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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RANDIN LEE MARTIN,

Plaintiff,

v.

J. HURTADO, Correctional
Officer; C. BUGARIN,
Correctional Officer; J. J.
AGUIRRE, Correctional
Sergeant,

Defendants.

Civil No. 07cv0598 BTM (RBB)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS THE
COMPLAINT [DOC. NO. 13]**

Plaintiff Randin Lee Martin, a state inmate proceeding pro se and in forma pauperis, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 on April 2, 2007 [doc. no. 1]. Martin alleges that on September 26, 2005, Defendants J. Hurtado and C. Bugarin, both correctional officers at Calipatria State Prison, violated Plaintiff's First Amendment right to freedom of speech by confiscating his television in retaliation for an inmate grievance he had filed against another officer. (Compl. 3.)¹ Plaintiff's

¹ The pages of the Complaint are not consecutively numbered. Accordingly, for convenience, the Court will refer to the page numbers supplied by the electronic case filing system.

1 Complaint further alleges that Defendant J. J. Aguirre, in denying
2 the grievance Martin filed against Hurtado and Bugarin for
3 confiscating his television, violated Plaintiff's Fourteenth
4 Amendment "administrative disciplinary due process protections in
5 knowing disregard of the fact that Plaintiff's constitutional
6 rights were violated." (Id. at 6.)

7 Defendants filed a Motion to Dismiss the Complaint [doc. no.
8 13] on February 15, 2008, with a Memorandum of Points and
9 Authorities in Support of the Motion. Defendants argue the
10 current action should be dismissed pursuant to Federal Rule of
11 Civil Procedure 12(b)(6) for failure to state a claim for which
12 relief may be granted. (Defs.' Mem. P. & A. 2.) They contend
13 that Plaintiff fails to state a First Amendment retaliation claim
14 against Hurtado and Bugarin because the officers had a legitimate
15 penological reason to seize Martin's television. (Id. at 5-6.)
16 Additionally, the Complaint does not allege that these Defendants
17 actually chilled Plaintiff's First Amendment rights. (Id. at 7.)
18 Defendant Aguirre claims that he cannot be held liable for a First
19 Amendment claim under a theory of supervisory liability. (Id.)
20 Lastly, Defendant Aguirre argues the Complaint fails to allege a
21 due process claim against him because Plaintiff does not have a
22 due process right to administrative grievance procedures. (Id. at
23 8.)

24 On June 16, 2008, Martin filed a Memorandum of Points and
25 Authorities in Opposition to Defendants' Motion to Dismiss [doc.
26 no. 19], along with a Request for Judicial Notice and a
27 Declaration with four supporting exhibits. The Court found the
28 Motion was suitable for resolution without oral argument pursuant

1 to Civil Local Rule 7.1(d)(1). (Mins. Apr. 18, 2008 [doc. no.
2 18].) For the reasons set forth below, Defendants' Motion to
3 Dismiss is **GRANTED IN PART and DENIED IN PART.**

4 **I. FACTUAL BACKGROUND**

5 Plaintiff is currently incarcerated at Calipatria State
6 Prison. (See Compl. 1.) He was transferred to Calipatria on
7 September 26, 2005, from Corcoran State Prison. (Pl.'s Opp'n 3-
8 4.) Martin had a thirteen-inch color television which was
9 transferred to Calipatria with him. (Id. at 4-5; Compl. 3.)
10 Before he was transferred, the television was inspected by
11 officers at Corcoran who determined that it was in compliance with
12 institutional regulations. (Pl.'s Opp'n 3-5.)

13 Correctional Officers Hurtado and Bugarin processed Plaintiff
14 and his personal property upon arrival at Calipatria. (See Pl.'s
15 Opp'n 4; Compl. 3.) Martin contends that while searching his
16 legal property, Defendants Hurtado and Bugarin discovered a large
17 manila envelope which contained correspondence from Plaintiff to
18 the California Inspector General's Office in which he complained
19 about an assault committed by another correctional officer.
20 (Compl. 3-4; Pl.'s Opp'n 4.) Although the material was clearly
21 marked "Confidential," Hurtado and Bugarin read the grievance and
22 thereafter became "openly hostile" toward Martin. (Compl. 3.)
23 Plaintiff alleges they seized his television for the purpose of
24 retaliating against him for filing an administrative grievance
25 alleging misconduct by another officer. (Id.) Defendants Hurtado
26 and Bugarin claimed that they seized the television because it was
27 in violation of regulations because the glue seals had been
28 tampered with. (Id. at 5; Pl.'s Opp'n 6.)

1 Martin filed an administrative grievance against Defendants
2 Hurtado and Bugarin which was reviewed by Defendant J. J. Aguirre,
3 a Calipatria correctional sergeant, on November 16, 2005. (Compl.
4 4.) Plaintiff contends that Aguirre failed to perform his duties
5 as a correctional sergeant and appeals reviewer by not conducting
6 an investigation into Martin's allegations. (Pl.'s Opp'n 5.)
7 Plaintiff argues that by failing to intervene, Defendant Aguirre
8 affirmed Defendant Hurtado and Bugarin's retaliatory actions,
9 thereby denying Plaintiff's liberty interests in an unbiased
10 grievance procedure and meaningful review. (Id.)

11 **II. LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION TO DISMISS**

12 **A. Rule 12(b)(6) Motion to Dismiss**

13 A motion to dismiss for failure to state a claim pursuant to
14 Federal Rule of Civil Procedure 12(b)(6) tests the legal
15 sufficiency of the claims in the complaint. Davis v. Monroe
16 County Bd. of Educ., 526 U.S. 629, 633 (1999). The plaintiff must
17 allege "enough facts to state a claim to relief that is plausible
18 on its face." Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S.
19 Ct. 1955, 1974 (2007). The Court must accept as true all material
20 allegations in the complaint, as well as reasonable inferences to
21 be drawn from them, and must construe the complaint in the light
22 most favorable to the plaintiff. Cholla Ready Mix, Inc. v.
23 Civish, 382 F.3d 969, 973 (9th Cir. 2004) (citing Karam v. City of
24 Burbank, 352 F.3d 1188, 1192 (9th Cir. 2003)); Parks Sch. of Bus.,
25 Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); N.L.
26 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

27 The question is not whether the plaintiff will "ultimately
28 prevail but whether the claimant is entitled to offer evidence to

1 support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
2 A dismissal under Rule 12(b)(6) is generally proper only where
3 there "is no cognizable legal theory or an absence of sufficient
4 facts alleged to support a cognizable legal theory." Navarro v.
5 Block, 250 F.3d 729, 732 (9th Cir. 2001); Balistreri v. Pacifica
6 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

7 The Court need not accept conclusory allegations in the
8 complaint as true; rather, it must "examine whether [they] follow
9 from the description of facts as alleged by the plaintiff."
10 Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation
11 omitted); Halkin v. VeriFone, Inc., 11 F.3d 865, 868 (9th Cir.
12 1993); see also Cholla Ready Mix, 382 F.3d at 973 (citing Clegg v.
13 Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994))
14 (stating that on Rule 12(b)(6) motion, a court "is not required to
15 accept legal conclusions cast in the form of factual allegations
16 if those conclusions cannot reasonably be drawn from the facts
17 alleged[]"). "Nor is the court required to accept as true
18 allegations that are merely conclusory, unwarranted deductions of
19 fact, or unreasonable inferences." Sprewell v. Golden State
20 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

21 In addition, when resolving a motion to dismiss for failure
22 to state a claim, the Court may not generally consider materials
23 outside the pleadings. Schneider v. Cal. Dep't of Corr., 151 F.3d
24 1194, 1197 n.1 (9th Cir. 1998); Jacobellis v. State Farm Fire &
25 Cas. Co., 120 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay
26 Television Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th
27 Cir. 1995). "The focus of any Rule 12(b)(6) dismissal . . . is
28 the complaint." Schneider, 151 F.3d at 1197 n.1. This precludes

1 consideration of "new" allegations that may be raised in a
2 plaintiff's opposition to a motion to dismiss brought pursuant to
3 Rule 12(b)(6). Id. (citing Harrell v. United States, 13 F.3d 232,
4 236 (7th Cir. 1993); 2 James Wm. Moore et al., Moore's Federal
5 Practice § 12.34[2], at 12-90 (3d ed. 2008) ("The court may not
6 . . . take into account additional facts asserted in a memorandum
7 opposing the motion to dismiss, because such memoranda do not
8 constitute pleadings under Rule 7(a) (footnote omitted).").

9 But "[w]hen a plaintiff has attached various exhibits to the
10 complaint, those exhibits may be considered in determining whether
11 dismissal [i]s proper" Parks Sch. of Bus., 51 F.3d at
12 1484 (citing Cooper v. Bell, 628 F.2d 1208, 1210 n.2 (9th Cir.
13 1980)). The Court may also consider "documents whose contents are
14 alleged in a complaint and whose authenticity no party questions,
15 but which are not physically attached to the pleading." Branch v.
16 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other
17 grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th
18 Cir. 2002); Stone v. Writer's Guild of Am. W., Inc., 101 F.3d
19 1312, 1313-14 (9th Cir. 1996). Additionally, the Court may
20 consider matters that are subject to judicial notice. Lee v. City
21 of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

22 These Rule 12(b)(6) guidelines apply to Defendants's Motion
23 to Dismiss.

24 **B. Standards Applicable to Pro Se Litigants**

25 Where a plaintiff appears in propria persona in a civil
26 rights case, the Court must construe the pleadings liberally and
27 afford the plaintiff any benefit of the doubt. Karim-Panahi v.
28 Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). The

1 rule of liberal construction is "particularly important in civil
2 rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.
3 1992). In giving liberal interpretation to a pro se civil rights
4 complaint, however, the Court may not "supply essential elements
5 of claims that were not initially pled." Ivey v. Bd. of Regents
6 of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague
7 and conclusory allegations of official participation in civil
8 rights violations are not sufficient to withstand a motion to
9 dismiss." Id.; see also Jones v. Cmty. Redev. Agency, 733 F.2d
10 646, 649 (9th Cir. 1984) (finding conclusory allegations
11 unsupported by facts insufficient to state a claim under § 1983).
12 "The plaintiff must allege with at least some degree of
13 particularity overt acts which defendants engaged in that support
14 the plaintiff's claim." Jones, 733 F.2d at 649 (internal
15 quotation omitted).

16 Nevertheless, the Court must give a pro se litigant leave to
17 amend his complaint unless it is "absolutely clear that the
18 deficiencies of the complaint could not be cured by amendment."
19 Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Even when
20 leave to amend is granted, the Court must provide the plaintiff
21 with a statement of the complaint's deficiencies before a pro se
22 civil rights complaint may be dismissed. Karim-Panahi, 839 F.2d
23 at 623-24. This is "to ensure that the litigant uses the
24 opportunity to amend effectively." Eldridge v. Block, 832 F.2d
25 1132, 1136 (9th Cir. 1987). But where amendment of a pro se
26 litigant's complaint would be futile, denial of leave to amend is
27 appropriate. See James v. Giles, 221 F.3d 1074, 1077 (9th Cir.
28 2000).

1 **C. Stating a Claim Under 42 U.S.C. § 1983**

2 To state a claim under § 1983, the plaintiff must allege
3 facts sufficient to show (1) a person acting "under color of state
4 law" committed the conduct at issue, and (2) the conduct deprived
5 the plaintiff of some right, privilege, or immunity protected by
6 the Constitution or laws of the United States. 42 U.S.C.A. § 1983
7 (West 2003); Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th
8 Cir. 1986).

9 **III. MERITS OF DEFENDANTS' MOTION TO DISMISS**

10 **A. Plaintiff's Request for Judicial Notice**

11 Martin filed a Request for Judicial Notice [doc. no. 19],
12 wherein he requests that the Court take judicial notice of the
13 following regulations and operation procedures: (1) California
14 Code of Regulations section 3084.1, which establishes an inmate's
15 right to appeal departmental decisions; (2) California Code of
16 Regulations section 3190, which concerns an inmate's right to
17 possess personal property; (3) California Code of Regulations
18 section 3191, which concerns the registration and disposition of
19 an inmate's personal property ; (4) California Code of Regulations
20 section 3144, which describes the procedures for inspecting an
21 inmate's confidential mail; and (5) Calipatria State Prison
22 Operational Procedure manual describing "Inmate Property
23 Procedure." (Pl.'s Req. for Judicial Notice 1-2.)

24 The Court may take judicial notice of any fact that is "not
25 subject to reasonable dispute in that it is either (1) generally
26 known within the territorial jurisdiction of the trial court or
27 (2) capable of accurate and ready determination by resort to
28 sources whose accuracy cannot reasonably be questioned." Fed. R.

1 Evid. 201(b). "A court shall take judicial notice if requested by
2 a party and supplied with the necessary information." Fed. R.
3 Evid. 201(d).

4 "Administrative regulations fall within the category of facts
5 'capable of accurate and ready determination by resort to sources
6 whose accuracy cannot reasonably be questioned.'" Toth v. Grant
7 Trunk R.R., 306 F.3d 335, 349 (6th Cir. 2002) (quoting Fed. R.
8 Civ. P. 201(b)) (finding district court did not abuse its
9 discretion by taking judicial notice of certain regulations from
10 the Code of Federal Regulations); see also Whittington v. Sokol,
11 491 F. Supp. 2d 1012, 1019 (D. Colo. 2007) (citations omitted)
12 (taking judicial notice of regulations setting forth the Colorado
13 Department of Corrections' administrative process). Accordingly,
14 the Court will take judicial notice of California Code of
15 Regulations sections 3084.1, 3190, 3191, and 3144, attached to
16 Plaintiff's Request for Judicial Notice as Exhibits One through
17 Four. The facts contained in these regulations are matters of
18 public record and are not subject to reasonable dispute. See
19 Bovarie v. Giurbino, 421 F. Supp. 2d 1309, 1314 (S.D. Cal. 2006)
20 (taking judicial notice of a section of the California Code of
21 Regulations).

22 The Court will also take judicial notice of Exhibit Five,
23 Calipatria State Prison Operational Procedure number 3004, because
24 its authenticity is not questioned by any party and the facts
25 contained therein are not subject to dispute. See Murray v.
26 Terhune, No. 02-CV-5978 AWI-DLB PC, 2007 U.S. Dist. LEXIS 46538,
27 at *8-9 n.1 (E.D. Cal. June 27, 2007) (taking judicial notice of a
28 section from the Pleasant Valley State Prison Operations Procedure

1 manual); Gleave v. Graham, 954 F. Supp. 599, 605 (W.D.N.Y. 1997)
2 (taking judicial notice of "Program Statements" issued by the
3 Bureau of Prisons); Hodges v. Klein, 421 F. Supp. 1224, 1233
4 (D.N.J. 1976) (taking judicial notice of written regulations of
5 New Jersey's Department of Corrections).

6 **B. Martin's First Amendment Retaliation Claim**

7 "A prison inmate retains those first amendment rights that
8 are not inconsistent with his status as a prisoner or with the
9 legitimate penological objectives of the corrections system."
10 Pell v. Procunier, 417 U.S. 817, 822 (1974). Prisoners' First
11 Amendment rights include the right to free speech and to petition
12 the government. Farrow v. West, 320 F.3d 1235, 1248 (11th Cir.
13 2003); Bradley v. Hall, 64 F.3d 1276, 1278-79 (9th Cir. 1995); see
14 also Sandin v. Conner, 515 U.S. 472, 487 n.11 (1995).
15 Nevertheless, "the constitutional rights that prisoners possess
16 are more limited in scope than the constitutional rights held by
17 individuals in society at large." Shaw v. Murphy, 532 U.S. 223,
18 229 (2001).

19 The Constitution protects prisoners from deliberate
20 retaliation by government officials for the exercise of their
21 First Amendment rights. See Rhodes v. Robinson, 408 F.3d 559, 567
22 (9th Cir. 2005); Vignolo v. Miller, 120 F.3d 1075, 1077-78 (9th
23 Cir. 1997). Because retaliation by prison officials may chill an
24 inmate's exercise of legitimate First Amendment rights,
25 retaliatory conduct is actionable regardless of whether it
26 otherwise constitutes misconduct. Rhodes, 408 F.3d at 567 (citing
27 Pratt v. Rowland, 65 F.3d 802, 806 & n.4 (9th Cir. 1995)); see
28 Thomas v. Evans, 880 F.2d 1235, 1242 (11th Cir. 1989) ("The penalty

1 need not rise to the level of a separate constitutional
2 violation.") Even so, there must be a causal connection between
3 the allegedly retaliatory conduct and the action that provoked the
4 retaliation; a plaintiff must "show that the protected conduct was
5 a 'substantial' or 'motivating' factor in the defendant's decision
6 [to act]." Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314
7 (9th Cir. 1989) (citing Mt. Healthy City Sch. Dist. Bd. of Educ.
8 v. Doyle, 429 U.S. 274, 287 (1977)).

9 To withstand a motion to dismiss, a plaintiff suing prison
10 officials pursuant to § 1983 for retaliation must allege facts
11 that show the following: (1) "[A] state actor took some adverse
12 action against [the] inmate (2) because of (3) that prisoner's
13 protected conduct, and . . . such action (4) chilled the inmate's
14 exercise of his First Amendment rights, and (5) the action did not
15 reasonably advance a legitimate correctional goal." Rhodes, 408
16 F.3d at 567-68 (citing Resnick v. Hayes, 213 F.3d 443, 449 (9th
17 Cir. 2000); Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir.
18 1994)) (footnote omitted).

19 **1. Defendants Hurtado and Bugarin**

20 In count one of his Complaint, Martin alleges that Defendants
21 Hurtado and Bugarin seized his television set in retaliation for
22 the filing of an administrative grievance against another peace
23 officer. (Compl. 3.) In their Motion to Dismiss, Hurtado and
24 Bugarin assert that Martin's Complaint fails to state a claim for
25 retaliation because their "actions reasonably advanced a
26 legitimate correctional goal and Plaintiff does not allege that
27 Defendants Hurtado and Bugarin's actions chilled the exercise of
28 his First Amendment rights." (Defs.' Mem. P. & A. 5.) Martin

1 argues that Defendants' seizure of the television did not advance
2 a legitimate correctional goal because the television had not been
3 impermissibly altered, so there was no nonretaliatory reason for
4 Defendants to seize it. (Pl.'s Opp'n 7-8.) Additionally,
5 Plaintiff claims he has properly alleged a chilling of his rights.
6 (Id. at 7.)

7 a. Legitimate Correctional Goal

8 "Because a prisoner's First Amendment rights are necessarily
9 curtailed, . . . a successful retaliation claim requires a finding
10 that 'the prison authorities' retaliatory action did not advance
11 legitimate goals of the correctional institution or was not
12 tailored narrowly enough to achieve such goals.'" Pratt v.
13 Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (quoting Rizzo v.
14 Dawson, 778 F.2d 527, 532 (9th Cir. 1985)). Accordingly, in order
15 to state a cognizable retaliation claim, a plaintiff must allege
16 that the defendant's retaliatory action did not serve a legitimate
17 penological purpose. Id.; Barnett, 31 F.3d at 815-16 (citing
18 Rizzo, 778 F.2d at 532).

19 Defendants assert that Martin fails to state a claim for
20 retaliation because "[t]he confiscation of plaintiff's altered
21 television set clearly advanced the legitimate correctional goal
22 of ensuring the safety and security of the institution, other
23 inmates, the correctional officers, and prison staff members."
24 (Defs.' Mem. P. & A. 5.) Calipatria State Prison regulations
25 prohibit inmates from possessing appliances that have been
26 altered, so Defendants claim they had an objectively legitimate
27 basis for confiscating the television. (Id. at 7; Defs.' Reply
28 3.)

1 The Ninth Circuit has found that "preserving institutional
2 order, discipline, and security are legitimate penological goals."
3 Barnett, 31 F.3d at 816. Defendants argue that "objective
4 legitimacy should be sufficient to defeat a prisoner's retaliation
5 claim, even where there may be evidence of improper motive[.]"
6 (Defs.' Mem. P. & A. 6 (citing Hartman v. Moore, 547 U.S. 250, 260
7 (2006).)

8 Nevertheless, a prison official cannot defeat a retaliation
9 claim simply by pointing to "a general justification for a neutral
10 process" Bruce v. Ylst, 351 F.3d 1283, 1289 (9th Cir.
11 2003). "But, if, in fact, the defendants abused the . . .
12 procedure as a cover or a ruse to silence and punish [the inmate]
13 because he filed grievances, they cannot assert . . . a valid
14 penological purpose, even though he may have arguably ended up
15 where he belonged." Id. Once a plaintiff makes "a prima facie
16 showing of retaliatory harm, the burden shifts to the defendant
17 official to demonstrate that even without the impetus to retaliate
18 he would have taken the action complained of" Hartman v.
19 Moore, 547 U.S. at 260 (citing Mt. Healthy, 429 U.S. at 287). An
20 objective legitimacy test, argued for by Defendants, (Defs.' Mem.
21 P. & A. 6), may ultimately preclude recovery, but at this stage,
22 the existence of a facially neutral prison regulation is not, by
23 itself, sufficient to defeat a plaintiff's retaliation claim.

24 The Complaint asserts that after reading Martin's
25 confidential legal correspondence, Defendants Hurtado and Bugarin
26 "became openly hostile towards plaintiff and immediately seized
27 plaintiff's authorized 13" color Zenith television." (Compl. 3.)
28 It further claims that "Defendant's actions in seizing plaintiff's

1 television were done for the very purpose of 'retaliating' against
2 him for engaging in a protected activity, specifically, the filing
3 of an administrative inmate appeal complaint" (Id.)

4 Finally, Martin alleges that "Defendants' acts . . . constitute
5 punishment imposed in an 'arbitrary and capricious' manner,
6 without good cause, for the very purpose of arousing anger,
7 resentment, anguish, and hostility" (Id. at 3-4.)

8 By alleging that the Defendants' actions were "arbitrary and
9 capricious" and taken for the sole purpose of retaliating against
10 him, Plaintiff has sufficiently alleged the absence of a
11 legitimate correctional reason for the seizure of his television.
12 As the Ninth Circuit held in Rizzo, 778 F.2d at 532, "the
13 plaintiff has alleged that [the defendants'] actions were
14 retaliatory and were arbitrary and capricious. He has thereby
15 sufficiently alleged that the retaliatory acts were not a
16 reasonable exercise of prison authority and that they did not
17 serve any legitimate correctional goal."

18 The California Code of Regulations provides that when an
19 inmate is in possession of a television, a staff member must seal
20 the outside surfaces with hot glue, so that all parts of the
21 appliance that could be used to access the television's interior
22 are sealed. Cal. Code Regs. tit. 15, § 3190(k) (2008). If an
23 inmate tampers with the glue seals, he may be subject to
24 disciplinary action and the television may be confiscated. Cal.
25 Code Regs. tit. 15, § 3190(1) (2008). When Defendants Hurtado and
26 Bugarin seized Plaintiff's television, they asserted that it was
27 confiscated because Martin had tampered with the glue seals.
28 (Compl. 5.) Martin, however, contends that the glue seals were

1 satisfactory when he was transferred to Calipatria, so Defendants'
2 stated reason for confiscating the television was untrue. (Pl.'s
3 Opp'n 8.)

4 The Court need not resolve the factual issue at this time.
5 In order to rule on Defendants' Motion to Dismiss, the Court must
6 determine whether, on the face of his Complaint, Plaintiff has
7 alleged the necessary elements to state a claim for retaliation.
8 See Bell Atlantic, __ U.S. at __, 127 S. Ct. at 1974; see also
9 Ramirez v. Arlequin, 447 F.3d 19, 24-25 (1st Cir. 2006) (refusing
10 to resolve the issue of whether the city had a legitimate interest
11 underlying its allegedly retaliatory actions because for purposes
12 of the 12(b)(6) motion to dismiss, all that mattered was the
13 allegations on the face of the complaint); Rhodes, 408 F.3d at
14 566, 568 (denying 12(b)(6) motion to dismiss because prisoner's
15 complaint properly alleged the defendant's actions were
16 retaliatory and did not advance legitimate penological goals).

17 In their Reply, Defendants argue that Exhibit 2 attached to
18 Plaintiff's Opposition demonstrates that "Defendants' actions were
19 based on legitimate penological goals of confiscating an altered
20 appliance." (Defs.' Reply 3.) This document is not a part of, or
21 referred to in, Plaintiff's Complaint. "As a general rule, 'a
22 district court may not consider any material beyond the pleadings
23 in ruling on a Rule 12(b)(6) motion.'" Lee v. City of Los Angeles,
24 250 F.3d 668, 688 (9th Cir. 2001) (quoting Branch v. Tunnell, 14
25 F.3d 449, 453 (9th Cir. 1994)). Otherwise, the motion is treated
26 as one for summary judgment. Id. There are exceptions for
27 material which is properly submitted as part of the complaint and
28 "matters of public record" which may be judicially noticed. Id.

1 at 688-89. Exhibit 2, an inmate grievance form, is neither. "If
2 the documents are not physically attached to the complaint, they
3 may be considered if the documents' 'authenticity . . . is not
4 contested' and 'the plaintiff's complaint necessarily relies' on
5 them." Id. at 688 (quoting Parrino v. FHD, Inc., 146 F.3d 699,
6 705-06 (9th Cir. 1998)).

7 Even if Martin's grievance form meets this test, his claim
8 survives. Whether the defendants abused the property protocol as
9 a ruse to punish Plaintiff for filing prior grievances against
10 other correctional officers cannot be resolved on this Rule
11 12(b)(6) motion. See Bruce v. Ylst, 351 F.3d at 1289.

12 Plaintiff's Complaint properly alleges that Defendants
13 confiscated his television for no legitimate reason and only for
14 the purpose of retaliating against him for exercising his First
15 Amendment rights. This is sufficient to withstand a motion to
16 dismiss pursuant to Rule 12(b)(6). Accordingly, Defendants
17 Hurtado and Bugarin's Motion to Dismiss is **DENIED** on this ground.

18 b. Chilling the Exercise of First Amendment Rights

19 One of the necessary elements of a retaliation claim is that
20 the defendants' retaliatory conduct chilled the plaintiff's
21 exercise of his First Amendment rights. Rhodes, 408 F.3d at 567-
22 68. But a plaintiff is not required to allege "a total chilling
23 of his First Amendment rights to file grievances and to pursue
24 civil rights litigation in order to perfect a retaliation claim.
25 Speech can be chilled even when not completely silenced." Id. at
26 568. As the Ninth Circuit has recognized, "[It] would be unjust
27 to allow a defendant to escape liability for a First Amendment
28 violation merely because an unusually determined plaintiff

1 persists in his protected activity" Id. at 569 (quoting
2 Mendocino Env'tl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300
3 (9th Cir. 1999)).

4 Accordingly, the correct inquiry in determining liability is
5 "whether an official's acts would chill or silence a person of
6 ordinary firmness from future First Amendment activities.'" Mendocino Ent'l. Ctr., 192 F.3d at 1300 (quoting Crawford-El v.
7 Britton, 93 F.3d 813, 826 (D.C. Cir. 1996), vacated, 523 U.S. 1273
8 (1997)); see also Thaddeus-X v. Blatter, 175 F.3d 378, 398 (6th
9 Cir. 1999) ("Retaliation against a prisoner is actionable if it is
10 capable of deterring a person of ordinary firmness from exercising
11 his or her right to access the courts.").

12 Defendants assert that Martin's Complaint fails to state a
13 claim for retaliation because he does not allege that Defendants'
14 conduct chilled or silenced him in any way. (Defs.' Mem. P. & A.
15 7; Defs.' Reply 4.) The face of the Complaint does not contain
16 any allegation that Plaintiff's First Amendment rights were
17 chilled or that he was deterred from filing future grievances
18 against prison staff. (See Compl. 3-4.) Nevertheless, Martin
19 contends that his Complaint properly alleges this element because,
20 "by alleging the Defendants' actions were retaliatory, arbitrary,
21 and capricious punishment for exercising his First Amendment
22 right[, Plaintiff] has thereby sufficiently alleged that
23 Defendants Hurtado and Bugarin's actions chilled this right via
24 the deprivation suffered." (Pl.'s Opp'n 7.) He claims that by
25 seizing his television in retaliation for filing a prison
26 grievance, Defendants undermined Plaintiff's "only viable
27 mechanism to remedy prison injustices." (Id.)
28

1 The present case is similar to Rhodes v. Robinson, 408 F.3d
2 559. Rhodes alleged that correctional officers seized and
3 "completely destroyed" his typewriter, and also seized his CD
4 player and twelve compact discs, in retaliation for grievances
5 that he filed. Rhodes, 408 F.3d at 563-65. After exhausting
6 administrative remedies, Rhodes filed a civil rights complaint in
7 federal court. Id. at 565. The defendants moved to dismiss the
8 complaint on the ground that the plaintiff would be unable to show
9 a chilling of his First Amendment rights, due to the fact that he
10 filed numerous complaints against staff and initiated litigation.
11 Id. at 566.

12 The Ninth Circuit disagreed. It held that Rhodes's
13 allegations were sufficient to state a retaliation claim; Rhodes
14 did "not have to demonstrate that his speech was 'actually
15 inhibited or suppressed.'" Id. at 569. The court stated that if
16 it adopted the defendants' view, it would create a "perverse"
17 situation where a prisoner was required to exhaust administrative
18 remedies before filing suit in federal court to vindicate his
19 rights, yet by filing grievances to exhaust those remedies, the
20 prisoner would no longer be able to plead a claim for relief,
21 since he could not state that his speech was "chilled." Id.

22 Rhodes's complaint had specifically alleged that the
23 defendants acted with intent to chill his First Amendment rights,
24 see id. at 566, but nevertheless, the court indicated that such an
25 allegation may not have been necessary:

26 If Rhodes had not alleged a chilling effect,
27 perhaps his allegations that he suffered harm would
28 suffice, since harm that is more than minimal will
almost always have a chilling effect. Alleging harm and
alleging the chilling effect would seem under the
circumstances to be no more than a nicety.

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Id. at 567-68 n.11 (citing Pratt, 65 F.3d at 807; Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989)).

Here, Plaintiff's Complaint is sufficient. Martin alleges that Hurtado and Bugarin seized his television without justification and with the intent to retaliate against him for exercising his First Amendment right to file a grievance against a correctional officer. (Compl. 3-4.) Thus, he has alleged a concrete harm -- the confiscation of his television -- which is more than minimal. The seizure of an inmate's personal property is the type of action that would chill the exercise of his First Amendment rights. See Entler v. Bolinger, No. CV-05-5122-FVS, 2008 U.S. Dist. LEXIS 27523, at *18-19 (E.D. Wash. Mar. 21, 2008) (denying summary judgment and finding plaintiff sufficiently raised material issue of fact as to chilling effect where plaintiff had to perform extra duty and his property was confiscated in alleged retaliation because a jury could find that those consequences would chill the speech of a reasonable person); Rayford v. Omura, 400 F. Supp. 2d 1223, 1230-31 (D. Haw. 2005) (discussing Rhodes and stating that a plaintiff can recover for retaliation by proving either that he was actually harmed or that the defendant's actions would chill a person of ordinary firmness from speaking against defendant). For these reasons, the Court concludes that Plaintiff has alleged all necessary elements to state a cause of action for retaliation, and Defendants Hurtado and Bugarin's Motion to Dismiss is **DENIED** on this ground.

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1 **2. Defendant Aguirre**

2 Defendant Aguirre is not named in count one of the Complaint,
3 and his conduct is only set forth in count two, which describes
4 Plaintiff's claim as a due process violation. (Compl. 3-6.)
5 Regardless of where they are located in the Complaint, the Court
6 will construe Martin's allegations against Aguirre as also
7 attempting to allege a First Amendment retaliation claim.

8 Nevertheless, Defendant Aguirre asserts that the Complaint
9 fails to state a First Amendment retaliation claim against him
10 because Martin cannot recover under § 1983 on a theory of
11 supervisory liability, and there are no allegations that Aguirre
12 participated in the allegedly retaliatory conduct. (Defs.' Mem.
13 P. & A. 7-8.) Plaintiff argues this claim should not be dismissed
14 because his Complaint alleges that Aguirre knew the other
15 Defendants acted with retaliatory intent, but he failed to
16 intervene, and therefore, Defendant Aguirre became complicit in
17 the retaliation. (Pl.'s Opp'n 10.)

18 Under section 1983 of the Civil Rights Act, a defendant
19 cannot be held liable under a respondeat superior theory. Monell
20 v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). But
21 "[a]lthough there is no pure respondeat superior liability under §
22 1983, a supervisor is liable for the constitutional violations of
23 subordinates 'if the supervisor participated in or directed the
24 violations, or knew of the violations and failed to act to prevent
25 them.'" Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007)
26 (quoting Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)); see
27 also King v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987) (stating
28 that state officials may be liable under § 1983 if "they play an

1 affirmative part in the alleged deprivation of constitutional
2 rights[]"). "The supervisor must know about the conduct and
3 facilitate it, approve it, condone it, or turn a blind eye for
4 fear of what [he] might see." Ripson v. Alles, 21 F.3d 805, 809
5 (8th Cir. 1994) (quoting Jones v. City of Chicago, 856 F.2d 985,
6 992 (7th Cir. 1988)).

7 Defendant Aguirre argues that Plaintiff fails to state a
8 claim against him because Martin alleges liability based only on
9 Aguirre's position as a supervisor:

10 [T]here are no allegations that Defendant Aguirre
11 witnessed or participated in the alleged viewing of
12 Plaintiff's confidential correspondence, or the alleged
13 resultant retaliatory act of confiscating Plaintiff's
14 television. Rather, the Complaint specifically alleges
15 Defendant Aguirre examined the television set and found
16 it was tampered with, thereby justifying its
17 confiscation.

18 (Defs.' Mem. P. & A. 7.)

19 The Complaint alleges that Defendant Aguirre is a
20 Correctional Sergeant assigned to the Receiving and Release Unit
21 at Calipatria. (Compl. 2, 5.) When Martin filed an inmate
22 grievance complaining of the retaliatory actions of Defendants
23 Hurtado and Bugarin, Plaintiff was interviewed by Defendant
24 Aguirre for the first-level administrative response. (Id. at 5.)
25 "Defendant Aguirre denied plaintiff's inmate appeal stating [sic]
26 that he had personally inspected plaintiff's television and he
27 noticed that the glue seals were tampered with." (Id. at 5-6.)
28 Martin alleges that Defendant Aguirre "encourage[d], directed,
29 ratified, and knowingly acquiesced [sic] in the actions of
30 defendants Hurtado and Bugarin" (Id. at 6.)

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1 Because Plaintiff is proceeding pro se, the Court must
2 construe his Complaint broadly, accepting as true all factual
3 allegations and reasonable inferences to be drawn from them. See
4 Cholla Ready Mix, 382 F.3d at 973 (citing Karam, 352 F.3d at
5 1192). Viewing the allegations in a light most favorable to
6 Martin, the Court finds that the Complaint sufficiently alleges a
7 First Amendment retaliation claim against Defendant Aguirre. The
8 Complaint states that Aguirre knew Hurtado and Bugarin seized
9 Plaintiff's television with the intent to retaliate against him,
10 and Aguirre condoned that action by denying Martin's grievance.
11 The Complaint alleges that Defendant Aguirre took personal action;
12 it does not attempt to hold Aguirre liable merely for his
13 supervisory position. See Hamilton v. Endell, 981 F.2d 1062, 1067
14 (9th Cir. 1992), abrogated on other grounds, Saucier v. Katz, 533
15 U.S. 194 (2201), (finding plaintiff sufficiently alleged personal
16 involvement where two prison officials reviewed and denied the
17 plaintiff's inmate appeals complaining of a decision to transfer
18 him in deliberate indifference to his medical needs). Therefore,
19 Defendant's Motion to Dismiss a First Amendment retaliation claim
20 against Defendant Aguirre is **DENIED**.

21 **C. Plaintiff's Fourteenth Amendment Due Process Claim**

22 In claim two of his Complaint, Martin asserts that he was
23 denied due process of law when Defendants Hurtado and Bugarin
24 seized his television without initiating a formal disciplinary
25 action against him, thereby denying Plaintiff the "minimal
26 disciplinary procedural due process protections" provided to state
27 inmates by California law. (Compl. 5-6.) He further alleges that
28 Defendant Aguirre violated Plaintiff's right to due process when

1 he denied the inmate grievance Martin submitted to complain about
2 Hurtado and Bugarin's actions. (Id.) Plaintiff also contends
3 that all three Defendants acted in concert. (Id. at 6.)

4 The Due Process Clause of the Fourteenth Amendment protects
5 prisoners from being deprived of life, liberty, or property
6 without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556
7 (1974). To invoke the Due Process Clause, Martin must establish
8 that he has a protected liberty or property interest at stake.
9 Wilkinson v. Austin, 545 U.S. 209, 221 (2005). This liberty
10 interest may arise from the Constitution or from state laws or
11 policies. Id.; Sandin, 515 U.S. at 483-84. "Procedural due
12 process rules are meant to protect persons not from the
13 deprivation, but from the mistaken or unjustified deprivation of
14 life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259
15 (1978).

16 A plaintiff presenting a procedural due process claim must
17 allege two elements: (1) the plaintiff had "a liberty or property
18 interest which has been interfered with by the State . . ." and
19 (2) the procedures employed to deprive the plaintiff of liberty or
20 property were constitutionally insufficient. Kentucky Dep't of
21 Corr. v. Thompson, 490 U.S. 454, 460 (1989) (citation omitted);
22 see also Ramirez v. Galaza, 334 F.3d 850, 860-61 (9th Cir. 2003);
23 Wright v. Riveland, 219 F.3d 905, 913 (9th Cir. 2000).

24 **1. Deprivation of Liberty Interest**

25 Defendants move to dismiss Plaintiff's due process claim
26 because they assert that Martin does not have a liberty interest
27 in an administrative grievance procedure. (Defs.' Mem. P. & A. 8;
28 Defs.' Reply 5-6.) They argue, "Plaintiff does not have a due

1 process right to file an inmate grievance and, as such, cannot
2 maintain a Due Process claim against Defendant Aguirre for denying
3 his inmate grievance." (Defs.' Mem. P. & A. 8.)

4 Plaintiff contends he has a liberty interest in a grievance
5 procedure, which is established by the California Code of
6 Regulations. (Pl.'s Opp'n 11.) The specific regulation cited by
7 Martin provides that any inmate or parolee under the jurisdiction
8 of the California Department of Corrections "may appeal any
9 departmental decision, action, condition, or policy which they can
10 demonstrate as having an adverse effect upon their welfare." Cal.
11 Code Regs. tit. 15, § 3084.1(a) (2008); (see Pl.'s Opp'n 11.)

12 "While a violation of a state-created liberty interest can
13 amount to a violation of the Constitution, not every violation of
14 state law or state-mandated procedures is a violation of the
15 Constitution." Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir.
16 1993) (citations omitted). Accordingly, the fact that the
17 California Code of Regulations provides a procedure for inmates to
18 assert their grievances does not, in itself, create a federally
19 protected liberty interest. "The simple fact that state law
20 prescribed certain procedures does not mean that the procedures
21 thereby acquire a federal constitutional dimension." Id. (quoting
22 Vruno v. Schwarzwald, 600 F.2d 124, 130-31 (8th Cir.
23 (1979) (internal quotations omitted)). State-created procedures
24 for the processing of inmate complaints and the disciplining of
25 inmates do not create protected liberty interests that implicate
26 the protections of the Fourteenth Amendment. Id. (citing Azeez v.
27 De Robertis, 568 F. Supp. 8, 10 (N.D Ill. 1982)). "'A prison
28 grievance procedure is a procedural right only; . . . it does not

1 give rise to a protected liberty interest" Id. (quoting
2 Azeez v. De Roberts, 568 F. Supp. at 10).

3 The Ninth Circuit has held that inmates have "no legitimate
4 claim of entitlement to a grievance procedure." Mann v. Adams,
5 855 F.2d 639, 640 (9th Cir. 1988) (order on rehearing). This
6 conclusion has also been consistently reached in other circuits:
7 "The courts of appeals that have confronted the issue are in
8 agreement that the existence of a prison grievance procedures
9 confers no liberty interest on a prisoner." Massey v. Helman, 259
10 F.3d 641, 647 (7th Cir. 2001) (discussing cases from the Fourth,
11 Seventh, Eighth, and Ninth Circuits). Because Plaintiff does not
12 have an entitlement to a specific grievance procedure, he cannot
13 state a claim under § 1983 based on any alleged deficiencies in
14 the processing of his grievance by Defendant Aguirre. See Ramirez
15 v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (dismissing inmate's
16 claim that "disciplinary and appeals boards denied his request to
17 examine adverse witnesses in violation of his Due Process
18 rights[]". The same is true for Plaintiff's claim that his
19 television was seized without the initiation of formal
20 disciplinary procedures. (See Compl. 5.)

21 Under the framework established by the Supreme Court in
22 Sandin v. Connor, 515 U.S. at 484, Plaintiff can state a
23 cognizable due process claim only by alleging that state action
24 "restrains a state-created liberty interest in some 'unexpected
25 manner[]'" or imposed an "'atypical and significant hardship . . .
26 in relation to the ordinary incidents of prison life.'" Ramirez,
27 334 F.3d at 860 (quoting Sandin, 515 U.S. at 483-84). The Supreme
28 Court has explained that "[t]hese [state-created liberty]

1 interests will be generally limited to freedom from restraint[,]”
2 for example, the transfer from a prison to a mental hospital or
3 the involuntary administration of psychotropic medications Sandin,
4 515 U.S. at 484 (citing Vitek v. Jones, 445 U.S. 480, 493 (1980);
5 Washington v. Harper, 494 U.S. 210, 221 (1990)).

6 Plaintiff’s Complaint fails to state a procedural due process
7 claim because the deprivation of his television does not pose an
8 “atypical and significant hardship” when compared to “the ordinary
9 incidents of prison life.” See id. Similar deprivations have
10 been found not to impose undue hardship on prisoners. See, e.g.,
11 Cosco v. Uphoff, 195 F.3d 1221, 1224 (10th Cir. 1999) (finding
12 prison policy that did not permit inmates to have hobby materials
13 in their cells did not impose atypical, significant deprivation
14 under Sandin); Lyon v. Farrier, 730 F.2d 525, 526-27 (8th Cir.
15 1984) (finding no due process violation where a painting belonging
16 to another inmate was confiscated and destroyed because prison
17 regulations did not allow inmate to possess another’s property).
18 Plaintiff has not alleged facts sufficient to establish “a
19 dramatic departure from the basic conditions” of imprisonment.
20 See Sandin, 515 U.S. at 485. Thus, Martin fails to state a claim
21 for violation of his right to procedural due process.²

22
23 ² It is not clear whether Plaintiff attempts to state a claim for
24 violation of substantive due process, but to the extent he does, his
25 allegations are similarly insufficient. Whereas procedural due process
26 requires that the state utilize certain procedures before depriving a
27 person of liberty or property, substantive due process imposes limits on
28 what the state can do, regardless of the procedures used. Pittsley v.
Warish, 927 F.2d 3, 6 (1st Cir. 1991) (citations omitted). A plaintiff may
assert a substantive due process claim by alleging either (1) the
deprivation of an identified liberty or property interest, or (2) state
conduct which “shocks the conscience.” Id. (citations omitted). Martin
fails to establish a protected liberty or property interest that can
support a due process claim. He also fails to establish that the
confiscation of his television “shocks the conscience.”

1 **2. Deprivation of Property Interest**

2 To the extent that Martin's Complaint attempts to state a
3 claim for the deprivation of property (i.e. his television)
4 without due process of law, his claim also fails. "[W]here
5 deprivation of property resulted from the unpredictable negligent
6 acts of state agents, the availability of an adequate state
7 postdeprivation remedy satisfie[s] the requirement of due
8 process." Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1989)
9 (citing Parratt v. Taylor, 451 U.S. 527, 538 (1981)). This rule
10 also applies to "intentional, unauthorized actions." Id. at 805-
11 06 (citing Hudson v. Palmer, 468 U.S. 517, 530-33 (1984)).

12 Martin's Complaint asserts that Defendants Hurtado and
13 Burgarin acted contrary to established policies when they seized
14 his television, and Defendant Aguirre also violated established
15 procedures by condoning their actions and denying Plaintiff's
16 grievance. (See Compl. 3-6.) Because he asserts that Defendants'
17 actions were unauthorized, rather than taken pursuant to
18 established policies, Martin could only state a claim for
19 deprivation of property if he alleged there were no state
20 postdeprivation remedies available to redress the harm. The
21 result is the same whether the deprivation of property is
22 negligent or intentional, so long as adequate postdeprivation
23 remedies are available. Hudson v. Palmer, 468 U.S. at 5336; see
24 also Parratt, 451 U.S. at 543 (finding failure to state a claim
25 where there was no allegation that postdeprivation procedures were
26 inadequate); Copeland v. Machulis, 57 F.3d 476, 479-80 (6th Cir.
27 1995) (same). Plaintiff does not make that allegation. Indeed,
28 California provides a postdeprivation remedy which the Ninth

1 Circuit has previously found to be adequate. Barnett v. Centoni,
2 31 F.3d 813, 816-17 (9th Cir. 1994) (citing Cal. Gov't Code §§ 810-
3 895). Accordingly, the Complaint fails to state a claim for the
4 taking of property without due process of law.

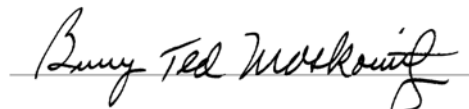
5 For all these reasons, Plaintiff's Complaint fails to state a
6 claim for deprivation of due process. Defendants' Motion to
7 Dismiss the due process claim alleged in count two of the
8 Complaint is **GRANTED** without leave to amend. It is "absolutely
9 clear that the deficiencies of the complaint could not be cured by
10 amendment." Noll v. Carlson, 809 F.2d at 1447.

11 **IV. CONCLUSION**

12 The Court finds that Plaintiff has alleged enough facts to
13 state a claim for retaliation under the First Amendment against
14 Defendants Hurtado, Bugarin, and Aguirre, but his Complaint fails
15 to state a due process claim against any Defendant. Accordingly,
16 Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN**
17 **PART**. Plaintiff will be permitted to proceed only on claim one of
18 his Complaint for retaliation against Defendants Hurtado and
19 Bugarin. The due process violation alleged in claim two of the
20 Complaint is **DISMISSED** against all Defendants. The retaliation
21 claim against Defendant Aguirre alleged in claim two may also
22 proceed.

23 **IT IS SO ORDERED.**

24 DATED: September 3, 2008



26 Honorable Barry Ted Moskowitz
27 United States District Judge
28