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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 CARLOS A. HAWTHORNE,

8 Plaintiff,

9 v.

10 A YANEZ, et al.,

11 Defendants.

Case No. [17-cv-04960-HSG](#)

**ORDER DENYING DEFENDANT
SWENSEN'S MOTION TO DISMISS;
GRANTING MOTION FOR
SUMMARY JUDGMENT; SETTING
BRIEFING SCHEDULE**

Re: Dkt. Nos. 66, 67

12
13 Plaintiff, an inmate at San Quentin State Prison ("SQSP"), has filed this *pro se* action
14 pursuant to 42 U.S.C. § 1983. Now pending before the Court are: (1) defendant Swensen's
15 motion to dismiss, Dkt. No. 66, and (2) defendants Czajkowski, Davis, Fonesca, Hagen, Thomas,
16 and Yanez ("CDCR Defendants")'s motion for summary judgment, Dkt. No. 67. Plaintiff has not
17 filed an opposition to defendant Swensen's motion to dismiss, and defendant Swensen has not
18 filed a reply in support of her motion. Plaintiff has filed an opposition to the CDCR Defendants'
19 summary judgment motion, Dkt. No. 75, and the CDCR Defendants have filed a reply, Dkt. No.
20 76. For the reasons set forth below, the Court DENIES defendant Swensen's motion to dismiss,
21 Dkt. No. 66; and GRANTS the CDCR Defendants' motion for summary judgment, Dkt. No. 67.

22 **I. Procedural Background**

23 The Court found that the amended complaint stated the following cognizable claims:

- 24 • Defendants Fonesca and Yanez discovered and read Plaintiff's draft federal civil
25 rights complaint and, in retaliation for the protected conduct, confiscated the
26 complaint and reported it to Plaintiff's mental health team, in violation of the First
27 Amendment;
- Defendants Czajkowski, Davis, Deal,¹ Hagens, Swensen, and Thomas directed

28 ¹ On October 5, 2021, the Court dismissed defendant Deal from this action pursuant to the parties'
joint stipulation. Dkt. No. 63.

1 custodial staff to confiscate Plaintiff’s property, including his legal documents and
2 the draft complaint, in retaliation for Plaintiff’s protected conduct, in violation of
3 Plaintiff’s First Amendment right to access the courts and right to engage in
4 protected conduct without suffering retaliation;

- 5 • Defendants Czajkowski, Davis, Deal, Hagens, Swensen, and Thomas confiscated
6 Plaintiff’s religious books and items, in violation of his First Amendment right to
7 free exercise of religion;
- 8 • Defendants Czajkowski, Davis, Deal, Hagens, Swensen, and Thomas confiscated
9 Plaintiff’s books and magazines, in violation of his First Amendment right to free
10 exercise of speech;
- 11 • Defendant Czajkowski squeezed Plaintiff’s handcuffs too tightly; grabbed Plaintiff
12 roughly by the neck; shoved Plaintiff’s head into the wall; and choked Plaintiff, in
13 violation of the Eighth Amendment’s prohibition on excessive use of force; and
- 14 • Defendant Czajkowski threatened to beat Plaintiff if he cried out for help, in
15 violation of his First Amendment right to freedom of speech.

16 **II. Defendant Swensen’s Motion to Dismiss**

17 **A. Amended Complaint**

18 The amended complaint makes the following allegations regarding defendant Swensen.

19 Plaintiff is enrolled in the SQSP Psychiatric Inpatient Program (“PIP”). In order to shield
20 himself from complete view when he was bathing or using the toilet, Plaintiff would use discarded
21 paper bags to cover ten percent of the windows. Dkt. No. 21 (“FAC”) at 1 and 7. The PIP has a
22 policy prohibiting inmate-patients who are on suicide watch from covering their cell windows.
23 But, during the relevant time period, Plaintiff was not on suicide watch and never fully covered the
24 windows. *Id.* Because Plaintiff had filed a grievance alleging that mental health services
25 personnel and other prison officials had discriminated against him, mental health services placed
26 Plaintiff on suicide watch. FAC at 1. Plaintiff was unsuccessful in obtaining relief regarding the
27 discriminatory treatment via the administrative grievance process, so he drafted a federal civil
28 rights complaint regarding these issues. FAC at 1–2.

 On or about August 26, 2016, during the course of a cell search, defendants Fonesca and
 Yanez discovered the draft complaint. FAC at 4. Defendants Fonesca and Yanez confiscated
 Plaintiff’s drafted federal civil rights complaint, his attorney-client communications, and his other
 legal documents. FAC at 4.

 On or about September 9, 2016, defendant Swensen, along with defendants Hagen,

1 Thomas, Deal, Czajkowski, and Davis summoned Plaintiff to a medical treatment planning
2 conference, known as a MEGA session. Based on Defendant Bensimon’s false report that
3 Plaintiff was fully covering his windows, also referred to as “boarding up,” defendant Thomas
4 recommended that Plaintiff be placed on property control, a disciplinary measure that involves
5 confiscating all of an inmate’s property, including hygiene products, reading materials, and legal
6 materials. The MEGA session team members implemented the recommendation. FAC at 5–6.

7 Plaintiff’s property, specifically his legal documents, draft complaint, religious books and
8 items, and books and magazines, was confiscated per the property control measure which
9 defendant Swensen (and others) authorized. The confiscation of the legal documents and draft
10 complaint was in retaliation for Plaintiff’s protected conduct, in violation of the First Amendment.
11 The confiscation of his religious books and items violated Plaintiff’s First Amendment right to
12 free exercise of religion. The confiscation of his books and magazines violated Plaintiff’s First
13 Amendment right to free exercise of speech.

14 **B. Legal Standard**

15 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s
16 complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Under the “notice pleading”
17 standard of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide a short and
18 plain statement of the plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); *see*
19 *also Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009).

20 “[A] court may dismiss a complaint as a matter of law for (1) lack of cognizable legal
21 theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta*
22 *Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). However, a complaint
23 will survive a motion to dismiss if it contains sufficient factual matter, accepted as true, to state a
24 claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim
25 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
26 reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

27 In making this determination, a court reviews the contents of the complaint, accepting all
28 factual allegations as true and drawing all reasonable inferences in favor of the nonmoving party.

1 *See Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.
2 2007). Notwithstanding this deference, the reviewing court need not accept as true conclusory
3 allegations that are contradicted by documents referred to in the complaint, *Paulsen*, 559 F.3d at
4 1071, and need not accept as true legal conclusions cast in the form of factual allegations, *see*
5 *Iqbal*, 556 U.S. at 678. It is also improper for a court to assume “the [plaintiff] can prove facts
6 that [he or she] has not alleged.” *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of*
7 *Carpenters*, 459 U.S. 519, 526 (1983). However, “[w]hen there are well-pleaded factual
8 allegations, a court should assume their veracity and then determine whether they plausibly give
9 rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 664. “In sum, for a complaint to survive a
10 motion to dismiss, the non-conclusory factual content, and reasonable inferences from that
11 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S.*
12 *Secret Serv.*, 572 F.3d 962 (9th Cir. 2009) (quotations and citation omitted).

13 In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b), the court “may generally
14 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
15 matters properly subject to judicial notice.” *Outdoor Media Group, Inc. v. City of Beaumont*, 506
16 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted).

17 **C. Request for Judicial Notice**

18 Defendant Swensen requests that the Court take judicial notice of the following: (1) ECF
19 No. 1 in this action; (2) ECF No. 1 at 5-6, State of California, Department Corrections and
20 Rehabilitation, Interdisciplinary Progress Notes, dated September 8, 2016, attached as Exhibit C to
21 original complaint (Dkt. No. 1), filed August 25, 2017, in this action; and (3) State of California,
22 Department Corrections and Rehabilitation, Interdisciplinary Progress Notes, dated September 9,
23 2016, attached as Exhibit B to Declaration of Mary B. Pendleton in Support of Defendant Sarah
24 Swensen’s Motion to Dismiss. Plaintiff argues that the Court may take judicial notice of these
25 documents pursuant to Fed. R. Evid. 201(b)(2) and Fed. R. Evid. 801(d)(2), but does not say
26 which rule of evidence applies to which document or why the rule is applicable. Dkt. No. 66-4.

27 The Court GRANTS IN PART AND DENIES IN PART the request for judicial notice.
28 Fed. R. Evid. 201(b) provides that a court may judicially notice a fact that is not subject to

1 reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction;
2 or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably
3 be questioned. Fed. R. Evid. 201(b). Fed. R. Evid. 801(d)(2) has been used to allow judicial
4 notice of documents where the contents are challenged as hearsay, but the underlying document is
5 a document whose accuracy can be accurately and readily determined from sources whose
6 accuracy cannot reasonably be questioned. Generally speaking, a court only takes judicial notice
7 of the fact that documents were filed in a court proceeding, but does not make any determinations
8 regarding the accuracy of the contents of the documents, including the alleged authorship of the
9 document. *See, e.g., In re Bare Escentuals, Inc. Sec. Lit.*, 745 F.Supp.2d 1052, 1067 (N.D. Cal.
10 2010) (in considering defendant’s motion to dismiss, the court took notice of the existence of
11 unrelated court documents, but did not take judicial notice of the documents for the truth of the
12 matter asserted in them).

13 The Court GRANTS the request for judicial notice with respect to document No. 1 and
14 takes judicial notice of the existence of this court document. The Court does not take judicial
15 notice of the truth of the matters asserted in the original complaint or the attached exhibits. The
16 Court DENIES the request for judicial notice with respect to document Nos. 2 and 3 because it
17 appears that defendant Swensen is requesting that the Court take judicial notice of the truth of the
18 matters asserted in these progress notes. The accuracy of the contents of the progress notes,
19 specifically the purpose of the property confiscation, cannot be accurately and readily determined
20 at this stage in the litigation.

21 **D. Analysis**

22 Defendant Swensen argues that the amended complaint should be dismissed because
23 (1) the claims against her are untimely; (2) Plaintiff has not adequately alleged that she was
24 personally involved in the deprivation of his constitutional rights; (3) she is entitled to qualified
25 immunity; and (4) any property confiscation was reasonably related to a legitimate penological
26 interest.

27 **1. Timeliness**

28 Defendant Swensen argues that Plaintiff’s claims against her are untimely because they

1 were not brought within the applicable one-year statutory period. She argues that because she is a
2 healthcare provider, Plaintiff was required to file suit against her within the one year statute of
3 limitations set forth in Cal. Code Civ. Proc. § 340.5. Defendant Swensen argues that Plaintiff was
4 aware of his injury – the property confiscation – by September 7, 2016, but did not name her in
5 this action until April 4, 2018, when he named her in the amended complaint. But the Court finds
6 that Section 340.5 does not supply the relevant statute of limitations.

7 Section 1983 does not contain its own limitations period. “Without a federal limitations
8 period, the federal courts borrow the statute of limitations for § 1983 claims applicable to personal
9 injury claims in the forum state.” *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (citing
10 *Wilson v. Garcia*, 471 U.S. 261, 276–79 (1985), *superseded by statute on other grounds as stated*
11 *in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377–78 (2004)); *see also Wallace v. Kato*,
12 549 U.S. 384, 387 (2007). Section 1983 actions are characterized as personal injury actions for
13 statute of limitations purposes. *Flynt v. Shimazu*, 940 F.3d 457, 461 (9th Cir. 2019). In
14 California, the applicable statute is Cal. Civ. Proc. Code § 335.1. Cal. Civ. Proc. Code § 335.1
15 provides that the general residual statute of limitations for personal injury actions is two years.
16 *See* Cal. Civ. Proc. Code § 335.1 (current codification of residual limitations period, which is now
17 two years; enacted in 2002). The applicable statute of limitations for Section 1983 actions brought
18 in California is therefore two years. A federal court must also give effect to a state’s tolling
19 provisions when applicable. *See Hardin v. Straub*, 490 U.S. 536, 538, 544 (1989). In relevant
20 part, California law tolls the limitations period for two years for the disability of imprisonment.
21 Cal. Civ. Proc. Code § 352.1(a). Accordingly, an inmate bringing a Section 1983 action has,
22 generally speaking, four years from the date the claim accrued to file a Section 1983 action raising
23 that claim.

24 Cal. Civ. Proc. § 340.5 is inapplicable here because it applies to actions “for injury or
25 death against a health care provider based upon such person’s alleged professional negligence.”
26 Cal. Civ. Proc. § 340.5 (“In an action for injury or death against a health care provider based upon
27 such person’s alleged professional negligence, the time for the commencement of action shall be
28 three years after the date of injury or one year after the plaintiff discovers, or through the use of

1 reasonable diligence should have discovered, the injury, whichever occurs first.”). The amended
2 complaint does not allege that Plaintiff suffered injury because of defendant Swensen’s alleged
3 professional negligence; nor does it allege that defendant Swensen was professionally negligent.
4 The amended complaint alleges that defendant Swensen authorized the confiscation of Plaintiff’s
5 property in retaliation for Plaintiff’s protected conduct; and that the confiscation violated
6 prevented Plaintiff from practicing his religion and engaging in free speech.

7 Assuming arguendo that Plaintiff was aware of his claims against defendant Swensen by
8 September 9, 2016, the limitations period for bringing a Section 1983 action against defendant
9 Swensen for the property confiscation expired on September 9, 2020. This action was filed on
10 August 25, 2017, and the amended complaint was filed on April 4, 2018. Plaintiff’s claims
11 against defendant Swensen are timely.

12 **2. Lack of Personal Involvement**

13 Defendant Swensen alleges that the Court should dismiss the claims against her because
14 Plaintiff has not adequately alleged what acts were taken by her, or how she was personally
15 involved in the deprivation of his constitutional rights. She argues that the amended complaint’s
16 allegation that she “decided in unison” to have custodial officers confiscate Plaintiff’s property is
17 “vague and fails to allege what act, if any, [she] personally performed on September 9, 2016, that
18 violated Plaintiff’s constitutional rights.” Dkt. No. 66-1 at 11. In addition, Defendant Swensen
19 argues that Plaintiff’s deposition testimony contradicts the amended complaint’s allegations
20 because, in his deposition, Plaintiff admitted that he did not know if defendant Swensen directed
21 or supervised anyone who removed the property from his cell and admitted that the property was
22 confiscated prior to the September 9, 2016 meeting.

23 Defendant Swensen’s arguments are not well-taken on a motion to dismiss. In considering
24 the motion to dismiss, the Court must determine whether, accepting all factual allegations in the
25 amended complaint as true and drawing all reasonable inferences in favor of Plaintiff, Plaintiff has
26 pled factual content that allows the Court to draw the reasonable inference that defendant Swensen
27 has engaged in First Amendment retaliation and violated Plaintiff’s First Amendment rights to free
28 speech and free exercise of religion. The Court may only consider the allegations in the amended

1 complaint in considering the motion to dismiss. *Outdoor Media Group, Inc.*, 506 F.3d at 899.
2 The Court cannot and does not consider Plaintiff’s deposition testimony on a motion to dismiss
3 because the content of a deposition is not a clearly established “fact” of which a court can
4 judicially take notice. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 n.1 (9th Cir. 2010) (citing
5 *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007)).

6 In relevant part, the amended complaint alleges the following: Plaintiff drafted a civil
7 rights complaint alleging that mental health services staff had discriminated against him; this draft
8 complaint was found and read during a cell search; correctional officers informed mental health
9 services about this draft complaint; two weeks later, Plaintiff was summoned to a mental health
10 services hearing (MEGA session) with defendant Swensen and other mental health services staff
11 and informed that all his property would be confiscated and unavailable to him; the property
12 confiscated included religious materials necessary to practice his religion and included all his
13 books and magazines; and the MEGA session team, which included defendant Swensen, decided
14 on this punitive measure even though Plaintiff had done nothing to warrant the
15 confiscation/restriction. Accepting these factual allegations as true and drawing all reasonable
16 inferences in favor of Plaintiff, Plaintiff has sufficiently alleged defendant Swensen personally
17 participated in the constitutional violations. Defendant Swensen was allegedly notified of the
18 draft complaint against mental services health staff, which included her, and two weeks later
19 defendant Swensen was part of the mental health services team that authorized an unwarranted
20 property confiscation that deprived Plaintiff of his legal materials, his religious materials, and his
21 books and magazines.

22 **3. Qualified Immunity**

23 Defendant Swensen argues that she is entitled to qualified immunity because Plaintiff has
24 failed to plead any facts that establish either the existence of a constitutional violation or her
25 involvement in the alleged constitutional violations. As discussed *supra*, the complaint has
26 adequately pled defendant Swensen’s involvement in the alleged constitutional violations.

27 **4. First Amendment Claim**

28 Defendant Swensen argues that Plaintiff’s First Amendment claims fail on the merits

1 because the property confiscation was reasonably related to the legitimate penological interest of
2 ensuring the safety of employees, medical professionals, and inmates. Specifically, she argues
3 that the progress notes indicate that Plaintiff’s property was confiscated because he was using it to
4 cover his windows which eliminated nursing sightlines, therefore impacting the ability to provide
5 him with medical care and which violated the fire safety hazard policy. On a motion to dismiss,
6 the Court cannot assume the truth of the statements made in the progress notes. This would
7 require the Court to make a credibility determination or to otherwise look to the merits of this
8 claim. The amended complaint adequately alleges that the property confiscation was unjustified
9 and retaliatory. Plaintiff alleges that he was not boarding up or violating PIP policy, and that the
10 property confiscation happened shortly after correctional officials discovered his draft complaint
11 that sought to bring suit against the mental health services staff.

12 **E. Setting Briefing Schedule**

13 For the foregoing reasons, the Court DENIES defendant Swensen’s motion to dismiss.
14 Within sixty (60) days of the date of this order, defendant Swensen shall file a motion for
15 summary judgment. Plaintiff’s opposition shall be filed within twenty-eight (28) days of the date
16 that defendant Swensen’s dispositive motion is filed. Defendant Swensen shall file her reply
17 within fourteen (14) days of the date the opposition is filed. The motion will be deemed submitted
18 as of the date the reply is filed. No hearing shall be held on this motion.

19 **III. CDCR Defendants’ Motion for Summary Judgment**

20 The CDCR Defendants argue that Plaintiff has failed to exhaust his administrative
21 remedies with respect to his claims against defendants Fonseca, Davis, Hagens, and Czajkowski,
22 and with respect to his free exercise of religion and free speech claims against defendant Thomas,
23 such that they are entitled to summary judgment on these claims. Dkt. No. 67.

24 In response, Plaintiff argues that “there is no escape from the conclusion that the complaint
25 states a cause of action,” and proceeds to discuss the elements of a conspiracy claim. Plaintiff
26 appears to be alleging that all defendants were engaged in a civil conspiracy. Plaintiff also
27 attaches to the opposition an informational chrono dated December 22, 2021 regarding opened
28 legal mail. Plaintiff does not address the exhaustion issue. Dkt. No. 75.

1 In reply, the CDCR Defendants argue correctly that the civil conspiracy claim was
2 screened and dismissed by the Court.² In addition, the CDCR Defendants argue that Plaintiff has
3 failed to provide any evidence that challenge the facts presented in the summary judgment motion.
4 Dkt. No. 76.

5 **A. Factual Background**

6 **i. CDCR Administrative Remedies**

7 During the relevant time period, the California Department of Corrections and
8 Rehabilitation (“CDCR”) provided inmates with the following administrative remedies, also
9 referred to as the administrative grievance process.³ The CDCR provided its inmates the right to
10 appeal administratively “any policy, decision, action, condition or omission by the department or
11 its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or
12 her health, safety or welfare.” 15 Cal. Code Regs. § 3084.1(a). Grievance issues are separated
13 into two categories: custody issues and healthcare issues.

14 To grieve a custody issue, a prisoner was required to submit his complaint on a CDCR
15 Form 602 and describe the specific issue being grieved and the relief requested. 15 Cal. Code
16 Regs. § 3084.2(a). The prisoner was required to state all facts known and available to him
17 regarding the issue being appealed at the time of submission; and list all staff members involved
18 and describe their involvement in the issue. 15 Cal. Code Regs. § 3084.2(a)(1), (4). To exhaust
19 available administrative remedies for custody grievances, a prisoner was required to have his
20 grievance proceed through three levels of review: (1) first formal level filed with one of the
21 institution’s appeal coordinators, (2) second formal level filed with the institution head or
22 designee, and (3) third formal level filed with the CDCR director or designee. 15 Cal. Code Regs.

23 _____
24 ² In screening the amended complaint, the Court dismissed the conspiracy claim with prejudice
25 because Plaintiff brought a conspiracy claim pursuant to 18 U.S.C. §§ 241, 242, but there is no
26 private right of action under these statutes. Dkt. No. 30 at 4.

27 ³ The regulations that set out the features of the administrative grievance process for custody
28 grievances for California prisoners underwent a substantial restructuring in 2020. On March 25,
2020, and effective June 1, 2020, 15 Cal. Code Regs. §§ 3084-3084.9 were repealed and replaced
with renumbered and amended provisions at sections 3480 through 3487. Because the alleged
incidents took place prior to June 1, 2020, the current administrative grievance process does not
apply to Plaintiff’s claims. All the citations in this order to the California regulations are to the
regulations in place during the relevant period, rather than to the current regulations.

1 § 3084.7. Pursuing a grievance through the third and final level satisfied the exhaustion
2 requirement set forth in 42 U.S.C. § 1997e(a). 15 Cal. Code Regs. § 3084.1(b).

3 To grieve a healthcare issue, a prisoner must submit a CDCR Form 602 HC and “explain
4 the decision, action, condition, omission, policy, or regulation that has had a material adverse
5 effect upon [his] health and welfare for which [he sought] administrative remedy.” 15 Cal. Code
6 Regs. §§ 3999.226, 3999.277(a). The prisoner was required to state all facts known and available
7 to him regarding the healthcare issue being grieved at the time of submission; and required to
8 identify all staff member(s) involved. 15 Cal. Code Regs. § 3999.226(g). Healthcare grievances
9 are subject to two levels of review: an institutional level of review and a headquarters level of
10 review. 15 Cal. Code Regs. § 3999.226(a)(1). A headquarters level review exhausts the
11 prisoner’s administrative remedies for the healthcare grievance. 15 Cal. Code Regs. §§ 3087.5(h),
12 3999.230 (2019).

13 **ii. Plaintiff’s Grievances**

14 The relevant time period is from August 26, 2016, when defendants Fonesca and Yanez
15 discovered the draft civil rights complaint, to August 25, 2017, when Plaintiff filed this action.

16 **1) Custody Grievances**

17 During the relevant time period, Plaintiff filed twenty custody (non-healthcare)
18 grievances.⁴ Dkt. No. 67-1 (“Bell Decl.”) ¶¶ 7-8 and Ex. A at 19-21 (Dkt. No. 67-1 at 3-4; Dkt.
19 No. 67-2 at 20-22).⁵ Of these twenty grievances, only six of them were exhausted, i.e., timely
20 appealed to the third and final level of review. Those six custody grievances are described below.

21 _____
22 ⁴ The CDCR Defendants only identify seventeen grievances filed during the relevant time period.
23 But it appears from the record that Grievance Nos. SQ-H-16-01876, SQ-H-16-02042, and
24 Grievance No. SQ-17-01500 may have been filed within the relevant time period. The
25 Inmate/Parolee Appeals Tracking System (“IPATS”) reports Grievance Nos. SQ-H-16-01876 and
26 SQ-H-16-02042 as being received by prison officials on September 16, 2016, and reports
27 Grievance No. SQ-17-01500 as being received on August 3, 2017. The IPATS does not indicate
28 the date that Plaintiff submitted these grievances, but it is possible that these grievances were filed
within the relevant time period.

⁵ Of these twenty grievances, fifteen have been filed in the record. Grievance Nos. SQ-C-17-
00715, SQ-D-17-01101, SQ-H-16-01876, SQ-H-16-02042, and SQ-17-01500 are not in the
record. The CDCR Defendants report that they cannot locate Grievance Nos. SQ-C-17-00715 and
SQ-D-17-01101. The CDCR Defendants did not identify Grievance Nos. SQ-H-16-01876, SQ-H-
16-02042, and Grievance No. SQ-17-01500 as filed within the relevant time period, so did not
include copies of these grievances.

1 1. Grievance No. SQ-I-16-02339 (complaint regarding staff) alleged that Plaintiff
2 tried to commit suicide because defendant Yanez conducted a strip search of him, stared at his
3 genitals during the search, and had the nerve to laugh and say “thank you.” Plaintiff requested that
4 SQSP administrative address this matter per institutional and departmental policy. Dkt. No. 67-6
5 at 17-74.

6 2. Grievance No. SQ-J-16-02691 (complaint regarding property) alleged that,
7 sometime prior to October 11, 2016, on behalf of Plaintiff’s treatment team, defendant Thomas
8 had defendant Yanez confiscate two boxes of Plaintiff’s legal property, including “‘loose papers’
9 [which] consisted of civil documents related (to S.Q.H.C. No. #16040661), pursuant to 42 U.S.C.
10 § 1983;” that correctional officer Edwards incorrectly claimed that the loose papers were not in the
11 boxes; and that custody staff had stolen these loose papers. Plaintiff requested that all the loose
12 papers be returned to him; that an action notice be issued to officers Yanez, Edwards, Gomez,
13 Pitts, and Walls because they were part of the chain of custody; and that the papers be returned to
14 him. Dkt. No. 67-6 at 75-95.

15 3. Grievance No. SQ-C-17-00584 (complaint regarding legal issues) alleged that
16 Grievance No. SQ-16-1630⁶ was erroneously cancelled for failure to appeal within the specified
17 time period. Plaintiff alleges that he was unable to timely appeal because, during the specified
18 time period, he was on suicide watch and therefore unable to access his property. Plaintiff
19 requested that he be allowed to resubmit cancelled Grievance No. SQ-16-1630, and allowed to
20 exhaust administrative remedies with respect to the claims in that grievance. Dkt. No. 67-6 at 96-
21 149.

22 4. Grievance No. SQ-C-000647 (complaint regarding visiting procedures) challenged
23 having to pass through x-ray machine after visiting with his attorney and requested unclothed
24 body searches to avoid exposure to radiation. Dkt. No. 67-6 at 150-167.

25 5. Grievance No. SQ-C-17-00862 (complaint regarding staff) alleged that he would
26

27 ⁶ Grievance No. SQ-16-1630 alleges that on June 20, 2016, officer Castro held him while officer
28 McElroy took away his word search book, causing him to feel unsafe and violating his
 constitutional rights. Dkt. No. 67-6 at 116-18.

1 commit suicide because he was tired of defendant Yanez retaliating against him for filing
2 Grievance No. SQ-16-2339 against defendant Yanez. Plaintiff alleged that, in October 2016,
3 defendant Yanez harassed him by confiscating his allowable personal and state property items
4 without informing him what was done with the confiscated items and without allowing him to
5 dispose of the items. Plaintiff requested that SQSP administration take action against defendant
6 Yanez for harassing him and failing to keep him safe. Dkt. No. 67-6 at 168-181.

7 6. Grievance No. SQ-D-17-1079 (complaint regarding property) alleged that, on
8 March 3, 2017, officer Vasquez and defendant Yanez unlawfully confiscated Plaintiff's
9 canteen/personal food items after he refused three state-issued meals. Plaintiff requested that
10 defendants Yanez and Vasquez either return his food items or compensate him for these items.
11 Dkt. No. 67-6 at 182-196.

12 **2) Healthcare Grievances**

13 During the relevant time period, Plaintiff exhausted eight healthcare grievances, i.e., timely
14 appealed these grievances to the final level of review. The eight healthcare grievances are
15 described below.

16 1. Grievance No. SQ-SC-16000358 alleged that PT Jacobo fell asleep when he was on
17 1:1 watch and suggested that SQSP administration take appropriate action. Dkt. No. 67-4 at 49-
18 57.

19 2. Grievance No. SQ-SC-16000360 alleged that, on September 21, 2016, Mark
20 Spector sexually harassed Plaintiff by unbuttoning his shirt and describing what he was wearing
21 underneath. Plaintiff requested that the mental health team take action. Dkt. No. 67-4 at 58-69.

22 3. Grievance No. SQ-HC-16041292 alleged that inmate Michael Cook harassed
23 Plaintiff by yelling that he was a sellout and a Jewish piece of shit; and requested that action be
24 taken against Cook or Plaintiff would assume that Cook was hired to harass him and Plaintiff
25 would commit suicide. Dkt. No. 67-4 at 69-81.

26 4. Grievance No. SQ-HC-16041296 alleged that, on August 25, 2016, Plaintiff tried to
27 commit suicide because he was being mistreated by correctional officers Bellotti, Seaman and
28 S.W. C. Hedemark; that his treatment goals were not being acknowledged by his treatment team

1 and his patient rights were not being respected; and that he would try to commit suicide again
2 because his property was unlawfully taken. Plaintiff expressed concern for his psychological well-
3 being and alleged that officer Bellotti was bullying and aggravating him during sessions. Dkt. No.
4 67-4 at 82-95.

5 5. Grievance No. SQ-SC-1700377 alleged that, on February 19, 2017, mental health
6 services staff member Spector sexually harassed Plaintiff by talking to and staring at Plaintiff
7 while Plaintiff was urinating. Plaintiff requested that the Chief of Mental Health address the
8 sexual harassment or Plaintiff would commit suicide. Dkt. No. 67-4 at 112-25.

9 6. Grievance No. SQ-HC-1704173 alleged that, on March 16, 2017, Plaintiff
10 discovered that psychiatrists Hedemark and Seaman had forced him to take Celexa. Plaintiff
11 requested that Hedemark and Seaman be removed from his treatment team because he did not feel
12 safe with them. Plaintiff also requested a gaming console, alleging that it was necessary for his
13 mental health. Dkt. No. 67-4 at 127-67.

14 7. Grievance No. SQ-HC-17041757 alleged that, on April 11, 2017, Plaintiff felt
15 suicidal because he was under stress, and when he told prison medical staff Bensimmon, she said
16 she would be back but never returned. Plaintiff also alleged that the refusal to provide him with a
17 musical keyboard, electronic tablet, and/or gaming console violated his First Amendment right to
18 “read what he will and when he will.” He requested that his treatment team prepare a treatment
19 plan that would afford him cognitive stimulation and help him develop positive coping
20 mechanisms; and requested a fully functional gaming console. Dkt. No. 67-4 at 168-198.

21 8. Grievance No. SQ HC 17041759, alleged that he suffered from severe pain in right
22 shoulder, requested that Sgt. Ballien and his subordinates refrain from using mechanical restraints
23 on him; and requested a chrono for waist restraints and that SQ administration and medical take
24 action against Ballien for failing to keep him safe and causing him pain. Dkt. No. 67-4 at 199-
25 224.

26 **B. Legal Standard**

27 Summary judgment is proper where the pleadings, discovery and affidavits show that there
28 is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

1 law.” *See* Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case.
2 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is
3 genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving
4 party. *See id.*

5 A court shall grant summary judgment “against a party who fails to make a showing
6 sufficient to establish the existence of an element essential to that party’s case, and on which that
7 party will bear the burden of proof at trial [,] . . . since a complete failure of proof concerning an
8 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”
9 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The moving party bears the initial
10 burden of identifying those portions of the record that demonstrate the absence of a genuine issue
11 of material fact. *Id.* at 323. The burden then shifts to the nonmoving party to “go beyond the
12 pleadings and by [his] own affidavits, or by the ‘depositions, answers to interrogatories, and
13 admissions on file, ‘designate ‘specific facts showing that there is a genuine issue for trial.’” *See*
14 *id.* at 324 (citing Fed. R. Civ. P. 56(e)).

15 For purposes of summary judgment, the court must view the evidence in the light most
16 favorable to the non-moving party, drawing all justifiable inferences in that party’s favor. *AXIS*
17 *Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 844 (9th Cir. 2020). If, as to any
18 given material fact, evidence produced by the moving party conflicts with evidence produced by
19 the nonmoving party, the Court must assume the truth of the evidence set forth by the nonmoving
20 party with respect to that material fact. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013).
21 However, facts must be viewed in the light most favorable to the nonmoving party only if there is
22 a “genuine” dispute as to those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The court’s
23 function on a summary judgment motion is not to make credibility determinations or weigh
24 conflicting evidence. *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017).

25 **C. Exhaustion Standard**

26 The Prison Litigation Reform Act sets forth the following exhaustion requirement: “No
27 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
28 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such

1 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s
2 exhaustion requirement is mandatory. *Jones v. Bock*, 549 U.S. 199, 211 (2007). The
3 administrative remedies need not be plain, speedy, and effective; need not satisfy minimum
4 federal standards; and need not be capable of providing the form of relief sought. *Ross v. Blake*,
5 136 S. Ct. 1850, 1858, (2016) (citing to *Porter v. Nussle*, 534 U.S. 516, 524 (2002) and *Booth v.*
6 *Churner*, 532 U.S. 731, 741 (2001)).

7 The PLRA requires “proper exhaustion” of available administrative remedies. *Woodford*
8 *v. Ngo*, 548 U.S. 81, 93 (2006). Proper exhaustion requires using all steps of an administrative
9 process and “demands compliance with an agency’s deadlines and other critical procedural rules
10 because no adjudicative system can function effectively without imposing some orderly structure
11 on the course of its proceedings.” *Id.* at 90–91. Compliance with prison grievance procedures is
12 all that is required by the PLRA to “properly exhaust.” *Jones*, 549 U.S. at 217–18. The level of
13 detail necessary in a grievance to comply with the grievance procedures will vary from system to
14 system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the
15 boundaries of proper exhaustion. *Id.* at 218.

16 Where a prison’s grievance procedures do not specify the requisite level of factual
17 specificity required in the grievance, a grievance suffices if it alerts the prison to the nature of the
18 wrong for which redress is sought. *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). The
19 grievance should include sufficient information “to allow prison officials to take appropriate
20 responsive measures.” *Id.* (citation and internal quotation omitted) (no exhaustion where
21 grievance complaining of upper bunk assignment failed to allege, as complaint had, that nurse had
22 ordered lower bunk but officials disregarded that order). The grievance need not include legal
23 terminology or legal theories, because the primary purpose of a grievance is to alert the prison to a
24 problem and facilitate its resolution, not to lay the groundwork for litigation or provide personal
25 notice to a particular official that he may be sued. *Reyes v. Smith*, 810 F.3d 654, 659 (9th Cir.
26 2016). If an inmate’s grievance does not comply with a procedural rule but prison officials decide
27 it on the merits anyway at all available levels of administrative review, it is exhausted. *Id.* at 656,
28 658 (although plaintiff’s grievance did not name prison doctors sued in federal action contrary to

1 rule requiring inmates to name all staff members involved, grievance exhausted administrative
2 remedies because grievance plainly put prison officials on notice of nature of wrong alleged in
3 federal action – denial of pain medication by defendant doctors – and prison officials easily
4 identified named prison doctors involved).

5 Failure to exhaust under the PLRA is an affirmative defense that the defendant must plead
6 and prove. *Jones*, 549 U.S. at 204, 216. The defendant’s burden is to prove that there was an
7 available administrative remedy and that the prisoner did not exhaust that available administrative
8 remedy. *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014). Once the defendant has carried that
9 burden, the burden shifts to the prisoner to come forward with evidence showing that there is
10 something in his particular case that made the existing and generally available administrative
11 remedies effectively unavailable to him. *Id.* at 1172. A prisoner must provide evidence, not just
12 make conclusory allegations, to meet his burden to show that existing and generally available
13 administrative remedies were effectively unavailable. *See Draper v. Rosario*, 836 F.3d 1072,
14 1079-80 (9th Cir. 2016). But as required by *Jones*, the ultimate burden of proof remains with the
15 defendant. *Albino*, 747 F.3d at 1172.

16 **D. Analysis**

17 The CDCR Defendants have shown that the CDCR’s administrative remedies were
18 available to Plaintiff. The record indicates that he frequently filed grievances during the relevant
19 time period. *See* Dkt. No. 67-2 at 20-22; Dkt. No. 67-4 at 11-16; Dkt. No. 67-6 at 7. The CDCR
20 Defendants have also shown that Plaintiff did not exhaust the available administrative remedies
21 with respect to (1) the First Amendment retaliation claim against defendant Fonesca arising out of
22 the property confiscation; (2) the First Amendment right to access the court / retaliation claim
23 against defendants Czajkowski, Davis and Hagens arising out of the property confiscation; (3) the
24 First Amendment free exercise of religion and free speech claims against defendants Thomas,
25 Czajkowski, Davis, and Hagen arising out of the property confiscation; and (4) the Eighth
26 Amendment excessive force claim and First Amendment free speech claim against defendant
27 Czajkowski arising out of the alleged use of force following the September 2016 treatment team
28 meeting.

1 None of the grievances name defendants Fonesca, Davis, Hagens, or Czajkowski. None of
2 the grievances specifically reference the August 26, 2016 cell search (during which the draft
3 complaint was allegedly seized), or the September 9, 2016 treatment team meeting (during which
4 the property confiscation was authorized and immediately after which defendant Czajkowski
5 allegedly choked Plaintiff in violation of the First and Eight Amendments). Viewed in the light
6 most favorable to Plaintiff, Grievance No. SQ-J-16-02691 possibly raises the access to courts /
7 retaliation claim in this action against defendants Yanez and Thomas because it references a
8 confiscation of legal materials sometime prior to October 11, 2016, by defendant Yanez and under
9 the direction of defendant Thomas. But Grievance No. SQ-J-16-02691 did not put prison officials
10 on notice of claims against defendants Fonesca, Davis, Hagens, and Czajkowski because it did not
11 reference these defendants; focused primarily on the failure to return certain loose legal papers;
12 and identified *other* correctional officers (Thomas, Yanez, Edwards, Gomez, Pitts, and Walls) as
13 responsible for the alleged wrongdoing. Grievance No. SQ-J-16-02691 also did not put prison
14 officials on notice of the free exercise of religion and free speech claims against defendant
15 Thomas because it only grieves the confiscation of legal materials; and it does not inform prison
16 officials that Plaintiff's religious materials and books were confiscated and that the confiscation
17 prevented Plaintiff from practicing his religion and exercising his First Amendment right to free
18 speech. Finally, none of the grievances grieve the alleged use of force and threat by defendant
19 Czajkowski raised in this action.

20 The CDCR grievance procedure in effect at the time required that the prisoner identify the
21 staff members involved in the issue being grieved and describe the staff member's involvement in
22 the issue. 15 Cal. Code Regs. § 3084.2(a)(1), (4) (2018). None of the grievances have identified
23 Fonesca, Davis, Hagens, or Czajkowski as violating Plaintiff's constitutional rights. The only
24 grievance possibly raising the claims in this action, Grievance No. SQ-J-16-02691, did not put
25 prison officials on notice of any claims against defendants Fonesca, Davis, Hagens, or
26 Czajkowski, or on notice of First Amendment free exercise and free speech claims against
27 defendant Thomas. Viewing the record in the light most favorable to Plaintiff, the Court finds that
28 none of the grievances filed in the relevant time period exhausted the claims against defendants

1 Fonesca, Davis, Hagens, and Czajkowski, or exhausted the First Amendment free exercise and
2 free speech claims against defendant Thomas.

3 Because the CDCR Defendants have met their burden of proving that there was an
4 available administrative remedy and that Plaintiff did not exhaust that available administrative
5 remedy, the burden shifts to Plaintiff to come forward with evidence showing that there is
6 something in his particular case that made the existing and generally available administrative
7 remedies effectively unavailable to him. Plaintiff has not alleged, much less provided evidence,
8 that administrative remedies were unavailable to him. Moreover, his frequent grievance activity
9 during the relevant time period indicates that administrative remedies were available to him. The
10 Court finds that there is no triable issue of fact as to whether Plaintiff exhausted his claims against
11 defendants Fonesca, Davis, Hagens, and Czajkowski, or whether Plaintiff exhausted the First
12 Amendment free exercise and free speech claims against defendant Thomas. The Court GRANTS
13 summary judgment in favor of defendants Fonesca, Davis, Hagens, and Czajkowski on all claims,
14 and in favor of defendant Thomas on the First Amendment free exercise and free speech claims.

15 **CONCLUSION**

16 For the reasons set forth above, the Court orders as follows.

- 17 i. The Court DENIES defendant Swensen’s motion to dismiss. Dkt. No. 66.
- 18 ii. The Court GRANTS the CDCR Defendants’ motion for summary judgment. Dkt.
19 No. 67. The Court GRANTS summary judgment in favor of defendants Fonesca, Davis, Hagens,
20 and Czajkowski on all claims, and GRANTS summary judgment in favor of defendant Thomas on
21 the First Amendment free exercise and free speech claims. Defendants Fonesca, Davis, Hagens,
22 and Czajkowski are DISMISSED from this action.
- 23 iii. The remaining claims in this action are: (1) defendant Yanez discovered and read
24 Plaintiff’s draft federal civil rights complaint and in retaliation for this protected conduct,
25 confiscated the complaint and reported it to Plaintiff’s mental health team, in violation of the First
26 Amendment; (2) defendants Swensen and Thomas directed custodial staff to confiscate Plaintiff’s
27 property, including his legal documents and the drafted federal complaint, in retaliation for
28 Plaintiff’s protected conduct, in violation of Plaintiff’s First Amendment right to access the courts


1 and right to engage in protected conduct without suffering retaliation; (3) defendants Swensen and
2 Thomas confiscated Plaintiff's religious books and items, in violation of his First Amendment
3 right to free exercise of religion; and (4) defendants Swensen and Thomas confiscated Plaintiff's
4 books and magazines, in violation of his First Amendment right to free exercise of speech.

5 iv. The Court sets the following briefing schedule. Within sixty (60) days of the date
6 of this order, the parties shall file a dispositive motion. Plaintiff's opposition to the dispositive
7 motion must be filed with the Court and served upon Defendants no later than 28 days from the
8 date the motion is filed. Defendants shall file a reply brief in support of their dispositive motion
9 no later than 14 days after the date the opposition is filed. The motion shall be deemed submitted
10 as of the date the reply brief is due. No hearing will be held on the motion.

11 This order terminates Dkt. Nos. 66, 67.

12 **IT IS SO ORDERED.**

13 Dated: 3/7/2022

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15 HAYWOOD S. GILLIAM, JR.
16 United States District Judge
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