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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JAMAR HEARNS,  
Plaintiff,  
v.  
R. GONZALES, et al.,  
Defendants.

Case No. 1:14-cv-01177-DAD-MJS (PC)

**ORDER STRIKING PLAINTIFF'S  
SURREPLY**

**(ECF No. 46)**

**FINDINGS AND RECOMMENDATIONS  
TO DENY DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND SET CASE  
FOR EVIDENTIARY HEARING**

**(ECF No. 38)**

**FOURTEEN (14) DAY OBJECTION  
DEADLINE**

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 28 U.S.C. § 1983. The action proceeds on Plaintiff's Third Amended Complaint ("TAC") against Defendants Rosa Gonzales<sup>1</sup> and Sergeant Olsen on Plaintiff's First Amendment retaliation, Fourteenth Amendment Equal Protection, and state tort conversion claims. (ECF No. 19.)

Before the Court is Defendants' April 13, 2016 motion for summary judgment on exhaustion grounds. (ECF No. 38.) Plaintiff opposes the motion. (ECF No. 41.)

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<sup>1</sup> Defendant Gonzales' name has been alternately spelled "Gonzales" and "Gonzalez."

1 Defendants filed a reply (ECF No. 45.). The matter is deemed submitted. Local Rule  
2 230(l).

3 Also before the Court is Plaintiff's unauthorized surreply to Defendants' reply.  
4 (ECF No. 46.)

5 **I. Legal Standard**

6 A motion for summary judgment is the proper means to raise a prisoner's failure  
7 to exhaust administrative remedies. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir.  
8 2014). Defendants have the burden of proving Plaintiff failed to exhaust available  
9 administrative remedies. See Jones v. Bock, 549 U.S. 199, 216 (2007) (failure to  
10 exhaust is an affirmative defense). A defendant's burden of establishing an inmate's  
11 failure to exhaust administrative remedies has been characterized by the Ninth Circuit  
12 as "very low." Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012).

13 The Court shall grant summary judgment if the movant shows that there is no  
14 genuine dispute as to any material fact and the movant is entitled to judgment as a  
15 matter of law. Fed. R. Civ. P. 56(a); Wash. Mut. Inc. v. United States, 636 F.3d 1207,  
16 1216 (9th Cir. 2011). "If undisputed evidence viewed in the light most favorable to the  
17 prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under  
18 Rule 56." Albino, 747 F.3d at 1166. If material facts are disputed, summary judgment  
19 should be denied, and the Court should decide disputed factual questions relevant to  
20 exhaustion "in the same manner a judge rather than a jury decides disputed factual  
21 questions relevant to jurisdiction and venue." Id. at 1169-71.

22 Each party's position, whether it be that a fact is disputed or undisputed, must be  
23 supported by (1) citing to particular parts of materials in the record, including but not  
24 limited to depositions, documents, declarations, or discovery; or (2) showing that the  
25 materials cited do not establish the presence or absence of a genuine dispute or that  
26 the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ.  
27 P. 56(c)(1). In judging the evidence at the summary judgment stage, the Court may not  
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1 make credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty  
2 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007), and it must draw all inferences in the  
3 light most favorable to the nonmoving party, Comite de Jornaleros de Redondo Beach  
4 v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011).

5 **II. Factual Summary**

6 The Court finds the following facts are undisputed unless otherwise noted.

7 **A. Plaintiff's Allegations**

8 At all times relevant to this suit, Plaintiff was housed at Valley State Prison  
9 ("VSP") in Chowchilla, California, where he remains. (Compl. (ECF No. 19) ¶ 1.) His  
10 factual allegations may be summarized as follows:

11 On either September 13 or 23<sup>2</sup>, 2013, Defendant Gonzales stated that Plaintiff  
12 and other African-American inmates were being too loud in the Facility D dayroom. (Id.  
13 ¶ 2.) Inmates of other ethnicities were also being loud, but Defendant Gonzales did not  
14 address them. (Id. ¶ 3.) Defendant Gonzales announced she was going to search the  
15 cells of all African-American inmates on the B hallway. (Id. ¶ 2.) During the search,  
16 Defendant Gonzales seized family photographs from Plaintiff's cell. (Id. ¶ 6.) She did not  
17 give Plaintiff or the other inmates a cell search slip and refused to return Plaintiff's  
18 photographs. (Id. ¶¶ 7, 9.)

19 Plaintiff submitted several CDCR Request Form 22s ("Form 22") to the D-Yard  
20 program Sergeant, Defendant Olsen, complaining about Defendant Gonzales' conduct.  
21 (Id. ¶ 10.) Defendant Olsen refused to intervene, stating he would stand behind his  
22 officer. (Id. ¶ 12.)

23 **B. Facts Relating to Exhaustion**

24 On September 27, 2013, Plaintiff filed an Inmate/Parolee Appeal Form 602  
25 ("602") on behalf of himself and two other inmates complaining about the above-  
26 described search and Defendant Olsen's failure to intervene. (Decl. of S. Torres in  
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28 <sup>2</sup> Plaintiff has alternately alleged that the incident took place on September 13 and September 23, 2013.

1 Supp. of Def.'s Mot. Summ. J. ("MSJ") (ECF No. 38-5) Ex. A.) He attached a Form 602-  
2 G containing each inmate's signature to this appeal. Id. The Form 602-G is required for  
3 any appeal filed as a group appeal. Cal. Code Regs. tit. 15, § 3084.2(h). Plaintiff also  
4 submitted a letter to the Office of Internal Affairs complaining about Defendant  
5 Gonzales' conduct and forwarded a copy to the VSP Investigative Services Unit ("ISU").  
6 (Pl.'s Opp'n to MSJ (ECF No. 41) Ex. D; Decl. of J. Hearn in Supp. of Pl.'s Opp'n to  
7 MSJ (ECF No. 41 at 4) ¶ 8.)

8 The appeal, filed under Log. No. VSP-D-13-02232 (hereafter "the First Appeal"),  
9 was received by the Inmate Appeals Office ("IAO") on September 30, 2013. (Torres  
10 Decl. Ex. A.) The appeals coordinator cancelled the First Appeal because it was  
11 submitted on behalf of another person and because it was submitted as a staff  
12 complaint presented as a group appeal. (CDC Form 695 Appeal Screening (Id. Ex. B.))  
13 Staff complaints cannot be submitted as group appeals. Cal. Code Regs. tit. 15, §  
14 3084.2(h)(4).

15 The First Appeal and the CDC Form 695 cancelling the appeal (the "First  
16 Screening") were returned to Plaintiff on September 30, 2013. (Torres Decl. Ex. B.) The  
17 First Screening informed Plaintiff of the reasons for the cancellation, and issued the  
18 following instructions:

19 You will need to present your appeal as a single individual. If other inmates have  
20 the same concern, they will need to file their own 602's, presenting their own  
21 perception that that staff misconduct has occurred.

22 Id.

23 Plaintiff claims that in response to the First Screening, on October 1, 2013, he  
24 resubmitted the First Appeal without the Form 602-G attached. (Decl. of J. Hearn in  
25 Supp. of Opp'n to MSJ (ECF No. 41 at 4) ¶¶ 7, 9.) According to Defendants, however,  
26 there is no record that the First Appeal was resubmitted on October 1, 2013 or any  
27 other date. (Torres Decl. ¶ 11.)

1 On October 27, 2013 and November 24, 2013, Plaintiff submitted two Form 22s  
2 inquiring about the status of the October 1, 2013 resubmission of the First Appeal.  
3 (Hearns Decl. ¶¶ 9-10; Pl.'s Opp'n Exs. E & F.) Both Form 22s were marked as  
4 "received" by Correctional Officer T. Pronold and forwarded to the Appeals Coordinator.  
5 Id. The record does not reflect what happened to the Form 22s thereafter; Plaintiff  
6 never received a response from the Appeals Office to either Form 22. (Hearns Decl. ¶¶  
7 9-10.)

8 After waiting for the IAO to "get back" to him regarding his First Appeal and his  
9 two Form 22s, and after receiving no response from the VSP ISU regarding his  
10 complaint letter, on March 25, 2014, Plaintiff filed a 602 under Log No. VSP-D-14-00722  
11 (hereafter "Second Appeal") complaining about the same conduct as described in the  
12 First Appeal. (Hearns Decl. ¶ 12; Torres Decl. Ex. C.) The Second Appeal was received  
13 by the institution on April 8, 2014. (Torres Decl. Ex. C.) On April 21, 2014, the Second  
14 Appeal was screened out and cancelled because it was not submitted to the IAO within  
15 thirty calendar days of the event being appealed. Id. The Second Appeal and the CDC  
16 Form 695 (the "Second Screening") cancelling the appeal were returned to Plaintiff.  
17 (Hearns Decl. ¶ 12; Pl.'s Ex. G.) Plaintiff did not appeal this cancellation. (Torres Decl. ¶  
18 11.)

19 The instant suit was filed in the Madera County Superior Court on June 2, 2014.  
20 (Notice of Removal (ECF No. 2) ¶ 1.) On July 25, 2014, the case was removed to this  
21 Court. Id.

22 **III. Defendant's Motion for Summary Judgment**

23 **A. Exhaustion Legal Standard**

24 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought  
25 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
26 a prisoner confined in any jail, prison, or other correctional facility until such  
27 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).  
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1 Therefore, prisoners are required to exhaust all available administrative remedies prior  
2 to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007). A prisoner cannot satisfy the  
3 exhaustion requirement by filing an untimely or procedurally defective appeal. Woodford  
4 v. Ngo, 548 U.S. 81, 90-1 (2006) (“Proper exhaustion demands compliance with an  
5 agency’s deadlines and other critical procedural rules.”)

6 Exhaustion is not required where circumstances render administrative remedies  
7 “effectively unavailable.” Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th Cir. 2010). To  
8 satisfy this exception to the exhaustion requirement, a plaintiff must show “(1) that he  
9 actually filed a grievance or grievances that, if pursued through all levels of  
10 administrative appeals, would have sufficed to exhaust the claim that he seeks to  
11 pursue in federal court, and (2) that prison officials screened his grievance or  
12 grievances for reasons inconsistent with or unsupported by applicable regulations.” Id.  
13 at 823-24; see also Nunez v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (warden's  
14 mistake rendered prisoner's administrative remedies “effectively unavailable”).  
15 Alternatively, a plaintiff may show that officials failed to respond to a properly filed  
16 grievance in a timely manner. Vlasich v. Reynoso, No. CV F 01 5197 AWI LJO P, 2006  
17 WL 3762055, at \*3 (E.D. Cal. Dec. 20, 2006) (citing Circuit Court decisions holding that  
18 a prisoner’s administrative remedies are exhausted when prison officials fail to timely  
19 respond to a properly filed grievance.) Defendants have the burden of establishing  
20 Plaintiff’s failure to exhaust. Wyatt v. Terhune, 315 F.3d 1108, 1112 (9th Cir. 2003),  
21 *accord* Brown v. Valoff, 422 F.3d 926, 936 (9th Cir. 2005). Once that burden has been  
22 met, the onus shifts to Plaintiff to demonstrate that administrative remedies were  
23 effectively unavailable to him. Albino, 697 F.3d at 1031.

24 California has a three-level formal grievance process for prisoners. Cal Code  
25 Regs. tit. 15, § 3084.7. Prisoners must first submit their grievances to the appeals  
26 coordinator on a 602 within thirty days of the incident “describ[ing] the specific issue  
27 under appeal and the relief requested.” Id. §§ 3084.2(a) and 3084.8(b)(1). Appeals at  
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1 the first level must be responded to and returned to the inmate within thirty days of  
2 receipt. Id. § 3084.8(c)(1). If a prisoner is not satisfied with the response he receives at  
3 the first level, he must submit his appeal to the second level of review, after which he  
4 may appeal to the third and final level, called the Director's Level. Id. § 3084.7. Appeals  
5 may be rejected or cancelled by the appeals coordinator reviewing the appeal at any  
6 level of review. Id. § 3084.6(a).

7 **B. Parties' Arguments**

8 Defendants argue that the First Appeal was properly cancelled at the first level of  
9 review, and the First Screening issued clear instructions to Plaintiff on how to properly  
10 submit that grievance. According to Defendants, Plaintiff did not heed those instructions  
11 until six months later, when Plaintiff submitted the Second Appeal. The Second Appeal  
12 was also properly cancelled at the first level of review. As the only two appeals  
13 submitted by Plaintiff were both properly cancelled and not pursued to the final level of  
14 review, Plaintiff failed to exhaust.

15 Defendants further argue that Plaintiff's claim that he resubmitted the First  
16 Appeal on October 1, 2013 without the Form 602-G attached should be disregarded as  
17 there is no evidence that it was received by the IAO and no record of such an appeal  
18 within the IAO. Defendants do not argue that the resubmitted First Appeal, if pursued  
19 through all three levels, would have been insufficient to exhaust Plaintiff's administrative  
20 remedies.

21 Plaintiff concedes that his First and Second Appeals were properly cancelled. He  
22 argues, however, that his First Appeal was timely resubmitted on October 1, 2013, and  
23 that the prison's failure to respond to both the resubmitted appeal and the two Form 22s  
24 inquiring after the status of the appeal led Plaintiff to reasonably believe that his  
25 administrative remedies were effectively unavailable, thus satisfying the exhaustion  
26 requirement.

1           **C.     Discussion**

2           Defendants have demonstrated that Plaintiff did not exhaust his administrative  
3 remedies prior to filing this lawsuit. There is a genuine issue of material fact, however,  
4 as to whether circumstances rendered administrative remedies effectively unavailable.

5           Plaintiff states, under penalty of perjury that, on October 1, 2013, he resubmitted  
6 his First Appeal as instructed by the appeals coordinator, but never received a response  
7 to it. This statement raises a genuine issue of material fact as to whether administrative  
8 remedies were effectively unavailable. Accordingly, Defendants' motion for summary  
9 judgment should be denied.

10          Defendants argue the lack of corroborating evidence of resubmission of the First  
11 Appeal to the IAO. There is however, some corroboration: It is undisputed that both  
12 Form 22s inquiring about the First Appeal made it as far as Correctional Officer Pronold  
13 who supposedly forwarded the Form 22s to the appeals coordinator. The fact that the  
14 Form 22s were submitted so soon after Plaintiff allegedly resubmitted his First Appeal  
15 lends credence to Plaintiff's claim that he in fact resubmitted the grievance as alleged.

16          Additionally, Defendants' assertion that the IAO never received Plaintiff's  
17 resubmitted First Appeal does not prove non-submission. Indeed, if exhaustion were  
18 dependent entirely on whether the appropriate officials *received* a properly filed  
19 grievance, prisoners would be entirely at the mercy of the prison's record-keeping  
20 capabilities. McCoy v. Stratton, No. 2:12-cv-1137 WBS DAD P, 2014 WL 6633319, at \*8  
21 (E.D. Cal. Nov. 21, 2014) (citing Badwi v. Hedgpeth, No. C 08-2221 SBA, 2012 WL  
22 479192, at \*4 (N.D. Cal. Feb. 14, 2012)).

23          In any event, the determination of whether Plaintiff actually resubmitted the First  
24 Appeal turns on the relative credibility of the parties. Because such determinations  
25 cannot be made on a motion for summary judgment, the Court must recommend that  
26 Defendants' motion for summary judgment be denied. See Soremekun, 509 F.3d at  
27 984. In light of Defendants' request for an evidentiary hearing in the event their motion  
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1 is denied, the Court will also recommend that the matter be referred back to the  
2 undersigned for the purpose of conducting an evidentiary hearing to resolve the issue of  
3 whether Plaintiff resubmitted his First Appeal.

4 **IV. Plaintiff's Surreply**

5 On July 25, 2016, Plaintiff filed an "Opposition" to Defendants' reply. (ECF No.  
6 46.) He did not seek leave before doing so.

7 Parties do not have the right to file surreplies, and motions are deemed  
8 submitted when the time to reply has expired. Local Rule 230(l). Plaintiff has not set  
9 forth any reasons why he should be permitted to file a surreply. See Hill v. England, No.  
10 CVF05869 REC TAG, 2005 WL 3031136, at \*1 (E.D. Cal. Nov. 8, 2005) (courts should  
11 allow surreplies "only where a valid reason for such additional briefing exists.") In any  
12 case, the Court has recommended denying Defendants' motion, thus any additional  
13 arguments by Plaintiff are unnecessary. Plaintiff's surreply will be stricken from the  
14 record.

15 **V. Conclusion and Recommendation**

16 Based on the foregoing, IT IS HEREBY ORDERED:

- 17 1. Plaintiff's surreply (ECF No. 46) is STRICKEN from the record; and  
18 IT IS HEREBY RECOMMENDED that:  
19 2. Defendants' motion for summary judgment (ECF No. 38) be DENIED; and  
20 3. The matter be referred back to the undersigned for purposes of conducting  
21 an evidentiary hearing to resolve the dispute of fact set forth herein.

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

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8 Dated: November 7, 2016

/s/ Michael J. Seng  
9 UNITED STATES MAGISTRATE JUDGE  
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