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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RUBEN GARCIA,

Plaintiff,

vs.

D. STRAYHORN, et al.,

Defendants.

CASE NO. 13-CV-807-BEN (KSC)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

[Doc. No. 15.]

Ruben Garcia, a state prisoner proceeding *pro se*, filed a civil rights Complaint pursuant to Title 42, United States Code, Section 1983, on April 3, 2013. [Doc. No. 1.] Plaintiff then filed a First Amended Complaint on May 13, 2013. [Doc. No. 3.] On June 6, 2013, this Court dismissed Plaintiff's First Amended Complaint *sua sponte* pursuant to Title 28, United States Code, Sections 1915(e)(2) and 1915A(b). Plaintiff was granted leave to amend in order to correct all of the deficiencies identified by the Court in his pleading. [Doc. No. 5, at pp. 6-7.] Plaintiff then filed a Second Amended Complaint on July 16, 2013. [Doc. No. 6.]

On September 23, 2013, this Court issued a second Order pursuant to Title 28, United States Code, Sections 1915(e)(2) and 1915A(b), dismissing some but not all of the claims in the Second Amended Complaint. [Doc. No. 7.] In this Order, the Court dismissed Plaintiff's claims that Defendants conspired to violate his constitutional rights and violated his constitutional rights under the Equal Protection Clause of the

1 Fourteenth Amendment. [Doc. No. 7, at pp. 3-4.] In addition, the District Court
2 dismissed all of Plaintiff's claims based on supervisory liability against Defendants
3 Franco, Reid, Hernandez, and Seibel for failure to state a claim. [Doc. No. 7, at p. 5.]
4 The District Court also concluded Plaintiff failed to state a claim for retaliation against
5 Defendant Stricklin. [Doc. No. 7, at p. 5.] These defendants were all terminated from
6 the Court's docket. [Doc. No. 7, at p. 6.] However, the District Court concluded that
7 Plaintiff sufficiently pled claims for retaliation against Defendants Strayhorn and Luna
8 and ordered them to respond to the Second Amended Complaint. [Doc. No. 7, at p. 6-
9 7.]

10 Currently before the Court is Defendants' Motion to Dismiss the Second
11 Amended Complaint pursuant to Federal Rule 12(b)(6) for failure to state a claim.
12 [Doc. No. 15.] In their Motion to Dismiss, Defendants seek an order dismissing
13 Plaintiff's retaliation claims against remaining defendants Strayhorn and Luna for
14 failure to state a claim, without leave to amend. [Doc. No. 15, at p. 10.] Plaintiff has
15 filed an Opposition to the Motion [Doc. No. 19] and Defendants filed a Reply [Doc.
16 No. 20]. For the reasons outlined below, the Court finds that Defendants' Motion to
17 Dismiss for failure to state a claim must be **GRANTED** in part and **DENIED** in part.

18 I. Background

19 Plaintiff is housed at the Richard J. Donovan Correctional Facility in San Diego
20 (RJDCF). [Doc. No. 6, at p. 1; Doc. No. 19, at p. 1.] In the operative Second Amended
21 Complaint, Plaintiff describes two separate incidents on October 24, 2011 and April 26,
22 2012 that serve as the basis for his retaliation claims against Strayhorn and Luna.
23 [Doc. No. 6, at pp. 5-19.] The following facts are drawn from Plaintiff's allegations
24 in the Second Amended Complaint. The Court makes no findings of fact.

25 A. October 24, 2011 Incident

26 Plaintiff alleges that on October 24, 2011, he had authority and a written pass to
27 attend a pre-scheduled appointment with an optometry specialist at RJDCF. After the
28 appointment, he was escorted by security personnel back to his housing unit and then

1 released to return to his cell. [Doc. No. 6, at p. 5.] While he was on his way, Plaintiff
2 told another inmate: “[D]on’t worry. I just came from TTA and [another inmate named
3 Jimenez] just finished a[n] interview regarding a six-o-two against Strayhorn . . . all
4 this stuff is catching up with him. . . .” [Doc. No. 6, at p. 5.]¹ Strayhorn, who was
5 standing nearby, stated: “[You’re] p.c. so ain’t nobody worry about you!” [Doc. No.
6 6, at p. 5.] Plaintiff claims that “p.c.” is “prison lingo” and is used by inmates and
7 prison staff to identify an inmate as a “jail house informant.” [Doc. No. 6, at p. 6 n.3.]
8 Plaintiff alleges that “a large number of inmates” overheard this remark. [Doc. No. 6,
9 at p. 5.] According to Plaintiff, this remark threatened his safety and security because
10 inmates identified as a “jail house informant” are targeted by other inmates for
11 “assault, systematic abuse, or even death.” [Doc. No. 6, at p. 6 n.3.]

12 In response to Strayhorn’s “p.c.” remark, Plaintiff said, “If you want to give me
13 a direct order. . . I will gladly follow such orders . . . other than that we don’t need to
14 speak to each other, this is why you get six-o-two . . .” [Doc. No. 6, at p. 6.] Plaintiff
15 stated that, “I’m six-o-twoing you.” [Doc. No. 6, at p. 6.] Strayhorn ordered Plaintiff
16 to return to his housing unit, and Plaintiff complied, but Strayhorn proceeded to “direct
17 a [barrage] of derogatory verbal obscenities at the plaintiff.” [Doc. No. 6, at pp. 6-7.]
18 Specifically, Plaintiff alleges that Strayhorn stated: “You punk bitch don’t get it . . you
19 six-o-two me and you gonna make me fuck you-up! . . . I’m not like others you six-o-
20 two . . . you hear!! . . . coward, p.c., scary bird . . . Try me bitch, Try me bitch!!, Try me
21 bitch!!! . . . I know you hear me!!! . . . Try me bitch!!!”² [Doc. No. 6, at p. 7.] Plaintiff
22 further alleges that Strayhorn left his post to make these remarks and that his conduct
23 could not have had any legitimate penological interest. [Doc. No. 6, at p. 7 n.4.]

24 Next, Plaintiff alleges that Strayhorn walked fast to catch up to him as he

25
26 ¹ “Six-o-two” is allegedly “prison lingo” used to refer to an inmate-
27 generated grievance filed using a CDC-602 Inmate Appeal/Grievance Form. [Doc. No.
6, at p. 5, n. 2.]

28 ² The Court notes that “verbal harassment” and “vulgar language” directed
at an inmate by prison staff is generally not a constitutional violation. *Keenan v. Hall*,
83 F.3d 1083, 1092 (9th Cir. 1996).

1 continued on his way toward his housing unit. Strayhorn then stepped in front of
2 Plaintiff, stopped him, and continued to “vent his anger” at Plaintiff with offensive
3 remarks. [Doc. No. 6, at p. 7.] During this time, Luna arrived in the area, and Plaintiff
4 “verbally expressed” to Luna his intent to file “a grievance with the CDCR to report
5 defendant D. Strayhorn [sic] illegal acts and violation of his civil rights.” [Doc. No.
6 6, at p. 7.] In response, Luna allegedly said: “[Y]ou file against my officer and I’ll
7 lock you up in Administrative Segregation” [Doc. No. 6, at p. 8.] Plaintiff said
8 he intended to file a grievance to report “their serious acts of misconduct” regardless
9 of any retaliatory or punitive acts which Luna and Strayhorn had already taken or
10 planned to take against him. [Doc. No. 6, at p. 8.]

11 After these events, Plaintiff alleges that Strayhorn filed retaliatory disciplinary
12 charges against him. [Doc. No. 6, at p. 8.] In these disciplinary charges, Strayhorn said
13 that Plaintiff verbally threatened his safety and, as a result, he had to be placed in
14 handcuffs. Strayhorn also claimed that Plaintiff stated that he was going to report him
15 for use of excessive force. [Doc. No. 6, at p. 8.] Plaintiff further alleges that Luna filed
16 a “retaliatory” Incident Report to support Strayhorn’s retaliatory disciplinary charges
17 and to provide a “cover” for Strayhorn’s “illegal acts.” [Doc. No. 6, at p. 8.] Plaintiff
18 then filed a Form 602 to report the violation of his civil rights by Strayhorn and Luna.
19 [Doc. No. 6, at p. 9.]

20 **B. April 26, 2012 Incident**

21 Plaintiff alleges that on April 26, 2012, he went to the medical clinic for a
22 doctor’s appointment and waited “outside” the inmate waiting area to be called in for
23 his appointment. A short time after he arrived, Strayhorn approached him and
24 instructed him to “turn around.” [Doc. No. 6, at p. 9.] Plaintiff complied by turning
25 around to face the wall behind him. He was then handcuffed by Strayhorn. [Doc. No.
26 6, at p. 9.] Plaintiff stood silently without moving, then was escorted by two other staff
27 members to a gymnasium, where he was locked up “inside a cage.” [Doc. No. 6, at p.
28 9.]

1 After this incident, Plaintiff alleges that Strayhorn generated and filed more
2 retaliatory disciplinary charges against him. In part, a “Misconduct Report” charges
3 that Plaintiff had “displayed a disregard to Title 15 Policy § 3005(a)” which requires
4 inmates to refrain from behavior that might lead to violence or disorder, or which
5 otherwise endangers the facility, and that he called Strayhorn a “child molester in
6 green.” [Doc. No. 6, at p. 10.] In response, Plaintiff filed a grievance (Form 602)
7 claiming a violation of his civil rights. [Doc. No. 6, at p. 10.]

8 The Second Amended Complaint also generally alleges that Defendants had no
9 legitimate penological interest for their conduct and that Defendants’ conduct was the
10 actual or proximate cause of the deprivation of Plaintiff’s constitutional rights. [Doc.
11 No. 6, at p. 16.] As a result of Defendants’ alleged misconduct, Plaintiff seeks both
12 monetary and injunctive relief. [Doc. No. 6, at p. 20.] Plaintiff apparently believes the
13 misconduct charges made by Strayhorn and Luna could be used against him in the
14 future, as he seeks an injunction to prevent Strayhorn from using fabricated charges to
15 have him placed in Administrative Segregation. [Doc. No. 6, at p. 20.]

16 **C. Exhibits Attached to the Second Amended Complaint**

17 Plaintiff has incorporated by reference all exhibits attached to the Second
18 Amended Complaint. [Doc. No. 6, at pp. 16, 18.] Listed in chronological order, these
19 exhibits include copies of the following documents that are relevant to the allegations
20 in the Second Amended Complaint:

21 March 16, 2012 [Doc. No. 6, at pp. 43-44] (grievance on Form 602 by Plaintiff
22 complaining that: (1) Strayhorn harassed him during a medical appointment on
23 March 14, 2012; (2) Strayhorn has a “long history” of abusive treatment of Plaintiff
24 and other inmates during medical appointments; (3) Strayhorn targets inmates because
25 they file grievances against him; and (4) he was “currently awaiting a 3rd level
26 response on a [Form] 602 to include c/o Strayhorn”);

27 April 15, 2012 [Doc. No. 6, at p. 45] (Inmate Request (Form CDCR 22)
28 inquiring about status of Form 602 submitted by Plaintiff on March 16, 2012 in which

1 he reported “serious misconduct” by Strayhorn that occurred on March 14, 2012);

2 April 29, 2012 [Doc. No. 6, at p. 48] (Inmate Request (Form CDCR 22) stating
3 that Plaintiff filed two Form 602s reporting Strayhorn for harassment and that in
4 retaliation Strayhorn cancelled two of Plaintiff’s medical appointments and worked
5 with other staff to perpetrate “lies, fabrications & false reports” seeking to have
6 Plaintiff placed in Administrative Segregation);

7 May 1, 2012 [Doc. No. 6, at p. 50] (Inmate Request (Form CDCR 22) repeating
8 statements made on Form CDCR 22 dated April 29, 2012, described above);

9 May 4, 2012 [Doc. No. 6, at p. 46] (Inmate Request (Form CDCR 22) requesting
10 status of Form 602 submitted on March 16, 2012 in which he reported “serious acts of
11 misconduct” by Strayhorn);

12 August 2, 2012 [Doc. No. 6, at pp. 61-62] (Inmate Request (Form CDCR 22)
13 reporting that on July 25, 2012, he went to the medical clinic for an appointment and
14 handed his appointment form to Strayhorn, but Strayhorn acted unethically by
15 cancelling his appointment and noting that Strayhorn “has a history of retaliating
16 against inmates that submit grievances”);

17 Exhibits attached to the Second Amended Complaint also include a letter from
18 Plaintiff to the Office of Inspector General dated May 15, 2012 making a formal
19 complaint against Strayhorn. [Doc. No. 6, at pp. 52-54.] In the letter, Plaintiff
20 complains that Strayhorn “has been using his position and authority to systematically
21 abuse inmates . . . when they come into contact with him as they attend medical
22 appointments at the facilities Medical Clinic.” [Doc. No. 6, at p. 52.] The letter
23 includes a number of examples of alleged abusive treatment of Plaintiff and other
24 inmates by Strayhorn. [Doc. No. 6, at pp. 52-54.]

25 **D. Similar Grievances Against Strayhorn by Other Inmates**

26 The Second Amended Complaint also alleges that Strayhorn’s retaliatory
27 conduct against Plaintiff is part of a larger pattern of retaliatory conduct by Strayhorn
28 against a number of other inmates during the years he has worked as a security officer

1 at the medical clinic. When inmates report to the medical clinic for services, Plaintiff
2 alleges that Strayhorn routinely engages in retaliatory acts to punish inmates for filing
3 grievances against him to report his behavior. These alleged retaliatory acts include
4 “physical altercations” or assaults, “false cancellations of inmate medical
5 appointments,” harassment, and threats. [Doc. No. 6, at p. 12-13.] According to
6 Plaintiff, Strayhorn also routinely fabricates allegations to support disciplinary charges
7 that he uses as a “calculated tactic” to “cover up” his illegal acts against inmates. [Doc.
8 No. 6, at p. 13.] In support of these allegations, Plaintiff attached copies of other
9 inmates’ grievances about Strayhorn to the Second Amended Complaint. [Doc. No. 6,
10 at pp. 21-41; 63-84.] He alleges that there are an unusually large number of
11 disciplinary charges and misconduct reports generated by Strayhorn. [Doc. No. 6, at
12 p. 14.] Plaintiff believes the exhibits and other prison records will support his claims
13 against Strayhorn, because they will show an unusually “large volume” of inmate
14 grievances, disciplinary charges, misconduct reports, incident reports, and altercations
15 involving Strayhorn. [Doc. No. 6, at p. 14.]

16 II. Discussion

17 In their Motion to Dismiss, Defendants seek dismissal of Plaintiff’s retaliation
18 allegations on the ground that Plaintiff has not pled sufficient facts against them based
19 on the incidents from October 24, 2011 and April 26, 2012 to state viable claims for
20 retaliation. Citing the sovereign immunity doctrine and the Eleventh Amendment,
21 Defendants also seek dismissal of Plaintiff’s claims for monetary damages to the extent
22 they are being sought against them in their official capacity.

23 A. Motion to Dismiss Standards.

24 A plaintiff’s complaint must provide a “short and plain statement of the claim
25 showing that [he] is entitled to relief.” *Johnson v. Riverside Healthcare Sys., LP*, 534
26 F.3d 1116, 1122 (9th Cir. 2008) [hereinafter *Riverside*] (citing FED. R. CIV. P. 8(a)(2)).
27 “Specific facts are not necessary; the statement need only ‘give the defendant fair
28 notice of what . . . the claim is and the grounds upon which it rests.’” *Erickson v.*

1 *Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
2 (2007)).

3 A motion to dismiss under Federal Rule 12(b)(6) may be based on either a “‘lack
4 of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a
5 cognizable legal theory.’” *Riverside*, 534 F.3d at 1121-22 (quoting *Balistreri v.*
6 *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)). A motion to dismiss should
7 be granted if the plaintiff fails to proffer “enough facts to state a claim to relief that is
8 plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when
9 the plaintiff pleads factual content that allows the court to draw the reasonable
10 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556
11 U.S. 662, 678 (2009).

12 “[W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true
13 all of the factual allegations contained in the complaint.” *Erickson*, 551 U.S. at 94.
14 However, it is not necessary for the Court “to accept as true allegations that are merely
15 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*
16 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “Threadbare recitals of the
17 elements of a cause of action, supported by mere conclusory statements, do not
18 suffice.” *Iqbal*, 556 U.S. at 678. “Factual allegations must be enough to raise a right
19 to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

20 On the other hand, “[a] document filed *pro se* is ‘to be liberally construed,’
21 [citation omitted] and ‘a *pro se* complaint, however inartfully pleaded, must be held to
22 less stringent standards than formal pleadings drafted by lawyers” *Erickson*, 551
23 U.S. at 94. Particularly in civil rights cases, courts have an obligation to construe the
24 pleadings liberally and to afford the plaintiff the benefit of any doubt. *Bretz v. Kelman*,
25 773 F.2d 1026, 1027 n.1 (9th Cir. 1985).

26 **B. First Amendment Retaliation Claims Under Section 1983.**

27 “Section 1983 does not create any substantive rights; rather it is the vehicle
28 whereby plaintiffs can challenge actions by governmental officials.” *Jones v. Williams*,

1 297 F.3d 930, 934 (9th Cir. 2002). “To prove a case under section 1983, the plaintiff
2 must demonstrate that (1) the action occurred ‘under color of state law’ and (2) the
3 action resulted in the deprivation of a constitutional right or federal statutory right.”

4 *Id.*

5 Although incarceration results in the “necessary withdrawal or limitation of
6 many privileges and rights, . . . a prison inmate retains those First Amendment rights
7 that are not inconsistent with his status as a prisoner or with the legitimate penological
8 objectives of the corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

9 “Within the prison context, a viable claim of First Amendment retaliation entails five
10 basic elements: (1) An assertion that a state actor took some adverse action against an
11 inmate (2) because of (3) that prisoner’s protected conduct, and that such action
12 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did
13 not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d
14 559, 567-568 (9th Cir. 2005). “[P]risoners have a First Amendment right to file prison
15 grievances. [Citations omitted.] Retaliation against prisoners for their exercise of this
16 right is itself a constitutional violation, and prohibited as a matter of ‘clearly
17 established law.’” *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009).

18 **1. Protected Speech.**

19 Defendants contend that Plaintiff has failed to state a claim against them for
20 retaliation based on the incidents that allegedly took place on October 24, 2011,
21 because he has not identified any protected speech that could have resulted in
22 retaliation against him. Defendants also argue that Plaintiff’s verbal threats or
23 promises on October 24, 2011 indicating he intended to file a prison grievance or a
24 “six-o-two” do not constitute speech that is protected by the First Amendment. [Doc.
25 No. 15-1, at pp. 7, 9.] This Court disagrees.

26 Review of current caselaw indicates that an inmate’s threat to file a prison
27 grievance constitutes protected speech. In *Gifford v. Atchison, Topeka and Santa Fe*
28 *Ry. Co.*, 685 F.2d 1149 (9th Cir. 1982), in the context of an employee’s claim of

1 discrimination in retaliation for the employee's participation in First Amendment
2 activity, the Ninth Circuit stated as follows in a footnote: "We see no legal distinction
3 to be made between the filing of a charge which is clearly protected, [citation omitted],
4 and threatening to file a charge." *Id.* at 1156 n.3. More recently, in the context of
5 prisoner civil rights actions under Section 1983, a number of courts have concluded
6 that verbal statements made by an inmate that essentially constitute a grievance, or that
7 indicate an intent to file a formal written grievance, are protected by the First
8 Amendment. *See, e.g., Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006)
9 (declining to hold that "legitimate complaints by a prisoner lose their protected status
10 simply because they are spoken"); *West v. Dizon*, No. 2:12-cv-1293, 2014 WL 794335,
11 at *5-6 (E.D. Cal. Feb. 27, 2014) (stating that protected speech includes an inmate's
12 verbal expression of an intent to submit a formal written grievance); *Hackworth v.*
13 *Torres*, No. 1:06-cv-773, 2011 WL 1811035, at *1, 6 (E.D. Cal. May 12, 2011)
14 (rejecting defendant's argument that an inmate's verbal objections to a prison policy
15 during a housing classification committee meeting with prison staff was not protected
16 by the First Amendment because the inmate had not filed a written grievance prior to
17 the meeting); *Conkleton v. Muro*, No. 08-cv-2612, 2011 WL 1119869, at *3 (D. Colo.
18 Mar. 28, 2011) (finding that the inmate's "verbal articulation" of "an intent to file a
19 grievance" is protected activity); *Uribe v. McKesson*, No. 08-cv-1285, 2011 WL 9640,
20 at *12 (E.D. Cal. Jan. 3, 2011) (concluding that an inmate's attempt to report a prison
21 official's misconduct, either "verbally or in writing, constitutes speech or conduct
22 entitled to First Amendment protection"); *Carter v. Dolce*, 647 F. Supp. 2d 826, 834
23 (E.D. Mich. Aug. 19, 2009) (concluding that an inmate's statement of intent to file a
24 written grievance is protected by the First Amendment and stating that "[o]nce a
25 prisoner makes clear his intention to resort to official channels to seek a remedy for ill
26 treatment by a prison employee, retaliation against the prisoner by that employee
27 implicates all the policies intended to protect the exercise of a constitutional right").

28 On the other hand, a number of district courts have found that verbal challenges

1 to prison officials that are argumentative, confrontational, and disrespectful are not
2 protected by the First Amendment. *See Johnson v. Carroll*, No. 2:08-cv-1494, 2012
3 WL 2069561 at *33-34 (E.D. Cal. June 7, 2012) (citing cases). In *Johnson v. Carroll*,
4 the District Court rejected the inmate's argument that his verbal statements made to
5 correctional officers incident to a strip search were protected speech, because the
6 statements were argumentative, confrontational, disrespectful, and "laced with
7 expletives." *Id.* at *34. According to the District Court, the inmate's "protected
8 recourse for challenging [the strip search] . . . was to file an administrative grievance."
9 *Id.* The District Court therefore concluded that the plaintiff failed to state a First
10 Amendment retaliation claim based on conduct by prison officials immediately after
11 the search.

12 Here, Plaintiff alleges that on October 24, 2011, he told Strayhorn and Luna that
13 he intended to file a formal written grievance to report Strayhorn's conduct. As alleged
14 by Plaintiff, these statements were not argumentative, confrontational, or disrespectful.
15 This Court finds persuasive the reasoning of the courts which have concluded that
16 similar statements are protected by the First Amendment. Accordingly, the Court
17 concludes that Plaintiff has sufficiently alleged that he engaged in protected speech
18 on October 24, 2011 to survive a motion to dismiss.

19 With respect to the incident on April 26, 2012, Defendants argue that Plaintiff
20 failed to identify or allege any act of protected speech that could have triggered
21 Strayhorn to act in a retaliatory manner towards Plaintiff while he waited for his
22 appointment at the medical clinic. [Doc. No. 15-1, at p. 9.] However, when the Second
23 Amended Complaint is read liberally and as a whole, Plaintiff's allegations sufficiently
24 identify protected speech that took place prior to the incident on April 26, 2012 that
25 could have resulted in retaliatory acts by Strayhorn.

26 First, during the prior incident on October 24, 2011, Plaintiff told Strayhorn he
27 intended to file a written grievance against him and, as outlined more fully above, this
28 statement qualifies as protected speech. [Doc. No. 6, at p. 6.] Second, by the time of

1 the incident on April 26, 2012, the Second Amended Complaint alleges that Plaintiff
2 had filed a formal, written grievance against Strayhorn about the incident on
3 October 24, 2011. [Doc. No. 6, at p. 9.] In addition, exhibits³ attached to the Second
4 Amended Complaint indicate that Plaintiff filed another grievance against Strayhorn
5 on March 16, 2012, alleging he had been harassed during a different medical
6 appointment on March 14, 2012. At this time, Plaintiff also alleged that Strayhorn has
7 a “long history” of abusive treatment of Plaintiff and other inmates during medical
8 appointments. [Doc. No. 6, at p. 44.] In short, the Second Amended Complaint
9 includes allegations from which it could be inferred that Plaintiff engaged in protected
10 speech prior to the alleged retaliatory acts that resulted from the incident on April 26,
11 2012.

12 Based on the foregoing, Court finds that Plaintiff has sufficiently alleged he
13 engaged in protected speech on or before October 24, 2011 and April 26, 2012 that
14 could have triggered the alleged retaliatory acts by Defendants. Therefore, the Court
15 finds that Defendants’ Motion to Dismiss must be **DENIED** to the extent it seeks
16 dismissal of Plaintiff’s retaliation claims on the ground that Plaintiff did not allege he
17 engaged in protected speech that could have resulted in retaliatory acts by Defendants.

18 **2. Adverse Action.**

19 Defendants argue that Plaintiff has failed to state a retaliation cause of action
20 against them because he has not alleged any actions by Defendants that are adverse
21 enough to support the finding of a constitutional violation. According to Defendants,
22 Plaintiff’s allegations are insufficient because he has not claimed that any rules
23 violation report was issued against him, that he suffered any loss of privileges or
24 discipline, or that he was ever placed in administrative segregation. [Doc. No. 15-1,

25 ³ The Federal Rules of Civil Procedure provide as follows: “A copy of a
26 written instrument that is an exhibit to a pleading is a part of the pleading for all
27 purposes.” FED. R. CIV. P. 10(c). If the plaintiff has attached documents to a
28 complaint, the District Court in considering a motion to dismiss under Rule 12(b)(6)
for failure to state a claim “is not limited by the allegations contained in the complaint.”
Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Exhibits attached
to a complaint “may be considered” in determining the sufficiency of the pleading. *Id.*

1 at pp. 7-8, 9.]

2 “The adverse action need not be an independent constitutional violation.”
3 *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). For example, an allegation by
4 an inmate that he was transferred to another prison or placement because he engaged
5 in protected conduct may state a cause of action for retaliation, even though the
6 prisoner has no constitutionally-protected liberty interest in being held at or remaining
7 at a particular facility. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Other
8 actions that may be sufficiently adverse to state a cause of action for retaliation because
9 of protected conduct include: arbitrarily confiscating and destroying an inmate’s
10 property and initiating a transfer to another prison (*Rhodes*, 408 F.3d at 568)); placing
11 an inmate in administrative segregation on false charges (*Austin v. Terhune*, 367 F.3d
12 1167, 1171 (9th Cir. 2004)); validating an inmate as a gang member based on evidence
13 previously deemed insufficient (*Bruce v. Ylst*, 351 F.3d 1283, 1287-88 (9th Cir. 2003));
14 filing a false disciplinary report (*Hines v. Gomez*, 108 F.3d 265, 267-268 (9th Cir.
15 1997)); and labeling an inmate a “snitch” in order to subject him to retribution by other
16 inmates (*Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989)).

17 Without more, a “mere threat” made to convince an inmate “to *refrain* from
18 pursuing legal redress” is not enough to state a cause of action for retaliation. *Gaut v.*
19 *Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (emphasis added). On the other hand, a “mere
20 *threat*,” if made in retaliation for the filing of a prison grievance, “can be an adverse
21 action, regardless of whether it is carried out” because “the threat itself can have a
22 chilling effect.” *Brodheim*, 584 F.3d at 1270 (emphasis in original). The threat need
23 not be explicit or specific. *Id.* In *Brodheim v. Cry*, for example, the inmate frequently
24 filed prison grievances and a prison official responded to the inmate’s formal, post-
25 grievance request for an interview with a note stating that the inmate “‘should be
26 ‘careful’ what he writes and requests in his administrative grievances.” *Id.* at 1264.
27 Although the prison official made no specific or explicit threat, the Ninth Circuit
28 concluded that a reasonable fact finder could interpret the warning to imply that some

1 form of punishment or adverse regulatory actions would follow if the inmate failed to
2 comply. *Id.* at 1270. Based on the warning and other circumstantial evidence
3 indicating the warning was indeed a threat, the Ninth Circuit reversed a factual finding
4 that the inmate produced inadequate evidence of an adverse action. *Id.* at 1271.

5 With respect to the incident on October 24, 2011, Plaintiff alleges he told Luna
6 that he intended to report Strayhorn's conduct in a formal, written grievance. As
7 outlined above, Plaintiff's verbal threat to file a written grievance constitutes protected
8 speech. In response to this protected speech, Luna allegedly threatened to place
9 Plaintiff in Administrative Segregation if he filed a grievance against Strayhorn. [Doc.
10 No. 6, at pp. 7-8.] Despite Defendants' argument to the contrary, it is not legally
11 significant that Plaintiff failed to allege that Luna actually carried out the threat to place
12 him in Administrative Segregation. Therefore, Plaintiff has sufficiently alleged that
13 Luna took an adverse action against him.

14 Plaintiff's allegations that Strayhorn twice filed "retaliatory disciplinary charges
15 against him" in connection with the incidents on October 24, 2011 and April 26, 2012
16 [Doc. No. 6, at pp. 8, 10] are also sufficient to constitute adverse actions. In *Hines v.*
17 *Gomez*, the Ninth Circuit upheld a jury's verdict that a prison official retaliated against
18 an inmate by filing a "false" disciplinary report. *Hines*, 108 F.3d at 267-268. From
19 Plaintiff's allegation that the disciplinary charges filed against him by Strayhorn were
20 "retaliatory," [Doc. No. 6, at pp. 8, 10], and that Strayhorn routinely fabricates
21 allegations to support disciplinary charges that he uses as a "calculated tactic" to "cover
22 up" his illegal acts against inmates, [Doc. No. 6, at p. 13], it can reasonably be inferred
23 that Plaintiff contends the charges were false. Therefore, the Court finds that Plaintiff's
24 allegations are sufficient. Defendants' Motion to Dismiss is **DENIED** to the extent it
25 seeks dismissal of Plaintiff's retaliation claims on the ground that Plaintiff failed to
26 sufficiently allege that Defendants took adverse actions against him.

27 3. Causation.

28 In their Motion to Dismiss, Defendants contend that Plaintiff failed to plead any

1 facts to satisfy the element of causation. According to Defendants, Plaintiff has not
2 alleged any facts that could show that his protected conduct was the motivation
3 underlying Defendants' alleged acts of filing "retaliatory" disciplinary reports against
4 him. For example, Defendants argue that Plaintiff did not allege that Strayhorn "ever
5 learned that [Plaintiff] actually submitted an administrative grievance. . . ." [Doc. No.
6 15-1, at p. 9-10.]

7 The causation element of a First Amendment retaliation claim requires the
8 inmate plaintiff to show that protected conduct was the substantial or motivating factor
9 underlying the defendant's adverse action. *Brodheim*, 584 F.3d at 1271. "Recognizing
10 that the ultimate fact of retaliation for the exercise of a constitutionally protected right
11 rarely can be supported with direct evidence of intent that can be pleaded in a
12 complaint, [citation omitted], courts have found sufficient complaints that allege a
13 chronology of events from which retaliation may be inferred." *Murphy v. Lane*, 833
14 F.2d 106, 108 (7th Cir. 1987) (quoting *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir.
15 1985)). "[T]iming can properly be considered as circumstantial evidence of retaliatory
16 intent." *Pratt*, 65 F.3d at 808. On the other hand, timing alone is generally not enough
17 to support an inference that prison officials took an adverse action against a prisoner
18 in retaliation for the prisoner's participation in protected conduct. *See id.* In *Pratt v.*
19 *Rowland*, for example, the Ninth Circuit concluded that suspicious timing of an adverse
20 action was not enough to establish causation, because there was nothing to indicate the
21 defendant was "actually aware" of the prisoner's protected conduct. *Id.*

22 By contrast, the Ninth Circuit in *Hines v. Gomez* agreed there was an evidentiary
23 basis for the jury to find that a prison official filed a disciplinary report with a
24 retaliatory motive. *Hines*, 108 F.3d at 267. The defendant contended that there was
25 no proof that the defendant knew that the inmate had used the prison grievance system.
26 *Id.* at 267-68. The Ninth Circuit noted that prison officials were aware of the inmate's
27 reputation for "complaining" or "whining," and that the defendant had been told by the
28 inmate on the morning of the incident giving rise to the Section 1983 action that the

1 inmate intended to file a grievance. *Id.* at 268. The *Hines* Court concluded that the
2 evidence “amply support[ed]” the inference that the defendant knew, at least to some
3 extent, of the inmate’s use of the grievance system. *Id.*

4 Although Plaintiff does not specifically allege a causal connection between his
5 protected conduct and the alleged adverse actions, he has pled a chronology of events
6 from which a reasonable trier of fact could infer that Defendants’ actions against him
7 were retaliatory. First, the timing of the alleged adverse actions qualify as suspicious
8 because they either took place a short time after protected conduct, or as part of a larger
9 pattern of similar conduct that took place over time. Second, Plaintiff alleges he told
10 both Strayhorn and Luna that he intended to file a formal, written grievance reporting
11 Strayhorn’s “serious acts of misconduct.” [Doc. No. 6, at p. 7-8.] Because of the
12 timing of the alleged events and because Plaintiff claims that he told both defendants
13 he intended to file prison grievances, a reasonable trier of fact could conclude there is
14 circumstantial evidence to show Defendants were aware of Plaintiff’s use of the prison
15 grievance system and were therefore motivated to retaliate.

16 In addition, Plaintiff has alleged that Strayhorn routinely engages in retaliatory
17 acts to punish inmates for filing grievances to report his behavior. He has attached
18 similar claims as exhibits to the Second Amended Complaint, and has alleged that
19 prison records will show an unusually “large volume” of inmate grievances,
20 disciplinary charges, misconduct reports, incident reports, and altercations involving
21 Strayhorn. [Doc. No. 6, at p. 14.] These allegations, if proven, would further support
22 an inference that Plaintiff’s protected conduct was the substantial or motivating factor
23 underlying adverse actions taken by Strayhorn against Plaintiff.

24 Based on the foregoing, the Court finds that Plaintiff’s causation allegations are
25 sufficient when the Second Amended Complaint is read liberally and as a whole.
26 Therefore, Defendants’ Motion to Dismiss must be **DENIED** to the extent it seeks
27 dismissal of Plaintiff’s retaliation claims on the ground that Plaintiff failed to plead
28 facts to show that his protected conduct was the substantial or motivating factor

1 underlying adverse actions taken against him by Defendants.

2 **4. Chilling Effect or Other Harm.**

3 Defendants' Motion to Dismiss argues that Plaintiff has failed to allege that any
4 actions by them had any harmful or chilling effect on his protected conduct. As
5 examples, Defendants argue that Plaintiff has not alleged that he was deterred in any
6 way from filing grievances or that he suffered any other harm or adverse consequences,
7 such as discipline or placement in administrative segregation, as a result of the
8 misconduct reports filed against him by Defendants.

9
10 [A]n objective standard governs the chilling inquiry; a plaintiff does not
11 have to show that 'his speech was actually inhibited or suppressed,' but
12 rather that the adverse action at issue 'would chill *or* silence a person of
13 ordinary firmness from future First Amendment activities.' [Citations
omitted.] To hold otherwise 'would be unjust' as it would 'allow a
defendant to escape liability for a First Amendment violation merely
because an unusually determined plaintiff persists in his protected
activity.' [Citation omitted.]

14 *Brodheim*, 584 F.3d at 1271. "[S]ince harm that is more than minimal will almost
15 always have a chilling effect[, a]lleging harm *and* alleging the chilling effect would
16 seem under the circumstances to be no more than a nicety." *Id.* at 1270 (quoting
17 *Rhodes v. Robinson*, 408 F.3d at 568 n.11).

18 Here, Plaintiff's allegations are sufficient because it can be inferred that having
19 a false misconduct report placed in the prison's records and the accompanying threat
20 of future consequences would discourage an ordinary person from filing any further
21 grievances. The Court therefore finds that Plaintiff sufficiently pled a "chilling effect."
22 As a result, Defendants' Motion to Dismiss must be **DENIED** to the extent it seeks
23 dismissal of Plaintiff's retaliation claims for failure to plead facts to establish that
24 Defendants' action chilled the exercise of his First Amendment rights.

25 **5. Legitimate Penological Interest.**

26 "[A] successful retaliation claim requires a finding that 'the prison authorities'
27 retaliatory action did not advance legitimate goals of the correctional institution or was
28 not tailored narrowly enough to achieve such goals.' [citation omitted.]" *Pratt*, 65 F.3d

1 at 806. “The plaintiff bears the burden of pleading and proving the absence of
2 legitimate correctional goals for the conduct of which he complains.” *Id.* At the
3 pleading stage, it is sufficient for an inmate to allege that a prison official’s actions
4 were retaliatory and were “arbitrary and capricious” or “that they were ‘unnecessary
5 to the maintenance of order in the institution.’” *Watison*, 668 F.3d at 1114-15. In
6 *Watison v. Carter*, the Ninth Circuit concluded the inmate implicitly pled the absence
7 of a legitimate penological reason for the alleged adverse actions by claiming that, in
8 retaliation for his filing of prison grievances, the defendant prison officials filed a
9 “false disciplinary complaint;” made “false statements to the parole board;” and
10 threatened to punch the inmate. *Id.* at 1115-1116 (emphasis in original).

11 Defendants do not argue that Plaintiff’s retaliation claims should be dismissed
12 because he failed to allege that Defendants’ action did not advance legitimate
13 correctional goals. The Court notes that Plaintiff has only alleged in summary fashion
14 that Defendants’ retaliatory actions did not serve legitimate penological goals.
15 However, Plaintiff has implicitly pled this element. From the allegations in the Second
16 Amended Complaint, it can be inferred that Plaintiff contends that Defendants filed
17 “false” misconduct charges against him which could not serve any legitimate
18 penological goal. [Doc. No. 6, at pp. 8, 10, 13.]

19 C. Sovereign Immunity.

20 Defendants contend that Plaintiff has sued them for monetary damages in their
21 official capacities but the Eleventh Amendment does not permit damages claims
22 against state officers in their official capacities. As a result, they seek dismissal of
23 these claims under the Eleventh Amendment. A review of the Second Amended
24 Complaint reveals that Strayhorn and Luna were sued in their individual capacities and
25 in their official capacities. [Doc. No. 6, at p. 2.] Plaintiff seeks \$250,000 in damages
26 and \$250,000 in punitive damages. [Doc. No. 6, at p. 20.]

27 The Eleventh Amendment prohibits damage actions against state officials acting
28 in their official capacities. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 &

1 n. 10 (1989); *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992). However, the
2 Eleventh Amendment does not bar actions against state officers in their personal
3 capacities. *Pena*, 976 F.2d at 472-473.

4 Based on the foregoing, the Eleventh Amendment bars Plaintiff from seeking
5 money damages against Defendants in their official capacities. In addition, there is no
6 possibility that Plaintiff could can amend his Second Amended Complaint to plead
7 facts sufficient to overcome the Eleventh Amendment bar to a suit for money damages
8 against a state actor in his official capacity. *See Silva v. Di Vittorio*, 658 F.3d 1090,
9 1105 (9th Cir. 2011) (stating that a district court should grant a pro se plaintiff leave
10 to amend “even if no request to amend the pleading was made, unless it determines that
11 the pleading could not possible be cured by the allegation of other facts”).
12 Accordingly, the Court finds that Plaintiff’s claims for money damages against
13 Defendants in their official capacities must be **DISMISSED** with prejudice and without
14 leave to amend.

15 **III. Conclusion**

16 For the foregoing reasons, Defendants’ Motion to Dismiss the Second Amended
17 Complaint is **GRANTED** in part and **DENIED** in part as follows:

18 1. Defendants’ Motion to Dismiss is **GRANTED** to the extent it seeks
19 dismissal of Plaintiff’s claims for monetary damages based on the Eleventh
20 Amendment. Plaintiff’s claims against Defendants for monetary damages in their
21 official capacities are **DISMISSED** with prejudice and without leave to amend.

22 2. Defendants’ Motion to Dismiss is **DENIED** to the extent it seeks dismissal
23 of Plaintiff’s retaliation claims against Strayhorn and Luna.

24 **IT IS SO ORDERED.**

25
26 Date: 9/3, 2014

27 
28 HON. ROGER T. BENITEZ
United States District Judge