



1 33), to which Defendants filed an opposition (ECF No. 43). Inasmuch as both Plaintiff's  
2 motion and Defendants' motion for summary judgment involve the same underlying facts  
3 and analysis of the same legal standards, the Court will address them both together  
4 here.

## 5 **II. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT**

6 Any party may move for summary judgment, and “[t]he [C]ourt shall grant  
7 summary judgment if the movant shows that there is no genuine dispute as to any  
8 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
9 56(a). Each party’s position, whether it be that a fact is disputed or undisputed, must be  
10 supported by (1) citing to particular parts of materials in the record, including but not  
11 limited to depositions, documents, declarations, or discovery; or (2) “showing that the  
12 materials cited do not establish the absence or presence of a genuine dispute, or that an  
13 adverse party cannot produce admissible evidence to support the fact.” Fed R. Civ. P.  
14 56(c)(1).

15 “Where the moving party will have the burden of proof on an issue at trial, the  
16 movant must affirmatively demonstrate that no reasonable trier of fact could find other  
17 than for the moving party.” Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th  
18 Cir. 2007). If the burden of proof at trial rests with the nonmoving party, then the moving  
19 party need only point to “an absence of evidence to support the nonmoving party’s  
20 case.” Id. Once the moving party has met its burden, the nonmoving party must point to  
21 “specific facts showing that there is a genuine issue for trial.” Id. (quoting Anderson v.  
22 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

23 In evaluating the evidence, “the [C]ourt does not make credibility determinations  
24 or weigh conflicting evidence,” and “it draws all inferences in the light most favorable to  
25  
26  
27  
28

1 the nonmoving party.” Id.

2 **III. FACTUAL SUMMARY**

3 The Court finds that the following facts are undisputed:

4 Plaintiff’s cell at Corcoran Substance Abuse Treatment Facility was searched and  
5 Plaintiff was allegedly restrained with excessive force by Defendants Huffman and Curry  
6 on August 11, 2013.

7  
8 On September 5, 2013, Plaintiff lodged Appeal Log No. SATF-D-13-03708 with  
9 the Appeals Office. The appeal discussed the cell search, seizure of Plaintiff’s personal  
10 items, use of force, and retaliation. The grievance was processed for first level review  
11 and granted in part on October 22, 2013. Plaintiff had 30 days to seek second level  
12 review. CAL. CODE REGS. tit. 15 § 3084.8(b)(3). Plaintiff’s second-level appeal, dated  
13 November 20, 2013, was received at the second-level appeal office on December 6,  
14 2013. The reviewer cancelled the appeal that day because it was filed outside of the 30-  
15 day time limit. Plaintiff had thirty days within which to appeal the cancellation in a  
16 separate appeal. CAL. CODE REGS. tit. 15 §§ 3084.8(b)(3), 3084.6(e). Plaintiff did not  
17 appeal the cancellation within the time limit. In April 2014, three months after Plaintiff  
18 had filed suit in the instant action, the appeals office sent Plaintiff a form requesting an  
19 amended response to Appeal Log. No. SATF-D-03708. Plaintiff sent numerous inquiries  
20 regarding the nature of the response requested. In August 2014, he appealed the  
21 original cancellation of Appeal Log. No. SATF-D-03708; this appeal was rejected at the  
22 first level for failure to meet the 30-day time limit for appealing cancellations. (ECF No.  
23 33, at 32.)

24 After Plaintiff was charged with an RVR for “Resisting Staff Resulting in the Use of  
25 Force” in connection with the incident on August 11, 2013, Plaintiff filed Appeal Log No.  
26  
27  
28

1 SATF-D-13-03689. In this appeal, he complained that the RVR did not list all witnesses  
2 to the incident and reiterated his challenge regarding Huffman's use of force. The  
3 appeal was received and rejected at the first level of review on September 16, 2013  
4 because Plaintiff had not attached supporting documents. After Plaintiff corrected this  
5 deficiency, the appeal was denied at the second level on November 7, 2013. Plaintiff's  
6 appeal to the third level was rejected on December 10, 2013 for lack of supporting  
7 documentation. Plaintiff resubmitted the appeal on February 24, 2014 (by which time  
8 Plaintiff had already filed suit in the instant action) and it was cancelled for failure to file  
9 within the 30-day time limit. Plaintiff did not appeal the cancellation.  
10

#### 11 **IV. PARTIES' ARGUMENTS**

##### 12 **A. Defendants' Arguments**

13 Defendants argue that Plaintiff did not properly exhaust his administrative  
14 remedies. They acknowledge that Plaintiff filed two grievances relating to the incident  
15 giving rise to the claims in this action, but argue that he never completed the appeals  
16 process. Defendants point out that Appeal Log No. SATF-D-13-03708 was cancelled at  
17 the second level because the appeals office did not receive it within the 30-day window,  
18 and that Appeal Log No. SATF-D-13-03689 was rejected at the third level for failure to  
19 include supporting documentation. They observe that Plaintiff did not appeal the  
20 cancellation or rejection. They argue in their reply (ECF No. 47) and their opposition to  
21 plaintiff's motion (ECF No. 43) that the actions Plaintiff claims "thwarted" exhaustion  
22 occurred subsequent to the filing of his complaint, and thus should not affect the analysis  
23 of whether administrative remedies were exhausted before the suit was initiated.  
24  
25

##### 26 **B. Plaintiff's Arguments**

27 Plaintiff does not dispute that he never fully exhausted Appeal Log No. SATF-D-  
28

1 13-03708 or Appeal Log No. SATF-D-13-03689. Instead, he argues that the  
2 administrative remedy was rendered effectively unavailable by appeals coordinators'  
3 obstructive tactics. Specifically, he alleges that CDCR officials "join together to harass...  
4 and retaliate... against Plaintiff with a combination of unethical acts, refuse to answer,...  
5 use the inmate appeals screening form... to manipulate improper, excessive and  
6 repetitive delays... detaching inmate's supporting documentations from 602 to inmate  
7 with written statement refusing to process 602 because no supporting documents  
8 accompany 602, in screening out 602s." (ECF No. 42, at 4). He states that CDCR's  
9 conduct amounts to "moral turpitude." (Id.)

11 However, Plaintiff does not indicate that the cancellation of Appeal Log No. SATF-  
12 D-13-03708 on December 6, 2013 or the rejection of Appeal Log No. SATF-D-13-03689  
13 on December 10, 2013 was improper. Rather, he devotes the bulk of his opposition to  
14 the motion for summary judgment (ECF No. 42) and the motion for an order finding that  
15 his administrative remedies were thwarted (ECF No. 33) to challenging CDCR's  
16 allegedly dilatory tactics in 2014, after he had already initiated the present litigation.

#### 18 **IV. DISCUSSION**

##### 19 **A. Legal Standard -- Exhaustion**

20 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought  
21 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
22 a prisoner confined in any jail, prison, or other correctional facility until such  
23 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).  
24 Therefore, prisoners are required to exhaust all available administrative remedies prior to  
25 filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007).

27 "The primary purpose of a [prisoner's administrative] grievance is to alert the  
28

1 prison to a problem and facilitate its resolution, not to lay groundwork for litigation.”  
2 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). “A grievance need not include  
3 legal terminology or legal theories unless they are in some way needed to provide notice  
4 of the harm being grieved. A grievance also need not contain every fact necessary to  
5 prove each element of an eventual legal claim.” *Id.* Instead, the grievance must alert  
6 “the prison to the nature of the wrong for which redress is sought,” *Id.* at 1120 (quoting  
7 Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)), and must give the prison an  
8 opportunity “to reach the merits of the issue.” *Id.* at 1119.

10 A motion for summary judgment is the proper means to raise a prisoner's failure  
11 to exhaust administrative remedies. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir.  
12 2014). Defendants have the burden of proving Plaintiff failed to exhaust available  
13 administrative remedies. *Id.* A defendant's burden of establishing an inmate's failure to  
14 exhaust administrative remedies has been characterized by the Ninth Circuit as “very  
15 low.” Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The “defendant need only  
16 show the existence of . . . [a grievance procedure] that the plaintiff did not use.” *Id.*  
17 (citing Hilao v. Estate of Marcos, 103 F.3d 767, 778, n.5 (9th Cir. 1996)).

19 An inmate may be excused from the exhaustion requirement where administrative  
20 remedies were “effectively unavailable.” Albino, 747 F.3d at 1173 (citing Nunez v.  
21 Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010)). An administrative remedy may be  
22 “effectively unavailable” where prison officials fail to respond to a properly filed  
23 grievance, Sapp v. Kimbrell, 623 F.3d 813, 822-823 (9th Cir. 2010); erroneously inform  
24 inmates that additional paperwork is necessary, causing the inmate to miss filing  
25 deadlines, Nunez, 591 F.3d at 1226; or fail to provide an inmate with either grievance  
26 forms or information about the grievance procedure, despite his complaints or requests.  
27  
28

1 Albino, 747 F.3d at 1177; see also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir.  
2 2009) (inmate would not fail to timely file where he did not have access to the necessary  
3 forms within the filing time period).

### 4 **C. Analysis**

5 Viewing the evidence in the light most favorable to Plaintiff, the Court finds that  
6 Defendants have demonstrated an absence of a genuine dispute of material fact on the  
7 issue of exhaustion.

8  
9 Defendants have shown that Plaintiff failed to obtain a third-level disposition of  
10 either Appeal Log No. SATF-D-13-03708 or Appeal Log No. SATF-D-13-03689, the only  
11 two appeals relevant to the underlying facts of this case, and that Plaintiff also failed to  
12 timely appeal the respective rejection and cancellation of these appeals.

13  
14 Plaintiff, for his part, has provided no evidence that he did, in fact: (1) successfully  
15 exhaust either of the above appeals; (2) successfully appeal the cancellation or rejection  
16 of either appeal; or (3) file a separate appeal on the same issues that he did properly  
17 exhaust.

18 Nor has he provided evidence that administrative remedies were rendered  
19 effectively unavailable. Although he makes general allegations of impropriety, “moral  
20 turpitude,” and deliberate delay on the part of CDCR, he does not argue, much less  
21 support such argument with concrete evidence, that either the cancellation of Appeal  
22 Log No. SATF-D-13-03708 or the rejection of Appeal Log No. SATF-D-13-03689 was  
23 made for improper reasons. That is, he does not suggest that his second level appeal in  
24 SATF-D-13-03708 was in fact timely filed, or that his third-level appeal in SATF-D-13-  
25 03689 did have all the required documents attached.

26  
27 CDCR conduct after January 2014 is irrelevant to the Court’s analysis because it  
28

1 occurred after the filing of the complaint. The PLRA requires administrative remedies to  
2 have been exhausted *prior* to the filing of a federal lawsuit. 42 U.S.C. § 1997e(a); Jones  
3 v. Bock, 549 U.S. 199, 211 (2007). The undisputed facts in this case indicate that this  
4 requirement was not met.

## 6 **VI. CONCLUSION AND RECOMMENDATION**

7 The Court finds that Plaintiff has not met his burden of putting forth sufficient  
8 evidence to raise a triable issue of fact regarding exhaustion. Based on the foregoing,  
9 the Court HEREBY RECOMMENDS that Defendants' motion for summary judgment  
10 (ECF No. 35) be GRANTED, and Plaintiff's motion to find efforts to exhaust were  
11 thwarted (ECF No. 33) be DENIED, thus concluding this action in its entirety.

12 These Findings and Recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
14 **fourteen** (14) days after being served with these Findings and Recommendations, any  
15 party may file written objections with the Court and serve a copy on all parties. Such a  
16 document should be captioned "Objections to Magistrate Judge's Findings and  
17 Recommendations." Any reply to the objections shall be served and filed within fourteen  
18 (14) days after service of the objections. The parties are advised that failure to file  
19 objections within the specified time may result in the waiver of rights on appeal.  
20 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
21 F.2d 1391, 1394 (9th Cir. 1991)).

22 IT IS SO ORDERED.

23 Dated: May 11, 2015

24 /s/ Michael J. Seng  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28