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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 CARLOS HENDON,

12 Plaintiff,

13 v.

14 I. BAROYA, et al.,

15 Defendants.

Case No. 1:05-cv-01247-SAB-PC

ORDER GRANTING DEFENDANTS'  
MOTIONS FOR SUMMARY JUDGMENT

(ECF NOs. 177, 179)

ORDER DENYING AS MOOT  
PLAINTIFF'S MOTIONS IN LIMINE

(ECF NOs. 183, 187, 189)

17 Plaintiff Hendon is appearing pro se and in forma pauperis in this civil rights action  
18 pursuant to 42 U.S.C. § 1983. The parties have consented to magistrate judge jurisdiction  
19 pursuant to 28 U.S.C. § 636(c).<sup>1</sup> Pending before the Court are motions for summary judgment  
20 filed by Defendants Baroya, Hoppe, Nguyet and Riedman (ECF No. 177) and Defendant Pham  
21 (ECF No. 179). The motions were filed on September 25, 2014. Plaintiff's opposition was filed  
22 on December 9, 2015. (ECF No. 210). Defendants filed their replies on December 16, 2015.  
23 (ECF Nos. 212, 213.)<sup>2</sup> Plaintiff filed a surreply on January 4, 2016. (ECF No. 217.) Pursuant to  
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25 <sup>1</sup> Plaintiff filed a consent to proceed before a magistrate judge on October 17, 2005. (ECF No. 4.) Defendant Pham  
26 filed a consent on March 17, 2015. (ECF No. 155.) Defendants Baroya, Hoppe, Nguyet and Riedman filed a  
27 consent on March 19, 2015. (ECF No. 158.)

28 <sup>2</sup> On October 9, 2015, a telephonic hearing was held on Plaintiff's motion for extension of time to file opposition to  
Defendants' motions for summary judgment. On the same date, an order was entered, vacating the trial date and the  
October 23, 2015, hearing date on the motion for summary judgment and motions in limine. (ECF No. 203.) The  
Court set deadlines for the filing of an opposition to the motion for summary judgment and replies, which the parties  
have complied with. The Court also set a hearing date of January 8, 2016, for the motions for summary judgment

1 Local Rule 230(1), all motions in pro se prisoner cases are deemed submitted when the time for  
2 filing a reply has expired. The Court will, however, consider Plaintiff's surreply in resolving the  
3 motion for summary judgment.

4 **I.**

5 **PROCEDURAL HISTORY**

6 This action proceeds on the June 26, 2008, second amended complaint. Plaintiff alleges  
7 that he was repeatedly placed in secure cells for inmates on suicide watch from June 6, 2002, to  
8 January 2003. Plaintiff alleges that during this time he was limited to having the minimum of  
9 certain items. For example, he was given only a thin blanket which he states was sometimes  
10 dirty and stained, the heat was inadequate for winter months and that his requests to increase the  
11 heat went unfulfilled. Plaintiff alleges that he was sometimes kept in his cell for days or weeks  
12 covered in his own excrement, subjected to constant illumination and sometimes placed in a cell  
13 next to a psychotic inmate who would scream and beat on the doors resulting in a loss of sleep.  
14 Plaintiff alleges that he was sometimes deprived of toilet paper on the basis that he might use it  
15 to cover his cell window, was deprived of showers while confined in the infirmary, and that the  
16 cells were not cleaned when one inmate was removed and another took his place. Plaintiff  
17 alleges that the Defendants were aware of these conditions which, he contends, resulted in pains,  
18 cramps, chills, lower back and neck pain and extreme emotional anguish. Plaintiff claims that  
19 the conditions constituted an Eighth Amendment violation.

20 Defendants were served with the second amended complaint, and filed an answer. On  
21 November 24, 2009, Defendants filed a motion pursuant to Federal Rule of Civil Procedure  
22 12(b) on the ground that Plaintiff had failed to exhaust his available administrative remedies  
23 prior to filing suit. (ECF No 42.) On July 23, 2010, findings and recommendations were entered,  
24 recommending that the motion to dismiss be denied. (ECF No. 45.)<sup>3</sup> On September 7, 2010, the

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25 and motions in limine. The Court, having reviewed the record, finds the matter suitable for decision without oral  
26 argument. See Local Rule 230(g).

27 <sup>3</sup> The November 24, 2009, motion to dismiss was denied on the ground that the exhibits submitted by Defendants  
28 indicated that B. Snider, the Litigation Coordinator at CCI's review of the appeals from the appeals tracking system  
log covered the period of June 6, 2002, through January 22, 2003. The allegations of the Second Amended  
Complaint indicated that Plaintiff was housed in the OHU during that time frame. Appeals must be submitted  
within fifteen working days of the event being appealed. Cal. Code Regs., tit. 15 § 3084.2(a). The Magistrate Judge

1 District Court adopted the findings and recommendations, denying Defendants' motion to  
2 dismiss. (ECF No. 49.) On October 1, 2012, Defendants Baroya, Hoppe, Nguyet and Riedman  
3 filed a motion for summary judgment. (ECF No 93.) Defendant Pham filed a motion for  
4 summary judgment on November 30, 2012. (ECF No. 107.) On June 26, 2013, findings and  
5 recommendations were entered, recommending that Defendants' motions for summary judgment  
6 be granted. (ECF No 125.) Plaintiff objected and on September 23, 2014, the District Court  
7 adopted in part the findings and recommendations. The District Court granted Defendants'  
8 motion as to Plaintiff's claims relating to the deprivation of showers and hygienic items,  
9 deprivation of adequate clothing, constant illumination, and Plaintiff's stay length in the  
10 Observation Housing Unit (OHU). The District Court denied the motion as to Plaintiff's claims  
11 relating to the OHU's cell temperature, the deprivation of a suicide mattress and being placed in  
12 a cell containing feces. (ECF No. 134.)

13 The parties consented to magistrate judge jurisdiction, and a trial date was set. At the  
14 September 21, 2015, pretrial confirmation hearing, Defendants indicated their desire to file  
15 motions for summary judgment. On September 25, 2015, Defendants filed their motions. As  
16 noted, the parties have timely complied with the briefing schedule.

## 17 II.

### 18 SUMMARY JUDGMENT

19 Any party may move for summary judgment, and the Court shall grant summary  
20 judgment if the movant shows that there is no genuine dispute as to any material fact and the  
21 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks  
22 omitted); Washington Mutual Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's  
23 position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to  
24 particular parts of materials in the record, including but not limited to depositions, documents,  
25 declarations, or discovery; or (2) showing that the materials cited do not establish the presence or

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26 reasoned that because Defendants did not submit evidence that they reviewed appeals filed within fifteen working  
27 days after January 22, 2003, Plaintiff could have filed a grievance in that time frame. In support of the motion for  
28 summary judgment now before the Court, Defendants Baroya, Hoppe, Riedman and Nguyet submit the declaration  
of B. Snider, establishing that Snider reviewed the appeals from June 5, 2002, until July 15, 2009. (Snider Decl. ¶ 4,  
Ex. 2.)

1 absence of a genuine dispute or that the opposing party cannot produce admissible evidence to  
2 support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider  
3 other materials in the record not cited to by the parties, but it is not required to do so. Fed. R.  
4 Civ. P. 56(c)(3); Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir.  
5 2001); accord Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

6 Defendants do not bear the burden of proof at trial and in moving for summary judgment,  
7 they need only prove an absence of evidence to support Plaintiff's case. In re Oracle Corp.  
8 Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S.  
9 317, 323 (1986)). If Defendants meet their initial burden, the burden then shifts to Plaintiff "to  
10 designate specific facts demonstrating the existence of genuine issues for trial." In re Oracle  
11 Corp., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 323). This requires Plaintiff to "show  
12 more than the mere existence of a scintilla of evidence." Id. (citing Anderson v. Liberty Lobby,  
13 Inc., 477 U.S. 242, 252, (1986)).

14 However, in judging the evidence at the summary judgment stage, the Court may not  
15 make credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless,  
16 Inc., 509 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw  
17 all inferences in the light most favorable to the nonmoving party and determine whether a  
18 genuine issue of material fact precludes entry of judgment, Comite de Jornaleros de Redondo  
19 Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and  
20 citation omitted). The Court determines *only* whether there is a genuine issue for trial and in  
21 doing so, it must liberally construe Plaintiff's filings because he is a pro se prisoner. Thomas v.  
22 Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted).

### 23 **A. Exhaustion**

24 Pursuant to the Prison Litigation Reform Act of 1996, "[n]o action shall be brought with  
25 respect to prison conditions under [42 U.S.C. § 1983], or any other federal law by a prisoner  
26 confined in any jail, prison, or other correctional facility until such administrative remedies as  
27 are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the  
28 available administrative remedies prior to filing suit. Jones v. Bock, 49 U.S. 199, 211 (2007);

1 McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required  
2 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,  
3 Booth v. Churner, 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all suits  
4 relating to prison life. Porter v. Nussle, 435 U.S. 516, 532 (2002).

5 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense  
6 under which Defendant has the burden of raising and proving the absence of exhaustion. Jones,  
7 549 U.S. at 216; Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014); Wyatt v. Terhune, 315  
8 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust nonjudicial administrative remedies is  
9 subject to a motion for summary judgment in which the Court may look beyond the pleadings.  
10 Albino, 747 F.3d at 1170. If the Court concludes that Plaintiff has failed to exhaust, the proper  
11 remedy is dismissal without prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d  
12 1164, 1175-76 (9th Cir. 2005).

13 The California Department of Corrections and Rehabilitation (CDCR) has an  
14 administrative grievance system for prisoners to appeal any departmental decision, action,  
15 condition, or policy having an adverse effect on prisoners' welfare. Cal. Code Regs. tit. 15, §  
16 3084.1. Prior to 2011, the process was initiated by submitting a CDC Form 602 describing the  
17 problem and the action requested, tit. 15, §3084.2(a), and the appeal had to be submitted within  
18 fifteen working days of the event being appealed or of the receipt of the unacceptable lower level  
19 decision, tit. 15, §3084.6(c). Up to four levels of appeal may be involved, including the informal  
20 level, first formal level, second formal level, and third formal level, also known as the Director's  
21 Level. Tit. 15, §3084.5. In order to satisfy section 1997e(a), California state prisoners are  
22 required to use this process to exhaust their claims prior to filing suit. Woodford v. Ngo, 548  
23 U.S. 81, 85-86 (2006); McKinney, 311 F.3d at 1199-1201. On January 28, 2011, the inmate  
24 appeals process was modified and limited to three levels of review with provisions allowing the  
25 first level to be by bypassed under specific circumstances. Cal. Code Regs. tit. 15, § 3084.7.

26 "[E]xhaustion is not per se inadequate simply because an individual later sued was not  
27 named in the grievance." Jones v. Bock, 549 U.S. 199, 219 (2007). "The level of detail  
28 necessary in a grievance to comply with grievance procedures will vary from system to system

1 and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the  
2 boundaries of proper exhaustion.” Id. In California, the courts have previously found that  
3 CDCR guidelines do not need to identify the defendants by name because the proper form and  
4 CDCR regulations do not require identification of specific individuals. See, e.g., Butler v.  
5 Adams, 397 F.3d 1181, 1183 (9th Cir. 2005).

6 However, as of January 2011, inmates are required to list all staff members involved and  
7 describe their involvement, include only one issue or related set of issue per appeal, and  
8 “describe the specific issue under appeal and the relief requested.” Cal. Code Regs. Tit 15,  
9 §3084.2(a)(1)-(4) (Jan. 28, 2011).

10 Defendant Pham supports his motion with the declarations of the following individuals: J.  
11 Wood, Appeals Coordinator at CCI Tehachapi; M. Voong, Chief, Office of Appeals in  
12 Sacramento; B. Snider, Correctional Counselor at CCI Tehachapi; A. Pacillas, Appeals  
13 Coordinator at CSP Corcoran; J. Morgan, Appeals Coordinator at Pleasant Valley State Prison;  
14 M. Kimbrell, Litigation Coordinator at CSP Corcoran. Defendant Pham’s evidence establishes  
15 the following statement of undisputed material facts.<sup>4</sup>

- 16 . 1. The procedure for submitting inmate appeals is listed in the California Code of  
17 Regulations (CCR), Title 15, and the Inmate Orientation Manual. (Wood Decl. ¶  
18 4.)
- 19 2. The California Code of Regulations and Inmate Orientation Manual are available  
20 in the inmate libraries located at each CDCR facility, including CCI Tehachapi.  
21 (Wood Decl. ¶ 4.)
- 22 3. To initiate the appeals process, inmates must submit a CDCR 602 form. (Wood  
23 Decl. ¶ 6.)
- 24 4. The CDCR 602 forms are located in all inmate housing units, including  
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26 <sup>4</sup> Plaintiff neither filed his own separate statement of undisputed facts nor admitted or denied the facts set forth by  
27 Defendants as undisputed. Local Rule 260(b). Therefore, Defendants’ statement of undisputed facts is accepted  
28 except where brought into dispute by Plaintiff’s verified complaint and verified opposition. Jones v. Blanas, 393  
F.3d 918, 923 (9th Cir. 2004)(verified complaint may be used as an opposing affidavit if it based on pleader’s  
personal knowledge of specific facts which are admissible in evidence); see also Johnson v. Meltzer, 134 F.3d 1393,  
1399-1400 (9th Cir. 1998).

1 the Administrative Segregation Unit and the Outpatient Housing Unit  
2 at CCI. (Wood Decl. ¶ 6.)

- 3 5. Appeals are recorded in the Inmate/Parolee Appeals Tracking System  
4 At Level I and II for each CDCR facility. (Wood Decl. ¶¶ 7, 20. Snider  
5 Decl. ¶; Pacillas Decl. ¶ 3; Fordham Decl. ¶3; Morgan Decl. ¶ 3.)
- 6 6. Appeals submitted to Level III, or the Director's Level, are recorded in the  
7 Inmate Appeals Tracking System – Level III. (Voong Decl. ¶ 3.)
- 8 7. In 2002, only those appeals that were submitted in accordance with applicable  
9 California Code of Regulations were accepted for review and received a log  
10 number. (Wood Decl. ¶¶ 8-9.)
- 11 8. In 2002, those appeals that failed to comply with the regulations were screened  
12 and did not receive a log number. (Wood Decl. ¶ 9.)
- 13 9. CDCR regulations require copies of inmate appeals, submitted in accordance with  
14 California Code of Regulations, and the administrative responses to be maintained  
15 in the inmate's custody file. (Snider Decl. ¶ 4.)
- 16 10. Prior to his first placement in OHU at CCI on June 6, 2002, Hendon had  
17 submitted seven appeals to the third level in accordance with California Code of  
18 Regulations and received final dispositions. (Voong Decl. ¶¶ 4, 6, Ex. 13.)
- 19 11. From June 5, 2002 until July 15, 2009, Hendon properly submitted only seven  
20 appeals regarding incidents or events occurring at CCI, in accordance with  
21 applicable California Code of Regulations. (Snider Decl. ¶ 4, Ex. 2; Wood Decl.  
22 ¶¶ 9, 10, Ex. 3-9; Kimbrell Decl. ¶¶ 4-9, Ex. 1.)
- 23 12. Appeal Log No. CCI-07-02-02899 was first submitted by Hendon on August 14,  
24 2002. (Kimbrell Decl. ¶ 11, Ex. 3.)
- 25 13. Appeal Log No. CCI-07-02-02899 generally regards Hendon's assertion that his  
26 Rules Violation Report, dated June 8, 2002, charging him with "Masturbation"  
27 was adjudicated unfairly. (Wood Decl. ¶12, Ex. 3.)
- 28 14. Appeal Log No. CCI-9-00060 was first submitted by Hendon on January 2, 2003.

1 (Kimbrell Decl. ¶ 12, Ex. 4.)

2 15. Appeal Log No. CCI-9-03-00060 generally regards Hendon's assertion that he  
3 was not afforded an investigative employee prior to being found guilty of a Rules  
4 Violation Report for Battery on a Peace Officer on September 9, 2002. (Wood  
5 Decl. ¶ 13, Ex. 4.)

6 16. Appeal Log No. CCI-9-03-00061 was first submitted by Hendon on December  
7 19, 2002. (Kimbrell Decl. ¶ 13, Ex. 5.)

8 17. Appeal Log No. CCI-9-03-00061 generally regards Hendon's request to reassess  
9 his ten month Security Housing Unit term for being found guilty of a Rules  
10 Violation Report for Possession of a Weapon. (Wood Decl. ¶ 14, Ex. 5.)

11 18. Appeal Log No. CCI-9-03-00084 was first submitted by Hendon December 15,  
12 2002. (Kimbrell Decl. ¶ 14, Ex. 6.)

13 19. Appeal Log No. CCI-9-03-00084 generally regards Hendon's allegation that he  
14 was denied access to the law library. (Wood Decl. ¶ 15, Ex. 6.)

15 20. Appeal Log No. CCI-9-03-01315 was first submitted by Hendon on April 13,  
16 2003. (Kimbrell Decl. ¶ 15, Ex. 7.)

17 21. Appeal Log No. CCI-9-03-01315 generally regards the confiscation of Hendon's  
18 magazines that contained nude images. (Wood Decl. ¶ 16, Ex. 7.)

19 22. The only appeal that Hendon submitted to the third level of appeals, regarding an  
20 incident or events occurring at CCI, was Appeal Log No. CCI-9-03-01315.  
21 (Voong Decl. ¶¶7-8, Ex. 13.)

22 23. Appeal Log No. CCI-9-03-01315 was screened at the third level for Hendon's  
23 failure to comply with appeals procedures as required by California Code of  
24 Regulations, Title 15. (Voong Decl. ¶ 8, Ex. 13.)

25 24. Appeal Log No. CCI-9-03-02730 was first submitted by Hendon On October 16,  
26 2003. (Kimbrell Decl. ¶ 16, Ex. 8.)

27 25. Appeal Log No. CCI-9-03-02730 generally regards Hendon's allegation that the  
28 use of force policy for cell extractions is improper. (Wood Decl. ¶ 17, Ex. 8.)



- 1 26. Appeal Log No. CCI-6-04-02215 was first submitted by Hendon on September 2,  
2 2004. (Kimbrell Decl. ¶ 17, Ex. 9.)
- 3 27. Appeal Log No. CCI-6-04-02215 generally regards Hendon's allegation that he  
4 was transferred to a CDCR institution without his property.  
5 (Wood Decl. ¶ 18, Ex. 9.)
- 6 28. Inmates transferred between CDCR facilities are able to continue the appeals  
7 process for appeals regarding an incident or event occurring at CCI, at the third  
8 level. (Wood Decl. ¶ 20.)
- 9 29. Hendon did not complete any appeal regarding an incident or event occurring at  
10 CCI at the third level. (Voong Decl. ¶ 7, Ex. 13.)
- 11 30. Dr. Luong Pham treated Hendon on June 10, 2002. (Ex. C to Dr. Pham's  
12 November 30, 2012, motion for summary judgment, (ECF No. 107, ¶. 42.)
- 13 31. Dr. Luong Pham treated Hendon on September 16, 2002. ( Ex. C to Dr. Pham's  
14 November 30, 2012, motion for summary judgment, (ECF No. 107, ¶. 56.)
- 15 32. Dr. Luong Pham treated Plaintiff on October 15, 2002. (Ex. C to Dr. Pham's  
16 November 30, 2012, motion for summary judgment, (ECF No. 107, ¶ 59.)

17 Defendants Baroya, Hoppe, Nguyet and Riedman support their motion with the  
18 declarations of the following individuals: W. Robinson, Custodian of Records at CSP Corcoran;  
19 J. Morgan, Appeals Coordinator at Pleasant Valley State Prison; M. Fordham, Appeals  
20 Coordinator at CSP Lancaster; J. Wood, Appeals Coordinator at CCI Tehachapi; D. Gore,  
21 Appeals Coordinator at CSP Corcoran; B. Snider, Correctional Counselor at CCI; M. Voong,  
22 Chief, Office of Appeals, Sacramento. Defendants' evidence establishes the following  
23 undisputed facts.

- 24 1. At all relevant times, Plaintiff Carlos Hendon (J-62763) was a state prisoner in the  
25 lawful custody of the CDCR, and housed at CCI Tehachapi. (Sec. Am. Compl.,  
26 ECF No. 18 at 3.)
- 27 2. Plaintiff was placed on suicide prevention status in the CCI Outpatient Housing  
28 Unit on: June 6, 2002 to June 20, 2002; August 17, 2002 to August 19, 2002;

1 September 16 2002 to October 1, 2002; October 15, 2002 to October 16, 2002;  
2 January 8, 2003 to January 10, 2003; January 17, 2003 to January 21, 2003.

3 (Order on Mot. For Summ. J., ECF No. 134 at 3:12-17.)

4 3. During the course of his stays in the CCI OHU between June 6, 2002 and January  
5 21, 2003, Plaintiff was seen by psychologists Dr. Riedman and Hoppe, and  
6 psychiatrists Drs. Baroya and Nguyet. (Sec. Am. Compl., ECF No. 18 at 2-3.)

7 4. Plaintiff claims that while on suicide prevention status, he was forced to remain in  
8 cells that were covered in feces, exposed to forty to fifty degree temperatures, and  
9 deprived of adequate bedding. (Order on Mot. For Summ. J., ECF No. 134 at 3:19-  
10 24, 7:21-23.)

11 5. Between June 6, 2002 and January 21, 2003, Plaintiff was temporarily housed in  
12 other prisons. (Robinson Decl. Ex. H.)

13 6. Plaintiff transferred from CCI to California State Prison, Los Angeles County on  
14 October 4, 2002 (Robinson Decl. Ex. H.)

15 7. Plaintiff transferred to CCI on October 10, 2002. (Robinson Decl. Ex. H.)

16 8. Plaintiff transferred to CSP Corcoran on October 16, 2002.  
17 (Robinson Decl. Ex. H.)

18 9. Plaintiff transferred back to CCI on November 7, 2002. (Robinson Decl. Ex. H.)

19 10. Plaintiff transferred to Pleasant Valley State Prison on January 10, 2003.  
20 (Robinson Decl. Ex. H.)

21 11. Plaintiff transferred back to CCI on January 17, 2003. (Robinson Decl. Ex. H.)

22 12. Plaintiff stayed at CCI until his transfer to R.J. Donovan Correctional facility on  
23 November 19, 2003. (Robinson Decl. Ex. H.)

24 13. Between June 6, 2002 and June 6, 2003, Plaintiff did not submit grievances  
25 concerning conditions at CCI while he was housed at CSP Corcoran, Pleasant  
26 Valley State Prison or CSP Los Angeles County. (Goree Decl. ¶¶6-7; Morgan  
27 Decl. ¶¶6-7; Fordham Decl. ¶¶ 6-7.)

28 14. If Plaintiff submitted a grievance regarding conditions at CCI while he was

1 housed at another prison, the grievance would have been forwarded to CCI  
2 for further processing. (Wood Decl. ¶ 12; Goree Decl. ¶ 8; Morgan Decl. ¶ 8.  
3 Fordham Decl. ¶ 8.)

4 15. CCI Appeals Office records show that between June 6, 2002 and June 26, 2008,  
5 Plaintiff submitted seven grievances concerning events at CCI that complied with  
6 State regulations and were accepted for review. (Wood Decl. ¶¶ 7, 12; Robinson  
7 Decl. Exs. A-G; Snider Decl. Ex. I.)

8 16. The accepted grievances at CCI during that time period are: (1) CCI-02-02899;  
9 (2) CCI-03-00060; (3) CCI-03-00061; (4) CCI-03-00084; (5) CCI-03-01315;  
10 (6) CCI-03-02730; and (7) CCI-04-02215. (Wood Decl. ¶¶ 7, 12; Robinson Decl.  
11 Exs. A-G; Snider Decl. Ex. 1.)

12 17. None of these seven grievances concerned the conditions of Plaintiff's  
13 confinement while in the CCI OHU. (Wood Decl. ¶¶ 7, 12; Robinson Decl.  
14 Exs. A-G.)

15 18. Between June 6, 2002 and June 26, 2008, Plaintiff submitted three grievances  
16 that were accepted for a third level of review. (Voong Decl. ¶ 8, Exs. J-L.)

17 19. Those three grievances concerned events at California State Prison, Sacramento.  
18 (Voong Decl. ¶ 8, Exs. J-L.)

19 20. The Office of Appeals' records reflect Plaintiff submitted one grievance to the  
20 third level of review originating from CCI on November 20, 2003, bearing log  
21 number CCI-03-01315. (Voong Decl. ¶ 9; Robinson Decl. Ex. E.) However,  
22 that grievance involved confiscation of magazines depicting nudity and was  
23 screened due to non-compliance with grievance procedures. (Voong Decl. ¶9;  
24 Robinson Decl. Ex. E.)

25 21. Plaintiff did not submit any grievances concerning incidents from CCI that were  
26 accepted at the third level of review between June 6, 2002 and June 26, 2008.  
27 (Voong Decl. ¶ 11.)  
28

1 **III.**

2 **ANALYSIS**

3 Defendants argue that the evidence establishes that Plaintiff did not administratively  
4 exhaust any grievance regarding his conditions of confinement claims against Defendants arising  
5 from the conditions of confinement at the relevant times Plaintiff was housed in the CCI OHU.  
6 Defendants' evidence establishes that Plaintiff submitted seven grievances to the CCI Appeals  
7 Office between June 6, 2002 and June 26, 2008, that complied with regulations and were  
8 accepted for review. Although some of those grievances were submitted during the time that  
9 Plaintiff's claims arose, a review of the grievances indicates that none of them concerned  
10 Plaintiff's claims in this lawsuit.

11 **1. CCI-02-02899**

12 This grievance concerned a Rules Violation Report. Plaintiff submitted CCI-02-02899  
13 on August 19, 2002. (Wood Decl. ¶ 7; Robinson Decl. Ex. A.) This was the same day Plaintiff's  
14 second stay in the CCI OHU ended. (Order on Mot. for Summ. J., ECF No. 134 at 3:12-17.)  
15 This grievance concerned Plaintiff's claim that his Rules Violation Report, Log No. IVB-SH-  
16 02/06-0449, dated June 8, 2002, was adjudicated unfairly. (Id.) The grievance was cancelled on  
17 September 17, 2002, at the second level of review, because Plaintiff refused to exit his cell and  
18 be interviewed. (Id.)

19 **2. CCI-03-00060**

20 This grievance also concerned a Rules Violation Report. Plaintiff submitted CCI-03-  
21 00060 on January 9, 2003. (Wood Decl. ¶ 7; Robinson Decl. Ex. B.) This grievance was  
22 submitted during Plaintiff's sixth stay in the CCI OHU. (Order on Mot. for Summ. J., ECF No.  
23 134 at 3:12-17.) In it, Plaintiff claimed that his Rules Violation Report, Log No. CCI-09-03-  
24 00060, dated September 9, 2002, as adjudicated unfairly. (Id.) The Rules Violation Report was  
25 adjudicated in between Plaintiff's second and third stay in the CCI OHU. (Id.) The grievance  
26 was denied at the second level of review on February 18, 2003. (Id.)

27 **3. CCI-03-00061**

28 Plaintiff submitted CCI-03-00061 on January 9, 2003. (Wood Decl. ¶ 7; Robinson Decl.

1 Ex C.) This grievance, like CCI-03-00060, was submitted during Plaintiff's sixth stay in the CCI  
2 OHU. (Order on Mot. for Summ. J., ECF No. 134 at 3:12-17.) It concerned Plaintiff's claim  
3 that he was improperly assessed a Security Housing Unit term for possession of a razor. (Id.)  
4 The grievance was denied at the second level of review on January 22, 2003. (Id.)

#### 5 **4. CCI-03-00084**

6 This grievance concerns law library access. Plaintiff submitted CCI-03-00084 on  
7 January 9, 2003. (Wood Decl. ¶ 7; Robinson Decl. Ex. D.) This grievance was also submitted  
8 during Plaintiff's sixth stay in the CCI OHU. (Order on Mot. for Summ. J., ECF No. 134 at  
9 3:12-17.) Plaintiff claimed that he was improperly denied access to the law library. (Id.) The  
10 grievance was denied at the first level of review on February 18, 2003. (Id.)

#### 11 **5. CCI-03-01315**

12 This grievance concerned the confiscation of banned publications. Plaintiff submitted  
13 CCI-03-01315 on May 14, 2003, several months after his last stay at the CCI OHU. (Wood  
14 Decl. ¶ 7; Robinson Decl. Ex. E.) Plaintiff claimed that several of his Playboy magazines were  
15 improperly confiscated from his cell. (Id.) The grievance was granted in part at the first level of  
16 review, denied at the second level of review on October 31, 2003, and cancelled at the third level  
17 of review on July 22, 2003. (Wood Decl. ¶ 7, Ex. F; Voong Decl. ¶ 10.)

#### 18 **6. CCI-04-02730**

19 This grievance concerned the use of pepper spray. Plaintiff submitted CCI-04-02730 on  
20 October 24, 2003. (Wood Decl. ¶ 7; Robinson Decl. Ex. G.) This grievance concerned an  
21 excessive force claim arising from Plaintiff being pepper sprayed (Id.) The grievance was  
22 denied at the second level of review on November 17, 2003. (Id.)

#### 23 **7. CCI-04-02215**

24 This grievance concerned property transfers. Plaintiff submitted CCI-04-02215 on  
25 September 8, 2004. (Wood Decl. ¶ 7; Robinson Decl. Ex. H.) This grievance concerned  
26 Plaintiff's claim that he was transferred to the R. J. Donovan Correctional Facility, and then to  
27 CSP Sacramento, without his property. (Id.) The grievance was granted at the first level of  
28 review on October 13, 2004. (Id.)

1 The Court finds that Defendants have met their burden on summary judgment.  
2 Defendants have come forward with evidence that establishes that none of the grievances  
3 submitted by Plaintiff addressed Plaintiff's claims in this lawsuit. Plaintiff was required to  
4 submit a grievance within fifteen working days for each incident giving rise to his claims.  
5 Defendants' evidence establishes that Plaintiff was able to pursue grievances during the relevant  
6 timeframe, but none of the grievances filed by Plaintiff addressed the claims in this lawsuit. As  
7 noted, this action proceeds on Plaintiff's claims relating to the OHU's cell temperature, the  
8 deprivation of a suicide mattress, and being placed in a cell containing feces. (ECF No. 134 at  
9 7:21-22.) Defendant's evidence establishes that Plaintiff's claims are unexhausted. The burden  
10 shifts to Plaintiff to come forward with evidence that establishes a triable issue of fact as to  
11 whether he exhausted his available administrative remedies prior to filing suit.

12 In opposition to Defendants' motion for summary judgment, Plaintiff submits a two page  
13 declaration. (ECF No. 210.) Plaintiff declares, under penalty of perjury, that he submitted a  
14 grievance on October 4, 2002, that he never received a response, and that CCI's failure to  
15 respond to his claims rendered them exhausted. (ECF No. 210 at 4, ¶3.) Plaintiff reasons that  
16 during the time period relevant to his case, because grievances that were screened out did not get  
17 assigned a tracking number, his grievance submitted on October 4, 2002, could have concerned  
18 claims in this lawsuit.

19 "Unauthenticated documents cannot be considered in a motion for summary judgment,"  
20 and [t]he authentication of a document requires 'evidence sufficient to support a finding that the  
21 matter in question is what its proponent claims.'" Las Vegas Sands, LLC v. Nehme, 632 F.3d  
22 526, 532-533 (9th Cir. 2011)(quoting Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th  
23 Cir. 2002)(citing Fed. R. Evid. 901(a). An inquiry into authenticity concerns the genuineness of  
24 an item of evidence, not its admissibility. Orr, 285 F.3d at 776. Rule 901 of the Federal Rules of  
25 Evidence provides that evidence may be authenticated by "[t]he appearance, contents, substance,  
26 internal patterns, or other distinctive characteristics of the item, taken together with all the  
27 circumstances," Fed. R. Evid. 901(b)(4), and documents may be authenticated by review of their  
28 contents if they appear to be sufficiently genuine, Las Vegas Sands, LLC, 632 F.3d at 533 (citing

1 Orr, 285 F.3d at 778 n. 24)(quotation marks omitted).

2 Courts generally view objections based on authentication skeptically in the absence of an  
3 indication that the document's authenticity is genuinely in dispute. Chamberlain v. Les Schwab  
4 Tire Center of California, Inc., No. 2:11-cv-03105-JAM-DAD, 2012 WL 6020103, at \*2 (E.D.  
5 Cal. Dec. 3, 2012); Burch v. Regents of the University of California, 433 F. Supp.2d 1110, 1120-  
6 1121 (E.D. Cal. 2006), and objections to prison records which are clearly what they purport to be  
7 are routinely overruled under Rule 901(b)(4), see, e.g., Thomas v. Quintana, No. CV 10-2671-  
8 JGB (CWX) (official Bureau of Prisons logs and records maintained in the ordinary course of  
9 business); Howard v. Wang, No. 1:10-cv-01783-AWI-DLB-PC, 2014 WL 3687728, at \*3 (E.D.  
10 Cal. Jul. 24, 201)(prison records maintained in inmate's central and medical files), findings and  
11 recommendations adopted in full, 2014 WL 5483739 (E.D. Cal. Nov. 19, 2014); Abdullah v.  
12 CDC, No. CIV S 06-2378 MCE JFM P, 2010 WL 4813572, at \*3 (E.D. Cal. Nov, 19,  
13 2010)(finding no objection for lack of foundation and authentication unavailing where the  
14 records were from the plaintiff's prison file and they were created and maintained by prison  
15 officials), findings and recommendations adopted in full, 2011 WL 489599 (E.D. Cal. Feb. 7,  
16 2011); Sanchez v. Penner, No. CV S-07-0542 MCE EFB P, 2009 WL 3088331, at \*5 (E.D. Cal.  
17 Sept. 22, 2009)(overruling lack of foundation and proper authentication objections to prison  
18 medical records submitted by the plaintiff).

19 Here, Plaintiff submits a declaration that he submitted a grievance on October 4, 2002,  
20 but fails to offer any competent evidence that it complied with procedural requirements and that  
21 it was submitted through the third level of review. Documents may be authenticated through  
22 personal knowledge where they are attached to an affidavit and the affiant is a competent witness  
23 who wrote the document, signed it, used it, or saw others do so. Fed. R. Evid. 901(b)(1); Las  
24 Vegas Sands, LLC, 632 F.3d at 553 (citing Orr, 285 F.3d at 773.) Moreover, Plaintiff's  
25 competence to testify about matters within his personal knowledge may be inferred from his  
26 declaration. Strong v. Valdez Fine Foods, 724 F.3d 1042, 1045 (9th Cir. 2013); Barthelemy v.  
27 Air Line Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990)(per curiam). However, Plaintiff's  
28 opposition does not lay an adequate foundation to authenticate the October 4, 2002, grievance.

1 Even considering the leniency Plaintiff is entitled to given his pro se status, Plaintiff's opposition  
2 contains only bare statements that he filed a grievance on October 4, 2002, and that it could have  
3 addressed the issues in this lawsuit. There are no facts as to how he submitted the forms, to  
4 whom he submitted the forms.

5 In his reply, Defendant Pham correctly argues that the only issue before the Court is  
6 whether Plaintiff's conclusory declaration that he submitted a grievance on October 4, 2002, is  
7 sufficient to withstand summary judgment. Defendant Pham argues that Plaintiff's declaration is  
8 plainly contradicted by a previously sworn statement. Exhibit 1 to Dr. Pham's reply is an  
9 amended complaint in a separate lawsuit filed by Plaintiff on July 31, 2006, against Defendant  
10 Pham, as well as Defendants Baroya and Riedman.<sup>5</sup> (1:05-cv-00838-OWW-SMS-P.) In that  
11 action, Plaintiff generally alleged that defendants violated his constitutional and state rights by  
12 wrongfully removing Plaintiff from the Outpatient Housing Unit while suicidal. (Exh. 1, p. 2.)  
13 Defendant Pham's Exhibit 2 to his reply is a copy of Plaintiff's objections to the findings and  
14 recommendations to dismiss the action. In his objections, Plaintiff declared that on October 4,  
15 2002, he filed a grievance regarding his wrongful removal from suicide watch. That claim is  
16 distinct from the claims at issue in this lawsuit. Defendant Pham's Exhibit 2 clearly establishes  
17 that Plaintiff alleged then to have filed that grievance on October 4, 2002, but one challenging  
18 the fact of his removal from suicide watch. Plaintiff made no reference to the conditions of his  
19 confinement. The claims at issue in this lawsuit directly related to the conditions of his  
20 confinement while in the OHU. (Ex. 2, at 5:2-6.) Defendant Pham correctly argues that this  
21 previous sworn statement contradicts the declaration before the Court in this motion for  
22 summary judgment. For purposes of summary judgment, a court may disregard self-serving and  
23 conclusory statements that contradict prior declarations. Angel v. Seattle-First Nat'l Bank, 653  
24 F.2d 1293, 1299 (9th Cir. 1981); S.E.C. v. Phan, 500 F.3d 895, 909 (9th Cir. 2007).

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26 <sup>5</sup> The Court may take judicial notice of court records in another case. Fed. R. Evid. 201; See United States v.  
27 Wilson, 631 F.2d 118, 119 (9th Cir. 1980)(stating that a court may take judicial notice of court records in another  
28 case).



1 IV.

2 CONCLUSION AND ORDER

3 Defendants have come forward with evidence that establishes, beyond dispute, that  
4 Plaintiff failed to exhaust the available administrative remedies regarding the claims at issue in  
5 this lawsuit. Plaintiff has not come forward with any evidence that establishes a triable issue of  
6 fact as to whether he exhausted his available administrative remedies. Plaintiff's only evidence  
7 consists of a single declaration that is contradicted by his earlier declaration. Defendants'  
8 motions for summary judgment should therefore be granted.

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. The motions for summary judgment by Defendants Baroya, Hoppe, Nguyet and  
11 Riedman and by Defendant Pham are granted in favor of Defendants and against  
12 Plaintiff.
- 13 2. This action is dismissed, without prejudice, for Plaintiff's failure to exhaust his  
14 available administrative remedies prior to filing suit.
- 15 3. The motions in limine filed on September 28 and September 30, 2015, are denied as  
16 moot.
- 17 4. The Clerk is directed to close this case.

18 IT IS SO ORDERED.

19 Dated: January 6, 2016

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22 UNITED STATES MAGISTRATE JUDGE  
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