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

SERGIO M. TANORI,) Case No.: 1:13-cv-01888-AWI-SAB (PC)
)
Plaintiff,)
)
v.) FINDINGS AND RECOMMENDATIONS
) REGARDING DEFENDANTS' MOTIONS FOR
) SUMMARY JUDGMENT
M. BITER, et al.,)
) [ECF Nos. 41, 45]
Defendants.)
)
)

Plaintiff Sergio M. Tanori is appearing pro se in this civil rights action pursuant to 42 U.S.C. § 1983.

This action is proceeding against Defendants Robles and Herrera for excessive force in violation of the Eighth Amendment.

On May 21, 2015, Defendant Herrera filed a motion for summary judgment for Plaintiff's failure to exhaust the administrative remedies. On July 8, 2015, Defendant Robles joined in Defendant Herrera's motion for summary judgment, and also filed a motion for summary judgment, separate statement of undisputed facts, and request for judicial notice.¹ (ECF Nos. 44, 45.)

¹ Defendant Robles' request for judicial notice of the filing of the following documents is GRANTED: (1) Defendant Herrera's notice of motion and motion for summary judgment (ECF No. 41); (2) memorandum of points and authorities in support of Defendant Herrera's motion for summary judgment (ECF No. 41-1); (3) Defendant Herrera's Rand warning (ECF No. 41-2); (4) Defendant Herrera's statement of undisputed facts in support of summary judgment (ECF No. 41-3); (5) Declaration of D. Tarnoff in support of Herrera's motion for summary judgment (ECF No. 41-4); (6) complaint (ECF

1 Although Plaintiff received two extensions of time to file an opposition, to date no opposition
2 has been filed. Pursuant to Local Rule 230(l), the motions are deemed submitted for review.

3 **I.**

4 **DISCUSSION**

5 **A. Motion for Summary Judgment Standard**

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

18 Defendants do not bear the burden of proof at trial and in moving for summary judgment, they
19 need only prove an absence of evidence to support Plaintiff’s case. In re Oracle Corp. Securities
20 Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323
21 (1986)). If Defendants meet their initial burden, the burden then shifts to Plaintiff “to designate
22 specific facts demonstrating the existence of genuine issues for trial.” In re Oracle Corp., 627 F.3d at
23 387 (citing Celotex Corp., 477 U.S. at 323). This requires Plaintiff to “show more than the mere
24 existence of a scintilla of evidence.” Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252,
25 (1986)).

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28 No. 1); (7) Answer of Defendant H. Robles (ECF No. 38); (8) Plaintiff’s response to order to show cause re: dismissal for failure to exhaust administrative remedies (ECF No. 15). (ECF No. 45-3.)

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

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

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

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

27 The California Department of Corrections and Rehabilitation (CDCR) has an administrative
28 grievance system for prisoners to appeal any departmental decision, action, condition, or policy having

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

11 “[E]xhaustion is not per se inadequate simply because an individual later sued was not named
12 in the grievances.” Jones v. Bock, 549 U.S. 199, 219 (2007). “The level of detail necessary in a
13 grievance to comply with the grievances procedures will vary from system to system and claim to
14 claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper
15 exhaustion.” Id. In California, the courts have previously found that CDCR guidelines do not need to
16 identify the defendants by name because the proper form and CDCR regulations do not require
17 identification of specific individuals. See, e.g., Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005).
18 However, as of January 2011, inmates are required to list all staff members involved and describe their
19 involvement, include only one issue or related set of issues per appeal, and “describe the specific issue
20 under appeal and the relief requested.” Cal. Code Regs. tit. 15, § 3084.2(a)(1)-(4) (Jan. 28, 2011).

21 **C. Allegations of Complaint**

22 Plaintiff alleges that on January 11, 2013 at approximately 7:28 a.m. Defendants Robles and
23 Herrera were assigned to transport inmate Olivares to Bakersfield for court. (Id. at 4.) Plaintiff was
24 confined in a cell with inmate Olivares and Defendant Robles placed Plaintiff in handcuffs behind his
25 back and ordered him to the rear of the cell. (Id.) Defendant Robles then conducted an unclothed
26 body search of inmate Olivares in the cell. (Id.) Defendant Robles then placed inmate Olivares in
27 handcuffs and directed Defendant Arreola to open the cell door. (Id. at 5.)
28

1 Plaintiff contends that Defendant Robles ordered inmate Olivares to back out of the cell and
2 move to the left and inmate Olivares refused. (Id. at 6.) Defendant Robles then physically moved
3 inmate Olivares to the left. (Id. at 7.) As the cell door was closing, Plaintiff heard Defendant Robles
4 yell to Defendant Arreola to reopen the cell door. (Id. at 5.) Defendant Robles ran into the cell and
5 attacked Plaintiff. (Id.) Plaintiff alleges that Defendant Robles picked Plaintiff up by the handcuffs
6 and threw him to the cell floor and started punching and kicking Plaintiff. (Id.) Defendant Herrera
7 assisted Plaintiff with the physical assault of Plaintiff. (Id.) Due to the alleged assault, Plaintiff
8 sustained an abrasion, bruises, swelling, a serious head injury, and swelling to his head and face. (Id.)

9 Plaintiff states that Defendants Robles and Herrera should have left the cell door secured and
10 notified the lieutenant if they suspected there was contraband in the cell. (Id. at 7.) Defendant Robles
11 had just completed an unclothed body search of inmate Olivares and was aware that he did not possess
12 contraband. (Id.) Plaintiff alleges that he was cooperating with Defendant Robles who lost self-
13 control with inmate Olivares and ran back into the cell to assault Plaintiff. (Id.) Plaintiff contends that
14 Defendants Robles and Herrera attempted to cover up their use of excessive force by falsely claiming
15 that Plaintiff bit Defendant Herrera. (Id.) Defendant Herrera claimed to have sustained redness to his
16 forearm as a result of being bitten by Plaintiff but they did not have DNA or other trace evidence
17 taken. (Id. at 8.) Further, Plaintiff states that Defendants Robles and Herrera did not warn him that if
18 he refused comply with their directive physical force would be used on him to remove him from the
19 cell. (Id.)

20 Plaintiff believes that Defendants Herrera and Robles have a long history of use of excessive
21 force on inmates at Kern Valley State Prison. (Id. at 6.)

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D. Statement of Undisputed Facts²

1. Plaintiff Sergio M. Tanori is an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR) who is currently incarcerated at California Correctional Institution (CCI) in Tehachapi, California. (ECF No. 1 at 1.)

2. Plaintiff claims that on January 11, 2013, at Kern Valley State Prison (KVSP), he was subjected to excessive force by Defendants Robles and Herrera. (ECF No. 1 at 2.)

3. On the same day the alleged incident took place, Plaintiff was transferred to CCI from KVSP in Delano, California. (ECF No. 1 at 2.)

4. On January 31, 2013, Plaintiff sent a letter to the Office of Internal Affairs (OIA) stating that he was the victim of excessive force by Defendants Robles and Herrera. (ECF No. 1 at 12.)

5. Plaintiff’s letter to OIA included an inmate appeal form regarding the alleged use of excessive force by Defendants Robles and Herrera. In his letter, Plaintiff asked OIA to process this inmate appeal. (Id.)

6. On March 29, 2013, Plaintiff sent a follow-up letter to OIA asking about the status of his appeal. Plaintiff did not receive a response from OIA. (Id.)

7. On April 27, 2013, Plaintiff sent a Form 22 “Inmate/Parolee Request Form” to the Appeals Coordinator at KVSP asking about the status of the appeal that he had submitted to OIA alleging excessive force by Defendants Robles and Herrera. (Id.)

8. On May 2, 2013, the KVSP Appeals Office responded to Plaintiff’s Form 22, stating that “the inmate appeals office has no record of receiving an appeal submitted regarding excessive force on or about January 31, 2013.” (Id.)

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² Plaintiff neither filed his own separate statement of disputed facts nor admitted or denied the facts set forth by Defendant as undisputed. Local Rule 56-260(b). Therefore, Defendants’ statements of undisputed facts are accepted except where 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 9. On May 13, 2013, Plaintiff sent a letter to the warden of KVSP containing another
2 inmate appeal form alleging excessive force on the part of Defendants Robles and Herrera on January
3 11, 2013. (Id. at pp. 12-13.)

4 10. On May 31, 2013, Plaintiff was interviewed by the second level responder regarding
5 his appeal. His appeal was partially granted in that it was referred to an investigator as a staff inquiry.
6 (Id. at 13.)

7 11. On September 27, 2013, Plaintiff's appeal was cancelled by the third level of appeal.
8 (Id. at 13; ECF No. 15 at 32.)

9 12. In his cancellation letter, J.D. Lozano, Chief of the Office of Appeals, noted that the
10 alleged incident took place on January 11, 2013, but that Plaintiff did not file his appeal until May 13,
11 2013. The letter further stated that Plaintiff failed to demonstrate a legitimate reason for the delay in
12 submitting his appeal and informed him that he could appeal the cancellation. (ECF No. 15 at 32.)

13 13. Each institution within the CDCR employs a designated Appeals Coordinator who,
14 prior to accepting an appeal for review, is responsible for screening and categorizing every appeal.
15 (Cal Code Regs. tit. 15, § 3084.5; D. Tarnoff Decl. ¶ 2.)

16 14. First and second level appeals must be submitted to the Appeals Coordinator to be
17 processed. Cal. Code Regs. tit. 15, § 3084.2(c).

18 15. At the relevant time in this case, CDCR regulations required prisoners to submit an
19 appeal within thirty calendar days of the event or decision being appealed, use the required form, and
20 proceed through three levels of appeal: (1) first level; (2) second level appeal to hiring authority; and
21 (3) third level appeal at the director's level. (Cal. Code Regs. tit. 15, §§ 3084.2(a), 3084.7, 3084.8(b);
22 D. Tarnoff Decl. ¶ 3.)

23 16. Plaintiff was required to obtain a decision at the third level (Director's level) in order to
24 fully exhaust his available administrative remedies. (Cal. Code Regs. tit. 15, § 3084.1(b).)

25 17. In some instances, the Appeals Coordinator will not accept an appeal for review on the
26 merits of the inmate's complaint because the appeal is deficient under one or more criteria specified by
27 the California Code of Regulations. For example, an appeal may be rejected, and thus, no response
28 rendered, if it is untimely. (Cal. Code Regs. tit. 15, § 3084.6(b)(1)-(16); D. Tarnoff Decl. ¶ 3.)

1 18. Appeals coordinators have the discretion to accept late appeals when an adequate
2 explanation and/or documentation is provided to justify the delay. (D. Tarnoff Decl. ¶ 14.)

3 19. If an inmate does not provide an adequate explanation or documentation to justify a late
4 appeal, it must be screened out. (D. Tarnoff Decl. ¶ 14.)

5 20. Erroneous acceptance of an appeal at a lower level does not preclude the next level of
6 review from taking appropriate action, including rejection or cancellation of the appeal. (Cal. Code
7 Regs. tit. 15, § 3084.6(a)(5); D. Tarnoff Decl. ¶ 14.)

8 **E. Analysis**

9 Defendants move for summary judgment on the basis that there is no reasonable dispute that
10 Plaintiff failed to “complete the administrative review process in accordance with the applicable
11 procedural rules, including deadlines, as a precondition to bringing suit in federal court.” Woodford v.
12 Ngo, 548 U.S. 81, 88 (2006).

13 As previously stated, the State of California provides all prisoners the right to administratively
14 appeal any departmental decision, action, condition, or policy that has an adverse effect on their
15 welfare. Cal. Code Regs. tit. 15, § 3084.1(a). Thus, a CDCR prisoner must follow the procedures set
16 forth in Article 8 of Title 15 of the California Code of Regulations. Woodford, 548 U.S. at 88.

17 At the relevant time in this case, the regulations required prisoners, such as Plaintiff, to submit
18 an appeal within thirty calendar days of the event or decision being appealed, use the required form,
19 and proceed through three levels of appeal: (1) first level; (2) second level appeal to hiring authority;
20 and (3) third level appeal at the director’s level. Cal. Code Regs. tit. 15, §§ 3084.2(a), 3084.7,
21 3084.8(b).

22 CDCR has set forth rules that inmates must comply with when submitting appeals, such as use
23 of the standardized CDCR Form 602, attachment of necessary supporting documentation, and
24 submission of the appeal within thirty days of the disputed event. Cal. Code Regs. tit. 15, §§ 3084.2,
25 3084.3(a), 3084.8(b). Each prison is required to have an “appeals coordinator” whose job is to “screen
26 all appeals prior to acceptance and assignment for review.” Cal. Code Regs. tit. 15, § 3084.5(b). The
27 appeals coordinator may refuse to accept an appeal, and can either reject or cancel the appeal. Id. §
28 3084.6(a) (“Appeals may be rejected pursuant to subsection 3084.6(b), or cancelled pursuant to

1 subsection 3084.6(c), as determined by the appeals coordinator”). Pursuant to the regulations, “a
2 cancellation or rejection decision does not exhaust administrative remedies.” Id. § 3084.1(b). When
3 an appeal is “rejected,” the appeals coordinator is required to “provide clear and sufficient instructions
4 regarding further actions the inmate ... must take to qualify the appeal for processing.” Id. §
5 3084.6(a)(1). When an appeal is “cancelled,” the prisoner “shall be notified of the specific reason(s)
6 for the ... cancellation.” Id. § 3084.5(b)(3).

7 In the complaint, Plaintiff contends that he sent a letter and inmate appeal alleging he had been
8 the victim of excessive force on January 11, 2013 to Special Agent Dunlop of the Office of Internal
9 Affairs on January 13, 2013. (Compl. ¶ 68, ECF No. 1.) Plaintiff sent a follow-up letter to Agent
10 Dunlop on March 29, 2013 requesting the status of his appeal. (Id. at ¶ 69.) It was not until April 27,
11 2013, that Plaintiff submitted an inmate appeal to the appeals coordinator at Kern Valley State Prison
12 asking that the appeal sent to the Office of Internal Affairs on January 13, 2013 be processed. (Id. at ¶
13 71.) Plaintiff received a response on May 2, 2013, that there was no record of any appeal being
14 submitted on or about January 13, 2013. (Id. at ¶ 72.) Plaintiff filed an inmate appeal on May 13,
15 2013, and was interviewed by Defendant Seaman on May 31, 2013. (Id. at ¶ 73.) Plaintiff contends
16 that his appeal was illegally cancelled on September 27, 2013 by Defendant Pimental. (Id. at ¶ 81.)
17 Plaintiff alleges that the evidence clearly shows that Defendants Biter, Vera, Goss, Tyson, Marta,
18 Lozano, Pimental, Seaman, Kunz, and Rodriguez have effectively prevented Plaintiff from timely
19 using the available administrative remedies by falsely claiming that he did not timely process his
20 inmate appeal. (Id. at ¶ 85.)

21 Defendants argue that Plaintiff appears to have chosen “this date because it was the date that
22 Appeals Examiner R. Pimentel cancelled Plaintiff’s appeal in accordance with CDCR regulations.
23 Although Plaintiff claims that his appeal was illegally cancelled, he did not appeal the cancellation
24 decision.” Defendants further argue that Plaintiff did not offer any explanation to the KVSP Appeals
25 Coordinator as to why his appeal was four months late, making the cancellation of his appeal proper
26 under CDCR regulations.

27 In moving for summary judgment, Defendants submit the declaration of D. Tarnoff, Appeals
28 Coordinator at KVSP. (ECF No. 41-4, D. Tarnoff Decl.) D. Tarnoff declares that every 602

1 received by the appeals, even those that are rejected or cancelled, is assigned a log number and
2 tracked. (D. Tarnoff Decl. ¶¶ 5-6.) After the appeals office receives, screens, logs, and answers
3 accepted inmate appeals, it sends a copy of the 602 appeal to case records for placement in the
4 inmate’s central file. Additionally, the original 602 is returned, along with the CDCR response, to the
5 inmate. (Id. ¶ 7.) “All grievances, along with the CDCR’s responses to them, are tracked in a
6 computerized system called the Inmate Appeals Tracking System (IATS).” (Id. ¶ 9.) “A printout of
7 the IATS information for a particular inmate lists all of the 602 appeals that the inmate has filed at a
8 particular prison.” (Id.)

9 D. Tarnoff declares that the appeals office has no record of Plaintiff submitting an appeal
10 regarding the cancellation of his May 13, 2013 appeal. (Id. ¶ 13.)

11 1. Letter to the Office of Internal Affairs dated January 31, 2013

12 As this Court noted in its June 30, 2014, Findings and Recommendations, the Office of Internal
13 Affairs is not part of the inmate appeals process. (ECF No. 17 at 5.) CDCR regulations explicitly
14 require inmates to submit appeals to the Appeals Coordinator to be processed. Cal. Code Regs. tit. 15,
15 § 3084.5. Therefore, Plaintiff’s letter and appeal sent to the Office of Internal Affairs could not have
16 exhausted his administrative remedies, and CDCR’s failure to respond to that appeal does not
17 represent an improper screening out of his claim. See De Shazo v. Hieng, No. 1:07-cv-01258-OWW-
18 MJS PC, 2011 WL 570263, at *4 (E.D. Cal. Feb. 15, 2011); see also Panaro v. City of North Las
19 Vegas, 432 F.3d 949, 953 (9th Cir. 2005) (participating in Internal Affairs investigation did not
20 exhaust administrative remedies); Wilson v. Wann, No. 2:06-cv-01629-GEB-KJM P, 2008 WL
21 4166886, at *2 (E.D. Cal. Sept. 8, 2008) (letter to warden and Internal Affairs does not exhaust
22 administrative remedies).

23 2. Inmate Appeal dated May 13, 2013

24 As previously noted, Plaintiff submitted a 602 inmate appeal on May 13, 2013, regarding an
25 alleged use of force incident that occurred on January 11, 2013.³ This appeal, which was submitted
26 over four months after the alleged incident, was erroneously processed by the second level on May 31,

27 _____
28 ³ Plaintiff alleges that he sent this appeal in a letter to the warden, who then chose to forward it to the Appeals Coordinator.
(ECF No. 15 at 34; ECF No. 22 at 6.)

1 2013. (ECF No. 1 at 13; ECF No. 15 at 28.) The appeal was subsequently screened out by the third
2 level on September 27, 2013, as untimely under Cal. Code Regs. tit. 15, § 3084.6. The September 27,
3 2013, screen out letter provided Plaintiff with an opportunity to appeal the cancellation decision, but
4 he was required to provide a legitimate reason for the delay in submitting his appeal. (ECF No. 15 at
5 32.)

6 The administrative remedy process provides staff with the discretion to determine whether the
7 inmate had the opportunity to submit a timely appeal and it allows staff to excuse late appeals or to
8 reinstate cancelled appeals. (D. Tarnoff Decl. ¶ 14; Cal. Code Regs. tit. 15, §§ 3084.6(a)(3)-(4),
9 (c)(4).) Under CDCR regulations, Plaintiff was required to first submit his appeal within thirty
10 calendar days of the January 11, 2013 incident, i.e. by February 10, 2013. Cal. Code. Regs. tit. 15, §
11 3084.8(b). Plaintiff's May 13, 2013 appeal was significantly late and was appropriately screened out,
12 absent an explanation justifying the significant delay. (ECF No. 15 at 24-27, 32.)

13 A cancellation decision may be challenged, § 3084.6(e), and in the cancellation letter dated
14 September 27, 2013, Plaintiff was specifically informed in writing as follows: "Pursuant to CCR
15 3084.6(e), once an appeal has been cancelled, that appeal may not be resubmitted. However, a
16 separate appeal can be filed on the cancellation decision. The original appeal may only be resubmitted
17 if the appeal on the cancellation is granted." (ECF No. 15 at 32.) Plaintiff had the opportunity to
18 appeal this cancellation, but he failed to do so. Plaintiff's conclusory and false assertion that his
19 appeal was illegally cancelled is insufficient to demonstrate that CDCR improperly screened out his
20 appeal.

21 If Plaintiff believed that he was justified in filing his appeal late--either because he mistakenly
22 sent an appeal to the Office of Internal Affairs or because he was in extremely restrictive housing, as
23 he alleges—he had multiple opportunities to explain that in his appeal, in the second-level response
24 interview, or in his request for third level review. As is clear from Plaintiff's exhibits, he failed to take
25 advantage of these opportunities. (ECF No. 15 at 24-27.) Moreover, if Plaintiff believed that his
26 appeal was incorrectly screened out, he could have contested that decision. He simply chose not to do
27 so. (D. Tarnoff Decl. ¶ 8.)

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1 3. Alleged Efforts by Plaintiff to Exhaust Administrative Remedies

2 Although Plaintiff did not file an opposition to the instant motion for summary judgment,
3 Plaintiff addressed exhaustion of the administrative remedies in his complaint (ECF No. 1.), response
4 to the court’s order to show cause (ECF No. 15), and objections to the previous Findings and
5 Recommendations (ECF No. 22). In order to properly determine whether the exhaustive remedies
6 were exhausted by Plaintiff, the court will consider and address the content of each filing below.

7 On June 23, 2014, in response to the Court’s order to show cause (ECF No. 11), Plaintiff
8 alleged for the first time that he had actually submitted another appeal on January 17, 2013. (ECF No.
9 15 at 5.) In support of his allegation, Plaintiff submits as “exhibit A pg 7” a handwritten note on a
10 blank sheet of paper with “602” written across the top and a recitation of the claims in this lawsuit.
11 (Id. at 22.) After the Court issued a recommendation that the action be dismissed for failure to
12 exhaust the administrative remedies, Plaintiff explained that his “exhibit A pg 7” was intended to show
13 a “copy of the rough draft of what was originally written in the January 17, 2013 602 appeal” and not
14 an exact copy of what he submitted. (ECF No. 22 at 11, emphasis in original.) Plaintiff stated that “at
15 all times” he submitted an appropriate Form 602 appeal via regular mail to the KVSP Appeals
16 Coordinator. (Id.) Plaintiff further stated that the Appeals Coordinator’s failure to respond to this
17 appeal proves that his appeals “were being mishandled, lost, or torn up,” and therefore he should be
18 exempt from the PLRA’s exhaustion requirement. (Id. at 13.) Plaintiff further alleges that his April
19 27, 2013 Form 22 request asked about the status of all previous 602s submitted to the Appeals
20 Coordinator. (Id. at 14.)

21 Plaintiff’s new allegation of a missing 602 appeal mailed on January 17, 2013, is inconsistent
22 with the remainder of his pleadings and allegations. In his complaint, filed November 21, 2013,
23 Plaintiff set forth in great detail his alleged efforts to exhaust the administrative remedies, but he made
24 no mention of this alleged “original” 602. (See ECF No. 1, Compl. at 12-14.) It is also noteworthy
25 that despite Plaintiff’s attempt to later claim otherwise, the Form 22 provided to the Court
26 demonstrates that he only asked about the status of his 602 appeal “sent from the Internal Affairs
27 Office on 1/31/13.” (ECF No. 15 at 33.) Plaintiff has not submitted any documentation that he
28 inquired as to the status of this alleged “original” 602 appeal.

1 Indeed, D. Tarnoff declares that “[e]xcept for the appeal submitted on May 13, 2013, the
2 Appeals Office records show that Plaintiff filed only one other appeal regarding an allegation of
3 excessive force on January 11, 2013. This appeal was received on November 5, 2013 and assigned log
4 number KVSP-0-13-03120. This appeal was subsequently rejected and screened out to the appellant
5 on 11-6-13. The comments section notes the following: “This is a duplicate of appeal log #KVSP-O-
6 13-01318 which was completed and cancelled by Third level on 10-7-13. Requested copies may be
7 obtained through your assigned CCI.” (D. Tarnoff Decl. ¶ 15.)

8 In any event, even if it is assumed that Plaintiff actually mailed an appeal on January 17, 2013,
9 regarding his claims at issue in the instant action, Plaintiff has provided nothing more than bare
10 conclusory assertions that CDCR officials refused to respond to this appeal, or that they even actually
11 received such appeal. In addition, there is no record of Plaintiff submitting any appeal regarding his
12 allegations in this case prior to the cancelled May 13, 2013, appeal. (D. Tarnoff Decl. ¶ 15; Ex. A.)
13 Furthermore, there is an absolute lack of authentication for Plaintiff’s handwritten duplicate copy of
14 the 602 inmate appeal he allegedly written on January 17, 2013.

15 “Unauthenticated documents cannot be considered in a motion for summary judgment,” and
16 “[t]he authentication of a document requires ‘evidence sufficient to support a finding that the matter in
17 question is what its proponent claims.’” Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 532-533
18 (9th Cir. 2011) (quoting Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (citing
19 Fed. R. Evid. 901(a)). An inquiry into authenticity concerns the genuineness of an item of evidence,
20 not its admissibility. Orr, 285 F.3d at 776. Rule 901 of the Federal Rules of Evidence provides that
21 evidence may be authenticated by “[t]he appearance, contents, substance, internal patterns, or other
22 distinctive characteristics of the item, taken together with all the circumstances,” Fed. R. Evid.
23 901(b)(4), and documents may be authenticated by review of their contents if they appear to be
24 sufficiently genuine, Las Vegas Sands, LLC, 632 F.3d at 533 (citing Orr, 285 F.3d at 778 n.24)
25 (quotation marks omitted).

26 Courts generally view objections based on authentication skeptically in the absence of an
27 indication that the document’s authenticity is genuinely in dispute, Chamberlain v. Les Schwab Tire
28 Center of California, Inc., No. 2:11-cv-03105-JAM-DAD, 2012 WL 6020103, at *2 (E.D. Cal. Dec. 3,

1 2012); Burch v. Regents of the University of California, 433 F.Supp.2d 1110, 1120-1121 (E.D. Cal.
2 2006), and objections to prison records which are clearly what they purport to be are routinely
3 overruled under Rule 901(b)(4), see, e.g., Thomas v. Quintana, No. CV 10-2671-JGB (CWX) (official
4 Bureau of Prisons logs and records maintained in the ordinary course of business); Howard v. Wang,
5 No. 1:10cv01783 AWI DLB PC, 2014 WL 3687728, at *3 (E.D. Cal. Jul. 24, 2014) (prison records
6 maintained in inmate’s central and medical files), findings and recommendations adopted in full, 2014
7 WL 5483739 (E.D. Cal. Nov. 19, 2014); Abdullah v. CDC, No. CIV S-06-2378 MCE JFM P, 2010
8 WL 4813572, at *3 (E.D. Cal. Nov. 19, 2010) (finding no objection for lack of foundation and
9 authentication unavailing where the records were from the plaintiff’s prison file and they were created
10 and maintained by prison officials), findings and recommendations adopted in full, 2011 WL 489599
11 (E.D. Cal. Feb. 7, 2011); Sanchez v. Penner, No. CIV S-07-0542 MCE EFB P, 2009 WL 3088331, at
12 *5 (E.D. Cal. Sept. 22, 2009) (overruling lack of foundation and proper authentication objections to
13 prison medical records submitted by the plaintiff).

14 In this case, however, Plaintiff admittedly presents a handwritten “rough draft” copy (on a
15 blank sheet of paper) of an inmate appeal he claims to have written on January 17, 2013. The
16 handwritten copy of the 602 does not contain any indicia of official receipt or other distinctive
17 characteristics sufficient to support a finding that it is what it purports to be. There is no way for the
18 Court to determine (and Plaintiff does not provide any detail) as to when and how the 602 inmate
19 appeal form was submitted. Plaintiff merely contends in conclusory fashion that “at all times” he
20 submitted an appropriate Form 602 appeal via regular mail to the KVSP Appeals Coordinator. (ECF
21 No. 22 at 11.) Documents may be authenticated through personal knowledge where they are attached
22 to an affidavit and the affiant is a competent witness who wrote the document, signed it, used it, or
23 saw others do so. Fed. R. Evid. 901(b)(1); Las Vegas Sands, LLC, 632 F.3d at 553 (citing Orr, 285
24 F.3d at 773.) Moreover, Plaintiff’s competence to testify about matters within his personal knowledge
25 may be inferred from his declaration. Strong v. Valdez Fine Foods, 724 F.3d 1042, 1045 (9th Cir.
26 2013); Barthelemy v. Air Line Pilots Ass’n, 897 F.2d 999, 1018 (9th Cir. 1990) (per curiam). In this
27 instance, Plaintiff has failed to lay an adequate foundation to authenticate the handwritten rough draft
28 copy of the inmate appeal. Even considering the leniency to Plaintiff is entitled given his pro set

1 status, Plaintiff's filing contains only bare assertions that "at all times" he submitted an appropriate
2 Form 602 appeal (written on January 17, 2013) via regular mail to the KVSP Appeals Coordinator.
3 (ECF No. 15 at 5; ECF No. 22 at 11.) Plaintiff further stated that the Appeals Coordinator's failure to
4 respond to this appeal proves that his appeals "were being mishandled, lost, or torn up," and therefore
5 he should be exempt from the PLRA's exhaustion requirement. (Id. at 13.) There are no facts as to
6 the date on which he allegedly submitted the original appeal form, how he submitted the form, to
7 whom he submitted the form, and the rough draft handwritten copy completely lacks any indicia of
8 genuineness, as previously discussed herein. Plaintiff's conclusory contentions and arguments are
9 insufficient to meet his burden of producing evidence showing that his administrative remedies were
10 rendered effectively unavailable to him by the actions of prison officials. Accordingly, Defendants'
11 motion for summary judgment should be granted.

12 II.

13 RECOMMENDATIONS

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

- 15 1. Defendants Herrera and Robles' motions for summary judgment be GRANTED; and
- 16 2. This action be dismissed, without prejudice, for failure to exhaust the administrative
17 remedies.

18 These Findings and Recommendations will be submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
20 being served with these Findings and Recommendations, the parties may file written objections with
21 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
22 Recommendations." The parties are advised that failure to file objections within the specified time

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1 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
2 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: October 13, 2015


UNITED STATES MAGISTRATE JUDGE