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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. PAYAN,  
  
                                Plaintiff,  
  
          v.  
  
TATE, et al.,  
  
                                Defendants.

Case No. 1:13-cv-00807 LJO DLB PC  
  
FINDINGS AND RECOMMENDATIONS  
REGARDING DEFENDANTS’ MOTION FOR  
SUMMARY JUDGMENT  
(Document 62)  
  
THIRTY-DAY OBJECTION DEADLINE

Plaintiff Michael J. Payan (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s October 19, 2015, First Amended Complaint.

Defendants Tate, Bingamon, Joaquin, Shiesha and Vu filed the instant motion for summary judgment for failure to exhaust on May 19, 2015. Plaintiff filed his opposition on July 13, 2015, and Defendants filed a reply, as well as evidentiary objections, on July 17, 2015. Plaintiff also filed a surreply on August 20, 2015.<sup>1</sup> The motion is ready for decision pursuant to Local Rule 230(l).

**A. PROCEDURAL HISTORY**

Plaintiff filed his complaint on May 28, 2013. On January 8, 2014, the Court screened the complaint and found the following cognizable claims: (1) retaliation in violation of the First Amendment by Defendants Bingamon, Tate and Vu; and (2) deliberate indifference to a serious

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<sup>1</sup> Defendants did not object to Plaintiff’s surreply.

1 medical need in violation of the Eighth Amendment against Defendants Bingamon, Tate, Vu,  
2 Shiesha and Joaquin.

3 Defendants filed this motion for summary judgment on May 19, 2015. Merits-based  
4 discovery has been stayed pending resolution of the motion.

5 On June 22, 2015, Plaintiff filed a motion to amend the complaint. The Court granted the  
6 motion in part on August 25, 2015, and permitted Plaintiff to amend to add certain claims.

7 Plaintiff filed his First Amended Complaint on October 19, 2015.

8 The Court screened the First Amended Complaint and issued an order on November 4, 2015,  
9 finding the following cognizable claims: (1) retaliation in violation of the First Amendment against  
10 Defendants Bingamon, Tate, Vu, Shiesha, Baniga, Joaquin, Longcrier and Does; (2) deliberate  
11 indifference to a serious medical need in violation of the Eighth Amendment against Defendants  
12 Bingamon, Tate, Vu, Shiesha, Joaquin, Baniga, Longcrier and Does; and (3) negligence against  
13 Defendants Vu, Tate, Shiesha, Baniga, Joaquin, and Does.

14 On December 1, 2015, Defendants Tate, Bingamon, Joaquin, Shiesha and Vu notified the  
15 Court that they wished to move forward with the pending motion for summary judgment based on  
16 exhaustion. Service has not been returned for Defendants Baniga and Longcrier, and they have not  
17 made an appearance in this action.

18 **B. ALLEGATIONS IN FIRST AMENDED COMPLAINT**

19 Plaintiff is currently incarcerated at Kern Valley State Prison. From February 2010 through  
20 July 2014, Plaintiff was incarcerated at the California Correctional Institution (“CCI”), where the  
21 events at issue occurred.

22 Plaintiff alleges that on or about July 21, 2010, he injured his left shoulder after he fell in the  
23 shower.

24 Plaintiff was seen by Defendant Bingamon on August 11, 2010. Plaintiff told Defendant  
25 Bingamon that he felt a painful tear in his left shoulder when he fell. Defendant Bingamon  
26 performed range of motion testing, and told Plaintiff that he had a torn tendon in his left rotator cuff  
27 and that he would order x-rays. Plaintiff told him that x-rays were not sufficient to detect tendon or

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1 muscle injuries, and he asked for an MRI. Defendant Bingamon got upset and told Plaintiff that he  
2 was careless, and he was lucky he was getting an x-ray.

3 On August 11, 2010, Plaintiff had x-rays of his left shoulder taken.

4 Plaintiff saw Defendant Bingamon again on September 29, 2010, and continued to complain  
5 of pain. He told Plaintiff that the x-ray did not pick up any tears in the tendon. Defendant  
6 Bingamon ordered a steroid injection and prescribed Gabapentin, to which Plaintiff objected because  
7 he did not agree that Gabapentin was “for torn tendons.” ECF No. 81, at 8. Plaintiff continued to  
8 request an MRI. Defendant Bingamon told Plaintiff that if he did not consent to the injection and  
9 Gabapentin, he would terminate the appointment and Plaintiff would forfeit all medical attention.  
10 Plaintiff consented to the treatment. Defendant Bingamon refused to alter the course of treatment  
11 and told him that he should not make a habit of complaining.

12 Plaintiff filed grievance number CCI-03-10-13065, complaining that Defendant Bingamon  
13 was indifferent to his pain and refused to order necessary diagnostic exams. Plaintiff also requested  
14 an MRI.

15 Plaintiff returned to Defendant Bingamon on October 20, 2010, for the interview related to  
16 his appeal. Defendant Bingamon told Plaintiff that because of his complaints, Defendant Tate, his  
17 supervisor, got upset and discontinued Gabapentin because it was not for torn tendons. Defendant  
18 Bingamon told Plaintiff that he would be scheduled for a steroid injection and considered for  
19 physical therapy, and an MRI would be ordered if there was no improvement.

20 On or about October 26, 2010, Defendant Tate gave Plaintiff an injection. Defendant Tate  
21 told Plaintiff that he was scheduled for an MRI to get a proper diagnosis.

22 On November 2, 2010, Plaintiff returned to Defendant Bingamon. He reported that the  
23 injection did not work and requested an MRI. Defendant Bingamon became angry and told Plaintiff  
24 that he wasn't going to treat Plaintiff because of his complaints.

25 On or around December 2, 2010, Plaintiff saw Defendant Tate. Defendant Tate told Plaintiff  
26 that he hated whiners and inmates who told doctors what to do, and that an MRI wasn't worth the  
27 five dollars that it would cost Plaintiff. He told Plaintiff that he should learn to live with the pain  
28 and that if he continued to complain, he would cancel the MRI.

1 On or about December 6, 2010, Defendant Shiesha, as the Second Level reviewer, became  
2 aware of Plaintiff's ongoing left shoulder pain and refused to provide a sufficient diagnostic exam.

3 On December 15, 2010, Plaintiff filed medical care grievance number CCI-03-10-13844  
4 regarding Defendant Tate's medical treatment and threats.

5 On January 4, 2011, Defendant Shiesha interviewed Plaintiff at the Second Level. Plaintiff  
6 reiterated his complaints about Defendant Tate and told Defendant Shiesha that he believed he had a  
7 torn tendon. Defendant Shiesha told Plaintiff that he wasn't the first one to complain about  
8 Defendant Tate, but that the medical staff does not get paid enough to look into petty matters.  
9 Defendant Shiesha turned the grievance into a staff complaint and ended the interview.

10 In the Second Level response, Defendant Joaquin only reiterated part of the appeal and  
11 implied that because an inquiry was done, the inquiry partially granted the complaint. Plaintiff  
12 believes that Defendants Shiesha and Joaquin deliberately turned Plaintiff's grievance into a staff  
13 complaint to make the complaint confidential and to allow for the continuation of improper  
14 treatment.

15 Defendant "Doe for L.D. Zamora" allowed the appeal to be erroneously denied.

16 After Plaintiff filed his grievance against Defendant Tate, Defendant Tate recommended that  
17 the MRI be disapproved.

18 On January 5, 2011, Defendant Tate disregarded the risks and gave Plaintiff a second steroid  
19 injection. Plaintiff did not experience pain relief.

20 On March 9, 2011, Plaintiff saw Defendant Bingamon and reported that his shoulder was in  
21 constant pain. Defendant Bingamon told Plaintiff that his grievance upset Defendant Tate and that  
22 he wasn't going to "go against his supervisor." ECF No. 81, at 15. He told Plaintiff to live with the  
23 pain and sent him back to his cell.

24 On May 4, 2011, Plaintiff saw Defendant Vu and told him of his dissatisfaction with his prior  
25 care and prior appeals. Defendant Vu told Plaintiff that he shouldn't complain about the people that  
26 have "the keys to his life." ECF No. 81, at 16. He told Plaintiff that he needed an MRI, but because  
27 of the problems he caused, he'd have to go through shots and physical therapy first.

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1           When Plaintiff saw Defendant Vu on December 1, 2011, he Plaintiff pleaded for an MRI, as  
2 one had been originally prescribed in October 2010. Defendant Vu said that CDCR policy prevents  
3 him from ordering an MRI without prior x-rays, shots, physical therapy and another shot. Plaintiff  
4 asked for a copy of the cited policy so that he could file a grievance. Defendant Vu became angry  
5 and told Plaintiff that he would take the injections, or nothing at all.

6           On December 16, 2011, Defendant Shiesha administered an injection even though Plaintiff  
7 pleaded for an MRI. Defendant Shiesha questioned the location of Defendant Tate's prior injections,  
8 and told Plaintiff that if he did not consent to the injections, he would be charged with interfering  
9 with medical staff and would not receive any treatment at all. Defendant Vu rejected Plaintiff's  
10 pleas for an MRI and Plaintiff fearfully consented to the injection.

11           Plaintiff was seen by Defendant Vu on January 24, 2012, after he further injured his shoulder  
12 while performing the recommended exercises. He requested stronger pain medication and an MRI  
13 because the injections were making his shoulder worse. Defendant Vu told Plaintiff that he  
14 (Plaintiff) was not a doctor, and that he would continue to treat him pursuant to policy even if the  
15 injections were not working.

16           On March 27, 2012, Plaintiff filed health care grievance number CCI-HC-12033521  
17 complaining about the way treatments were given and his further damage.

18           Plaintiff was seen by Defendant Vu on April 27, 2012, regarding appeal CCI-HC-12033521.  
19 He complained of worsening shoulder pain and again requested an MRI. Defendant Vu told Plaintiff  
20 that he should never have filed a grievance on him, and although Plaintiff needed an MRI, he was  
21 going to note that he did not need one. Defendant Vu told Plaintiff that he was going to order  
22 another injection and physical therapy because policy dictates his treatment. Plaintiff pleaded for  
23 other treatment, but Defendant Vu refused to listen and sent him back to his cell.

24           Defendant Shiesha learned of the issue as the First Level reviewer. She adopted the report of  
25 Defendant Vu and refused to do her own investigation and evaluation.

26           Defendant Joaquin learned of the issue as the Second Level reviewer, but turned a blind eye  
27 to the issues.

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1 Defendant “Doe for L.D. Zamora” reviewed the issue at the Director’s Level, but failed to  
2 correct the issue.

3 Plaintiff believes that his medication was cancelled in retaliation for filing CCI-HC-  
4 12033521. He then filed health care grievance CCI-HC-12033906 alleging retaliation.

5 Defendant Vu interviewed Plaintiff on July 2, 2012, in connection with CCI-HC-12033906.  
6 He again told Plaintiff that he should not have filed a grievance against him, and he refused to  
7 prescribe the cancelled medication. Defendant Vu said that Plaintiff would only get injections.  
8 Plaintiff asked for a copy of the policy, but Defendant Vu told the escorting officers to take Plaintiff  
9 back to his cell and ended the interview without providing a remedy.

10 Defendant Shiesha reviewed CCI-HC-12033906 at the First Level, but adopted Defendant  
11 Vu’s report and failed to do her own investigation.

12 Defendant Joaquin reviewed CCI-HC-12033906 at the Second Level and again accepted the  
13 lower-level decisions.

14 Defendant “Doe for L.D. Zamora” dismissed the retaliation claims at the Director’s Level of  
15 Review.

16 On July 13, 2012, Plaintiff received another steroid injection from Defendant Shiesha.  
17 Plaintiff asked for an MRI, but Defendant Shiesha told him that she was not going to tend to his  
18 “stupid complaints” and that she was tired of Plaintiff’s grievances. ECF No. 81, at 25.

19 On July 20, 2012, Plaintiff saw Defendant Bingamon, who diagnosed inflammation of the  
20 left shoulder and deterioration of his shoulder tendon. He told Plaintiff that he needed an MRI, but  
21 that he was not going to get involved in Plaintiff’s problems with other doctors.

22 Defendant Vu saw Plaintiff again on October 5, 2012. Plaintiff told him that he had gone  
23 through the physical therapy evaluation but was not better. Defendant Vu told Plaintiff that it did  
24 not matter how he felt, because he would still need to have another injection before he would  
25 consider recommending an MRI.

26 Plaintiff saw Defendant Vu on November 29, 2012, and explained that he had reinjured his  
27 shoulder. Defendant Vu told Plaintiff that he would order the last injection when he wanted, and  
28 that because he was in a “good mood,” he would order an MRI. ECF No. 81, at 28.

1 On December 5, 2012, Defendant Shiesha gave Plaintiff another injection.

2 Plaintiff received an MRI on December 12, 2012. The test revealed a large full-thickness  
3 tear of the tendon and atrophy, a partial tear of another tendon and other shoulder problems.

4 On January 10, 2013, Plaintiff saw Defendant Vu, who told Plaintiff that he had several tears  
5 in the muscles surrounding the rotator cuff. Defendant Vu sent Plaintiff to the prison orthopedist  
6 and recommended surgery.

7 On January 22, 2013, Plaintiff saw Dr. Lewis, the orthopedic surgeon. He told Plaintiff that  
8 he had torn three of the four major muscles that make up the rotator cuff, and that the atrophy  
9 rendered it inoperable. He expressed concern as to how long Plaintiff had been in pain and told  
10 Plaintiff that the steroid injections may have caused, or contributed to, the atrophy. Dr. Lewis  
11 referred Plaintiff to a specialist.

12 On February 8, 2013, Plaintiff saw specialist Dr. Heiser for a second opinion. He told  
13 Plaintiff that the injury was inoperable, and that a total shoulder replacement was the only real  
14 solution. Dr. Heiser strongly suggested that Plaintiff did not receive any more injections.

15 On February 13, 2013, Plaintiff saw Defendant Vu and again requested the policy.  
16 Defendant Vu became defensive and refused to provide it.

17 On April 9, 2013, Plaintiff filed health care appeal CCI-HC-13034823, complaining that  
18 Defendants were refusing to provide the policy. Defendant Vu interviewed Plaintiff on April 17,  
19 2013, and again refused to provide it. He became angry and told Plaintiff that he could get the  
20 policy from the law library.

21 Defendant Shiesha accepted Defendant Vu's report on April 19, 2013, and refused to provide  
22 the policy.

23 Defendant Longcrier was presented with the issue on May 8, 2013, as the Second Level  
24 reviewer. However, he confused Plaintiff's appeal with new issues and failed to provide a remedy.

25 Defendant "Doe for L.D. Zamora" was presented with the problem but continued to refuse to  
26 provide a remedy.

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1 In late 2013, CCI changed its program and Plaintiff feared losing his lower-bunk chrono,  
2 which had been requested by Defendant Bingamon in September 2010 approved by Defendant Tate  
3 in March 2011.

4 On September 17, 2013, Plaintiff asked to have his chronos renewed. On October 29, 2013,  
5 Defendant Tate refused to renew the chronos, despite knowing of Plaintiff's conditions.

6 Plaintiff further alleges that Defendant Vu, in a retaliatory pattern, refused to renew  
7 Plaintiff's chronos on "12/6/? (12)". ECF No. 81, at 34.

8 In November/December 2013, Plaintiff was moved and assigned a top bunk. The top bunks  
9 are not equipped with a ladder, causing severe pain when Plaintiff had to jump to the top bunk.

10 On January 23, 2014, Plaintiff submitted a health care request form after injuring his  
11 shoulder. He could not climb up and down his bunk without difficulty, and hurt himself on several  
12 occasions.

13 On January 31, 2014, Plaintiff filed grievance number CCI-HC-140-35914 after being denied  
14 medical care and the opportunity to see a doctor other than Defendant Tate.

15 Defendant Tate interviewed Plaintiff on March 11, 2014, and told him that he'd been sued  
16 many times, but no one has ever won. Defendant Tate told Plaintiff that it was his "medical  
17 opinion" that he did not need a knee sleeve and that his shoulder pain was in his mind. He denied  
18 Plaintiff's request for medication and renewal of his chrono.

19 Defendant Shiesha failed to perform her own investigation and accepted Defendant Tate's  
20 report.

21 On April 2, 2014, Defendant Longcrier learned of the problem and refused to provide a  
22 remedy to receive medical care from someone other than Defendant Tate.

23 On July 15, 2014, "Doe for J. Lewis" was presented with the problem but refused to provide  
24 a remedy.

25 On March 6, 2014, Plaintiff sought ADA accommodations for a lower-bunk and waist  
26 chains. The request was denied on March 28, 2014, because a CDC 7410 noted that Plaintiff did  
27 "not need any accommodations" and did not have any limitations. ECF No. 81, at 39. The denial

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1 was automatically converted into appeal CCI-HC-14036009, though Section A was bypassed and  
2 Plaintiff was not allowed to describe the problem.

3 Defendant Baniga reviewed the appeal at the First Level, but failed to do his own  
4 investigation and adopted the prior report.

5 On May 8, 2014, Defendant Shiesha became aware of Plaintiff's issues during Second Level  
6 review. However, she refused to do her own investigation and denied the appeal.

7 On August 19, 2014, Defendant "Doe for J. Lewis" denied the appeal at the Director's Level.

8 **C. LEGAL STANDARD**

9 The failure to exhaust is subject to a motion for summary judgment in which the court may  
10 look beyond the pleadings. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014). If the Court  
11 concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice.  
12 Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

13 Defendants bear the burden of proof in moving for summary judgment for failure to exhaust,  
14 Albino, 747 F.3d at 1166, and they must "prove that there was an available administrative remedy,  
15 and that the prisoner did not exhaust that available remedy," id. at 1172. If Defendants carry this  
16 burden, the burden of production shifts to Plaintiff "to come forward with evidence showing that  
17 there is something in his particular case that made the existing and generally available administrative  
18 remedies effectively unavailable to him." Id. This requires Plaintiff to "show more than the mere  
19 existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir.  
20 2010) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)). "If the  
21 undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a  
22 defendant is entitled to summary judgment under Rule 56." Albino, 747 F.3d at 1166. However,  
23 "[i]f material facts are disputed, summary judgment should be denied, and the district judge rather  
24 than a jury should determine the facts." Id.

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1 **D. UNDISPUTED FACTS**

2 *Appeal 03-10-13065*

3 On October 7, 2010, Plaintiff submitted appeal number 03-10-13065,<sup>2</sup> after a visit with  
4 Defendant Bingamon. Robinson Decl. ¶ 12, Ex. F. This appeal was partially granted at the Second  
5 Level on December 8, 2010. Robinson Decl. Ex. F. Plaintiff did not submit this appeal to the Third  
6 Level of Review. Robinson Decl. ¶ 12.

7 *Appeal 03-10-13844*

8 On December 15, 2010, Plaintiff submitted appeal number 03-10-13844. Robinson Decl. ¶  
9 8, Ex. B. Plaintiff complained that he had an appointment with Defendant Tate on December 2,  
10 2010, but he was confrontational and dismissive of Plaintiff's pain. Plaintiff stated that Defendant  
11 Tate's unprofessional attitude prevented him from getting proper medical care, and he requested (1)  
12 that Defendant Tate be removed from his position; (2) that inmates who file grievances against him  
13 not be retaliated against; and (3) that he get necessary medical treatment, including an MRI that was  
14 ordered in October 2010. Robinson Decl. Ex. B.

15 The appeal was handled as a staff complaint, bypassing the formal and First Level of  
16 appeals. Robinson Decl. Ex. B. After Plaintiff was interviewed by Defendant Shiesha, Defendant  
17 Joaquin denied the appeal at the Second Level, finding that Defendant Tate did not violate CDCR  
18 policy. Robinson Decl. Ex. B.

19 In responding to the denial, Plaintiff asked that his appeal be reevaluated and that a "full  
20 audit" of all health care complaints filed against Defendant Tate be performed.

21 The appeal was denied at the Third Level on April 26, 2011. Robinson Decl. Ex. B. The  
22 denial noted that Plaintiff had improperly added new issues in appealing the Second Level denial.  
23 Plaintiff was also informed that his request for the MRI was a medical issue and would not be  
24 addressed, and that his request to remove Defendant Tate was not a proper request by an inmate.  
25 Robinson Decl. Ex. B.

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<sup>2</sup> Some of the appeals have two log numbers. For clarity, the Court will refer to the log number identified by Plaintiff in his allegations.

1           *Appeal 12033521*

2           Plaintiff filed appeal number 12033521 on April 5, 2012. Robinson Decl., ¶ 8, Ex. C.  
3 Plaintiff complained that a new doctor had given him a cortisone injection in December, and had  
4 injected him in a completely different “spot” than prior doctors. Plaintiff did not get relief and was  
5 in constant pain several weeks later. In January, while doing stretches, Plaintiff heard a tear in his  
6 left shoulder. Dr. Vu recommended x-rays even though Plaintiff expressed concern about an x-ray  
7 detecting soft tissue injuries. Plaintiff complained that he had been in constant pain and requested  
8 that an MRI be performed for a proper diagnosis. Robinson Decl. Ex. C.

9           Defendant Vu interviewed Plaintiff on April 27, 2012, and Defendant Shiesha denied the  
10 appeal at the First Level. Defendant Shiesha determined that Plaintiff’s doctor had properly  
11 determined an appropriate course of treatment. Robinson Decl. Ex. C.

12           In appealing the denial, Plaintiff complained about Defendant Vu’s April 27, 2012,  
13 examination and repeated his request for an MRI. Robinson Decl. Ex. C.

14           Defendant Joaquin denied the appeal at the Second Level on June 11, 2012. Defendant  
15 Joaquin explained that Plaintiff could not demand specific medication or diagnostic treatment, and  
16 that his review of medical records indicated that he was receiving appropriate medical care.  
17 Robinson Decl. Ex. C.

18           The appeal was denied at the Third Level on November 7, 2012. Robinson Decl. Ex. C.

19           *Appeal 12033906*

20           On June 12, 2012, Plaintiff submitted appeal number 12033906, contending that since April,  
21 his requests for refills of ferrious sulfate were being ignored. Plaintiff believed that this was done in  
22 retaliation for appeal 12033521, filed against Defendant Vu. He requested a refill of his medication.  
23 Robinson Decl. ¶ 8, Ex. D.

24           Defendant Shiesha partially granted the appeal at the First Level on July 10, 2012, to the  
25 extent that Plaintiff would be free from reprisals. Robinson Decl. Ex. D. However, Plaintiff’s  
26 request for iron supplements was denied as medically unnecessary. Robinson Decl. Ex. D.

27           Defendant Joaquin denied the appeal at the Second Level on August 7, 2012. Robinson  
28 Decl. Ex. D.

1 The appeal was denied at the Third Level on December 21, 2012. Robinson Decl. Ex. D.  
2 *Appeal 13034832*

3 Plaintiff filed appeal number 13034832 on April 9, 2013, requesting a copy of the “policy for  
4 approving a shoulder MRI.” Robinson Decl. ¶ 8, Ex. E. Plaintiff explained that Defendant Vu told  
5 him that policy prevented him from ordering an MRI sooner. Defendant Vu showed Plaintiff the  
6 policy on his computer, but would not print him out a copy.

7 On April 19, 2013, Defendant Shiesha denied the appeal at the First Level, explaining that  
8 copies of policies are not provided by Primary Care Physicians. Plaintiff was informed that he could  
9 review policies and procedures at the library and obtain copies. Robinson Decl. Ex. E.

10 In appealing the denial, Plaintiff stated for the first time that he had been denied an MRI for  
11 the past two years, and that Defendant Vu cited policy in making Plaintiff undergo injections and  
12 physical therapy first. He also argued that the O.P. Manual is no longer in the library, and that  
13 copies should therefore be provided. Robinson Decl. Ex. E.

14 Defendant Longcrier denied the appeal at the Second Level on May 17, 2013. Defendant  
15 Longcrier explained that inmates could not demand specific medical treatment. Defendant  
16 Longcrier also noted that it was not appropriate to add new issues to the appeal, and the new issue  
17 would not be addressed. Robinson Decl. Ex. E.

18 The appeal was denied at the Third Level on October 2, 2013. Robinson Decl. Ex. E.

19 **E. DISCUSSION**

20 1. Appeals Process

21 California law affords prisoners the right to appeal administratively any departmental  
22 decision, action, condition, or policy which they can demonstrate have an adverse effect upon their  
23 health, safety, or welfare. Cal.Code Regs. tit. 15, § 3084.1(a). Since the revision of applicable  
24 regulations effective January 28, 2011, CDCR’s appeal process consists of three levels of appeal: (1)  
25 a first level appeal filed with one of the institution's appeals coordinators unless exempted; (2) a  
26 second level appeal filed with the institution head or designee; and (3) a third level appeal filed with  
27 the CDCR Appeals Chief. Cal.Code Regs. tit. 15, §§ 3084.7, 3084.8. The inmate must submit the  
28 first level appeal within 30 days of the occurrence of the event being appealed or of first having

1 knowledge of the action or decision being appealed. Cal.Code Regs. tit. 15, § 3084.8(b). A prisoner  
2 exhausts the appeal process when he completes the third level of review. Cal.Code Regs. tit. 15, §  
3 3084.1(b); Harvey v. Jordan, 605 F.3d 681, 683 (9th Cir. 2010). A “cancellation or rejection” of an  
4 appeal “does not exhaust administrative remedies.” Cal.Code Regs. tit. 15, § 3084.1(b).

5 2. Analysis

6 As an initial matter, the Court notes that Defendants’ motion was submitted as an attack on  
7 the allegations in Plaintiff’s original complaint, which was the operative complaint at the time the  
8 motion was submitted. Now, however, the operative complaint is Plaintiff’s October 19, 2015, First  
9 Amended Complaint. Defendants opted to proceed with this motion after Plaintiff filed his First  
10 Amended Complaint. Therefore, these findings apply only to Plaintiff’s allegations occurring prior  
11 to May 28, 2013, the time Plaintiff filed this action. In other words, these findings analyze only the  
12 following claims for events occurring prior to May 28, 2013, all of which are repeated in the First  
13 Amended Complaint:

14 (1) Retaliation in violation of the First Amendment against Defendants Bingamon, Tate  
15 and Vu; and

16 (2) Deliberate indifference to a serious medical need in violation of the Eighth  
17 Amendment against Defendants Bingamon, Tate, Vu, Shiesha and Joaquin.

18 As Defendants’ motion did not address the exhaustion of claims related to events occurring  
19 after the filing of the original complaint, the Court will not analyze claims made for the first time in  
20 the First Amended Complaint. While the new claims may ultimately be unexhausted, it is  
21 Defendants burden to raise such a challenge.<sup>3</sup>

22 Defendants concede that appeal 12033521 exhausts Plaintiff’s claim against Defendant Vu  
23 for deliberate indifference insofar as he refused to order an MRI. They argue, however, that  
24 Plaintiff’s exhausted appeals do not exhaust any other claims against Defendants Bingamon, Tate,  
25 Vu, Shiesha and Joaquin.

26 In his opposition, Plaintiff contends that Defendants have not met their burden because they,  
27 or their declarants, have not “affirmatively stated” that he did not exhaust his remedies. ECF No. 75,

28 <sup>3</sup> Plaintiff does not appear to have alleged compliance with the California Tort Claims Act in his First Amended  
Complaint.

1 at 2. Whether Plaintiff exhausted his administrative remedies, however, is a legal issue that the  
2 Court determines once it examines the undisputed facts.

3 a. *Defendant Bingamon*

4 It is undisputed that the only appeal that specifically mentioned Defendant Bingamon, appeal  
5 03-10-13065, was not fully exhausted because Plaintiff did not seek Third Level Review.

6 In opposition,<sup>4</sup> Plaintiff argues that Defendant Bingamon was his only primary care provider  
7 from approximately August 11, 2010, through March 9, 2011, and was aware of Plaintiff's  
8 complaints of shoulder pain during this time. Plaintiff then cites appeal 03-10-13844, which alleged  
9 that Defendant Tate's indifference to his pain prevented him "from obtaining proper medical health  
10 care (by the only health care provider Plaintiff was see[ing] during this time)." ECF No. 75, at 4.

11 Plaintiff therefore argues that "the reference to 'proper medical health care' refers to  
12 Bingamon as the primary care physician." ECF No. 75, at 5. While Plaintiff is correct that he did  
13 not need to name every staff member involved and was not required to use legal terms, his  
14 description must nonetheless have been sufficient to put the prison on notice of the claims so as to  
15 fulfil the basic purposes of exhaustion. Reyes v. Smith, -- F.3d --, 2016 WL 142601 (9th Cir. 2016);  
16 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009).

17 In this regard, appeal 03-10-13844 was specifically about Defendant Tate's demeanor and his  
18 treatment of Plaintiff prior to December 15, 2010. It made no mention of any other medical  
19 provider, nor could it have encompassed events after December 15, 2010. Plaintiff's contention that  
20 his reference to "proper medical healthcare" would somehow have placed the prison on notice of all  
21 claims against Defendant Bingamon is untenable.

22 It is therefore undisputed that Plaintiff's deliberate indifference and retaliation claims against  
23 Defendant Bingamon for events occurring prior to May 28, 2013, are not exhausted.

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28 <sup>4</sup> In Defendants' motion, they respond to Plaintiff's arguments, made during discovery, as to which appeals exhausted his claims. Plaintiff's arguments during discovery included more appeals than those discussed here. As Plaintiff opposed this motion and therefore made specific arguments in response to Defendants' contentions, the Court will only review those appeals referred to in Plaintiff's opposition.

1                   b.       *Defendant Joaquin*

2           It is undisputed that none of Plaintiff's appeals specifically mentioned Defendant Joaquin.  
3           Plaintiff argues that Defendant Joaquin, as an appeal reviewer, was "duty bound" to review  
4   grievances, act on the evidence and remedy the issue. Although it is not entirely clear, he seems to  
5   suggest that because he reviewed appeals 03-10-13844 and 12033521, he became part of the  
6   underlying problem, and the initial appeal then encompassed (and exhausted) his actions.

7           Plaintiff is incorrect. As explained above, appeal 03-10-13844 dealt with Defendant Tate  
8   and his treatment of Plaintiff prior to December 15, 2010. Appeal 12033521, filed on April 5, 2012,  
9   related to Dr. Vu's treatment. There is nothing in either of these appeals that would have put the  
10   prison on notice that Defendant Joaquin, during his reviews of Plaintiff's appeals, was deliberately  
11   indifferent to Plaintiff's serious medical needs. While there are situations where an appeal reviewer  
12   can be held liable for the underlying conduct, such liability is separate and apart from the exhaustion  
13   requirement. In other words, Plaintiff is still required to exhaust his claims against him based on his  
14   review of the appeals.

15           The undisputed facts therefore show that Plaintiff has not exhausted his Eighth Amendment  
16   claim against Defendant Joaquin for events occurring prior to May 28, 2013.

17                   c.       *Defendant Shiesha*

18           As with Defendant Joaquin, it is undisputed that none of Plaintiff's appeals specifically  
19   mentioned Defendant Shiesha.

20           To the extent that Plaintiff argues that Defendant Shiesha's review of certain appeals  
21   somehow exhausted the claims against her, he is incorrect for the reasons discussed above.

22           Plaintiff also suggests that Defendant Shiesha was the unknown doctor referred to in appeal  
23   12033521. In that appeal, filed on April 5, 2012, Plaintiff states that in December, an unfamiliar  
24   doctor gave him a cortisone injection "in a completely different spot" than prior doctors. Plaintiff  
25   indicated that he did not receive relief, and then goes on to explain a January 2012 injury and his  
26   issues with Defendant Vu's related treatment and denial of an MRI.

27           While it appears that Defendant Shiesha did give Plaintiff an injection in December 2011,  
28   appeal 12033521 is not related to this treatment. Plaintiff describes the December 2011 injection as

1 background to his shoulder problems, and although he states that she administered the shot in a  
2 different area, he does not specifically say that he had an issue with her treatment. Moreover, while  
3 Plaintiff alleges that Defendant Shiesha denied his request for an MRI at the December 2011 visit,  
4 this appeal makes no mention of her denial. Appeal 12033521 was not sufficient to place the prison  
5 on notice of *any* claims against Defendant Shiesha.

6 The undisputed facts therefore show that Plaintiff has not exhausted his Eighth Amendment  
7 claim against Defendant Shiesha for events occurring prior to May 28, 2013.

8 d. *Defendant Tate*

9 It is undisputed that in appeal 03-10-13844, filed on December 15, 2010, Plaintiff  
10 complained that during a December 2, 2010, appointment, Defendant Tate was confrontational and  
11 dismissive of Plaintiff's pain. Plaintiff contended that Defendant Tate's unprofessional attitude  
12 prevented him from getting proper medical care, and he requested (1) that Defendant Tate be  
13 removed from his position; (2) that inmates who file grievances against him not be retaliated against;  
14 and (3) that he get necessary medical treatment, including an MRI that was ordered in October 2010.

15 It is also undisputed that this appeal was handled as a staff complaint. In the Third Level  
16 denial, Plaintiff was informed that his request for an MRI was a medical issue and would not be  
17 addressed.

18 Plaintiff contends that this appeal exhausted his retaliation claim against Defendant Tate "in  
19 its entirety" because the Third Level response addressed the issue, finding that policy prohibits  
20 retaliatory actions. However, although Plaintiff requested generally that inmates who appeal  
21 Defendant Tate's actions be free from reprisal, he never set forth any facts about specific retaliatory  
22 actions taken against him by Defendant Tate. This appeal therefore fails to exhaust any retaliation  
23 claims for events occurring prior to May 28, 2013, against Defendant Tate.

24 Insofar as appeal 03-10-13844 addressed Plaintiff's claims of deliberate indifference against  
25 Defendant Tate, the Court finds that the appeal exhausts Plaintiff's claim related only to the  
26 December 2, 2010, visit. Plaintiff did not submit any appeals regarding any subsequent treatment  
27 from Defendant Tate and any additional claims for events occurring prior to May 28, 2013, are  
28 unexhausted.



1 e. *Defendant Vu*

2 As noted above, Defendants agree that appeal 12033251 exhausted Plaintiff's deliberate  
3 indifference claim against Defendant Vu related to his refusal to send Plaintiff for an MRI.

4 The appeal does not, however, address any other claims against Defendant Vu, including any  
5 other allegations of deliberate indifference related to his medical treatment, or any allegations of  
6 retaliation.

7 In his opposition, Plaintiff contends that appeal 12033251 was sufficient enough to place  
8 prison officials on notice of his claim that Defendant Vu took retaliatory action when he ordered a  
9 second inadequate diagnostic exam. Plaintiff is incorrect. This appeal makes no mention of any  
10 allegedly retaliatory actions.

11 Therefore, Plaintiff's deliberate indifference claim against Defendant Vu for failure to  
12 provide an MRI prior to April 5, 2012, is exhausted. The remaining claims against Defendant Vu,  
13 including the retaliation claim, for events occurring prior to May 28, 2013, are not exhausted.

14 f. *Unavailability of Remedies*

15 In his July 13, 2015, declaration, Plaintiff vaguely suggests that his administrative remedies  
16 were not available because of CDCR's policy of assigning the doctor who is the target of the appeal  
17 to investigate the appeal. Pl.'s Decl. ¶ 13 (ECF No. 70, at 3-4).<sup>5</sup> Plaintiff believes that this caused  
18 additional retaliation in the form of delayed and/or denied treatment. Pl.'s Decl. ¶ 15 (ECF No. 70,  
19 at 4). As Plaintiff believes that his appeals led to greater harm, he suggests that his administrative  
20 remedies were not available.

21 Plaintiff's argument is without merit. To meet his burden of showing that his administrative  
22 remedies were effectively unavailable, Plaintiff must "show more than the mere existence of a  
23 scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing  
24 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)). Here, although  
25 Plaintiff suggests that his grievances were causing further harm, he does not, in any way, indicate  
26 that his belief prevented him from filing any appeals. Plaintiff's speculative statement, without  
27

28 <sup>5</sup> Defendants object to this paragraph of Plaintiff's declaration as irrelevant because it discusses the investigation of the appeal, rather than whether Plaintiff exhausted his claims. Defendants' objection is overruled insofar as Plaintiff's statement relates to his argument that administrative remedies were unavailable.

1 supporting evidence, is insufficient to demonstrate that his administrative remedies were  
2 unavailable.

3 **F. RECOMMENDATION**

4 The Court therefore RECOMMENDS that Defendants' motion for summary judgment be  
5 GRANTED IN PART, and all claims except (1) Plaintiff's deliberate indifference claim against  
6 Defendant Tate related to the December 2, 2010, visit; and (2) Plaintiff's deliberate indifference  
7 claim against Defendant Vu related to his refusals (prior to May 28, 2013) to send Plaintiff for an  
8 MRI, be DISMISSED WITHOUT PREJUDICE for failure to exhaust.

9 These Findings and Recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)  
11 days after being served with these Findings and Recommendations, any party may file written  
12 objections with the Court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
14 shall be served and filed within ten (10) days after service of the objections. The parties are advised  
15 that failure to file objections within the specified time may waive the right to appeal the District  
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

17  
18 IT IS SO ORDERED.

19 Dated: January 26, 2016

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE