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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 RONALD EARL GADSDEN,
12 CDCR # BJ-7048,

13 Plaintiff,

14 v.

15 Deputy Sheriff J. Gehris and
16 Deputy Sheriff M. McGrath,

17 Defendants.

Case No.: 20cv0470-WQH (DEB)

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

[ECF No. 8]

18 Plaintiff Ronald Earl Gadsden is proceeding *pro se* and *in forma pauperis* with a
19 civil rights Complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.) He alleges that while
20 incarcerated at the George Bailey Detention Facility (“GBDF”) in San Diego, California,
21 his First Amendment right to petition for the redress of his grievances was violated by his
22 placement in disciplinary segregation for six days based on false charges in retaliation for
23 complaining about missing a video visit with his girlfriend (claim one), and his Fourteenth
24 Amendment right to due process was violated by the lack of notice and opportunity to be
25 heard in the ensuing disciplinary proceedings (claim two). (*Id.* at 3-4.)

26 Currently pending before the Court is a Motion to Dismiss the Complaint by
27 Defendants San Diego County Sheriff’s Deputies J. Gehris and M. McGrath, the only
28 remaining Defendants in this action. (ECF No. 8.) They contend the Complaint fails to

1 adequately allege they personally participated in or caused any constitutional violations,
2 that Plaintiff's speech was chilled, that there was an absence of a legitimate correctional
3 goal in the alleged retaliatory actions, or that the conditions in disciplinary segregation
4 were significantly different than the conditions in general population necessary to create a
5 liberty interest protected by due process. (*Id.* at 5-11.)

6 Plaintiff has filed an Opposition. (ECF No. 11.) He presents additional allegations
7 of personal participation by the Defendants in the alleged constitutional violations, requests
8 judicial notice of documents attached to the Opposition, and argues he has plausibly alleged
9 constitutional violations. (*Id.* at 1-28.) Defendants reply that any factual allegations in the
10 Opposition which are not contained in the Complaint are not properly before the Court on
11 a motion to dismiss, object to Plaintiff's request for judicial notice on the ground he has
12 not shown the documents attached to his Opposition contain facts which can be judicially
13 noticed under the Federal Rules of Evidence, and argue the Opposition contains legal
14 conclusions insufficient to support the claims. (ECF No. 12 at 1-4.)

15 For the following reasons, the Court **GRANTS** in part Defendants' Motion to
16 Dismiss and **DISMISSES** Plaintiff's First Amendment claim against Defendant Gehris
17 and Plaintiff's Fourteenth Amendment claim against both Defendants. The Court **DENIES**
18 in part the Motion to Dismiss as to Plaintiff's First Amendment claim against Defendant
19 McGrath. Plaintiff is **GRANTED** leave to file an amended complaint to cure the pleading
20 defects identified in this Order, if he wishes to attempt to do so. If Plaintiff chooses not to
21 amend his Complaint, this matter will proceed with the only remaining claim in the
22 Complaint against the only remaining Defendant, a First Amendment retaliation claim
23 against Defendant McGrath.¹

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26 ¹ Although this matter was randomly referred to United States Magistrate Judge Daniel E.
27 Butcher pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has determined that neither a
28 Report and Recommendation nor oral argument is necessary for the disposition of this
matter. *See* S.D. Cal. Civ.L.R. 72.1(d).

1 **I. Procedural History**

2 Plaintiff initiated this action by filing a *pro se* civil rights Complaint on March 12,
3 2020, pursuant to 42 U.S.C. § 1983, accompanied by an application to proceed *in forma*
4 *pauperis* pursuant to 28 U.S.C. § 1915. (ECF Nos. 1-2.) He named as Defendants San
5 Diego County, San Diego County Sheriff William Gore, and San Diego County Sheriff's
6 Deputies O'Dell, Gehris and McGrath. (ECF No. 1.)

7 On May 5, 2020, the Court granted Plaintiff's *in forma pauperis* application. (ECF
8 No. 3.) The Court at that time screened the Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)
9 and 1915A(b), and found it failed to state a claim against Defendants Sheriff Gore, Deputy
10 Sheriff O'Dell and the County of San Diego. (*Id.* at 3-12.) The Court found the Complaint
11 survived screening as to a First Amendment retaliation claim against Defendants Gehris
12 and McGrath alleging Plaintiff was falsely charged and placed in segregation in retaliation
13 for complaining about missing a video visit, and a Fourteenth Amendment due process
14 claim against those two Defendants alleging they failed to provide due process in
15 connection to the ensuing disciplinary hearing. (*Id.*) The Court directed the United States
16 Marshal to effect service of the summons and Complaint on Defendants Gehris and
17 McGrath, the only remaining Defendants in this action. (*Id.* at 13.)

18 On July 16, 2020, Defendants Gehris and McGrath filed the instant Motion to
19 Dismiss the Complaint. (ECF No. 8.) Plaintiff filed an Opposition on August 18, 2020
20 (ECF No. 11) and Defendants filed a reply on August 24, 2020. (ECF No. 12.)

21 **II. Allegations in the Complaint**

22 Plaintiff alleges in claim one that on the evening of February 15, 2019, while housed
23 at GBDF, he was awaiting a scheduled video visit with his girlfriend. (ECF No. 1 at 3.)
24 Although all visits had been running on time that evening, he was not released from his
25 cell for the visit. (*Id.*) He informed Defendant Deputy Sheriff Sergeant McGrath about
26 the visit five minutes before its scheduled time and again three minutes past the scheduled
27 time, but Defendant "McGrath did not comply." (*Id.*) Plaintiff waited another five minutes
28 before informing Defendant McGrath for a third time he was scheduled for a video visit,

1 at which time Defendant McGrath told Plaintiff his visit had been cancelled. (*Id.*) Plaintiff
2 states he learned from an acting trustee named William “that my visit had not been
3 cancelled because your name was still on the kiosk meaning I still had time left to visit.”
4 (*Id.*) He instructed William to call Plaintiff’s girlfriend, and as a result Plaintiff’s girlfriend
5 called the jail and complained on behalf of herself and Plaintiff. (*Id.*) Defendant McGrath
6 immediately thereafter told Plaintiff: “Now your visit is really cancelled.” (*Id.*) Plaintiff
7 then asked Defendant McGrath for a complaint form. (*Id.*) Two hours later, Defendant
8 McGrath asked Plaintiff if he still wanted a complaint form, and when Plaintiff said “yes,”
9 Defendant McGrath told Plaintiff to “roll up his property for transfer.” (*Id.*) Plaintiff states
10 he was taken to “the hold,” referring to the Secure Housing Unit (“SHU”), “without ever
11 being informed of the charges and found guilty of charges without even having a hearing.”
12 (*Id.*) He states he was in the SHU for six days in the same cell as a suicidal military veteran
13 and was not permitted to shower although he requested one every day. (*Id.* at 3-5.)

14 Plaintiff alleges in claim two that on February 18, 2019, Defendant Deputy Sheriff
15 Sergeant Gehris “falsified [a] disciplinary hearing without Plaintiff being present or
16 [previously notified] of any hearing on the charges,” at which he was found guilty of
17 disrespect of staff, boisterous activity and interfering with jail operations. (*Id.* at 4.) He
18 claims he was denied his rights to written notice of the charges 24 hours prior to appearing
19 before a hearing officer, to call witnesses, and to be advised of the results at the time of the
20 hearing. (*Id.*) He alleges that when he was released from the SHU on February 22, 2019,
21 he was given a copy of the Sheriff’s Department Incident Report, attached to the Complaint
22 as Exhibit A, which he notes was not printed until February 19, 2019, and contends it was
23 therefore impossible for him to have had notice of the February 18, 2019 disciplinary
24 hearing. (*Id.*) He attaches as Exhibit B to the Complaint responses he received from the
25 Internal Affairs Unit of the San Diego County Sheriff’s Office and from the Claims and
26 Investigation Division of the Office of the San Diego County Counsel to complaints he
27 filed with those agencies about the lack of due process in the disciplinary proceedings. (*Id.*
28 at 12-19.)

1 The Complaint alleges two claims: (1) a First Amendment claim against Defendants
2 Gehris and McGrath based on allegations Plaintiff was placed in the SHU and subjected to
3 disciplinary proceedings on false charges in retaliation for requesting a complaint form and
4 having his girlfriend call and complain about missing their video visit, and (2) a Fourteenth
5 Amendment due process claim against Defendants Gehris and McGrath based on
6 allegations of the lack of due process in the disciplinary hearing. (ECF No. 3 at 6-7.)

7 **III. Defendants' Motion to Dismiss**

8 Defendants move to dismiss both claims. (ECF No. 8.) They contend Plaintiff has
9 not stated a Fourteenth Amendment due process claim because six days in disciplinary
10 segregation is not a sufficient duration to create an atypical and significant hardship in
11 relation to the ordinary incidents of his incarceration necessary to create a liberty interest
12 protected by federal due process, and there are insufficient allegations of their personal
13 participation in the alleged denial of due process in the disciplinary hearing. (*Id.* at 5-8.)
14 They contend Plaintiff has not stated a First Amendment retaliation claim because there
15 are insufficient allegations: (1) their alleged retaliatory actions caused the alleged due
16 process violation, (2) of an absence of a legitimate correctional goal in their alleged
17 retaliatory actions, (3) that Petitioner's speech was chilled, and (4) either Defendant
18 personally participated in the alleged retaliatory conduct. (*Id.* at 8-11.)

19 Plaintiff presents additional allegations in his Opposition. He alleges there were two
20 video consoles available on the evening of his scheduled video visit, one reserved for his
21 visit with his girlfriend, and that Defendant McGrath allowed another inmate to use the
22 other console for a visit that evening but not Plaintiff, showing "bias." (ECF No. 11 at 4-
23 5.) He claims that Defendant "McGrath's goal was to punish and silence Gadsden, plus
24 terrorize onlooking inmates by using greenwall scare tactics, and sending Plaintiff to
25 disciplinary isolation for requesting an Internal Affairs complaint form." (*Id.* at 7.)
26 Plaintiff alleges that while in the SHU he "was denied mail, shower and a disciplinary
27 hearing" by Defendant Gehris, who also used "greenwall scare tactics in order to terrorize
28 onlooking inmates and discourage both Plaintiff and witnesses from using Internal Affairs

1 complaint forms.” (*Id.* at 7-8.) He contends he was ordered to be placed in disciplinary
2 isolation but Defendant Gehris placed him in a cell with a suicidal military veteran to
3 further intimidate him, which, along with his inability to shower and the lack of mail,
4 created atypical and significant hardships compared to housing in the general population.
5 (*Id.* at 8.)

6 Plaintiff attaches a request for judicial notice to his Opposition. (*Id.* at 10-27.) He
7 requests judicial notice of Exhibit A, the same Sheriff’s Department Incident Report
8 attached to the Complaint as Exhibit A. (*Id.* at 10, 14-16.) It states he was charged with
9 “Disrespect to Staff, Boisterous Activities and Interfering w/Jail Operations” based on the
10 February 15, 2019 incident, which Defendant McGrath described in the report:

11 At approximately 18:50 hours, I was logging a safety check and soft
12 count started. The intercom was ringing from several video visits and inmates
13 with questions. I answered the calls in the order they were received. The last
14 call received was cell 241. As soon as the intercom was turned on, Inmate
15 Gadsden demanded the cell door be opened. I responded with, “Excuse me?”
he again demanded the door be opened, shouting “let me out now!”

16 I explained to Gadsden if he has a video visit he needs to ask
17 respectfully to be let out and to call me back when he can do so. Gadsden
18 called back immediately and demanded his video visit again, stating I was not
19 releasing him and I have done this to him three times. Gadsden continued
shouting over the intercom, “Fuck this, I need an IA form.”

20 (*Id.* at 15.)

21 The Incident Report concludes with a list of rights Plaintiff has with respect to the
22 charges. (*Id.* at 15-16.) Plaintiff requests judicial notice of a notation on the incident report
23 that it was printed on February 19, 2019 at 7:03 p.m., which he contends is the day after
24 his disciplinary hearing was held. (*Id.* at 10.) Plaintiff requests judicial notice of Exhibit
25 B, a United States Postal Service delivery confirmation form which he contends shows his
26 Internal Affairs complaint was sent to the Internal Affairs Unit by his girlfriend on
27 February 15, 2019, and Exhibit C, the process receipt and return forms used to effect
28 service of the summons and Complaint on Defendants Gehris and McGrath. (*Id.* at 18-21.)

1 He contends without explanation that Exhibits B and C establish a causal connection
2 between the Defendants and the alleged constitutional violations. (*Id.* at 6.) Finally, he
3 seeks judicial notice of Exhibit D, a complaint he filed with the Internal Affairs Unit of the
4 San Diego County Sheriff's Department alleging that his arrest which led to his
5 incarceration at GBDF was based on racial profiling, which he contends in his Complaint
6 here is "the basis for all of [the Defendants'] retaliatory and constitutional rights violations
7 against" him. (*Id.* at 4, 23-27.)

8 Defendants reply that any factual allegations in the Opposition which are not
9 contained in the Complaint are not properly before the Court on a motion to dismiss, and
10 that the Opposition does not contain any legal citations but merely legal conclusions and
11 threadbare recitals of the elements of the causes of action insufficient to withstand a motion
12 to dismiss. (ECF No. 12 at 1-4.) Defendants object to Plaintiff's request for judicial notice
13 on the ground he has not shown the documents contain facts which can be judicially noticed
14 under Rule 201(b) of the Federal Rules of Evidence. (*Id.* at 2-3.)

15 **1. Legal Standards**

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss
17 on the grounds that a complaint "fail[s] to state a claim upon which relief can be granted."
18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal
19 sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "To survive
20 a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to
21 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678
22 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

23 A claim is facially plausible "when the plaintiff pleads factual content that allows
24 the court to draw the reasonable inference that the defendant is liable for the misconduct
25 alleged." *Iqbal*, 556 U.S. at 678. Plausibility requires pleading facts, as opposed to
26 conclusory allegations or the "formulaic recitation of the elements of a cause of action."
27 *Twombly*, 550 U.S. at 555. The factual allegations must rise above the mere conceivability
28 or possibility of unlawful conduct. *Iqbal*, 556 U.S. at 678-79.

1 “Factual allegations must be enough to raise a right to relief above the speculative
2 level.” *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of
3 action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.
4 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual
5 content,’ and reasonable inferences [drawn] from that content, must be plausibly suggestive
6 of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
7 (9th Cir. 2009), quoting *Iqbal*, 556 U.S. at 678.

8 **2. First Amendment Retaliation Claim**

9 Plaintiff claims his First Amendment right to petition for the redress of grievances
10 was violated when Defendant McGrath: (1) cancelled his video visit in retaliation for his
11 girlfriend calling and complaining that Defendant McGrath failed to ensure they were
12 allowed their scheduled video visit, and (2) placed Plaintiff in the SHU on false charges in
13 retaliation for asking for an Internal Affairs complaint form. (ECF No. 1 at 3.) Plaintiff
14 states he was placed in the SHU on February 15, 2019 for six days without showering and
15 in a cell with a suicidal inmate based on false charges of disrespect to staff, boisterous
16 activity and interfering with jail operations. (*Id.* at 3-5.) He alleges Defendant Gehris
17 “falsified [a] disciplinary hearing” on those charges on February 18, 2019, that he did not
18 receive a copy of the Incident Report attached as Exhibit A to the Complaint until he was
19 released from the SHU on February 21, 2019, and that he noticed the report had been
20 printed on February 19, 2019, making it impossible for him to have been given notice of
21 the hearing prior to it taking place on February 18, 2019. (*Id.* at 4.)

22 “Prisoners have a First Amendment right to file grievances against prison officials
23 and to be free from retaliation for doing so.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th
24 Cir. 2012). “Within the prison context, a viable claim of First Amendment retaliation
25 entails five basic elements: (1) An assertion that a state actor took some adverse action
26 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action
27 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
28 reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559,

1 567-68 (9th Cir. 2005). The adverse action need not be an independent constitutional
2 violation. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995); *see also Gomez v. Vernon*,
3 255 F.3d 1118, 1127 (9th Cir. 2001) (“[A] retaliation claim may assert an injury no more
4 tangible than a chilling effect on First Amendment rights.”) The Complaint must allege a
5 retaliatory motive, that is, a causal connection between the adverse action and the protected
6 conduct. *Watison*, 668 F.3d at 1114-15.

7 Plaintiff has adequately alleged the first element because the filing of an inmate
8 complaint is protected conduct. *Rhodes*, 408 F.3d at 568; *Watison*, 668 F.3d at 1114
9 (“Prisoners have a First Amendment right to file grievances against prison officials and to
10 be free from retaliation for doing so.”) He has also satisfied the second element, as he has
11 alleged his placement in the SHU by Defendant McGrath and the subsequent allegedly
12 “falsified” disciplinary hearing by Defendant Gehris constitute “adverse action.” *See e.g.*
13 *Stevenson v. Harmon*, No. 07-CV-1619 W (NLS), 2009 WL 10700432, at *4 (S.D. Cal.
14 July 30, 2009) (noting that prison disciplinary proceedings constitute adverse action),
15 *report and recommendation adopted*, No. 07-CV-1619 W (NLS), 2009 WL 10700476
16 (S.D. Cal. Aug. 25, 2009), *aff’d*, 399 F. App’x 274 (9th Cir. 2010).

17 Defendants do not contest those two elements, but first argue the Complaint does
18 not adequately allege Plaintiff’s First Amendment activity was chilled by Defendant’s
19 alleged actions. To satisfy this element, Plaintiff must allege facts from which a plausible
20 inference could be drawn that the “official’s acts would chill or silence a person of ordinary
21 firmness from future First Amendment activities.” *Rhodes*, 408 F.3d at 568-69 (internal
22 quotation marks and emphasis omitted). Plaintiff has plausibly alleged that a person of
23 ordinary firmness would feel a chilling effect from being placed in the SHU for six days
24 with a suicidal cellmate and thereafter convicted of several false charges at a disciplinary
25 hearing which did not take place, merely for requesting a complaint form. *See Watison*,
26 668 F.3d at 1114-16 (holding that allegations of placement in segregation on false
27 disciplinary charge and lying to parole board would have chilled or silenced a person of
28 ordinary firmness).

1 Defendants next contend the Complaint fails to plausibly allege the lack of a
2 legitimate correctional goal in their alleged adverse actions. To satisfy this element of a
3 retaliation claim, Plaintiff must allege “the prison authorities’ retaliatory action did not
4 advance legitimate goals of the correctional institution.” *Rizzo v. Dawson*, 778 F.2d 532,
5 532 (9th Cir. 1985); *see also Watison*, 668 F.3d at 1114-15. Assuming the allegations in
6 the Complaint can be proven, that Plaintiff was placed in the SHU and falsely charged and
7 convicted in a disciplinary hearing which never took place, all on the pretext of retaliating
8 against him for asking for a complaint form, he plausibly alleges the absence of a legitimate
9 correctional goal of placement in the SHU and the denial of due process in the disciplinary
10 hearing. *See Watison*, 668 F.3d at 1115 (holding that allegations of false disciplinary
11 proceedings initiated in retaliation were sufficient to allege the absence of a legitimate
12 correctional goal); *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992) (“When prison
13 officials limit an inmate’s efforts to defend himself, they must have a legitimate
14 penological reason.”)

15 Defendants finally contend the Complaint contains insufficient allegations of a
16 causal connection between their actions and the actions allegedly taken against Plaintiff.
17 With respect to the causation element, because direct evidence of retaliatory intent is
18 typically outside a plaintiff’s personal knowledge and therefore can rarely be pleaded in a
19 complaint, alleging “a chronology of events from which retaliation can be inferred is
20 sufficient to survive dismissal.” *Watison*, 668 F.3d at 1114.

21 Plaintiff alleges that immediately after his girlfriend called GBDF and complained
22 on behalf of herself and Plaintiff that they were not allowed to have their video visit,
23 Defendant McGrath told him: “Now your visit is really cancelled.” (ECF No. 1 at 3.)
24 Plaintiff alleges he immediately asked Defendant McGrath for a complaint form, and two
25 hours later, when Defendant McGrath asked Plaintiff if he still wanted a complaint form
26 and Plaintiff said “yes,” Defendant McGrath told him to “roll up his property for transfer.”
27 (*Id.*) With the addition of the allegation that he was placed in the SHU on false, pretextual
28 charges, the allegation that Defendant McGrath acted with a retaliatory motive is facially

1 plausible because the Complaint pleads “a chronology of events from which retaliation can
2 be inferred,” it plausibly alleges that the adverse action (placement in the SHU on
3 fabricated charges) was taken in retaliation for his protected activity (asking for a complaint
4 form). *Watison*, 668 F.3d at 1114.

5 As to Defendant Gehris, however, there are no allegations in the Complaint that
6 when he allegedly falsified a disciplinary hearing he was aware the charges against Plaintiff
7 were false and a pretext for retaliation against him for asking Defendant McGrath for a
8 complaint form. Although it may seem plausible to Plaintiff that the only reason Defendant
9 Gehris would have “falsified [a] disciplinary hearing” on false charges brought by
10 Defendant McGrath was because they shared a retaliatory motive, other than the timing of
11 the events there are no *facts* alleged that Defendant Gehris acted with a retaliatory motive,
12 and reliance on the timing of events is insufficient by itself to satisfy the causation element.
13 *See Pratt*, 65 F.3d at 808 (holding that timing “can properly be considered as circumstantial
14 evidence of retaliatory intent,” but finding timing insufficient where there was “little else
15 to support the inference” of retaliation.)

16 In his Opposition, Plaintiff presents allegations not contained in the Complaint that
17 Defendant Gehris cooperated in and shared Defendant McGrath’s goal to punish and
18 silence him by using “greenwall scare tactics in order to terrorize onlooking inmates and
19 discourage both Plaintiff and witnesses from using Internal Affairs complaint forms.”
20 (ECF No. 11 at 7-8.) He contends he was supposed to be placed in disciplinary isolation
21 but Defendant Gehris placed him in a cell with a suicidal military veteran to further
22 intimidate him, and that Defendant Gehris is responsible for Plaintiff not receiving mail or
23 a shower while in the SHU. (*Id.*)

24 Any new allegations presented in opposition to a motion to dismiss are not properly
25 before the Court. *See Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197
26 n.1 (9th Cir. 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court *may*
27 *not* look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in
28 opposition to a defendant’s motion to dismiss.”) Nevertheless, the new allegation that

1 Defendant Gehris shared Defendant McGrath's retaliatory motive is vague and conclusory,
2 in that it does not contain a factual basis as to how Plaintiff knows they shared that motive.
3 "Vague and conclusory allegations of official participation in civil rights violations are not
4 sufficient to withstand a motion to dismiss." *Ivey v. Board of Regents of the University of*
5 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). The same is true with the new allegation that
6 Defendant Gehris was the person who denied Plaintiff mail and showers while he was in
7 the SHU. Without a factual basis for how Plaintiff knows these allegations are true they
8 are insufficient to allege Defendant Gehris directly participated in the allegedly retaliatory
9 conduct. *See Pratt*, 65 F.3d at 807-08 (concluding that, in the absence of factual allegations
10 to the contrary, it would be "sheer speculation" to assume that prison officials were aware
11 of an inmate's First Amendment activity and retaliated on that basis). The "mere
12 possibility of misconduct" falls short of meeting the *Iqbal* plausibility standard. *Iqbal*, 556
13 U.S. at 679. There are no factual allegations in the Complaint which plausibly allege
14 Defendant Gehris knew the charges were false and retaliatory, and the allegations in the
15 Complaint are nonexistent with respect to whether Defendant Gehris acted with a
16 retaliatory motive when he allegedly "falsified" the disciplinary hearing.

17 In sum, Plaintiff has plausibly alleged a First Amendment retaliation claim against
18 Defendant McGrath, and the motion to dismiss that claim is **DENIED**. Plaintiff has failed
19 to plausibly allege a First Amendment retaliation claim against Defendant Gehris, and the
20 motion to dismiss that claim is **GRANTED**. Plaintiff is granted leave to amend to attempt
21 to cure the pleading deficiencies with respect to his First Amendment retaliation claim
22 against Defendant Gehris, or he may proceed only with his First Amendment retaliation
23 claim against Defendant McGrath. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir.
24 2015) ("A district court should not dismiss a pro se complaint without leave to amend
25 unless 'it is absolutely clear that the deficiencies of the complaint could not be cured by
26 amendment.'"), quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

27 3. Fourteenth Amendment Due Process Claim

28 Plaintiff claims in count two of the Complaint that on February 18, 2019, Defendant

1 Gehris “falsified [a] disciplinary hearing without Plaintiff being present or [previously
2 notified] of any hearing on the charges.” (ECF No. 1 at 4.) Plaintiff states that while he
3 was in the SHU, without being informed that any charges were brought, he was found
4 guilty of disrespect to staff, boisterous activity and interfering with jail operations. (*Id.*)
5 He alleges that when he was released from the SHU on February 22, 2019, he was given a
6 copy of the incident report, attached to the Complaint as Exhibit A, which he noticed was
7 printed on February 19, 2019, making it impossible for him to have had notice of the
8 charges or of the February 18, 2019 disciplinary hearing. (*Id.*) Plaintiff alleges he was not
9 permitted to shower while he was in the SHU although he requested one every day and was
10 placed in the same cell as a suicidal veteran. (*Id.* at 4-5.) He claims he was denied his
11 rights in connection to the disciplinary hearing with respect to written notice of the charges
12 at least 24 hours prior to appearing before a hearing officer, to call witnesses at the hearing,
13 and to be advised of the results at the time of the hearing. (*Id.* at 4.)

14 The Fourteenth Amendment provides that “[n]o state shall . . . deprive any person of
15 life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. “The
16 requirements of procedural due process apply only to the deprivation of interests
17 encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd. of*
18 *Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). “To state a procedural due
19 process claim, [a plaintiff] must allege ‘(1) a liberty or property interest protected by the
20 Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of
21 process.’” *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000), quoting *Portman v. Cty.*
22 *of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). A prisoner is entitled to certain due
23 process protections when he is charged with a disciplinary violation. *Serrano v. Francis*,
24 345 F.3d 1071, 1077 (9th Cir. 2003), citing *Wolff v. McDonnell*, 418 U.S. 539, 564-571
25 (1974).—“Such protections include the rights to call witnesses, to present documentary
26 evidence and to have a written statement by the fact-finder as to the evidence relied upon
27 and the reasons for the disciplinary action taken.” *Id.* at 1077-78; *see also Wolff*, 418 U.S.
28 at 566 (explaining that an inmate must be afforded an opportunity “to call witnesses and

1 present documentary evidence in his or her defense when permitting him to do so will not
2 be unduly hazardous to institutional safety or correctional goals.”)

3 The Complaint adequately alleges Plaintiff did not receive the *Wolff* procedural
4 protections. However, those protections “adhere only when the disciplinary action
5 implicates a protected liberty interest in some ‘unexpected matter’ or imposes an ‘atypical
6 and significant hardship on the inmate in relation to the ordinary incidents of prison life.”
7 *Serrano*, 345 F.3d at 1078, quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The level
8 of hardship necessary to show a liberty interest must be determined on a case-by-case basis,
9 and “[i]n *Sandin*’s wake the Courts of Appeals have not reached consistent conclusions for
10 identifying the baseline from which to measure what is atypical and significant in any
11 particular prison system.” *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). “[T]he
12 touchstone of the inquiry into the existence of a protected, state-created liberty interest in
13 avoiding restrictive conditions of confinement is not the language of regulations regarding
14 those conditions but the nature of those conditions themselves ‘in relation to the ordinary
15 incidents of prison life.” *Id.*, quoting *Sandin*, 515 U.S. at 484. Due process protections
16 also attach “where the State’s action will inevitably affect the duration of [a] sentence.”
17 *Sandin*, 515 U.S. at 487.

18 Defendants first contend Plaintiff has failed to allege they personally participated in
19 the alleged violation of due process. *See Iqbal*, 556 U.S. at 676 (noting that in a § 1983
20 action “a plaintiff must plead that each Government-official defendant, through the
21 official’s own individual actions, has violated the Constitution.”) Plaintiff plausibly alleges
22 Defendant Gehris personally participated by holding the “fraudulent” disciplinary hearing,
23 and Defendant McGrath personally participated by placing him in the SHU based on false
24 charges in retaliation for asking for a complaint form.

25 Defendants next contend Plaintiff has not alleged the conditions in the SHU were
26 any different than the general population, and that six days in segregation is insufficient to
27 create a liberty interest. (ECF No. 8-1 at 5, citing *Sandin*, 515 U.S. at 485 (holding that
28 placement in administrative segregation for thirty days did not impose an atypical and

1 significant hardship).) Plaintiff alleges in the Complaint he was housed in the SHU based
2 on false charges for six days starting on February 15, 2019, with a suicidal cellmate, and
3 during his stay he was not allowed a shower and was fraudulently convicted of disciplinary
4 infractions. (ECF No. 1 at 3.) The allegation of the filing of false disciplinary charges by
5 itself does not state a claim under 42 U.S.C. § 1983 because federal due process protections
6 are contained in the ensuing disciplinary proceedings themselves. *See Atherley v. Kernan*,
7 No. 3:19-cv-02355-LAB-KSC, 2020 WL 2079374, at *11 (S.D. Cal. Apr. 29, 2020). The
8 duration of the stay is a factor to be considered. *See Sandin*, 515 U.S. 486-87 (holding that
9 thirty days in administrative segregation did not impose an atypical and significant
10 hardship). The duration here, six days, is not enough by itself, as district courts in
11 California have found that administrative segregation stays of five days, of five months,
12 and of nearly two years failed to allege atypical and significant hardships within the
13 meaning of *Sandin*. *See e.g. Hernandez v. Constable*, No. 2:19-cv-2195 MCE DB P, 2020
14 WL 2145387, at *3 (E.D. Cal. Feb. 21, 2020) (collecting cases), *report and*
15 *recommendation adopted*, No. 2:19-cv-2195 MCE DB P, 2020 WL 2126893 (E.D. Cal.
16 May 5, 2020). As to the refusal of his requests to shower, Exhibit B attached to the
17 Complaint, a July 15, 2019 letter from the Internal Affairs Unit of the San Diego County
18 Sheriff's Department, states that Plaintiff was logged in as having refused a shower on
19 February 19, 2019, and that on February 15, 16 and 20, 2019, he was offered laundry
20 exchange.² (*Id.* at 13.) There are no facts alleged in the Complaint which plausibly allege
21 a change in confinement that imposed an "atypical and significant hardship" on Plaintiff
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23
24 ² In deciding whether Plaintiff has stated a plausible claim for relief, the Court may
25 consider exhibits attached to his Complaint. *See* FED.R.CIV.P. 10(e) ("A copy of a written
26 instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Hal*
27 *Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990),
28 citing *Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978)
("[M]aterial which is properly submitted as part of the complaint may be considered" in
ruling on a Rule 12(b)(6) motion to dismiss).

1 such that the protections of *Wolff* apply.

2 The same is true even were the Court to consider Plaintiff's additional allegations in
3 his Opposition, or his request for judicial notice, that the conditions in the SHU imposed
4 an atypical and significant hardship on him in relation to the general population because
5 he was ordered to be in security *isolation* but was housed with a mentally ill inmate and
6 because his mail was not delivered. (ECF No. 11 at 8.) "Both the conditions and their
7 duration must be considered, since exceptionally harsh conditions endured for a brief
8 interval and somewhat harsh conditions endured for a prolonged interval might both be
9 atypical." *Sealer v. Giltner*, 197 F.3d 578, 586 (2nd Cir. 1999) (internal quote marks and
10 citation omitted). Plaintiff has not alleged exceptionally harsh conditions in the SHU to
11 plausibly infer that his short stay there subjected him to atypical and significant hardships.

12 Because Plaintiff has failed to allege that the six days he spent in the SHU exposed
13 him to atypical and significant hardships in relation to the ordinary incidents of prison life,
14 he has failed to plausibly allege a liberty interest protected by federal due process with
15 respect to his placement in the SHU, and therefore his allegations of a failure to receive
16 due process in the subsequent disciplinary proceedings does not state a claim upon which
17 relief may be granted. The motion to dismiss Plaintiff's Fourteenth Amendment due
18 process claim is **GRANTED** with respect to both Defendants Gehris and McGrath. As
19 with the First Amendment claim, the dismissal is with leave to amend if Petitioner wishes
20 to file an amended complaint.

21 **IV. CONCLUSION AND ORDER**

22 Based on the foregoing, the Court **GRANTS** in part Defendants' Motion to Dismiss
23 pursuant to Fed. R. Civ. P. 12(b)(6) with respect to Plaintiff's First Amendment retaliation
24 claims against Defendant Gehris and Plaintiff's First Amendment retaliation claim against
25 Defendants Gehris and McGrath. Those claims are **DISMISSED** with leave to amend.
26 The Court **DENIES** Defendants' motion to dismiss Plaintiff's First Amendment retaliation
27 claim against Defendant McGrath. Plaintiff is **GRANTED** leave to amend his Complaint
28 within thirty (30) days from the date this Order is filed. If Plaintiff does not file a First

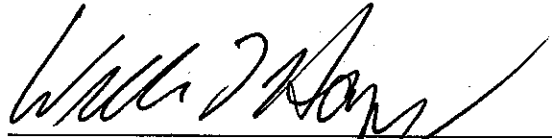
1 Amended Complaint, this action will proceed with the only remaining claim in the
2 Complaint against the only remaining Defendant, Plaintiff's First Amendment claim
3 against Defendant McGrath. If Plaintiff does not file an amended complaint, Defendant
4 McGrath's Answer to the Complaint is due sixty (60) days from the date of this Order.

5 Any amended complaint must be complete by itself without reference to his original
6 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint
7 will be considered waived. *See* S.D. Cal. Civ.L.R. 15.1; *Hal Roach Studios, Inc.*, 896 F.2d
8 at 1546 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cty.*, 693
9 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are
10 not re-alleged in an amended pleading may be “consider[ed] . . . waived if not repl[ea]d.”)

11 **IT IS SO ORDERED.**

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14 Dated:

9/25/20

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16 Hon. William Q. Hayes
17 United States District Judge
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