any adverse action against inmate Crane because of his litigation activities." (ECF No. 238-1 at 3 (Robinette declaration); ECF No. 238-4 at 2 (Probst declaration); ECF No. 238-5 at 2 (Barton declaration).) Defendants do not move for summary judgment as to plaintiff's retaliation claim on the grounds that they were not motivated by retaliation when they took their alleged adverse actions against plaintiff. However, defendants' conclusory statements in their declarations that they never encouraged any adverse action against plaintiff because of his litigation activities would not meet their initial summary judgment burden. See Aqua Connect v. Code Rebel, LLC, 2013 WL 3820544, at *3 (C.D. Cal. July 23, 2013) (a defendant's conclusory denial of wrongdoing, made in self-serving affidavits, fails to satisfy threshold requirements of Rule 56) (citing In re Rogstad, 126 F.3d 1224, 1227 (9th Cir. 1997)).

Defendants also argue that they are entitled to qualified immunity as to plaintiff's retaliation claim. Taking the facts in the light most reasonable to plaintiff, defendants Barton and Probst violated plaintiff's First Amendment rights when they housed plaintiff with inmate Washington, after encouraging inmate Washington to assault plaintiff in retaliation for plaintiff's legal work, and denied plaintiff's later requests for a cell move. The undersigned finds that the law was clearly established so that a reasonable officer would know that this conduct, if true, violated the First Amendment.

Taking the facts in the light most favorable to plaintiff, defendant Robinette committed

the alleged adverse action of denying plaintiff's requests for a cell move away from inmate Washington after plaintiff communicated his safety concerns regarding inmate Washington. As discussed above, defendants do not address the other elements of plaintiff's retaliation claim. For this reason, the undersigned cannot determine whether defendant Robinette is entitled to qualified immunity. Pearson, 555 U.S. at 238 (undeveloped or disputed material facts preclude application of qualified immunity).

4. Conclusion

For the reasons discussed above, defendants are not entitled to summary judgment as to the merits of plaintiff's claims regarding the February 5, 2010 incident. These claims may proceed only if plaintiff's related conspiracy claim survives summary judgment. The undersigned addresses plaintiff's conspiracy claim in a later section of these findings and recommendations.

F. Merits of Eighth Amendment and Retaliation Claims Regarding January 22, 2011 Incident: Defendants Robinette and Rodriguez

As discussed above, plaintiff alleges that defendants Robinette and Rodriguez violated the Eighth Amendment by disregarding the risk to his safety when they housed him with inmate Smith. Plaintiff also claims that defendants Robinette and Rodriguez disregarded the risk to plaintiff's safety from inmate Smith in retaliation for plaintiff's legal activities.

1. Disputed and Undisputed Facts

Defendants undisputed facts nos. 28-47 are directly relevant to plaintiff's claim regarding the January 22, 2011 incident.

For the reasons stated herein, the undersigned disregards defendants' undisputed fact no. 28; the undersigned finds that portions of defendants' undisputed facts nos. 36-38 are based on a "sham" affidavit; the undersigned finds that defendants' undisputed facts nos. 29, 30, 31, 32, 39, 41, 43, 44, 46 and 47 are undisputed and defendants undisputed facts nos. 33, 34, 35, 40, 42 and 45 are disputed.

Defendants' Undisputed Fact No. 28 is Disregarded

In undisputed fact no. 28, defendants contend that "[a]fter plaintiff's cellmate paroled in October of 2010, [defendant] Robinette gave plaintiff ample time to find someone else to live

with." (ECF No. 236-3 at 9.) In support of undisputed fact no. 28, defendants cite defendant Robinette's declaration at paragraph 3. (Id.) In his declaration, defendant Robinette states that after plaintiff's cellmate paroled in October 2010, he gave plaintiff "ample time" to find someone else to live with. (ECF No. 238-1 at 2.)

Defendant Robinette's statement that he gave plaintiff "ample time" to find a cellmate is vague. Defendant Robinette does not state when he told plaintiff to look for a new cellmate or otherwise address the amount of time plaintiff was given to find a new cellmate. For these reasons, the undersigned finds that defendant Robinette's vague statement that he gave plaintiff "ample time" to find a new cellmate does not demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. at 323. Accordingly, defendants' undisputed fact no. 28 is disregarded.

Defendants' Undisputed Fact Nos. 36-38

In support of the second amended complaint, plaintiff submitted the verified declaration of inmate Harrell. (ECF No. 16-1 at 25.) In this declaration, signed April 22, 2011, inmate Harrell states that in January 2011, while housed in cell no. 135 in Facility B at HDSP, he lived next door to plaintiff. (Id.) Inmate Harrell saw defendant Rodriguez standing in front of plaintiff's cell and heard defendant Rodriguez say, "I'll drag you out of that cell and beat your ass, and throw you back in there." (Id.) Inmate Harrell states that plaintiff was in his cell when defendant Rodriguez made this statement. (Id.) Inmate Harrell states that on January 22, 2011, plaintiff was involved in a violent incident inside his cell. (Id.) Inmate Harrell states that defendant Rodriguez made the threatening statements to plaintiff many days prior to January 22, 2011. (Id.)

In undisputed fact no. 36, defendants contend that inmate Harrell was celled next to plaintiff in January 2011 and never heard defendant Rodriguez or any other staff threaten plaintiff. (ECF No. 236-3 at 12.) In undisputed fact no. 37, defendants contend that inmate Harrell never witnessed any inmates conspiring with staff to assault plaintiff or staff celling plaintiff with an inmate and refusing to move him in order to set him up for assault. (Id.) In undisputed fact no. 38, defendants contend that inmate Harrell never witnessed correctional staff mistreat plaintiff. (Id.)

In support of undisputed fact nos. 36-38, defendants refer to inmate Harrell's declaration submitted in support of defendants' summary judgment motion, i.e., inmate Harrell's second declaration. In the second declaration, signed April 16, 2019, inmate Harrell disavows some of the statements made in his declaration submitted by plaintiff. In the second declaration, inmate Harrell states that he was celled next to plaintiff in January 2011. (ECF No. 238-12 at 1.) Plaintiff complained that staff were not always picking up his mail. (Id.) Inmate Harrell states that plaintiff asked him to sign a declaration regarding his complaint about mail. (Id.) Plaintiff prepared a declaration and inmate Harrell signed it. (Id.) Inmate Harrell states that he did not read the declaration before signing it, and did not realize that plaintiff had changed the subject of the declaration to an alleged threat from Correctional Officer Rodriguez. (Id.) Inmate Harrell states that he did not hear Correctional Officer Rodriguez tell plaintiff, "I'll drag you out of that cell and beat your ass, and throw you back in there." (Id. at 2.) Inmate Harrell states that he did not hear any staff threaten plaintiff in 2011. (Id.) Inmate Harrell states that had he realized that plaintiff changed the subject of the declaration, he would not have signed it. (Id.) Inmate Harrell states that he would be unable to provide any testimony in support of plaintiff's claims because he has no knowledge of those claims. (Id.)

For purposes of defendants' summary judgment motion, the undersigned herein finds that inmate Harrell's second declaration contains a sham affidavit.

On summary judgment, a witness cannot contradict a previously sworn statement by signing a declaration alleging different facts. See Cleveland v. Policy Management Systems, Corp., 526 U.S. 795, 806 (1999) (federal courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity."). However, a trial court must make a factual finding that an affidavit is a sham as opposed to "an honest discrepancy, a mistake," or an acceptable explanation or clarification of the prior testimony. Nelson v. City of Davis, 571 F.3d 924, 928 (9th Cir. 2009). If the affiant gives a plausible excuse for the contradiction, the affidavit might not be

deemed a sham. Jack v. Trans World Airlines, Inc., 854 F.Supp. 654, 660 (N.D. Cal. 1994) (citing Miller v. A.H. Robins Co., 766 F.2d 1102, 1104 (7th Cir.1985)).

The undersigned first finds that inmate Harrell's statement in his second declaration that he did not hear defendant Rodriguez threaten plaintiff in January 2011 contradicts his first declaration. For the following reasons, the undersigned finds that inmate Harrell's claim that he signed the first declaration without reading it, and did not know its true contents, is not plausible. Inmate Harrell's first declaration is one page long, containing four numbered paragraphs. (ECF No. 16-1 at 25.) Inmate Harrell's first declaration mentions defendant Rodriguez by name in each paragraph. (Id.) A quick scan of this document reveals its contents. Inmate Harrell's first declaration contains inmate Harrell's signature at the bottom of the page. (Id.) Based on these circumstances, inmate Harrell's claim that he did not know the contents of the first declaration when he signed it is not credible.

Accordingly, for the reasons discussed above, the undersigned finds that inmate Harrell's statement in his second declaration that he did not hear defendant Rodriguez threaten plaintiff is a sham affidavit. Therefore, defendants' undisputed fact no. 36, claiming that inmate Harrell did not hear defendant Rodriguez threaten plaintiff, is disregarded.

In undisputed fact no. 37, citing inmate Harrell's declaration, defendants claim that inmate Harrell never witnessed any inmates conspiring with staff to assault plaintiff or staff celling plaintiff with an inmate and refusing to move plaintiff in order to set him up for assault. (ECF No. 236-3 at 12.) Without further explanation of the differences between inmate Harrell's first and second declarations regarding these matters, the undersigned cannot determine the credibility of defendants' undisputed fact no. 37. Accordingly, undisputed fact no. 37 is disregarded.

In undisputed fact no. 38, defendants claim that inmate Harrell never witnessed Correctional Staff mistreat plaintiff. (Id.) It is unclear what defendants mean by "mistreat." For this reason, defendants' undisputed fact no. 38 is disregarded.

Undisputed Facts

Undisputed Fact No. 29: After plaintiff's cellmate paroled in October of 2010, plaintiff did not provide defendant Robinette with the name of another inmate that he wanted as his

cellmate and nor did he provide defendant Robinette a cell move request. (ECF No. 236-3 at 10; ECF No. 238-1 at 2 (defendant Robinette declaration).)

Plaintiff does not dispute defendants' undisputed fact no. 29. (ECF No. 283 at 10.) Plaintiff contends that defendant Robinette refused to allow plaintiff a new cellmate and smiled and said, "I have a new cellmate for you." (Id.)

Undisputed Fact No. 30: Prior to the January 22, 2011 incident, plaintiff and inmate Smith were not documented enemies. (ECF No. 236-3 at 10; ECF No. 238-13 at 2 (declaration of HDSP Litigation Coordinator McConnell).) Plaintiff and inmate Smith were both on double-cell status. (ECF No. 236-3 at 10; ECF No. 238-1 at 2 (declaration of defendant Robinette).)

Plaintiff does not dispute defendants' undisputed fact no. 30. (ECF No. 283 at 10.) However, plaintiff contends that he and inmate Smith were not "compatible" because inmate Smith was a prior gang leader and a Black supremacist with a violent record in and out of prison. (Id. at 10.)

Undisputed Fact No. 31: There is no record of plaintiff submitting a written cell move request prior to the January 22, 2011 incident. (ECF No. 236-3 at 10; ECF No. 283-13 at 2 (declaration of Litigation Coordinator McConnell).)

Plaintiff does not dispute defendants' undisputed fact no. 31. (ECF No. 283 at 10.) Plaintiff alleges that he made verbal requests to be moved away from inmate Smith. (Id.)

Undisputed Fact No. 32: There is no record of plaintiff submitting an emergency appeal requesting a cell move prior to the January 22, 2011 incident. (ECF No. 236-3 at 10); ECF No. 238-10 at 3 (declaration of HDSP Litigation Coordinator Espinoza); ECF No. 283 at 11 (plaintiff's response).)

Undisputed Fact No. 39: On January 22, 2011, plaintiff requested a cell move from defendant Rodriguez while the facility was on lockdown. (ECF No. 236-3 at 13 (defendants' undisputed fact no. 39); ECF No. 283 at 13 (plaintiff's verified response to undisputed fact no. 39).)

Undisputed Fact No. 41: Plaintiff did not tell defendant Rodriguez that inmate Smith was threatening him on January 22, 2011. (ECF No. 236-3 at 13.)

Plaintiff does not dispute defendants' undisputed fact no. 41. (ECF No. 283 at 13.) Plaintiff alleges that defendant Rodriguez refused to give plaintiff time to explain and refused to listen to plaintiff. (Id.)

Undisputed Fact No. 43: There is no record of plaintiff or inmate Smith being disciplined because of the January 22, 2011 incident. (ECF No. 236-3 at 14; ECF No. 238-13 at 2 (declaration of Litigation Coordinator McConnell); ECF No. 283 at 14 (plaintiff's response).)

Undisputed Fact No. 44: Plaintiff and inmate Smith signed a compatibility chrono after January 22, 2011, affirming that they were not enemies and could be housed together. (ECF No. 236-3 at 14 (undisputed fact no. 14); ECF No. 238-13 at 30 (compatibility chrono).)

In response to undisputed fact no. 44, plaintiff states, "Plaintiff believes the chrono has a forged signature. The compatibility was required, or plaintiff was told he would be put in segregation." (ECF No. 283 at 14.) The undersigned finds that plaintiff's response to undisputed fact no. 44 contains contradictory statements. Plaintiff states that his signature on the compatibility chrono is forged, but also suggests that he signed the compatibility chrono to avoid being housed in segregation. The undersigned finds that these contradictory statements do not create a material dispute regarding whether plaintiff signed the compatibility chrono.

Undisputed Fact No. 46: An inquiry was conducted regarding plaintiff's claim that defendants Robinette and Rodriguez set him up to be attacked on January 22, 2011. (ECF No. 236-3 at 15; ECF No. 238-13 at 299-303; ECF No. 283 at 15 (plaintiff's response).)[18]

Undisputed Fact No. 47: The inquiry found that plaintiff likely fabricated his allegations to receive a transfer to another prison. (ECF No. ECF No. 236-3 at 15; ECF No. 238-13 at 299-303); ECF No. 283 at 15 (plaintiff's response).)

Disputed Facts

The undersigned finds that defendants' undisputed fact nos. 33-35, 40, 42 and 45 are disputed. The undersigned herein refers to these facts as disputed.

Disputed Fact Nos. 33, 34, 35: In undisputed fact no. 34, defendants claim that

[18] In his response to defendants' undisputed fact no. 46, plaintiff contends that, "The alleged inquiry, if it was ever conducted, was merely a cover-up." (ECF No. 283 at 15.)

defendant Rodriguez did not refuse to move plaintiff from his cell prior to January 22, 2011. In undisputed fact no. 35, defendants contend that defendant Rodriguez did not threaten plaintiff in response to any request for a cell move. In the reply to plaintiff's response to defendants' statement of undisputed facts, defendants admit that undisputed fact nos. 34 and 35 are disputed. (ECF No. 302-1 at 13.)

In undisputed fact no. 33, defendants contend that defendant Rodriguez has no knowledge of plaintiff requesting a cell move prior to January 22, 2011. (ECF No. 236-3 at 11.) Defendants claim that undisputed fact no. 33 is disputed because plaintiff's response does not refute the asserted fact. (ECF No. 302-1 at 13.) While plaintiff's response to defendants' undisputed fact no. 33 may be inadequate, defendants' admission that undisputed facts nos. 33 and 34 are disputed renders undisputed fact no. 33 disputed as well. Nevertheless, the undersigned discusses the relevant evidence regarding disputed fact no. 33 herein.

In his declaration, defendant Rodriguez states that he has no knowledge of plaintiff requesting a cell move prior to January 22, 2011, and that he did not refuse to move plaintiff from his cell prior to January 22, 2011. (ECF No. 238-3 at 1.)

In his verified second amended complaint, plaintiff alleges that after prison officials moved inmate Smith into his cell, inmate Smith began threatening him. (ECF No. 16 at 6.) Plaintiff alleges that he asked defendant Rodriguez and Correctional Officer Patton for a cell move away from inmate Smith, but they refused plaintiff's request. (Id.) Plaintiff alleges that during cell feeding in January 2011, defendant Rodriguez walked by plaintiff's cell. (Id.) Plaintiff asked defendant Rodriguez to move plaintiff out of the cell or to get a sergeant. (Id.) Defendant Rodriguez responded, "I'll drag you out of that cell and beat your ass, and throw you back in there." (Id.) On January 22, 2011, inmate Smith assaulted him in his cell. (Id.)

In his supplemental opposition, plaintiff refers to his reply to defendants' opposition to plaintiff's previously filed cross-motion for summary judgment at ECF No. 164.[19] (ECF No. 298

[19] Plaintiff requests that the court take judicial notice of ECF No. 164. Plaintiff's request for judicial notice is denied as unnecessary. See Johnson v. Haight Ashbury Med. Clinics, Inc., 2012 WL 629312, at *1 (N.D. Cal. Feb. 27, 2012) (denying a request for judicial notice "because it is unnecessary to take judicial notice of documents in the record in this action"); Martinez v. Blanas,

at 5.) Attached to ECF No. 164 is a verified declaration by inmate Smith. (ECF No. 164 at 16-17.) Inmate Smith states that several weeks prior to January 22, 2011, plaintiff asked defendant Rodriguez "to move one of us (to avoid a violent incident), and Rodriguez made a threatening response" to plaintiff's request. (Id. at 16.)

Plaintiff also refers to the verified declaration of inmate John Harrell attached to his second amended complaint. As discussed above, in his declaration, inmate Harrell states that "many days" prior to the January 22, 2011 incident, he heard defendant Rodriguez say to plaintiff (while plaintiff was in his cell), "I'll drag you out of that cell and beat your ass, and throw you back in there." (ECF No. 16-1 at 25.)

Based on the statements in the declarations by inmates Smith and Harrell, as well as the relevant verified allegations in plaintiff's second amended complaint, the undersigned finds that whether defendant Rodriguez had knowledge of plaintiff requesting a cell move prior to January 22, 2011 is disputed.

Disputed Fact No. 40: In undisputed fact no. 40, defendants contend that defendant Rodriguez told plaintiff that once the lockdown ended, he would complete a cell move for plaintiff. (ECF No. 236-3 at 13.) For the reasons stated herein, the undersigned finds that undisputed fact no. 40 is disputed.

In his declaration, defendant Rodriguez states that on January 22, 2011, plaintiff requested a cell move from defendant Rodriguez while the facility was on lockdown, and he told plaintiff that once lockdown ended he would complete a cell move for him. (ECF No. 238-3 at 2.)

In his verified response to undisputed fact no. 40, plaintiff alleges, "The only response plaintiff remember ever coming from Rodriguez when he requested a cell move was, 'I'll drag you out of that cell and beat your ass, and throw you back in there.' Rodriguez said, 'I'll drag you out by your hair.' Rodriguez never said he would ever do a cell move." (ECF No. 283 at 13.) Plaintiff claims that defendant Rodriguez made this statement in response to his first request

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2011 WL 864956, at *1 n.1 (E.D. Cal. Mar. 10, 2011) ("Defendant's request for judicial notice of the second amended complaint will be denied as unnecessary. The second amended complaint and its exhibits are a part of the record.").

for a cell move. Therefore, it appears that in his response to undisputed fact no. 40, plaintiff disputes whether, on January 22, 2011, defendant Rodriguez told him that he would move plaintiff once the lockdown ended.

Based on the evidence discussed above, the undersigned finds that the fact as to whether Rodriguez told plaintiff on January 22, 2011, that once the lockdown ended he would complete a cell move for plaintiff is disputed.

Disputed Fact No. 42: In undisputed fact no. 42, defendants contend that plaintiff and inmate Smith were in a fight on January 22, 2011. (ECF No. 236-3 at 13.) In his verified response to undisputed fact no. 43, plaintiff contends that he did not fight inmate Smith. (ECF No. 283 at 13.) Plaintiff contends that inmate Smith attacked him from behind. (Id.) Based on these allegations, the undersigned finds that whether plaintiff and inmate Smith engaged in a mutual fight on January 22, 2011, is disputed.

Disputed Fact No. 45: In undisputed fact no. 45, defendants state that defendant Rodriguez did not encourage inmate Smith to fight plaintiff, did not know that they would fight on January 22, 2011, and had no reason to know that these inmates would fight on that date. (ECF No. 236-3 at 14.) In support of undisputed fact no. 45, defendants refer to the declaration of defendant Rodriguez who states that he did not encourage inmate Smith to fight plaintiff, did not know that plaintiff and inmate Smith would fight on January 22, 2011, and had no reason to know that these inmates would fight on that date. (ECF No. 238-3 at 2.)

In his verified response to undisputed fact no. 45, plaintiff states that he does not know if defendant Rodriguez encouraged inmate Smith to assault plaintiff, "but he gave him clear indication of his permission when he refused the plaintiff a cell move, and saying, 'I'll drag you out of that cell and beat your ass, and throw you back in there.'" (ECF No. 283 at 15.)

It is undisputed that plaintiff asked for a cell move on January 22, 2011. As discussed above, plaintiff also claims that he previously communicated his safety concerns regarding inmate Smith to defendant Rodriguez when he asked for a cell move earlier in January 2011. Based on this evidence, the undersigned finds that whether defendant Rodriguez knew that plaintiff and inmate Smith would have a physical altercation on January 22, 2011, when plaintiff made his

second request for a cell move, or had reason to know that plaintiff and inmate Smith would have a physical altercation on that date, is disputed.

2. Discussion—Defendant Robinette

Defendants move for summary judgment as to defendant Robinette on the grounds that he had no foreknowledge of the January 22, 2011 incident. For the reasons stated herein, the undersigned finds that plaintiff has not presented sufficient evidence demonstrating that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff at the time he housed them together.

As stated above, it is undisputed that plaintiff and inmate Smith were not documented enemies and were both on double-cell status at the time defendant Robinette housed them together. In his declaration, defendant Robinette states that based on these circumstances, he had no reason to believe that plaintiff and inmate Smith could not cell together. (ECF No. 238-1 at 2.) Based on this evidence, the undersigned finds that defendants met their initial summary judgment burden of demonstrating the absence of a genuine issue of material fact that defendant Robinette did not know that inmate Smith posed a substantial risk of serious harm to plaintiff when he celled them together. Farmer, 511 U.S. at 837 (the prisoner must show that "the official [knew] of and disregard[ed] an excessive risk to inmate...safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference.").

In his verified response to defendants' undisputed fact no. 30, plaintiff contends that he and inmate Smith were not compatible because inmate Smith was a prior prison gang leader and a Black supremacist with a violent record in and out of prison. (ECF No. 283 at 10.) These allegations are vague and conclusory. Plaintiff does not describe inmate Smith's violent record nor does he explain why inmate Smith's prior gang leadership or status as a Black supremacist rendered him incompatible with being housed with plaintiff. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993) (when the non-moving party relies only on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact). Assuming that plaintiff and inmate Smith were incompatible for these

reasons, there is also no evidence that defendant Robinette had knowledge of these reasons.

Plaintiff suggests that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to him for two additional reasons. First, in his verified second amended complaint, plaintiff alleges that defendant Robinette walked by his cell at some time after plaintiff's cellmate paroled and said, "I have a new cellie for you!" (ECF No. 16 at 5.)

As found above, there is no evidence demonstrating that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff. For this reason, the undersigned finds that it is not reasonable to infer from defendant Robinette's alleged statement "I have a new cellie for you!" that he knew that inmate Smith posed a substantial risk of serious harm to plaintiff. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 n.10 (9th Cir.2002) (at summary judgment, a court need not draw all possible inferences in plaintiff's favor, but only all reasonable ones, and a reasonable inference is one based on more than mere speculation, conjecture, or fantasy).

In his verified response to defendants' statement of undisputed fact, plaintiff suggests that defendant Robinette knew that inmate Smith posed a risk of harm to him because defendant Robinette refused to allow plaintiff to find a new cellmate. (ECF No. 283 at 10.) It is unclear if plaintiff is claiming that he actually asked defendant Robinette for an opportunity to find a new cellmate, which defendant Robinette refused. The second amended complaint contains no such allegations.

Regardless of whether defendant Robinette denied an actual request made by plaintiff to find a new cellmate or made inmate Smith plaintiff's cellmate without consulting plaintiff, the undersigned finds that it is not reasonable to infer from either of these circumstances alone that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff. As stated above, there is no other evidence demonstrating that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff at the time he housed them together. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d at 1065 n.10.

Because there is no evidence demonstrating that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff at the time he housed them together,

defendant Robinette should be granted summary judgment as to plaintiff's Eighth Amendment claim.

Defendants move for summary judgment as to the retaliation claim against defendant Robinette based on the January 22, 2011 incident on the grounds that there is no evidence that defendant Robinette committed the alleged adverse action, i.e., housing plaintiff with inmate Smith in disregard of a substantial risk of serious risk of harm to plaintiff. Because there is no evidence demonstrating that defendant Robinette knew that inmate Smith posed a substantial risk of serious harm to plaintiff at the time he housed them together, defendant Robinette did not commit the alleged adverse action. Accordingly, defendant Robinette should be granted summary judgment as to plaintiff's retaliation claim.

Defendants argue that defendant Robinette is entitled to qualified immunity. Because the undersigned finds that defendant Robinette should be granted summary judgment as to the merits of plaintiff's Eighth Amendment and retaliation claims regarding the January 22, 2011 incident, the undersigned need not address qualified immunity.

3. Discussion: Defendant Rodriguez

Plaintiff alleges that defendant Rodriguez failed to move him away from inmate Smith in violation of the Eighth Amendment and in retaliation for his legal activities. Defendants move for summary judgment as to plaintiff's Eighth Amendment claim on the grounds that there is no evidence that defendant Rodriguez had foreknowledge of the January 22, 2011 incident.

For the following reasons, the undersigned finds that whether defendant Rodriguez disregarded a substantial threat to plaintiff's safety when he denied plaintiff's request for a cell move on January 22, 2011, is disputed. As found above, whether plaintiff requested a cell move from defendant Rodriguez prior to January 22, 2011, based on his safety concerns regarding inmate Smith is disputed. Although plaintiff claims that defendant Rodriguez would not allow him to explain why he wanted a cell move on January 22, 2011, plaintiff alleges that he previously requested a cell move from defendant Rodriguez based on threats by inmate Smith. Based on this evidence, defendant Rodriguez's summary judgment as to plaintiff's Eighth Amendment claim should be denied. See Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050

(9th Cir. 2002) (officers violated the Eighth Amendment if they housed inmate Diesso with inmate Ford knowing that inmate Diesso was a threat to inmate Ford or that he acted out dangerously with cellmates); Farmer v. Brennan, 511 U.S. 825, 843 n. 8 (1994) (prison official cannot escape liability if the evidence showed that he merely refused to verify the underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist).[20]

The undersigned acknowledges that certain undisputed facts undermine plaintiff's allegations against defendant Rodriguez. For example, plaintiff failed to submit an emergency appeal requesting a cell move prior to January 22, 2011. In addition, plaintiff signed a compatibility chrono with inmate Smith, although he claims he signed it to avoid being placed into segregation. The court cannot make credibility determinations regarding plaintiff based on this evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (on summary judgment, the court cannot decide credibility). However, plaintiff may have to address this evidence at trial.

The undersigned next considers qualified immunity regarding plaintiff's Eighth Amendment claim. Taking the facts in the light most favorable to plaintiff, the undersigned finds that defendant Rodriguez allegedly violated plaintiff's Eighth Amendment rights by denying plaintiff's request for a cell move on January 22, 2011. The undersigned also finds that the law was clearly established such that a reasonable officer would know that their conduct, as alleged by plaintiff, violated the Eighth Amendment. Estate of Ford v. Ramirez-Palmer, supra; Farmer v. Brennan, supra. Accordingly, defendant Rodriguez is not entitled to qualified immunity as to plaintiff's Eighth Amendment claim.

Defendants move for summary judgment as plaintiff's retaliation claim against defendant Rodriguez on the grounds that defendant Rodriguez did not commit the alleged adverse action, i.e., denying plaintiff's January 22, 2011 request for a cell move in knowing disregard of a threat to plaintiff's safety by inmate Smith. (ECF No. 236-2 at 24.) In support of this argument,

[20] The undersigned takes into consideration that the prison was on a lockdown on January 22, 2011. Defendants present no evidence that defendant Rodriguez was prohibited from making a cell change during a lockdown if an inmate communicated a credible threat of harm from his cellmate.

defendants cite Watison v. Carter, 668 F.3d 1108 (9th Cir. 2012), for the proposition that a retaliation claim requires an adverse action by defendants against the plaintiff. (Id.) As discussed above, whether defendant Rodriguez committed the alleged adverse action against plaintiff is disputed. Accordingly, defendant Rodriguez is not entitled to summary judgment as to plaintiff's retaliation claim on these grounds.

The undersigned observes that in his declaration, defendant Rodriguez states that he has "never taken or encouraged any adverse action against inmate Crane because of his litigation activities." (ECF No. 238-3 at 2 (Rodriguez declaration).) Defendants do not move for summary judgment as to plaintiff's retaliation claim on the grounds that defendant Rodriguez was not motivated by retaliation when he allegedly took the adverse action against plaintiff. However, defendant Rodriguez's conclusory statement in his declaration that he never took any adverse action against plaintiff because of his litigation activities does not meet defendant's initial summary judgment burden. See Aqua Connect v. Code Rebel, LLC, 2013 WL 3820544, at *3 (C.D. Cal. July 23, 2013) (a defendant's conclusory denial of wrongdoing, made in self-serving affidavits, fails to satisfy threshold requirements of Rule 56) (citing In re Rogstad, 126 F.3d 1224, 1227 (9th Cir. 1997)).

Defendants also argue that they are entitled to qualified immunity as to plaintiff's retaliation claim against defendant Rodriguez. In their discussion of this claim, defendants do not address all of the elements of a retaliation claim, including whether defendant Rodriguez was motivated by retaliation when he denied plaintiff's request for a cell move on January 22, 2011. Because defendants do not address the other elements of plaintiff's retaliation claim, the undersigned cannot determine whether defendant Rodriguez is entitled to qualified immunity. Pearson, 555 U.S. at 238 (undeveloped or disputed material facts preclude application of qualified immunity).

For the reasons discussed above, defendant Rodriguez's motion for summary judgment regarding plaintiff's Eighth Amendment and retaliation claims regarding the January 22, 2011 incident should be denied.

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G. Merits of Eighth Amendment Claim Regarding March 1, 2013 Incident: Defendants Robinette and Davey

1. Disputed and Undisputed Facts

Defendants' undisputed facts nos. 58, 60, 65-92 are directly relevant to plaintiff's claims regarding the March 1, 2013 incident.

Undisputed Facts

Undisputed Fact No. 58: Plaintiff pursued Crane v. McDonald, case No. 2:11-cv-663, against defendant Davey until defendants were granted summary judgment on September 30, 2014. (ECF No. 236-3 at 18; ECF No. 236-4 at 48-49 (order granting summary judgment in case 11-cv-663); ECF No. 283 at 18 (plaintiff's response).)

Undisputed Fact No. 60: Plaintiff never personally met defendant Davey. (ECF No. 236-3 at 18; ECF No. 238-11 at 11 (plaintiff's deposition testimony); ECF No. 283 at 19 (plaintiff's response).)

Undisputed Fact No. 65: On March 1, 2013, defendant Robinette observed plaintiff walking on the yard in ad seg footwear and called plaintiff over to himself and defendant Weeks. (ECF No. 236-3 at 21; ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 21 (plaintiff's response).)

Undisputed Fact No. 66: On March 1, 2013, defendant Robinette told plaintiff that he could not wear ad seg unit footwear on the yard and that he needed boots. (ECF No. 236-3 at 21; ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 21 (plaintiff's response).)[21]

Undisputed Fact No. 67: On March 1, 2013, after defendant Robinette told plaintiff he could not wear ad seg unit footwear on the yard, defendant Weeks provided plaintiff a pair of boots. (ECF No. 21; ECF No 238-1 at 2 (Robinette declaration); ECF No. 283 at 21 (plaintiff's response).)

Undisputed Fact Nos. 72 and 73: Following the March 1, 2013 incident involving inmates

[21] In his verified response to defendants' undisputed fact no. 66, plaintiff contends that defendants Robinette and Weeks gave him boots. (ECF No. 283 at 21.) Plaintiff alleges that defendant Robinette told him, "You're going to need them!" (Id.)

Williams and Parker, defendant Weeks secured plaintiff and medical staff arrived. (ECF No. 236-3 at 3; ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 23 (plaintiff's response).) Following the March 1, 2013 incident, plaintiff was placed in waist-chains and a C-Spine Collar in case of a head or neck injury. (ECF No. 236-3 at 3; ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 23 (plaintiff's response).)[22]

Undisputed Fact No. 74: Following the March 1, 2013 incident, plaintiff was secured to a backboard, placed on a gurney, and escorted off the yard by medical and custody staff. (ECF No. 236-3 at 23); ECF No. 238-1 at 2 (Robinette declaration); ECF No. 283 at 23 (plaintiff's response).)

Undisputed Fact No. 78: An incident report was prepared and is consistent with defendant Robinette's account of events on March 1, 2013. (ECF No. 236-3 at 24; ECF No. 238-13 at 152-271 (incident report); ECF No. 283 at 24 (plaintiff's response).)[23]

Undisputed Fact No. 79: Plaintiff was interviewed on March 2, 2013, by non-party Lieutenant Leckie regarding the March 1, 2013 incident. (ECF No. 236-3 at 25; ECF No. 239 at 1 (Leckie declaration); ECF No. 283 at 25 (plaintiff's response).)

Undisputed Fact Nos. 80, 81: When Lieutenant Leckie asked plaintiff how he received his injuries on March 1, 2013, he attributed them to inmates Williams and Parker and did not implicate any staff. (ECF No. 236-3 at 25; ECF No. 239 at 2 (Leckie declaration); ECF No. 283 at 25 (plaintiff's response).) During the interview regarding the March 1, 2013 incident, plaintiff was asked, "Did staff use any force during this incident?" and plaintiff said "No." Plaintiff was then asked, "No? Is that correct?", and he responded, "No force." (ECF No. 236-3 at 25; ECF

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[22] Plaintiff does not dispute the facts alleged in defendants' undisputed facts nos. 72 and 73. (ECF No. 283 at 23.) However, in his verified response to these undisputed facts, plaintiff contends that defendant Weeks wrapped the medical collar to the attachment so tight that it suffocated him. (Id.) Plaintiff contends that he stated, "Please loosen the thing on my neck…I can't breathe." (Id.)

[23] In his response to defendants' undisputed fact no. 78, plaintiff contends that defendant Robinette's incident report is a falsified cover-up of the crime he and defendant Weeks committed against plaintiff. (ECF No. 283 at 24.) However, plaintiff does not dispute that the incident report is consistent with defendant Robinette's account of the events on March 1, 2013.

No. 239 at 2 (Leckie declaration); ECF No. 283 at 25 (plaintiff's response).)[24]

Undisputed Fact No. 82: Prior to the March 1, 2013, incident, plaintiff was not documented as enemies with inmates Williams and Parker. (ECF No. 236-3 at 26; ECF No. 238-13 at 2 (McConnell declaration); ECF No. 283 at 26 (plaintiff's response).)[25]

Undisputed Fact No. 83: Plaintiff, inmate Williams and inmate Parker signed a compatibility chrono stating that the incident occurred because of a misunderstanding and that despite this incident, all involved inmates state that they can successfully program together, are compatible to live on the same yard and in the same building. (ECF No. 236-3 at 26; 238-13 at 273 (compatibility chrono).)[26]

Undisputed Fact No. 85: According to inmates Williams and Parker, the March 1, 2013 incident resulted from a dispute over legal work. (ECF No. 236-3 at 26; ECF No. 238-8 at 2 (declaration of Williams); ECF No. 238-9 at 2 (declaration of Parker); ECF No. 283 at 26 (plaintiff's response).)[27]

Undisputed Fact No. 86: Following the March 1, 2013 incident, both inmates Williams and Parker received rules violation reports. (ECF No. 236-3 at 27; ECF No. 238-13 at 275-297 (rules violation reports); ECF No. 283 at 27 (plaintiff's response).)

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[24] In his response to defendants' undisputed facts nos. 80-81, plaintiff does not dispute that he told Lieutenant Leckie that staff did not use force against him on March 1, 2013. (ECF No. 283 at 25.) Plaintiff contends that the reason he told Lieutenant Leckie that staff did not use force against him was because he was afraid of further assaults if he accused defendants Weeks and Robinette of assaulting him. (Id.)

[25] In his response to defendants' undisputed fact no. 83, plaintiff contends that prior to March 1, 2013, he had never met either inmate William or inmate Parker. (ECF No. 283 at 26.)

[26] In his response to defendants' undisputed fact no. 84, plaintiff contends that he never signed any statement stating that the incident was a misunderstanding because he had never met inmates Williams and Parker before. (ECF No. 283 at 26.) Plaintiff does not deny that he signed a chrono containing the other statements contained in the chrono, as set forth above. Plaintiff's signature also appears to be on the compatibility chrono. For these reasons, the undersigned finds that defendants' undisputed fact no. 84 is undisputed.

[27] In his verified response to defendants' undisputed fact no. 85, plaintiff contends that he had never met inmates Parker or Williams before March 1, 2013. (ECF No. 283 at 26.) Plaintiff does not dispute that according to inmate Williams and Parker, the March 1, 2013 incident resulted from a dispute over legal work.

Undisputed Fact No. 87: According to statements made in inmate Williams' and inmate Parker's rules violation reports, plaintiff was doing inmate Williams' legal work but refused to get it done. (ECF No. 236-3 at 27; ECF No. 238-13 at 279 (statement by inmate Williams in rules violation report); ECF No. 238-13 at 292 (statement by inmate Parker in rules violation report); ECF No. 283 at 27 (plaintiff's response).)[28]

Undisputed Fact No. 88: According to statements made in inmate Williams and inmate Parker's rules violation reports, plaintiff and Williams argued and eventually started fighting. (ECF No. 236-3 at 27; ECF No. 238-13 at 279 (statement by inmate Williams in rules violation report); ECF No. 238-13 at 292 (statement by inmate Parker in rules violation report); ECF No. 283 at 27 (plaintiff's response).)[29]

Undisputed Fact No. 89: According to statements made in inmate Williams and inmate Parker's rules violation reports, plaintiff attempted to flee, but inmate Parker stepped in and began striking plaintiff. (ECF No. 236-3 at 28; ECF No. 238-13 at 292 (statement by inmate Parker in rules violation report); ECF No. 283 at 28 (plaintiff's response).)[30]

Undisputed Fact No. 91: Other than the fact that Crane v. McDonald, 2: 11-cv-663 was active at the time of the March 1, 2013 incident, plaintiff has no direct evidence to support his claim that defendant Davey allowed and/or sanctioned inmate assaults against him because of his litigation activities. (ECF No. 236-3 at 28; ECF No. 238-11 at 11-13 (plaintiff's deposition testimony); ECF No. 283 at 28 (plaintiff's response).)

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[28] In his response to defendants' undisputed fact no. 87, plaintiff claims that the statements made by inmates Williams and Parker were false. (ECF No. 283 at 27.) However, plaintiff does not deny that inmates Williams and Parker made these statements. (Id.)

[29] In his response to defendants' undisputed fact no. 88, plaintiff claims that nothing happened between himself and inmates Williams and Parker prior to the incident. (ECF No. 283 at 27.) However, plaintiff does not dispute the rules violation reports of inmates Williams and Parker contains statements by both inmates that plaintiff and inmate Williams argued and eventually started fighting.

[30] In his response to defendants' undisputed fact no. 89, plaintiff does not dispute that statements in the rules violation report of inmate Parker states that plaintiff attempted to flee and inmate Parker stepped in and began striking plaintiff. (ECF No. 283 at 28.)

Undisputed Fact No. 92: Defendant Davey was no longer employed by HDSP as of May 31, 2012, and had no knowledge of the March 1, 2013 incident, no involvement in that incident and no authority over any staff at HDSP. (ECF No. 236-3 at 28; ECF No. 238-2 at 1-2 (Davey declaration); ECF No. 283 at 29 (plaintiff's response).)[31]

Disputed Facts

Disputed Facts No. 68-71: Defendants' undisputed facts nos. 68-71 describes the incident between plaintiff and inmates Williams and Parker. For the reasons stated herein, the undersigned finds that the facts regarding this incident, as alleged in defendants' undisputed fact nos. 68-71, are largely disputed.

In undisputed fact nos. 68, defendants contend that on March 1, 2013, shortly after plaintiff was provided boots, defendant Robinette heard the order to "get down" over the public address system and looked to see inmates Williams and Parker striking plaintiff, who fell to the ground. (ECF No. 236-3 at 21-22; ECF No. 238-1 at 2 (Robinette declaration).) In undisputed fact no. 69, defendants contend that on March 1, 2013, after the order to "get down" was issued over the public address system, inmates Williams and Parker separated from plaintiff and entered a prone position approximately fifteen feet away. (ECF No. 236-3 at 22; ECF No. 238-1 at 2 (Robinette declaration).) In undisputed fact no. 70, defendants contend that staff responded immediately to the March 1, 2013 incident and defendant Robinette joined the line of skirmish as it was already forming. (ECF No. 236-3 at 22; ECF No. 238-1 at 2 (Robinette declaration).) In undisputed fact no. 71, defendants contend that following the March 1, 2013, incident, defendants Robinette and Weeks approached plaintiff who was unresponsive to Weeks' verbal commands

[31] In his verified response to defendants' undisputed fact no. 92, plaintiff contends that defendant Davey was promoted for his part in overseeing a corrupt group of prison guards who were assaulting numerous prisoners. (ECF No. 283 at 29.) Plaintiff contends that the Office of Inspector General 2015 Special Review regarding HDSP terminated Warden McDonald, who was defendant Davey's boss. (Id.) Plaintiff contends that Warden McDonald did not correct defendant Davey's failure to supervise his officers. (Id.) Plaintiff contends that defendant Davey was sued in a number of cases by prisoners. (Id.) The undersigned finds that in his response to defendants' undisputed fact no. 92, plaintiff provides no evidence demonstrating that defendant Davey had any involvement in the March 1, 2013 incident at HDSP, where defendant Davey had not been employed since May 31, 2012. The undersigned can find no evidence supporting plaintiff's claim that defendant Davey was involved in this incident elsewhere in the record.

and appeared to be unconscious. (ECF No. 236-3 at 22; ECF No. 238-1 at 2 (Robinette declaration).)

Plaintiff's response to defendants' undisputed facts nos. 68-71 sets forth a different version of events. (ECF No. 283 at 21-22.) Plaintiff cites the verified declarations of inmates Shaunta Ray, Juan Munoz and D. Boutte in support of his response. (Id.) For the following reasons, the declaration of inmate Boutte is disregarded.

In his declaration, inmate Boutte states that on March 1, 2013, he observed two African American inmates assault plaintiff while defendants Weeks and Robinette watched with approval. (ECF No. 283 at 39.) In the response to plaintiff's statement of undisputed facts, defendants contend that inmate Boutte does not have personal knowledge regarding the March 1, 2013 incident because he was not housed at HDSP on that date. (ECF No. 302-1 at 25.) Defendants refer to the declaration of Litigation Coordinator Quam attached to the reply. (ECF No. 302-2 at 2.) In his declaration, Litigation Coordinator Quam states that he is familiar with and has access to the Strategic Offender Management System ("SOMS"), including inmate bed histories. (Id. at 1-2.) Litigation Coordinator Quam states that these records are kept in the regular course of business at CDCR and entries into SOMS are made at or near the time of the events recorded by staff with knowledge of those events. (Id.) Attached to the declaration of Litigation Coordinator Quam is the bed history of inmate Boutte. (Id. at 4.) This bed history shows that inmate Boutte was not housed at HDSP on March 1, 2013. (Id.)

The court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The undersigned finds that the accuracy of inmate Boutte's bed history is not subject to reasonable dispute. Accordingly, the undersigned takes judicial notice of inmate Boutte's bed history record.

Because inmate Boutte's bed history record reflects that he was not housed at HDSP on March 1, 2013, inmate Boutte's declaration is disregarded.

In his verified declaration, inmate Munoz states that on March 1, 2013, "after a long time of observing" inmates Williams and Parker assault plaintiff, defendant Weeks and other guards

began beating plaintiff. (ECF No. 283 at 37.)

In the verified second amended complaint, plaintiff allege that the guards did not sound the alarm until plaintiff had been beaten for a long time. (ECF No. 16 at 8.) Plaintiff alleges that once plaintiff was on the ground, defendants Weeks and Robinette and other prison guards handcuffed him behind his back, smashed his face into the ground, dragged his face across the ground and hit him over the head with batons, rendering him unconscious. (Id.)

Based on the conflicting evidence set forth above, the undersigned finds that whether defendants Weeks and Robinette responded immediately to the assault on plaintiff by inmates Williams and Parker is disputed. The undersigned also finds that whether plaintiff was unconscious when defendants Robinette and Weeks approached plaintiff is disputed.

Disputed Fact No. 75: In undisputed fact no. 75, defendants contend that undisputed facts nos. 65-74 were the extent of defendant Robinette's involvement in the March 1, 2013 incident. (ECF No. 236-3 at 23-24.) Defendants' undisputed facts nos. 72-74 are undisputed. However, as discussed above, defendants' undisputed facts nos. 68-71 are disputed. For this reason, the undersigned finds that whether defendant Robinette's involvement, as described in undisputed facts nos. 65-71, was the extent of defendant Robinette's involvement in the March 1, 2013 incident is disputed.

Disputed Fact No. 76: In undisputed fact no. 76, defendants contend that at no time did defendant Robinette use any force on plaintiff during the March 1, 2013 incident, and he did not observe any other officers including defendant Weeks, use force on plaintiff. (ECF No. 236-3 at 24; ECF No. 238-1 at 3 (Robinette declaration).)

As discussed above, in his verified second amended complaint, plaintiff alleges that defendants Weeks and Robinette used force against plaintiff following the incident involving inmates Parker and Williams. As discussed above, in his verified declaration, inmate Munoz states that he saw defendants Weeks and other guards use force against plaintiff. Based on this evidence, the undersigned finds that whether defendant Robinette used force against plaintiff during the March 1, 2013 incident or observed any other officer, including defendant Weeks, use force against plaintiff is disputed.

Disputed Fact No. 77: In undisputed fact no. 77, defendants contend that defendant Robinette did not encourage inmates Williams and Parker in any way to assault plaintiff, and nor did defendant Robinette hear any other officers, including defendant Weeks, offer such encouragement. (ECF No. 236-3 at 24; ECF No. 238-1 at 3 (Robinette declaration).)

Plaintiff provided a verified declaration by inmate Shaunta Ray who states that he overheard defendants Weeks and Robinette tell inmates Parker and Williams to assault plaintiff. (ECF No. 283 at 35.) Inmate Ray states that on March 1, 2013, he observed defendants Weeks and Robinette tell inmates Parker and Williams to, "Get ready to do the favor for them." (Id.) Inmate Ray states that he heard defendant Weeks say to inmates Parker and Williams, "Crane!" (Id.) Inmate Ray states that "this appeared to be the call for these inmates to assault [plaintiff]." (Id.)

Based on the conflicting evidence discussed above, the undersigned finds that whether defendant Robinette encouraged inmates Parker and Williams to assault plaintiff or heard any other officers offer such encouragement is disputed.

Disputed Fact No. 84: In undisputed fact no. 84, defendants contend that inmates Parker and Williams did not conspire with correctional staff against plaintiff and were not acting at the direction of correctional staff. (ECF No. 236-3 at 26.; ECF No. 238-8 at 2 (declaration of Williams); ECF No. 238-9 at 2 (declaration of Parker).).

In response to undisputed fact no. 84, plaintiff refers to the declaration of inmate Ray who states that he heard defendants Weeks and Robinette give inmates Parker and Williams "the call" to assault plaintiff. (ECF No. 283 at 35.)

Based on the evidence discussed above, the undersigned finds that whether inmates Parker and Williams conspired with staff against plaintiff and were acting at the direction of staff when they assaulted plaintiff is disputed.

Disputed Fact No. 90: In undisputed fact no. 90, defendants contend that defendant Robinette did not know that inmates Williams and Parker were going to assault plaintiff on March 1, 2013, and had no reason to know that such an assault would occur. (ECF No. 236-3 at 28; ECF No. 238-1 at 3 (Robinette declaration).)

As discussed above, plaintiff provided the declaration of inmate Ray who states that he heard defendants Robinette and Weeks discussing the assault on plaintiff with inmates Williams and Parker prior to its occurrence. (ECF No. 283 at 35.)

Accordingly, the undersigned finds that whether defendant Robinette knew that inmates Williams and Parker were going to assault plaintiff on March 1, 2013, is disputed.

2. Discussion—Claims Against Defendant Robinette

Defendants argue that defendant Robinette is entitled to summary judgment as to plaintiff's Eighth Amendment failure-to-protect claim regarding the March 1, 2013 assault by inmates Parker and Williams because inmates Parker and Williams did not conspire with staff against plaintiff. Defendants contend that the March 1, 2013 incident was a dispute over legal work.

As discussed above, whether defendant Robinette directed inmates Parker and Williams to assault plaintiff is disputed. Whether the dispute between plaintiff and inmates Parker and Williams was over legal work is also disputed because plaintiff claims he did not know inmates Parker and Williams prior to the incident. Whether defendant Robinette immediately intervened in the incident between plaintiff and inmates Parker and Williams after it began is disputed. Based on these disputed facts, the undersigned cannot determine whether defendant Robinette disregarded a substantial risk of serious harm to plaintiff on March 1, 2013. Accordingly, defendant Robinette should be denied summary judgment as to plaintiff's failure-to-protect claim based on the March 1, 2013 incident.

Defendants argue that defendant Robinette is entitled to summary judgment as to plaintiff's excessive force claim based on the March 1, 2013 incident. Defendants argue that at no time did defendant Robinette, or any other staff, use force against plaintiff on March 1, 2013, a fact that plaintiff himself conceded during an interview following the incident.

As discussed above, whether defendant Robinette used excessive force against plaintiff on March 1, 2013, is disputed. For this reason, defendant Robinette should be denied summary judgment as to this claim.

While plaintiff told Lieutenant Leckie that no staff used force against him during the

March 1, 2013 incident, plaintiff claims that he made this statement out of fear of further assault. (ECF No. 283 at 25.) Whether plaintiff's explanation is credible is an issue for the jury to decide. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Defendants move for summary judgment as to plaintiff's retaliation claim against defendant Robinette on the grounds that defendant Robinette did not take the alleged adverse actions against plaintiff, i.e., failing to protect plaintiff from inmates Parker and Williams and using excessive force against plaintiff. (ECF No. 236-2 at 26.) In support of this argument, defendants cite Watison v. Carter, 668 F.3d 1108 (9th Cir. 2012), for the proposition that a retaliation claim requires an adverse action by defendants against the plaintiff. (Id.)

As discussed above, whether defendant Robinette failed to protect plaintiff and used excessive force against plaintiff on March 1, 2013, are disputed facts. Therefore, the undersigned cannot find that defendant Robinette took no adverse action against plaintiff. Accordingly, defendant Robinette's motion for summary judgment as to this retaliation claim should be denied.

The undersigned observes that in his declaration, defendant Robinette states that he has "never taken or encouraged any adverse action against inmate Crane because of his litigation activities." (ECF No. 238-1 at 3 (Robinette declaration).) Defendants do not move for summary judgment as to plaintiff's retaliation claim on the grounds that defendant Robinette was not motivated by retaliation when he allegedly took the adverse actions against plaintiff. However, defendant Robinette's conclusory statement in his declaration that he never encouraged any adverse action against plaintiff because of his litigation activities would not meet defendant's initial summary judgment burden. See Aqua Connect v. Code Rebel, LLC, 2013 WL 3820544, at *3 (C.D. Cal. July 23, 2013) (a defendant's conclusory denial of wrongdoing, made in self-serving affidavits, fails to satisfy threshold requirements of Rule 56) (citing In re Rogstad, 126 F.3d 1224, 1227 (9th Cir. 1997)).

Defendants argue that defendant Robinette is entitled to qualified immunity as to plaintiff's Eighth Amendment and retaliation claims. Taking the facts in the light most favorable to plaintiff, the undersigned finds that defendant Robinette violated plaintiff's Eighth Amendment rights by encouraging inmates Parker and Williams to assault plaintiff and by using excessive

force against plaintiff. The undersigned also finds that the law was clearly established such that a reasonable officer would know that their conduct, as alleged by plaintiff, violated the Eighth Amendment. For these reasons, defendant Robinette is not entitled to qualified immunity as to plaintiff's Eighth Amendment claims.

As discussed above, defendants move for summary judgment as to plaintiff's retaliation claim only on the grounds that defendant Robinette committed no adverse action. However, in their discussion of this claim, defendants do not address the other elements of a retaliation claim. Because defendants did not address the other elements of plaintiff's retaliation claim, the undersigned cannot determine whether defendant Robinette is entitled to qualified immunity. Pearson, 555 U.S. at 238 (undeveloped or disputed material facts preclude application of qualified immunity). Accordingly, defendant Robinette is not entitled to qualified immunity as to plaintiff's retaliation claim.

In conclusion, the undersigned recommends that defendant Robinette be denied summary judgment as to plaintiff's Eighth Amendment and retaliation claims based on the March 1, 2013 incident.

3. Discussion: Claim Against Defendant Davey

Plaintiff alleges that defendant Davey sanctioned the March 1, 2013 incident in retaliation for plaintiff's legal activities. Defendants move for summary judgment as to this claim on the grounds that the undisputed evidence demonstrates that defendant Davey was not involved in this incident.

As discussed above, defendants' undisputed evidence demonstrates that defendant Davey was no longer employed at HDSP as of May 31, 2012, he had no knowledge of the March 1, 2013 incident, he was not involved in that incident and had no authority over any staff at HDSP at that time. Based on this undisputed evidence demonstrating that defendant Davey was not involved in the March 1, 2013 incident, the undersigned recommends that defendant Davey be granted summary judgment as to plaintiff's claim regarding the March 1, 2013 incident.

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H. Calling Plaintiff a Snitch: Defendants Barton and Rodriguez

Plaintiff alleges that defendants Barton and Rodriguez called plaintiff a snitch in violation of the Eighth Amendment and in retaliation for his legal activities. See Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989) (deliberately spreading rumor that prisoner is a snitch stated claim under the Eighth Amendment).

Defendants move for summary judgment as to these claims on the grounds that they never attempted to label plaintiff a snitch. In support of this argument, defendants cite undisputed fact no. 96, which cites the declarations of defendants Barton and Rodriguez. (ECF No. 236-3 at 30 (undisputed fact no. 96)). In their declarations, both defendants Barton and Rodriguez state that they never attempted to label plaintiff as a snitch. (ECF No. 238-5 at 2 (Barton declaration); ECF No. 23803 at 2 (Rodriguez declaration).)

In his verified response to defendants' undisputed fact no. 96, plaintiff contends that defendants labeled him as a snitch. (ECF No. 283 at 30). As discussed above, in his verified second amended complaint, plaintiff alleges that defendants Barton and Rodriguez called him a snitch. (ECF No. 16 at 5.)

Whether defendants Barton and Rodriguez called or labeled plaintiff a snitch is a disputed material fact. Accordingly, defendants Barton and Rodriguez should be denied summary judgment as to this claim.[32]

I. Conspiracy

Plaintiff alleges that all of the incidents alleged in the second amended complaint were part of a conspiracy by defendants to retaliate against him for his legal activities. The undersigned herein considers plaintiff's conspiracy claim only as to those claims and defendants for whom the undersigned recommends that summary judgment be denied: 1) plaintiff's failure-to-protect and retaliation claims against defendants Barton, Probst and Robinette based on the February 5, 2010 incident;[33] 2) plaintiff's failure-to-protect and retaliation claims against

[32] Defendants' only argument for summary judgment as to this claim is that they did not label plaintiff as a snitch.

[33] As discussed above, plaintiff's failure-to-protect and retaliation claims based on the February

defendant Rodriguez based on the January 22, 2011 incident; 3) plaintiff's failure-to-protect, excessive force claim and retaliation claims against defendant Robinette based on the March 1, 2013 incident; and 4) plaintiff's claim that defendants Barton and Rodriguez called plaintiff a snitch.

Defendants move for summary judgment as to plaintiff's conspiracy claim on the grounds that they did not violate plaintiff's constitutional rights. Defendants also argue that they have no knowledge of any conspiracy against plaintiff to incite other inmates to abuse and assault him based on his litigation activities.

Defendants are not entitled to summary judgment as to plaintiff's conspiracy claim on the grounds that they did not violate plaintiff's rights. As discussed above, whether defendants violated plaintiff's constitutional rights as to the remaining claims is disputed. Lacey v. Maricopa County, 693 F.3d at 935 (for a conspiracy claim, there must always be an underlying constitutional violation).

In support of their argument that they had no knowledge of any conspiracy against plaintiff, defendants cite undisputed fact no. 97. In undisputed fact no. 97, defendants contend that they had no knowledge of any conspiracy against plaintiff to incite inmates to abuse and assault him based on his litigation activities and have never taken or encouraged any adverse action against plaintiff because of his legal activities. (ECF No. 236-3 at 30). Undisputed fact no. 97 refers to the declarations of defendants Barton, Probst, Robinette and Rodriguez which contain the same statement. (ECF No. 238-1 at 3 (Robinette declaration); ECF No. 238-3 at 2 (Rodriguez declaration); ECF No. 238-5 at 2 (Barton declaration); ECF No. 238-4 at 2 (Probst declaration).)

As discussed above, defendants' conclusory statements in their declarations that they never took or encouraged any adverse actions against plaintiff does not meet defendant's initial summary judgment burden. See Aqua Connect v. Code Rebel, LLC, 2013 WL 3820544, at *3 (C.D. Cal. July 23, 2013) (a defendant's conclusory denial of wrongdoing, made in self-serving

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5, 2010 incident are timely only if plaintiff can demonstrate that they are part of the alleged conspiracy.

affidavits, fails to satisfy threshold requirements of Rule 56) (citing In re Rogstad, 126 F.3d 1224, 1227 (9th Cir. 1997)).

Plaintiff alleges that all defendants conspired to retaliate against him for his legal activities. In their declarations, defendants merely state that they had no knowledge of any conspiracy to retaliate against plaintiff. Defendants do not, for example, address whether they communicated with each other regarding plaintiff's legal activities and/or any of the alleged adverse actions. Defendants' declarations do not specifically address plaintiff's conspiracy claim. Defendants' conclusory statements in their declarations that they have no knowledge of any conspiracy to retaliate against plaintiff based on his litigation activities do not meet defendants' initial summary judgment burden. See Aqua Connect v. Code Rebel, LLC, supra; In re Rogstad, supra.[34] Accordingly, defendants are not entitled to summary judgment as to plaintiff's conspiracy claim.

J. Conclusion

For the reasons discussed above, the undersigned recommends that the motion for summary judgment on behalf of defendants Davey, Rodriguez, Probst, Barton and Rodriguez be granted as to the following claims: 1) plaintiff's claims regarding the January 16, 2013 incident based on plaintiff's failure to exhaust administrative remedies (including the related claim against

[34] In Betancourt v. Rhodes, 2010 WL 672756 (D. Idaho Feb. 20, 2010), the district court found that the defendant prosecutors proffered sufficient declarations to meet their initial summary judgment burden of demonstrating that no conspiracy existed among them. Id. at 10. In their declarations, the prosecutors stated that they had no role in the autopsy or testing of the victim's body fluids, and that they have no knowledge that the Canyon County Prosecutor's Office had any "role in how the autopsy was performed, the body fluids collected, or what happened to the body fluids following the autopsy." Id. at *9. The prosecutors stated that they did not suppress or fabricate evidence, nor did anyone request that they do so. Id. In Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), the Supreme Court held, with respect to a claim that defendant and a third party conspired to deprive plaintiff of her civil rights, that defendant seeking summary judgment did not carry its initial burden because of its failure to foreclose the possibility of a conspiracy. In Adickes, the Supreme Court reviewed statements made in depositions made by a store manager and plaintiff and affidavits from the chief of police and two law enforcement officers. Id. at 154-56. While plaintiff's conspiracy claim in the instant action is not as complicated as the conspiracy claims alleged in Betancourt and Adickes, these cases instruct that defendants must do more than submit affidavits making conclusory assertions to meet their summary judgment burden.

defendant Davey); 2) plaintiff's claims against defendant Robinette regarding the January 22, 2011 incident as without merit; and 3) plaintiff's claims against defendant Davey regarding the March 1, 2013 incident as without merit.

The undersigned recommends that defendants' summary judgment motion be denied as to the following claims: 1) plaintiff's Eighth Amendment failure-to-protect and retaliation claims against defendant Rodriguez based on the January 22, 2011 incident; 2) plaintiff's Eighth Amendment failure-to-protect and excessive force and retaliation claims against defendant Robinette based on the March 1, 2013 incident; 3) plaintiff's Eighth Amendment and retaliation claims against defendants Barton and Rodriguez based on their allegedly calling plaintiff a snitch; and 4) plaintiff's claim alleging that defendants Barton, Robinette, Probst and Rodriguez conspired to retaliate against plaintiff for his legal activities based on the February 5, 2010 incident involving inmate Washington, the January 22, 2011 incident involving inmate Smith and the March 1, 2013 incident, and by defendants Barton and Rodriguez allegedly calling plaintiff a snitch.

VI. Motion for Summary Judgment on Behalf of Defendant Weeks (ECF No. 240)

A. Declaration of Inmate Boutte

Plaintiff attached to his response to defendant's statement of undisputed facts the declaration of inmate Donald Boutte dated July 25, 2021. (ECF No. 286 at 20.) Inmate Boutte states that on March 1, 2013, he was housed at HDSP. (Id.) Inmate Boutte states that he observed defendants Weeks and Robinette watch two inmates attack plaintiff before they finally went to the scene. (Id.) Inmate Boutte states that he then saw defendants Weeks and Robinette strike and pummel plaintiff as he lay on the ground. (Id.)

In the reply to plaintiff's opposition, defendant Weeks contends that the declaration of inmate Boutte is false because inmate Boutte was not housed at HDSP on March 1, 2013. (ECF No. 311-2.) Defendant Weeks requests that the court take judicial notice of inmate Boutte's bed history, attached to the reply, demonstrating that inmate Boutte was not housed at HDSP on March 2013. (Id. at 8.)

The court may take judicial notice of facts that are "capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The undersigned finds that the accuracy of inmate Boutte's bed history records is not subject to reasonable dispute. Accordingly, the request for judicial notice is granted.

Because inmate Boutte's bed history records reflect that he was not housed at HDSP on March 1, 2013, inmate Boutte's declaration is disregarded.

In the reply, defendant Weeks argues that plaintiff should be sanctioned for filing a false affidavit pursuant to Federal Rule of Civil Procedure 56(h). Rule 56(g) provides,

> If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorneys' fees, it incurred as a result. An offending party, or an attorney, may also be held in contempt or subjected to other appropriate sanctions.

Fed. R. Civ. P. 56(h).

In the reply, defendant Weeks argues that the inmate Boutte's affidavit is a completely fraudulent invention. (ECF No. 311 at 3.) Defendant argues that plaintiff acted in bad faith in submitting the Boutte declaration as a means to avoid an unfavorable summary judgment. (Id.) Defendant requests that the court sanction plaintiff for filing this false affidavit by granting defendant's summary judgment motion. (Id.)

On May 26, 2022, plaintiff filed a motion for leave to file a response to defendant Weeks' request for sanctions regarding inmate Boutte's declaration. (ECF No. 306.) On May 26, 2022, plaintiff filed a verified response to the request for sanctions. (ECF No. 307.) Good cause appearing, plaintiff's request for leave to file the response is granted.

In his verified response, plaintiff claims that on July 25, 2021, "newly discovered witness" Boutte wrote a handwritten declaration. (Id. at 1.) Plaintiff contends that he (plaintiff) was present when inmate Boutte "made spontaneous exclamation" which he later wrote down. (Id. at 2.) This led plaintiff to believe that inmate Boutte was present when plaintiff was assaulted at HDSP on March 1, 2013. (Id.)

In his verified response, plaintiff appears to claim that inmate Boutte voluntarily told plaintiff that he witnessed the March 1, 2013 incident. Based on these circumstances, plaintiff

claims that he believed that inmate Boutte witnessed the incident. Based on these statements, the undersigned cannot find that plaintiff submitted inmate Boutte's declaration in bad faith or solely for delay. Accordingly, defendant Weeks' motion for sanctions is denied without prejudice.[35]

B. Defendants' Evidence

In support of the summary judgment motion, defendant Weeks submitted a separate statement of undisputed facts. (ECF No. 240-2.) Plaintiff filed a response to defendant's statement of undisputed facts. (ECF No. 286.) In the reply, defendant Weeks argues that plaintiff's response to his statement of undisputed facts does not adequately address the undisputed facts. (ECF No. 311 at 4.) Defendant argues that plaintiff's conclusory responses must render the undisputed facts undisputed under the Federal Rules of Civil Procedure. (Id.)

The undersigned agrees with defendant that plaintiff failed to adequately address several of defendant's 56 undisputed facts. Federal Rule of Civil Procedure 56(e)(2) provides that if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may consider the fact undisputed for purposes of the motion. However, in light of the Ninth Circuit's directive that a document filed pro se be construed liberally, the undersigned shall strive to resolve defendant's summary judgment motion on the merits. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (document filed pro se is "to be liberally construed"); Erickson v. Pardus, 551 U.S. 89, 94 (2007); Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

Accordingly, the undersigned declines to find defendant's undisputed facts undisputed to the extent they are not adequately opposed by plaintiff in his response. Instead, the undersigned herein sets forth defendant's version of events, as contained in the evidence submitted in support of the summary judgment motion. The undersigned then sets forth plaintiff's version of events, based on plaintiff's admissible evidence.

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[35] The undersigned is skeptical regarding plaintiff's claim that he did not know that inmate Boutte was not housed at HDSP on March 1, 2013. However, based on the current record, the undersigned cannot find that plaintiff knowingly submitted a false declaration.

Defendant's Version of Events

On Friday, March 1, 2013, defendant Weeks was on duty at HDSP working a shift of 0600-1400. (ECF No. 240-4 at 5 (Weeks' declaration).) As defendant Weeks supervised inmates on the exercise yard, plaintiff was observed in the yard wearing inappropriate footwear from ad seg. (Id.) Defendant Robinette informed plaintiff that he needed to wear boots in the yard, and not the ad seg footwear. (Id.) Defendant Weeks provided plaintiff with boots. (Id.)

On March 1, 2013, at 1100 hours, Officer Bennett was working his assigned post as B-observation officer. (ECF No. 240-4 at 14 (Bennett declaration).)

At approximately 1110 hours, while continuing to supervise inmates outside in the Facility B exercise yard, defendant Weeks observed inmate Williams and inmate Parker punching plaintiff with their fists in his face and head. (ECF No. 240-4 at 5 (Weeks' declaration).)

The location of the fight occurred along the track next to the fence between buildings 2 and 3. (Id. at 6.) Defendant Weeks was located on the other side of the yard when he first observed the fight. (Id.) There are typically 100-200 inmates on the exercise yard. (Id.) The presence of officers on the yard is to avert inmate disturbances, and to watch for illegal activity. (Id.)

Yard Officer Bennett, who was positioned at the observation tower, gave all the inmates in the yard the order to "get down," via the public address system. (ECF No. 240-4 at 15 (Bennett declaration).) Using a state radio, defendant Weeks called a "Code 1, Bravo Yard, 2 on 1 in front of 2 block." (ECF No. 240-4 at 6 (Weeks' declaration).) As a result of this radio alert, multiple officers responded to the yard. (Id.)

Inmates Walker and Parker chased plaintiff from the track area out to the dirt area at the corner of building B2, behind the handball court. (Id.) Defendant Weeks responded across the yard toward the incident, along with other responding staff. (Id.)

Officer Bennett observed inmate Williams stand in close proximity to inmate Parker. (ECF No. 240-4 at 16 (Bennett declaration).) Both inmate Williams and inmate Parker were moving forward in tandem toward plaintiff, who appeared to be dazed and confused. (Id.) Plaintiff had his head down and hands in the air in an apparent attempt to protect himself from

any further harm. (Id.) Officer Bennett then saw inmate Williams step forward and strike plaintiff with his fist to plaintiff's lower facial area. (Id.) Plaintiff's body went limp and he fell to the ground, striking his face on the hard-surface dirt area. (Id.) Plaintiff lay motionless and did not move. (Id.)

Defendant Weeks also observed inmate Williams punch plaintiff with his fist, striking plaintiff on the left side of his head, causing plaintiff to fall to the ground. (ECF No. 240-4 at 6 (Weeks' declaration).)

Again using the public address system, Officer Bennett gave another lawful order to "get down," which produced negative results. (ECF No. 240-4 at 16 (Bennett declaration).) Officer Bennett observed inmates Williams and Parker refuse to obey the order without delay, by stopping their actions, and in a nonchalant manner, turned around and slowly walked back to the table area and lay face down on the concrete pad supporting the tables. (Id.)

Defendant Weeks observed inmates Williams and Parker move away from plaintiff about 15 feet, to the tables between buildings no. 2 and no. 3 on the yard. (ECF No. 240-4 at 6 (Weeks' declaration).) Defendant Weeks observed inmates Williams and Parker enter a prone position. (Id.)

A skirmish line is a method used to secure the prison yard in the event of an inmate fight. (Id.) This involves forming a line of officers to physically separate and confine the involved inmates from the rest of the inmate population. (Id.) After defendant Weeks called the Code 1 on his radio, staff and defendant Weeks formed a skirmish line facing building B2 and the tables. (Id.) The skirmish line moved forward to secure the area. (Id.) Defendant Robinette also joined the skirmish line. (ECF No. 240-5 at 5 (Robinette declaration).)

On March 1, 2013, Sergeant Shaver was assigned to B Yard Sergeant Post. (ECF No. 240-4 at 26) (staff incident report).) Sergeant Shaver responded from the program area to a code one announced over the institutional radio. (Id.) Sergeant Shaver assigned defendants Weeks and Robinette to restrain plaintiff. (ECF No. 240-4 at 6 (Weeks' declaration).) Defendants Weeks and Robinette approached plaintiff who was lying on his stomach. (Id.) Plaintiff's face was bloodied. (Id.) Plaintiff did not respond to defendant Weeks' verbal commands and

appeared to be unconscious. (Id.) Defendant Weeks secured plaintiff in handcuffs while defendant Robinette provided security. (Id.)

Officer Bennett observed Officer Gray handcuff inmate Williams, while Officer Fannon stood by as cover. (ECF No. 240-4 at 16 (Bennett declaration).) Officer Bennett observed Officer Paez handcuff inmate Parker, while Officer Barnes stood by as cover. (Id.) Officer Bennett saw defendant Weeks handcuff plaintiff while defendant Robinette stood by as cover. (Id.)

Officer Bennett did not observe any force used by custody staff during this incident. (Id. at 17.) Officer Bennett did not observe any custody staff utilize a baton on plaintiff. (Id.) Officer Bennett did not observe defendant Weeks strike plaintiff. (Id.)

Medical staff arrived and placed C-spine collar on plaintiff. (ECF No. 240-4 at 7 (Weeks' declaration).) Defendant Weeks transferred plaintiff's hands from handcuffs and onto waist chain cuffs. (Id.) Plaintiff was secured to a backboard and lifted onto a gurney. (Id.)

Officer Bennett observed Code 2 responders (A yard staff) walk onto the yard and connect with the already-in-place skirmish line. (ECF No. 240-4 at 16.) Officer Bennett then observed Investigative Service Unit Staff Members arrive and work to gather evidence. (Id.) Officer Dekens then provided escort as plaintiff was wheeled off the yard to an awaiting Medical Transport Van. (Id.)

According to plaintiff's medical records, plaintiff told medical staff at 1130 after the incident that "2 black guys attacked me." (Id. at 23 (medical records).)

Defendant Weeks prepared a CDCR form 837 Incident Report on March 1, 2013, which contains an accurate report of his observations of the inmate attack on that date. (ECF No. 240-4 at 7 (Weeks' declaration).) After the incident, photos and other evidence were collected by Investigative Services ("ISU") officers. (Id.)

In his declaration submitted in support of the summary judgment motion, defendant Weeks states that at no time did he use unreasonable or unnecessary force on plaintiff. (Id.) Defendant Weeks states that his contact with plaintiff on March 1, 2013, was limited to securing plaintiff in handcuffs as the medical staff arrived, and then transferring him to waist-chains before

he was placed on a backboard and positioned on the gurney. (Id.) Defendant Weeks states that he did not transport plaintiff to the Correctional Treatment Center/Treatment Triage Area. (Id.)

In his declaration, defendant Weeks states that he did not ask inmate Williams or inmate Parker to do him a "favor" on the yard, prior to their attack on plaintiff. (Id.) Defendant Weeks did not hear defendant Robinette nor any other correctional officer ask inmate Williams or inmate Parker to do a "favor" prior to the attack on plaintiff. (Id.) Defendant Weeks did not encourage or suggest to any inmate to assault plaintiff. (Id.) Defendant Weeks did not hear any other officers encourage or suggest to inmates plaintiff should be assaulted. (Id.) Inmates Parker and Williams did not owe defendant Weeks any "favors." (Id.)

Prior to the March 1, 2013, defendant Weeks had not been named as a defendant in any lawsuit filed by plaintiff. (Id.) Prior to March 1, 2013, defendant Weeks had not been a subject of an inmate appeal filed by plaintiff. (Id.) Defendant Weeks had never had any conflict with plaintiff before or during the incident on March 1, 2013. (Id.) At no time has defendant Weeks allowed and/or sanctioned any attack on plaintiff. (Id.) Defendant Weeks did not know that inmates Williams and Parker were going to assault plaintiff and he had no reason to believe that such an assault would occur. (Id.)

As of September 2019, defendant Weeks has a state issued expandable baton in his utility belt. (Id.) Defendant Weeks has been issued the expandable baton by CDCR in the course of his employment for well over ten years. (Id.) Defendant Weeks receives annual training on the use of the baton in the scope of his employment. (Id.) Defendant Weeks has been employed in corrections for 20 years. (Id.) Aside from this mandatory training, defendant Weeks has never used his expandable baton. (d.) Defendant Weeks did not remove his expandable baton on March 1, 2013. (Id.) Defendant Weeks did not strike plaintiff with a baton. (Id. at 7-8.) Defendant Weeks did not strike plaintiff with his hands or any other object. (Id. at 8.) Defendant Weeks did not witness defendant Robinette or any other officer assault plaintiff at any time. (Id.) Based on his personal observations in the prison yard, defendant Weeks states that no staff used force on plaintiff on March 1, 2013. (Id.)

In his declaration, defendant Weeks states that he did not conspire with anyone, and nor

did he take adverse action against plaintiff because of his litigation activities, for any reason. (Id.)

At his deposition, plaintiff testified that he could not recall defendant Weeks ever making comments directly to him suggesting that he was retaliating against plaintiff for anything. (ECF No. 240-4 at 55-56.) Plaintiff testified, "I never had a conflict with this man. I stayed away from him." (Id. at 56.) At his deposition, plaintiff testified that prior to March 1, 2013, he filed no staff complaints against defendant Weeks. (Id. at 48-49.) At his deposition, plaintiff testified that prior to March 1, 2013, he filed no lawsuits against defendant Weeks. (Id. at 49.)

Defendant Weeks was not reprimanded as a result of his actions in connection with the March 1, 2013 incident. (Id. at 8 (Weeks' declaration).) There were no personnel actions taken against defendant Weeks in relation to the March 1, 2013, incident. (Id.)

The CDCR Report of Findings concurred with by the Associate Warden on March 13, 2013 concludes:

> Based on the video recorded interview with Inmate Crane, a review of the CDCR 7219 Medical Report of Injury, and a review of Staff's 837-C reports, it is apparent that inmate Crane's injuries are a result of the Battery by Inmates Williams and Parker. Further, inmate Crane did not make any allegations of unnecessary or excessive use of force or intention to file an appeal. Staff did not report using any force during this incident and the injuries are consistent with the reported battery by inmates Williams and Parker. Therefore, I recommend no further action.

(Id. at 25 (report of findings).)

Inmates Parker and Williams both received Rules Violation Reports for battery on plaintiff. (Id. at 30-45 (rules violation reports).) Inmates Parker and Williams stated under oath that they did not conspire with correctional staff against plaintiff and they were not acting at the direction of correctional staff on March 1, 2013; the March 1, 2013 incident resulted from a dispute over legal work. (ECF No. 250-5 at 8-12 (declarations of inmates Parker and Williams).)

On March 2, 2013, Lieutenant Leckie interviewed plaintiff based on the March 1, 2013 incident. (ECF No. 240-4 at 60-71) (transcript from interview).) Plaintiff was not placed under oath during this interview.

During the interview, Lieutenant Leckie asked plaintiff how he received his injuries and

plaintiff stated that two inmates assaulted him. (Id. at 66.) Plaintiff stated,

> I was walking the track, and Weeks and Robinette called me over for boot—for to get boots, right? They gave me some boots over there in front of the law library. I put those on and walked half a lap and basically got by the pull up bars. These two guys just got off the bars and started punching me.

(Id.)

During the interview, plaintiff stated that staff did not use force during the incident. (Id. at 7-8.) During the interview, plaintiff stated that maybe five staff were present during the incident. (Id. at 8.) Plaintiff stated, "They—I couldn't see. I was really in a –I was really kind of out of it." (Id.) Plaintiff stated that during the incident, he lost consciousness for one minute. (Id. at 65.)

During the interview, plaintiff stated that he could not identify any staff members who were present during the incident because "I was down in the dirt like that. They told me go get down." (Id. at 8.)

At his deposition, plaintiff testified that he did not recall seeing his purported witness inmate Lopez on the yard on the day of the incident. (Id. at 53.) At his deposition, plaintiff testified that he did not recall seeing his purported witness inmate Shanta Ray on the yard the day of the incident. (Id. at 51.) At his deposition, plaintiff testified that he did not see defendant Weeks telling inmates Parker and Williams to assault plaintiff. (Id. at 54.)

C. Plaintiff's Opposition

Plaintiff's version of events is contained in his verified response to defendant's statement of undisputed facts, the verified declarations attached to his response to defendant's statement of undisputed facts and his verified second amended complaint.

In his verified declaration, inmate Shaunta Ray states that on March 1, 2013, he observed defendants Weeks and Robinette give inmates Parker and Williams "the call" to assault plaintiff. (ECF No. 286 at 16.) Inmate Ray states that he heard defendants Weeks and Robinette tell inmates Parker and Williams to "get ready to do the favor" they owed to defendants. (Id.) Inmate Ray states that he heard defendant Weeks say to inmates Parker and Williams, "Crane!" (Id.) Inmate Ray states that he next observed inmates Parker and Williams attack plaintiff. (Id.)

In his verified declaration, inmate Juan Munoz states that on March 1, 2013, after

observing two African American inmates beat plaintiff for "a long time," he saw defendant Weeks and other guard beating plaintiff while plaintiff was face down and prone on the ground. (Id. at 18.) Inmate Munoz saw defendant Weeks beat plaintiff on the back of his head with a baton. (Id.) Inmate Munoz states that no prison official ever asked him about this incident. (Id.)

As discussed above, in his verified second amended complaint, plaintiff alleges that on March 1, 2013, when defendants Weeks and Robinette gave plaintiff boots in exchange for his shoes, defendant Robinette said, "You're going to need them!" (ECF No. 16 at 8.) Plaintiff walked a half lap and was then assaulted by inmates Parker and Williams. (Id.) Plaintiff had never met these inmates before. (Id.) The guards did not sound the alarm until plaintiff had been beaten for a long time. (Id.) Defendants Robinette and Weeks came running and ordered plaintiff to get down while inmates Parker and Weeks were standing. (Id.) Once plaintiff was on the ground, defendants Weeks and Robinette and other guards handcuffed plaintiff behind his back, smashed his face into the ground, dragged his face across the ground and hit him on the heads with batons. (Id.)

D. Discussion

In discussing defendant Weeks' summary judgment motion, the undersigned refers to the relevant legal standards set forth above in the section addressing the summary judgment motion filed by defendants Barton, etc.

As discussed above, plaintiff raises four claims against defendant Weeks: 1) excessive force in violation of the Eighth Amendment based on the March 1, 2013 incident; 2) failure-to-protect in violation of the Eighth Amendment based on the March 1, 2013 incident; 3) retaliation in violation of the First Amendment based on the March 1, 2013 incident; and 4) conspiracy.

Defendant Weeks' summary judgment motion addresses only plaintiff's excessive force and conspiracy claims. Accordingly, the undersigned addresses only these two claims in these findings and recommendations.

The undersigned observes that defendant Weeks' summary judgment includes evidence relevant to plaintiff's retaliation and failure-to-protect claims. However, defendant does not specifically address these claims in the points and authorities and nor does he cite the legal

standards for these claims.

1. Excessive Force

Defendant Weeks moves for summary judgment on the grounds that plaintiff's version of events is inconsistent, implausible and contradicted by the record. Citing defendant's undisputed facts nos. 18 and 48, defendant argues that plaintiff's claims of excessive force are implausible because plaintiff was knocked unconscious. (ECF No. 240-3 at 14.) Defendant cites his own declaration where he stated that when he first approached plaintiff, plaintiff was lying on his stomach, he did not respond to verbal commands and appeared to be unconscious. (ECF No. 240-4 at 5.) Defendant also contends that during Lieutenant Leckie's March 2, 2013 interview with plaintiff, plaintiff told Lieutenant Leckie that staff did not use force against him on March 1, 2013. (ECF No. 240-2 at 12.) Defendant cites the transcript from this interview. (Id.; ECF No. 240-4 at 60-70.)

Defendant appears to suggest that plaintiff could not personally know whether defendant assaulted him because plaintiff was unconscious when defendant arrived at the scene. However, in his verified second amended complaint, plaintiff alleges that he lost consciousness after defendant beat him with the baton. Moreover, plaintiff submitted a declaration from inmate Munoz who states that he witnessed defendant assault plaintiff. Therefore, whether defendant Weeks assaulted plaintiff and whether plaintiff was conscious when the alleged assault occurred are disputed facts.

In his verified response to defendant's undisputed facts, plaintiff states that he told Lieutenant Leckie that staff did not use force against him on March 1, 2013, because Lieutenant Leckie was "one more criminal guard" and plaintiff did not trust Leckie. (ECF No. 286 at 11-12.) The undersigned cannot assess the credibility of plaintiff's explanation regarding why he told defendant Leckie that no staff used against force against him on March 1, 2013. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (on summary judgment, the court cannot decide credibility).

In the summary judgment motion, defendant also argues that the credibility of plaintiff's claims against defendant Weeks are undermined by plaintiff's fluctuating accounts. (ECF No.

240-3 at 14.) Defendant argues that in his original complaint, plaintiff alleged that defendant Robinette ordered inmates Parker and Williams to beat plaintiff, and later defendant Robinette and other guards beat plaintiff. (Id.) Defendant argues that "[b]y the operative second amended complaint," plaintiff included defendants Weeks in his allegations. (Id.)

While plaintiff did not name defendant Weeks as a defendant in the original complaint, plaintiff named defendant Weeks as a defendant in the first amended complaint. (ECF No. 12.) In the first amended complaint, plaintiff alleged that defendants Weeks and Robinette ordered inmates Williams and Parker to assault him. (Id. at 7.) Plaintiff also alleged that after the assault by inmates Williams and Parker, he was assaulted by defendants Weeks, Robinette and other guards, who hit him on the head with batons. (Id. at 8.) Whether plaintiff's failure to name defendant Weeks as a defendant in the original complaint undermines plaintiff's credibility is an issue for the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (on summary judgment, the court cannot decide credibility).

Defendant also argues that the declaration of plaintiff's inmate witness, Shaunta Ray, is not credible, because plaintiff testified at his deposition that he did not see inmate Ray on the yard on March 1, 2013. (ECF No. 240-3 at 17; ECF No. 240-4 at 51.) The undersigned does not understand how plaintiff's failure to see inmate Ray on the exercise yard on March 1, 2013, necessarily impacts the credibility of inmate Ray's statements in his declaration. In any event, the impact of plaintiff's failure to see inmate Ray on the yard on March 1, 2013, is for the jury to decide. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (on summary judgment, the court cannot decide credibility).[36]

Defendant further argues that plaintiff's claims are implausible because they do not make logical sense. (ECF No. 240-3 at 17.) Defendant argues that it is undisputed that defendants Weeks responded to the assault on plaintiff by inmates Williams and Parker by calling a "Code 1" on his radio to request assistance from other officers to break up the fight. (Id.) Defendant

[36] Defendant also argues that plaintiff testified at his deposition that he did not see inmate witness Joseph Lopez on the yard on March 1, 2013. (ECF No. 240-3 at 17.) Plaintiff did not submit a declaration by inmate Joseph Lopez. For this reason, the undersigned does not address defendant's arguments challenging the credibility of inmate Lopez.

argues that it is undisputed that a skirmish line of officers formed to secure the area. (Id.) Defendant argues that plaintiff would "then have the Court believe his farcical account that defendant Weeks had not only first 'set up' this inmate attack by Parker and Williams, but that he then proceeded to knock [plaintiff] unconscious himself with his baton as other staff and inmates looked on." (Id.)

The undersigned finds that plaintiff presented sufficient evidence to create a dispute regarding whether defendant Weeks used excessive force against him, including hitting plaintiff with his baton. Plaintiff presented the declaration of inmate Munoz stating that he observed defendant Weeks assault plaintiff. Plaintiff alleges in the verified second amended complaint that defendant Weeks assaulted him. Plaintiff's version of events, based on the evidence presented, is not rendered unbelievable by defendant's evidence.

Citing Scott v. Harris, 550 U.S. 372, 380 (2007), and Alston v. County of Sacramento, 2020 WL 6801941 (E.D. Cal. Nov. 19, 2020), findings and recommendations adopted in full at 2020 WL 7365025, defendant argues that the court should adopt his version of the facts because plaintiff's version of events is blatantly contradicted by the record, so that no reasonable jury could believe it. (ECF No. 240-3 at 14).

In Alston v. County of Sacramento, the plaintiff alleged that the defendant used excessive force against him while he was housed at the Sacramento County Jail. 2020 WL 6801941, at *1. In Alston, the plaintiff's version of events was "utterly discredited by the video recording that no reasonable jury could believe" plaintiff's version of events. Id.at * 5. The instant case is distinguished from Alston because, here, there is no video evidence contradicting plaintiff's version of events.

After carefully reviewing the record, the undersigned finds that plaintiff's version of events is not so blatantly contradicted by the record so that no reasonable jury could believe it. See Scott v. Harris, 550 U.S. at 380 (at summary judgment, respondent's version of events was "so utterly discredited by the record that no reasonable jury could have believed him."). Rather, the jury should evaluate the evidence and decide the credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255 (on summary judgment, the court cannot decide credibility).

Accordingly, the undersigned recommends that defendant Week's motion for summary judgment as to plaintiff's excessive force claim be denied because whether defendant Weeks used excessive force is disputed.

Finally, the undersigned addresses plaintiff's argument in his supplemental opposition that defendant Weeks produced false evidence. In his supplemental opposition, plaintiff argues that defendant Weeks produced false discovery documents to plaintiff in response to request for production of documents, set 1, request no. 1. (ECF No. 298 at 6.) Plaintiff appears to refer to a form attached to the supplemental opposition titled "Report of Findings." (Id. at 16.) Plaintiff contends that this form falsely states that Lieutenant Leckie interviewed inmate Munoz. For the following reasons, the undersigned finds that this argument is without merit.

The "Report of Findings" form states that, based on a review of the appeal, the incident package and interview with plaintiff and Munoz, Lieutenant Simmerson could find no evidence to support plaintiff's claim that staff battered plaintiff on March 1, 2013. (Id.) The form states that Lieutenant Leckie interviewed plaintiff. (Id.) The form states, "The interview with inmate Munoz supported the events that occurred on March 1, 2013." (Id.)

Attached to plaintiff's supplemental opposition is the declaration of inmate Munoz. (Id. at 40.) Inmate Munoz states that he saw defendant Weeks beat plaintiff on March 1, 2013. (Id.) Inmate Munoz states that from March 1, 2013, to the present, no prison official ever asked him if he witnessed any "incident of assault" on plaintiff on March 1, 2013. (Id.)

In the reply, defendant Weeks states that in the summary judgment motion, defendant referred to the previously filed declaration of Lieutenant Leckie. (ECF Nos. 311 at 5, 240-4 at 3.) In the declaration, Lieutenant Leckie stated that he interviewed plaintiff regarding the March 1, 2013 incident on March 2, 2013. (ECF No. 155-4 at 1-2.) Lieutenant Leckie did not state that he interviewed inmate Munoz. (Id.) The undersigned also observes that the "Report of Findings" attached to plaintiff's supplemental opposition does not state who interviewed inmate Munoz. (ECF No. 298 at 16.)

The undersigned agrees with defendant Weeks that plaintiff's argument as to whether or not inmate Munoz was interviewed in the investigation does not create a triable issue of material

fact for purposes of defendant Weeks' summary judgment motion. At trial, plaintiff may challenge the credibility of the "Report of Findings" with the testimony of inmate Munoz.

2. Conspiracy

In the summary judgment motion, defendant Weeks incorrectly framed plaintiff's conspiracy claim. Defendant Weeks argues that he did not conspire with inmates Crane and Parker. (ECF No. 240-3 at 19-20.) As discussed above, plaintiff's conspiracy claim is not based on a conspiracy between defendant Weeks and inmates Crane and Parker. Plaintiff alleges that defendant Weeks conspired with the other defendants to violate plaintiff's constitutional rights. Because defendant Weeks did not address the conspiracy claim raised in the second amended complaint, defendant is not entitled to summary judgment as to this claim.

VII. Objections

The issues in this action have been extensively briefed by both parties. For that reason, objections to these findings and recommendations shall be no longer than fifteen pages.

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion to file a response to defendant Weeks' challenge to inmate Boutte's declaration (ECF No. 306) is granted; and

IT IS HEREBY RECOMMENDED that:

1. The motion for summary judgment on behalf of defendants Barton, etc. (ECF No. 236) be granted as to the following claims: 1) plaintiff's claims regarding the January 16, 2013 incident based on plaintiff's failure to exhaust administrative remedies (including the related claim against defendant Davey); 2) plaintiff's claims against defendant Robinette regarding the January 22, 2011 incident as without merit; and 3) plaintiff's claims against defendant Davey regarding the March 1, 2013 incident as without merit;
2. The motion for summary judgment on behalf of defendants Barton, etc. (ECF No. 236) be denied in all other respects; and
3. The motion for summary judgment on behalf of defendant Weeks (ECF No. 240) be denied.

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)(l). Within **thirty** 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: January 4, 2023

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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