



1 On April 6, 2015, Defendants Trimble, Fisher, and Farkas<sup>1</sup> moved for summary judgment on  
2 the ground that Plaintiff failed to exhaust the administrative remedies.<sup>2</sup> (ECF No. 40.)

3 On May 1, 2015, Plaintiff filed an opposition, and Defendants filed a timely reply on May 20,  
4 2015. (ECF Nos. 43, 44.)

## 5 II.

### 6 DISCUSSION

#### 7 A. Motion for Summary Judgment Standard

8 Any party may move for summary judgment, and the Court shall grant summary judgment if  
9 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
10 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mutual Inc.  
11 v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is  
12 disputed or undisputed, must be supported by (1) citing to particular parts of materials in the record,  
13 including but not limited to depositions, documents, declarations, or discovery; or (2) showing that the  
14 materials cited do not establish the presence or absence of a genuine dispute or that the opposing party  
15 cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1). The Court may  
16 consider other materials in the record not cited to by the parties, but it is not required to do so. Fed. R.  
17 Civ. P. 56(c)(3); Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001);  
18 accord Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

19 Defendants do not bear the burden of proof at trial and in moving for summary judgment, they  
20 need only prove an absence of evidence to support Plaintiff's case. In re Oracle Corp. Securities  
21 Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323  
22 (1986)). If Defendants meet their initial burden, the burden then shifts to Plaintiff "to designate  
23 specific facts demonstrating the existence of genuine issues for trial." In re Oracle Corp., 627 F.3d at  
24 387 (citing Celotex Corp., 477 U.S. at 323). This requires Plaintiff to "show more than the mere

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25 <sup>1</sup> Defendants Giurbino and Myers do not move for summary judgment.

26 <sup>2</sup> Concurrently with their motion for summary judgment, Defendants served Plaintiff with the requisite notice of the  
27 requirements for opposing the motion. Woods v. Carey, 684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154 F.3d  
28 952, 960-61 (9th Cir. 1998).

1 existence of a scintilla of evidence.” Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252,  
2 (1986)).

3 However, in judging the evidence at the summary judgment stage, the Court may not make  
4 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d  
5 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the  
6 light most favorable to the nonmoving party and determine whether a genuine issue of material fact  
7 precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657  
8 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted). The Court determines *only*  
9 whether there is a genuine issue for trial and in doing so, it must liberally construe Plaintiff’s filings  
10 because he is a pro se prisoner. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation  
11 marks and citations omitted).

12 **B. Exhaustion under the Prisoner Litigation Reform Act**

13 Pursuant to the Prison Litigation Reform Act of 1996, “[n]o action shall be brought with  
14 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined  
15 in any jail, prison, or other correctional facility until such administrative remedies as are available are  
16 exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available administrative  
17 remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d  
18 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner  
19 and regardless of the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and  
20 the exhaustion requirement applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516,  
21 532 (2002).

22 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under  
23 which Defendant has the burden of raising and proving the absence of exhaustion. Jones, 549 U.S. at  
24 216; Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014); Wyatt v. Terhune, 315 F.3d 1108, 1119  
25 (9th Cir. 2003). The failure to exhaust nonjudicial administrative remedies is subject to a motion for  
26 summary judgment in which the Court may look beyond the pleadings. Albino, 747 F.3d at 1170. If  
27 the Court concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without  
28 prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

1 The California Department of Corrections and Rehabilitation (CDCR) has an administrative  
2 grievance system for prisoners to appeal any departmental decision, action, condition, or policy having  
3 an adverse effect on prisoners' welfare. Cal. Code Regs. tit. 15, § 3084.1. Prior to 2011, the process  
4 was initiated by submitting a CDC Form 602 describing the problem and the action requested, tit. 15,  
5 § 3084.2(a), and appeal had to be submitted within fifteen working days of the event being appealed or  
6 of the receipt of the unacceptable lower level decision, tit. 15, § 3084.6(c). Up to four levels of appeal  
7 may be involved, including the informal level, first formal level, second formal level, and third formal  
8 level, also known as the Director's Level. Tit. 15, § 3084.5. In order to satisfy section 1997e(a),  
9 California state prisoners are required to use this process to exhaust their claims prior to filing suit.  
10 Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); McKinney, 311 F.3d at 1199-1201. On January 28,  
11 2011, the inmate appeals process was modified and limited to three level of review with provisions  
12 allowing the first level to be bypassed under specific circumstances. Cal. Code Regs. tit. 15, § 3084.7.

13 "[E]xhaustion is not per se inadequate simply because an individual later sued was not named  
14 in the grievances." Jones v. Bock, 549 U.S. 199, 219 (2007). "The level of detail necessary in a  
15 grievance to comply with the grievances procedures will vary from system to system and claim to  
16 claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper  
17 exhaustion." Id. In California, the courts have previously found that CDCR guidelines do not need to  
18 identify the defendants by name because the proper form and CDCR regulations do not require  
19 identification of specific individuals. See, e.g., Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005).

20 However, as of January 2011, inmates are required to list all staff members involved and  
21 describe their involvement, include only one issue or related set of issues per appeal, and "describe the  
22 specific issue under appeal and the relief requested." Cal. Code Regs. tit. 15, § 3084.2(a)(1)-(4) (Jan.  
23 28, 2011). Furthermore, the inmate "shall state all facts known and available to him/her regarding the  
24 issue being appealed at the time of submitting the Inmate/Parolee Appeal Form, and if needed, the  
25 Inmate Parolee/Appeal Form Attachment." Id. at § 3084.2(a)(4).

### 26 C. Allegations of Complaint

27 Plaintiff who is a Muslim prisoner alleges that on or about February 28, 2011, Defendants and  
28 the CDCR started serving Muslim prisoners vegetarian meals for breakfast and lunch through the

1 Religious Meat Alternate Program (“RMAP”). Shabazz complained that the RMAP’s vegetarian  
2 meals did not meet the dietary requirements of his Islamic faith. He further complained that serving  
3 vegetarian meals to Muslim inmates were discriminatory because Jewish inmates, whose religious  
4 dietary requirements are similar to those of Muslims, receive Kosher meat options at every meal.

5 **D. Statement of Undisputed Facts<sup>3</sup>**

- 6 1. Plaintiff Amir Shabazz (V-87264) is a Muslim inmate in the custody of the California  
7 Department of Corrections and Rehabilitation (“CDCR”), who was housed at Pleasant  
8 Valley State Prison, in Coalinga, California (“PVSP”) between February 28, 2011 and  
9 September 15, 2011. (ECF No. 1, Compl. at 1, 5; ECF No. 12, Am. Compl. ¶ 1; ECF  
10 No. 40-3, Decl. of J. Morgan (“Morgan Decl.”) ¶ 5.)
- 11 2. Shabazz filed this lawsuit on September 15, 2011. (ECF No. 1 at 1.)
- 12 3. During all times relevant to this action, Defendant Fisher was an Associate Warden at  
13 PVSP. Fisher co-signed the first level response letter partially granting Appeal Log  
14 No. PVSP-C-11-00363. (ECF No. 12 at 20.)
- 15 4. During all times relevant to this action, Defendant Farkas was the Correctional Food  
16 Manager at PVSP. Farkas provided information about the nutritional value of the  
17 RMAP diet as well as the storage and preparation of halal meat products during  
18 investigation of Appeal Log No. PVSP-C-11-00363 at the first level of review. (ECF  
19 No. 12 at 19-20; Morgan Decl., Ex. B at 3, 5, 7, 9.)
- 20 5. Defendant Farkas did not sign any of the responses to Appeal Log No. PVSP-C-11-  
21 00363. (Morgan Decl., Ex. B at 13-17; ECF No. 40-2, Decl. of M. Voong (“Voong  
22 Decl.”), Ex B. at 1-2.)
- 23 6. During all times relevant to this action, Defendant Trimble was the Acting Warden at  
24 PVSP. Trimble signed the second level response letter drying Appeal Log No. PVSP-  
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26 <sup>3</sup> Plaintiff neither filed his own separate statement of disputed facts nor admitted or denied the facts set forth by defendant  
27 as undisputed. Local Rule 56-260(b). Therefore, defendant’s statement of undisputed facts is accepted except where  
28 brought into dispute by plaintiff’s verified complaint and opposition. Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004);  
Johnson v. Meltzer, 134 F.3d 1393, 1399-1400 (9th Cir. 1998).

1 C-11-00363. (ECF No. 12 at 24-25; Morgan Decl., Ex. B at 15-17.)

- 2 7. Shabazz named Trimble when requesting third level review of Appeal Log No. PVSP-  
3 C-11-00363 and complained that Trimble did not investigate the appeal. He did not  
4 identify Trimble as responsible for the RMAP. (ECF No. 12 at 2.)
- 5 8. Shabazz alleges in the Amended Complaint that on or about February 28, 2011,  
6 Defendants started serving Muslim prisoners vegetarian meals for breakfast and lunch  
7 as part of the RMAP. (ECF No. 12 at ¶¶ 1, 2.)
- 8 9. Shabazz contends in the Amended Complaint that the RMAP's vegetarian meals do not  
9 meet the dietary requirements of his Islamic faith. (ECF No. 12 at ¶¶ 1, 5, 6, 8-10.)
- 10 10. Shabazz contends that Defendants are discriminating against Muslims because Jewish  
11 inmates, whose Kosher diets are compatible with Islamic dietary requirements, receive  
12 meat products at breakfast and lunch. (ECF No. 12 at ¶¶ 3, 4, 5, 7, 11, 13, 14.)
- 13 11. CDCR had an administrative grievance process for inmates at all times relevant to the  
14 Amended Complaint. (Morgan Decl. ¶ 6.)
- 15 12. CDCR permits an inmate to appeal any policy, decision, action, condition, or omission  
16 by CDCR or its staff that the inmate can demonstrate as having a material adverse  
17 effect upon his health, safety, or welfare. (Morgan Decl. ¶ 6; Cal. Code Reg. tit. 15, §  
18 3084.1(a).)
- 19 13. Prisoners must follow the administrative grievance procedures set forth in Article 8 of  
20 the Title 15, which includes sections 3084.1 through 3085. (Morgan Decl. ¶ 6; Cal.  
21 Code Reg. tit. 15, § 3084.1.)
- 22 14. CDCR's administrative inmate grievance process has had three levels of review since  
23 January 28, 2011. (Morgan Decl. ¶ 7; Cal. Code Regs. tit. 15, §§ 3084.1(b), 3084.7.)
- 24 15. An inmate appeal is initiated by completing and submitting a CDCR Form 602 ("Form  
25 602"). (Cal. Code Reg. tit. 15, § 3084.2.)
- 26 16. To properly exhaust an administrative grievance, an inmate must pursue his appeals  
27 through all levels of the administrative exhaustion process, unless the inmate is excused  
28 from one of the levels under CDCR's administrative exhaustion procedures. (Cal.

Code Reg. tit. 15, §§ 3084.1(B), 3084.7.)

17. A final decision at the third level of review generally exhausts an inmate grievance. (Voong Decl. ¶ 3; Morgan Decl. ¶ 7.)
18. Shabazz knew about and utilized the administrative grievance process while at PVSP. (Morgan Decl. ¶¶ 8, 9.)
19. Appeal Log No. PVSP-C-11-00363 is the only appeal that Shabazz submitted for first or second level review between February 28, 2011 and September 15, 2011. (Morgan Decl. ¶ 9 & Ex. A.)
20. Appeal Log No. PVSP-C-11-00363 was a group appeal in which Muslim inmates complained that the Religious Meat Alternate Program/Vegetarian Diet option, which served vegetarian meals at breakfast and lunch, did not meet his religious dietary requirements. The appeal also complained that serving vegetarian meals to Muslims was discriminatory because Jewish inmates, whose religious dietary requirements are similar to that of Muslims, received Kosher meat options. (Morgan Decl. Ex. B at 3, 5, 7, 9, 11, 12.)
21. Shabazz requested in Appeal Log No. PVSP-C\_11-00363 that Defendants Myers and Giurbino stop discriminating against Muslims. Myers and Giurbino are the only CDCR officials identified in the original appeal. (Morgan Decl. Ex. B at 3, 5, 7, 9.)
22. Neither Farkas, Fisher, nor Trimble are identified or described in the original appeal for Appeal Log No. PVSP-C\_11-00363. (Morgan Decl. Ex B. at 3, 5, 7, 9.)
23. Nowhere in Appeal Log No. PVSP-C-11-00363 does Shabazz identify or otherwise describe Defendants Farkas, Fisher, or Trimble as responsible for the RMAP diet. (Morgan Decl. Ex B; Voong Decl. Ex. B.)
24. Appeal Log No. PVSP-C-11-00363 was partially granted at the first level of review. (Morgan Decl. ¶ 9, Exs. A, B at 13-13.)
25. Appeal Log No. PVSP-C-11-00363 was denied at the second level of review. (Morgan Decl. ¶ 9, Exs A, B at 15-17.)
26. Only two appeals from Shabazz were submitted to the third level of review and

1 adjudicated between February 28, 2011 and September 25, 2011. Appeal Log No.  
2 PVSP-C-11-00363, also known as IAB No. 1022332, was the only one of the two  
3 appeals that addressed the RMAP and food services at PVSP. (Voong Decl. ¶¶ 6-1,  
4 Exs A, B, C.)

5 27. Appeal Log No. PVSP-C-11-00363 was denied at the third level of review on August  
6 25, 2011. (Voong Decl. ¶ 9 & Ex. A.)

7 **E. Analysis**

8 1. Appeal Log No. PVSP-C-11-00363

9 The parties are in agreement that the only appeal relevant to this action is Log No. PVSP-C-11-  
10 00363, and therefore, the Court omits from discussion the substantively irrelevant appeals identified  
11 and addressed by Defendants in their motion.. (ECF No. 40, Motion at 2, 4, 7-8; ECF No. 40-3,  
12 Morgan Decl. ¶¶ 8-10; ECF No. 41, Opp'n at 1-3, Exs. A, B, C.) The Court finds that Defendants met  
13 their initial burden with respect to Plaintiff's failure to exhaust CDCR's generally available  
14 administrative remedy process prior to filing this lawsuit; and for the reasons which follow, it finds  
15 that Plaintiff neither exhausted nor demonstrated that the remedy process was rendered effectively  
16 unavailable, entitling Defendants to judgment. Williams, 775 F.3d at 1191; Albino, 747 F.3d at 1171-  
17 72.

18 Defendants Farkas, Fisher and Trimble move for summary judgment for failure to exhaust the  
19 administrative remedies because in appeal Log No. PVSP-C-11-00353, Plaintiff did not name Farkas,  
20 Fisher or Trimble in his original appeal.

21 Plaintiff argues that each of the Defendants had a reasonable opportunity to address and correct  
22 the denial of a proper Halal dietary meal. Specifically, as to food manager, Defendant Farkas,  
23 Plaintiff argues that he offered a statement during an interview involving Plaintiff's first level appeal  
24 and wrongfully stated that Plaintiff was being provided the proper nutritional value under the RMAP.  
25 As to Associate Warden, Defendant Fisher, Plaintiff contends that he was responsible for correcting  
26 the religious discrimination against Plaintiff but denied his appeal confirming the violations and failed  
27 to correct the problem. As to Acting Warden, Defendant Trimble, Plaintiff contends that he reviewed

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1 his appeal at the second level and a reasonable opportunity to grant the appeal but instead denied the  
2 appeal.

3 Plaintiff submits that his inmate appeal “clearly appraised” all of the Defendants “that Plaintiff  
4 was being religiously deprived of three Halal Meals and discriminated against from the Jewish Faith  
5 being provided three Kosher Meals while the Muslim Faith was being provide one Halal meal and  
6 being forced to violate their religion from eating two vegetarian meals.” (ECF No. 41, Opp’n at 3.)  
7 Plaintiff argues that he provided fair notice to each and every Defendant and genuine issues of  
8 material facts exist.

9 Exhaustion requirements are designed to deal with parties who do not want to exhaust and who  
10 would prefer not to give the agency a fair and full opportunity to adjudicate their claims. Woodford v.  
11 Ngo, 548 U.S. 81, 90 (2006). For this reason, proper procedural and substantive exhaustion of  
12 administrative remedies is required, which demands compliance with an agency’s deadlines and other  
13 critical procedural rules. Woodford, 548 U.S. at 90; Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th  
14 Cir. 2014). Prisoners are required to “use all the steps the prison holds out, enabling the prison to  
15 reach the merits of the issue,” Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing  
16 Woodford, 548 U.S. at 90).

17 Relevant here, the applicable prison regulations provide that inmates must list all involved staff  
18 members and describe their involvement; and inmates shall state all facts known regarding the issue  
19 being appealed. Tit. 15, § 3084.2(a)(3), (4). In addition, the regulations provide that “[a]dministrative  
20 remedies shall not be considered exhausted relative to any new issue, information, or person later  
21 named by the appellant that was not included in the originally submitted CDCR Form 602 (Rev.  
22 08/09), Inmate/Parolee Appeal. . . .” Tit. 15, § 3084.1(b).

23 The Ninth Circuit previously adopted the *Strong* standard as “the standard of factual specificity  
24 required when a prison’s grievance procedures do not specify the requisite level of detail,” Griffin,  
25 557 F.3d at 1120 (adopting standard articulated in Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)),  
26 and it applied that standard to California’s state prison regulations in 2009, holding that an appeal  
27 “suffices to exhaust a claim if it puts the prison on adequate notice of the problem for which the  
28 prisoner seeks redress.” Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (citing Griffin, 557 F.3d

1 at 1120) (internal quotation marks omitted). However, California’s prison regulations were amended  
2 in December 2010 and Sapp involved the previous, now-superseded regulations, Sapp, 623 F.3d at  
3 819 (2002 inmate appeals), as did subsequent Ninth Circuit cases applying the *Strong* standard to  
4 California’s regulations, Wilkerson v. Wheeler, 772 F.3d at 839); Akhtar v. Mesa, 698 F.3d 1202,  
5 1211 (9th Cir. 2012); McCollum v. California Dep’t of Corrs. & Rehab., 647 F.3d 870, 876 (9th Cir.  
6 2011); see Parks v. Chappell, No. C-13-4048 EMC (pr), 2015 WL 3466280, at \*3 (N.D.Cal. Jun. 1,  
7 2015) (recognizing that Strong standard cases are distinguishable because they address the prior  
8 regulations). At that time, the regulations required only a description of the problem and the action  
9 requested. Plaintiff’s appeal would have sufficed to exhaust the claims at issue in this action under  
10 that version of the regulations, but his appeal was submitted in July 2012 and it is subject to the  
11 current regulations.

12 The exhaustion requirement was enacted “to reduce the quantity and improve the quality of  
13 prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address  
14 complaints internally before allowing the initiation of a federal case.” Porter v. Nussle, 534 U.S. 516  
15 524-525 (2002); Cano v. Taylor, 739 F.3d 1214, 1219 (9th Cir. 2014); McKinney v. Carey, 311 F.3d  
16 1198, 1200-1201 (9th Cir. 2002) (per curiam). Thus, “[t]he primary purpose of a grievance is to alert  
17 the prison to a problem and facilitate its resolution, not to lay groundwork for litigation.” Griffin, 557  
18 F.3d at 1120; see also Jones v. Bock, 549 U.S. at 219 (promotion of early notice to those who might  
19 later be sued not thought to be one of the leading purposes of exhaustion requirement) (citing Johnson  
20 v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004)). However, as recognized by both the Supreme Court  
21 and the Ninth Circuit, “[t]he scope of [procedural and substantive exhaustion] depends on the scope of  
22 administrative remedies that the state provides,” Wilkerson, 772 F.3d at 839 (citing Jones, 549 U.S. at  
23 218), and the inquiry is now guided by more specific regulations than those at issue in Sapp and the  
24 cases that followed.

25 Here, the original appeal in Log No. PVSP-C-11-00353, did not name or identify Defendants  
26 Farkas, Fisher, and Trimble. (Morgan Decl., Ex. B. at 3, 5, 7, 9; Voong Decl. Ex. B.) Rather,  
27 Plaintiff’s appeal complained of the following:

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1 The Islamic (Muslim) community at Pleasant Valley State Prison (Fac.#C) currently are  
2 being denied the dietary requirements: which are rooted in our religious beliefs. The  
3 Religious Meat Alternate Program/Vegetarian Diet option being served for breakfast  
4 and lunch does not provide additional Halal meat such as lamb, fish also “NO”  
5 vegetables such as cucumber, cabbage, squash, zucchini, lettuce, onions, celery shall be  
6 provided with our breakfast and lunch. [citation omitted] [T]hus, the failure to provide  
7 a special Religious diet for Muslims that consist of different Halal meats (lamb, fish) &  
8 vegetables/other Halal food items, portions that are served with all (3) three meals  
9 (daily) & rotated! Currently the Halal/Vegetarian diet option does not receive the same  
10 nutritious food that satisfies dietary rules of our religion. The Kosher (Hebrew) diet  
11 provides many vegetables, meat, and other food items, portions that are (Halal) such as  
12 lamb that [sic] permitted and/or allowed for Muslims. [T]herefore Mr. George J.  
13 Giurbino as the Director for Division of Adult Inst. Along with Wendy Myer CRM(A)  
14 are discriminating against the Islamic community here by not satisfying the dietary  
15 rules of our religion & treat us with the same respect and dietary meal foods as the  
16 “Kosher diet for the Hebrews” that is always well-balanced. Most Muslims I/m [sic]  
17 here at PVSP (fac C) are currently taking high blood pressure/cholesterol medication &  
18 have colon ailments that prohibits too much frequently served eggs, peanut butter,  
19 cheese, etc. that shall be only consumed moderately! So nutritious foods vegetables are  
20 warranted to satisfy our dietary rules just like the Hebrews!

21 (ECF No. 40-3, Ex. B-003 & 005.)

22 Plaintiff requested that the “Director, Division of Adult Institution and Wendy Myers cease the  
23 discrimination against the Islamic community (Muslim) in Facility C at PVSP and the Halal  
24 meat/Vegetarian option for our meals provide us with the same treatment as the Kosher meals...” (Id.)

25 Thus, it is evident from the appeal that Plaintiff named/identified only Defendants Giurbino  
26 and Myers. Plaintiff’s argument that he identified Defendant Trimble by way of his request for third  
27 level review contending Trimble failed to review the appeal, is not sufficient to exhaust the  
28 administrative remedies because Trimble was not named in the original appeal and he was not  
identified as responsible for the RMAP. Moreover, to the extent Plaintiff argues that Defendants  
Fisher and Trimble are liable for constitutional violations based on their decisions in the administrative  
grievance process, and that Defendant Farkas is liable for statements made during the appeal process,  
Plaintiff is attempting to raise separate and distinct causes of action from the issues raised in appeal  
Log No. PVSP-C-11-00363-which should have been raised by way of a separate appeal. This action is  
proceeding strictly on Plaintiff’s claim that “Defendants” enforced the RMAP which failed to provide  
Plaintiff a proper Halal meal and discriminated against by failing to do so. Yet, Plaintiff claims that

1 Defendants Farkas, Fisher, and Trimble violated his constitutional rights by their involvement in the  
2 appeals process which is a separate and distinct claim that was not exhausted. The requirement of a  
3 separate appeal is supported by California Code of Regulations, Title 15, Section 3084.1(b), which  
4 states: “Administrative remedies shall not be considered exhausted relative to any new issue,  
5 information, or person later named by the appellant that was not included in the originally submitted  
6 [appeal] and addressed through all required levels of administrative review up to and including the  
7 third level.” Thus, a prisoner does not exhaust administrative remedies when he/she includes new  
8 issues from one level of review to another. See, e.g., Dawkins v. Butler, No. 09CV1053 JLS (DHB),  
9 2013 WL 2475870, at \*8 (S.D. Cal. 2013) (a claim made for the first time in plaintiff’s request for  
10 third level review was insufficient to exhaust the issue where it was not included in the original  
11 appeal). Indeed, this appeal could not have grieved the actions by Defendants Farkas, Fisher, and  
12 Trimble, as their actions giving rise to alleged liability had not yet taken place at the time Plaintiff  
13 initiated his appeal on February 28, 2011. Accordingly, Defendants Farkas, Fisher, and Trimble are  
14 entitled to summary judgment for failure to exhaust the administrative remedies.

15 2. Exhaustion Requirement Not Excused

16 An inmate who fails to exhaust his administrative remedies may be excused from the  
17 exhaustion requirement by demonstrating that pertinent administrative remedies were “effectively  
18 unavailable.” Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010). For instance, “a prisoner need  
19 not press on to exhaust further levels of review once he has either received all ‘available’ remedies at  
20 an intermediate level of review or been reliably informed by an administrator that no remedies are  
21 available.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

22 Improper screening of an administrative appeal may also excuse an inmate from the exhaustion  
23 requirement. Sapp, 623 F.3d at 823. In order for this exception to apply, the inmate must establish,  
24 “(1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative  
25 appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that  
26 prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by  
27 applicable regulations.” Id. at 823-824. If a grievance is properly rejected, the inmate is not excused  
28 from the exhaustion requirement.

1 The undisputed evidence demonstrates that Plaintiff was not excused from complying with the  
2 PLRA's exhaustion requirement. Plaintiff pursued Appeal Log No. PVSP-C-11-00363 to the third  
3 level of review and received a final decision. (Morgan Decl., Ex. B.; Voong Decl. Ex. B.) There is no  
4 evidence that Plaintiff submitted or attempted to submit a subsequent appeal alleging Defendants  
5 Farkas, Fisher, and Trimble's alleged involvement in the RMAP. Accordingly, Plaintiff was not  
6 excused from exhausting the administrative remedies.

7 **III.**

8 **RECOMMENDATIONS**

9 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 10 1. Defendants Farkas, Fisher, and Trimble's motion for summary judgment for Plaintiff's  
11 failure to exhaust the administrative remedies be GRANTED; and  
12 2. This action shall proceed as to Defendants Giurbino and Myers.

13 These Findings and Recommendations will be submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after  
15 being served with these Findings and Recommendations, the parties may file written objections with  
16 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and  
17 Recommendations." The parties are advised that failure to file objections within the specified time  
18 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
19 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20  
21 IT IS SO ORDERED.

22 Dated: November 2, 2015



23 UNITED STATES MAGISTRATE JUDGE