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

DAVID ESTRADA,) Case No.: 1:15-cv-01292-AWI-SAB (PC)
)
Plaintiff,)
)
v.) FINDINGS AND RECOMMENDATIONS
) REGARDING DEFENDANTS' MOTION FOR
) JUDGMENT ON THE PLEADINGS,
) DEFENDANTS' MOTION FOR SUMMARY
) JUDGMENT, PLAINTIFF'S MOTION TO HOLD
) DEFENDANTS IN CONTEMPT FOR VIOLATING
) A COURT ORDER, AND PLAINTIFF'S MOTION
) TO SEAL OPPOSITION AND EXHIBITS
)
) [ECF Nos. 26, 55, 56, 58, 61, 67]
)
)

Plaintiff David Estrada is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff consented and Defendants declined United States Magistrate Judge jurisdiction; therefore, this matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.¹

Currently before the Court is Defendants' motion for judgment on the pleadings, filed April 12, 2016; Defendants' motion for summary judgment for failure to exhaust the administrative remedies, filed August 19, 2016; Plaintiff's motion to hold Defendants in contempt for violating a court order, filed September 6, 2016; Plaintiff's motion to seal his opposition and exhibits, filed September 16, 2016; and Plaintiff's motion to compel discovery. (ECF Nos. 26, 55, 56, 58, 61, 67.)

¹ Plaintiff consented to United States Magistrate Judge jurisdiction on August 31, 2015, and Defendants declined United States Magistrate Judge jurisdiction on April 12, 2016. (ECF Nos. 5, 27.)

1 **I.**

2 **RELEVANT HISTORY**

3 This action is proceeding against Defendants Doctor Wang, Vickjord, Whitford, Lau, Garnett
4 and Flores for deliberate indifference to a serious medical need under the Eighth Amendment.

5 Defendants filed an answer to the complaint on April 12, 2016. (ECF No. 25.) On this same
6 date, Defendants filed a motion for judgment on the pleadings. (ECF No. 26.) On May 2, 2016,
7 Plaintiff filed an opposition to Defendants' motion for judgment on the pleadings, and a motion to seal
8 exhibits A, B and C. (ECF Nos. 31, 32.)

9 On May 25, 2016, the Court granted Plaintiff's motion to seal exhibits A, B and C. (ECF No.
10 39.)

11 On August 19, 2016, Defendants filed a motion for summary judgment for failure to exhaust
12 the administrative remedies. (ECF No. 55.)

13 On September 6, 2016, Plaintiff filed a motion to hold Defendants in contempt for violating a
14 court order to seal exhibits. (ECF No. 61.) Defendants filed an opposition to Plaintiff's motion on
15 September 27, 2016. (ECF No. 68.)

16 On September 13, 2016, the Court granted Defendants' request for a protective order and
17 stayed all merits-based discovery until after resolution of the motion for summary judgment relating to
18 exhaustion of the administrative remedies. (ECF No. 65.) The Court also granted Defendants' request
19 to extend the time to respond to Plaintiff's outstanding motions to compel until thirty days after the
20 exhaustion-relation motion is finally resolved. (Id.)

21 On September 16, 2016, Plaintiff filed a motion to seal his opposition and exhibits. (ECF No.
22 67.) Defendants filed an opposition by way of email pursuant to Local Rule 141(c) on October 7,
23 2016, and served Plaintiff by mail. Plaintiff filed a reply on November 3, 2016. (ECF No. 73.)

24 On October 21, 2016, Defendants filed a reply to Plaintiff's opposition to the motion for
25 summary judgment. (ECF No. 72.)

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1 **II.**

2 **DISCUSSION**

3 **A. Defendants’ Motion for Judgment on the Pleadings**

4 Defendants move for judgment on the pleadings because a careful reading of Plaintiff’s first
5 amended complaint reveals that he did not properly exhaust his administrative remedies. Defendants
6 also argue that Plaintiff’s official capacity claims are barred by the Eleventh Amendment.

7 Under Federal Rule of Civil Procedure 12(c), judgment on the pleadings may be granted when,
8 accepting as true all material allegations contained in the nonmoving party’s pleadings, the moving
9 party is entitled to judgment as a matter of law. Chavez v United States, 683 F.3d 1102, 1108 (9th Cir.
10 2012); Fed. R. Civ. P. 12(c). The applicable standard is essentially identical to the standard for a
11 motion to dismiss under Rule 12(b)(6). United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.,
12 637 F.3d 1047, 1055 n. 4 (9th Cir. 2011). Thus, although the Court must accept well-pleaded facts as
13 true, it is not required to accept mere conclusory allegations or conclusions of law. See Ashcroft v.
14 Iqbal, 556 U.S. 662, 678-679 (2009).

15 In ruling on a motion for judgment on the pleadings, the Court may consider documents
16 incorporated by reference in the pleadings and “may properly look beyond the complaint to matters of
17 public record” that are judicially noticeable. Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279,
18 1282 (9th Cir. 1986), abrogated on other grounds by Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501
19 U.S. 104, 111 (1991); Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The Court
20 “need not ... accept as true allegations that contradict matters properly subject to judicial notice or by
21 exhibit” attached to the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.
22 2001) (citation omitted).

23 1. Exhaustion of Administrative Remedies

24 By the Prison Litigation Reform Act (PLRA), Congress amended 42 U.S.C. §1997e to provide
25 that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or
26 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
27 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion
28 requirement “applies to all inmate suits about prison life, whether they involve general circumstances

1 or particular episodes, and whether they allege excessive force or some other wrong.” Porter v.
2 Nussle, 534 U.S. 516, 532 (2002).

3 The PLRA exhaustion requirement is not jurisdictional but rather creates an affirmative
4 defense that defendants must plead and prove. Jones, 747 F.3d at 1166. Thus, inmates are not
5 required to specifically plead or demonstrate exhaustion in their complaints. Albino holds that, in
6 general, the defense should be brought as a Rule 56 motion for summary judgment, unless in the rare
7 event that the prisoner’s failure to exhaust is clear on the face of the complaint. Albino, 747 F.3d
8 1168-1169, 1171.

9 A prisoner may be excused from complying with the PLRA’s exhaustion requirement if he
10 establishes that the existing administrative remedies were effectively unavailable to him. Albino, 747
11 F.3d at 1172-1173. When an inmate’s administrative grievance is improperly rejected on procedural
12 grounds, exhaustion may be excused as effectively unavailable. Sapp v. Kimbrell, 623 F.3d 813, 823
13 (9th Cir. 2010); see also Nunez v. Duncan, 591 F.3d 1217, 1224-1226 (9th Cir. 2010) (warden’s
14 mistake rendered prisoner’s administrative remedies “effectively unavailable”); Brown v. Valoff, 422
15 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required to proceed to third level where appeal granted at
16 second level and no further relief was available).

17 In the first amended complaint, Plaintiff checked the box “yes” affirming that an administrative
18 remedy process is available at his institution, an appeal or grievance was filed concerning all the facts
19 contained in the complaint, and the grievance process is complete. (ECF No. 16, First Amd. Compl. at
20 p. 2.) Although Defendants contend that Plaintiff tacitly concedes he could not have exhausted his
21 claims against the named Defendants because he did not learn of certain misconduct until February
22 2015, the Court cannot determine as a matter of law the failure to exhaust solely on the face of the
23 amended complaint. Based on Plaintiff’s allegations in his opposition and the arguments presented by
24 both parties, it is not clear and unequivocal on the face of the complaint that Plaintiff failed to exhaust
25 the administrative remedies, and the Court declines to find as a matter of law Plaintiff failed to
26 exhaust. Indeed, Plaintiff is not required to plead such argument and cannot be faulted for failing to
27 do so. As previously stated, it is the Defendant, not Plaintiff, who bears the initial and ultimate burden
28 of proving that Plaintiff failed to exhaust the administrative remedies. Accordingly, the Court

1 recommends that Defendants' motion for judgment on the pleadings for Plaintiff's failure to exhaust
2 the administrative remedies be denied.

3 2. Dismissal of Official Capacity Claims

4 Defendants submit that Plaintiff is suing each of them in their individual and official capacity.
5 (ECF No. 16, First Amd. Compl. at 6, ¶ M.)

6 Defendants correctly argue that Plaintiff may not sue Defendants in their official capacities.
7 "The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies,
8 and state officials acting in their official capacities." Aholelele v. Dept. of Public Safety, 488 F.3d
9 1144, 1147 (9th Cir. 2007). Plaintiff's official capacity claims shall be dismissed, as Plaintiff may
10 only seek relief against Defendants in their individual capacities.

11 **B. Plaintiff's Motion to File Opposition and Exhibits Under Seal**

12 Plaintiff seeks to file the exhibits attached to his opposition under seal due to alleged
13 confidential concerns. Pursuant to Plaintiff's request, Plaintiff's exhibits were not filed on the docket,
14 but were ordered lodged pending ruling on Plaintiff's request. Defendants oppose Plaintiff's request
15 and argue that Plaintiff has failed to meet his burden in demonstrating a compelling reason to seal
16 these exhibits. First, Defendants argue that Plaintiff's mere label of "confidential" is too vague to
17 justify sealing these documents. Second, several of the exhibits are not confidential in nature. Third,
18 several of the exhibits are irrelevant to the exhaustion process. Lastly, the Gipson and Gray litigations
19 do not justify sealing these exhibits.

20 Pursuant to the Local Rule of the United States Court, Eastern District of California ("L.R."),
21 documents may only be sealed by written order of the Court upon the showing required by applicable
22 law. L.R. 141(a). Plaintiff seeks to seal documents in support of his opposition to Defendants' motion
23 for summary judgment for failure to exhaust the administrative remedies.

24 Courts have long recognized a "general right to inspect and copy public records and
25 documents, including judicial records and documents." Kamakana v. City & Cnty. of Honolulu, 447
26 F.3d 1172, 1178 (9th Cir. 2006) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 & n. 7
27 (1978)). Nevertheless, this access to judicial records is not absolute. Kamakana, 447 F.3d at 1172.
28 The court has recognized a category of documents that is not subject to the right of public access

1 because the documents have “traditionally been kept secret for important policy reasons.” Times
2 Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989). Since resolution of disputes on the
3 merits “is at the heart of the interest in ensuring the ‘public’s understanding of the judicial process and
4 of significant public events[,] . . . “ ‘compelling reasons’ must be shown to seal judicial records
5 attached to a dispositive motion.” Kamakana, 447 F.3d at 1179.

6 The Ninth Circuit recognizes the strong presumption in favor of access to public records. Foltz
7 v. State Farm Mutual Automobile Insurance Co., 331 F.3d 1122, 1135 (9th Cir. 2003.) In determining
8 whether the common law right to access to the records is overridden, the party seeking protection must
9 show that “compelling reasons supported by specific factual findings ... outweigh the general history
10 of access and the public policies favoring disclosure.” Pintos v. Pacific Creditors Ass’n, 605 F.3d 665,
11 678 (9th Cir. 2009) (quoting Foltz, 331 F.3d at 1178-79); see Kamakana, 447 F.3d at 1183-84
12 (applying compelling reason standard to redaction of information contained in court records).

13 The Ninth Circuit has held that “compelling reasons” are “sufficient to outweigh the public’s
14 interest in disclosure and justify sealing court records” when such “court files might have become a
15 vehicle for improper purposes,” such as where the records could be used “to gratify private spite,
16 promote public scandal, circulate libelous statements, or release trade secrets.” Kamakana, 447 F.3d
17 at 1179 (quoting Nixon, 435 U.S. at 598). “ ‘[S]ources of business information that might harm a
18 litigant’s competitive standing’ often warrant protection under seal.” Williams v. U.S. Bank Nat.
19 Ass’n, 290 F.R.D. 600, 604–05 (E.D. Cal. 2013) (quoting Nixon, 435 U.S. at 598). However, the “fact
20 that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to
21 further litigation will not, without more, compel the court to seal its records.” Kamakana, 447 F.3d at
22 779 (quoting Foltz, 331 F.3d at 1136).

23 The party seeking to have the document sealed must present “articulable facts” identifying the
24 interests that favor secrecy and show that these specific interests overcome the presumption of access
25 because they outweigh the public’s interest in understanding the judicial process. Kamakana, 447
26 F.3d at 1180. The Court starts from the strong presumption in favor of access to public records and
27 then considers whether the party seeking to have the record sealed has demonstrated a compelling
28 reason to have the record sealed. Id. at 1178-79. This requires the Court to conscientiously balance

1 the competing interests of the public in accessing the records and the party who seeks to keep the
2 records secret. Id. at 1179. The Court is required to “articulate the factual basis for its ruling, without
3 relying on hypothesis or conjecture.” Id. (citations omitted).

4 At the outset the Court notes that Plaintiff’s motion to seal the exhibits in support of his
5 opposition must be considered in light of the claims upon which this action is proceeding and the
6 nature of Defendants’ pending motion for summary judgment for failure to exhaust the administrative
7 remedies. The fact that Plaintiff has designated such documents as confidential does not meet the
8 good cause standard for sealing of such documents, as privacy concerns apply in many cases.

9 The Court agrees with Defendants’ argument that several of Plaintiff’s exhibits are not
10 confidential, and with the exception of exhibits F, G and V, Plaintiff has failed to meet his burden in
11 demonstrating a compelling reason to seal the exhibits.

12 The fact that Plaintiff did not trust certain prison officials to handle and/or process his inmate
13 appeals at the time he submitted them, does not render such appeals “confidential” in nature. Indeed,
14 under Title 15 of the California Code of Regulations, the confidential portions of inmate appeals are
15 the “appeal inquiries” prison staff may generate. See Cal. Code Regs. tit. 15, §§ 3084.9(i)(B)(1)-(2),
16 3321, 3450(d). As Defendants submit, no such inquiries are at issue in Defendants’ motion and none
17 were attached to the motion. Accordingly, the Court will recommend that only exhibits F, G and V be
18 filed under seal.

19 **C. Plaintiff’s Motion to Hold Defendants in Contempt**

20 On September 6, 2016, Plaintiff filed a motion to hold Defendants in contempt for violating a
21 court order to seal exhibits. Defendants filed an opposition on September 27, 2016. (ECF No. 68.)

22 Plaintiff seeks to hold Defendants in contempt for violating the Court’s May 25, 2016, order.
23 Pursuant to the court’s May 25, 2016, order, Plaintiff’s opposition to Defendants’ motion for judgment
24 on the pleadings, which relied on several inmate appeals that Plaintiff claimed were part of a
25 confidential Office of Internal Affairs (OIA) investigation, was ordered sealed as to that motion.

26 Defendants submit that they “reasonably interpreted the Court’s order as pertaining to that
27 motion only and the order itself contained no language generally prohibiting the use of these inmate
28 appeals for all purposes, such as when Defendants’ moved for summary judgment for Plaintiff’s

1 failure to exhaust administrative remedies. Further, Defendants did not rely on confidential
2 information when moving for summary judgment because no OIA documentation was used as
3 evidence. As such, Defendants should not be held in contempt and Plaintiff's motion should be
4 denied." (Opp'n at 1:26-2:4.)

5 "Civil contempt ... consists of a party's disobedience to a specific and definite court order by
6 failure to take all reasonable steps within the party's power to comply." In re Dual-Deck Video
7 Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993). For issuance of a contempt order
8 against Defendants, Plaintiff must establish: (1) that Defendants violated the May 25, 2016 order, (2)
9 beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the
10 order, (4) by clear and convincing evidence. Labor/Cnty. Strategy Ctr. V. Los Angeles Cnty. Metro.
11 Transp. Auth., 564 F.3d 1115, 1123 (9th Cir. 2009).

12 As background and as previously stated, on April 12, 2016, Defendants moved for judgment
13 on the pleadings on the grounds that Plaintiff's failure to exhaust his administrative remedies was
14 plain on the face of the first amended complaint. (ECF No. 26.) Plaintiff filed an opposition on May
15 2, 2016. (ECF No. 31.) In support of his opposition, Plaintiff lodged several exhibits with the Court
16 and sought leave to seal such documents. (ECF Nos. 32-33.) Part of the exhibits were Plaintiff's
17 inmates appeals which he contended were part of an OIA investigation file pertaining to a workplace
18 investigation involving Licensed Vocational Nurse Delorise Tassej. (ECF No. 39.)

19 Defendants filed a reply to Plaintiff opposition, and made general reference to some of the
20 lodged inmate appeals. (ECF No. 38.) That same day, Defendants submitted a statement of non-
21 opposition to Plaintiff's motion to seal by way of email pursuant to Local Rule 141(c). (ECF No. 39.)
22 Defendants submit that although Plaintiff's inmate appeals are not confidential, they did not object to
23 the sealing of such documents because they were irrelevant to oppose Defendants' motion which was
24 based on facial exhaustion.

25 On May 25, 2016, the Court granted Plaintiff's request to seal the exhibits for purposes of
26 Plaintiff's opposition to Defendants' motion for judgment on the pleadings. (ECF No. 39.)

27 As previously stated, on August 19, 2016, Defendants moved for summary judgment for
28 Plaintiff's failure to exhaust the administrative remedies. (ECF No. 55.) Defendants attached several

1 inmate appeals which Plaintiff identified through discovery as exhaustive of his administrative
2 remedies against Defendants. (Rhoan Decl. ¶¶ 2, 4, Exs. A, C, ECF No. 55-5.) Defendants also
3 attached several declarations by custodians relating to the processing of these appeals. (ECF No. 55.)

4 In his present motion to hold Defendants in contempt, Plaintiff argues that inmate appeal Log
5 Nos. COR SC 12001313, COR SC 12001333, COR SC 12001377, and CSPC-5-12-4888 are
6 confidential because they are part of an OIA investigation into nurse Tassey. Plaintiff also contends
7 that public disclosure of these appeals will protect Plaintiff and his family from retaliation.

8 As Defendants submit, the Court's May 25, 2016 order was not a blanket sealing of Plaintiff's
9 inmate appeals for all purposes, and Defendants reasonably could have interpreted the Court's order as
10 such. The Court's May 25, 2016, order stated only that the exhibits were sealed "in support of
11 Plaintiff's opposition to Defendants' motion for judgment on the pleadings[.]" (ECF No. 39.)
12 Plaintiff also submits that the May 25, 2016 order "extends to a separate complaint in Estrada v.
13 Gipson et al., Case No. 1:13-cv-00919," however, Plaintiff fails to explain the relevance of these
14 litigations or the impact of such litigation on this case. Accordingly, Plaintiff has failed to
15 demonstrate that Defendants willfully violated the Court's May 25, 2016, order.

16 The Court finds that Defendants acted in good faith when moving for summary judgment on
17 the basis of Plaintiff's inmate appeals because such appeals do not contain confidential information.
18 Under Title 15 of the California Code of Regulations, the confidential portions of inmate appeals are
19 the "appeal inquiries" that may be generated. Cal. Code Regs. tit. 15, §§ 3084.9(i)(B)(1)-(2), 3321,
20 3450(d). No such inquiries are at issue in Defendants' motion. Plaintiff claims that Log Nos. COR
21 SC 12001313, COR SC 12001333, COR SC 12001377, and CSPC-5-12-4888 are confidential because
22 they are part of an OIA investigation into nurse Tassey; however, the OIA investigation documents
23 were not used as evidence in support of Defendants' motion. Indeed, Defendants have submitted the
24 declaration of Chief R. Robinson of the California Correctional Health Care Services (CCHCS), who
25 indicates the processing of inmate appeals are wholly independent of the processing of OIA
26 investigations. (Robinson Decl. ¶ 12, ECF No. 55-6.) Once OIA is involved, CCHCS loses
27 jurisdiction of that particular appeal's investigation, and OIA, not CCHCS, provides Plaintiff with the
28 results of the final investigation. (Id.) CCHCS simultaneously issues a third-level decision so as to

1 exhaust the administrative remedies. (Id.) Thus, because no confidential information is attached to
2 Defendants’ motion, they acted in good faith in presenting their motion for summary judgment.

3 Accordingly, there is no basis to impose contempt sanctions against Defendants, and Plaintiff’s
4 motion should be denied.

5 **D. Defendants’ Motion for Summary Judgment**

6 1. Statutory Exhaustion Requirement

7 The PLRA requires that prisoners exhaust “such administrative remedies as are available”
8 before commencing a suit challenging prison conditions.” 42 U.S.C. § 1997e(a); see Ross v. Blake,
9 ___ U.S. ___ 136 S.Ct. 1850 (June 6, 2016) (“An inmate need exhaust only such administrative remedies
10 that are ‘available.’”). Exhaustion is mandatory unless unavailable. “The obligation to exhaust
11 ‘available’ remedies persists as long as *some* remedy remains ‘available.’ Once that is no longer the
12 case, then there are no ‘remedies ... available,’ and the prisoner need not further pursue the
13 grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis in original) (citing Booth
14 v. Churner, 532 U.S. 731, 739 (2001)).

15 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter v.
16 Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by the
17 prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and
18 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing
19 Porter, 534 U.S. at 524).

20 The failure to exhaust is an affirmative defense, and the defendants bear the burden of raising
21 and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino, 747 F.3d at 1166. “In the rare
22 event that a failure to exhaust is clear from the face of the complaint, a defendant may move for
23 dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the defendants must produce
24 evidence proving the failure to exhaust, and they are entitled to summary judgment under Rule 56 only
25 if the undisputed evidence, viewed in the light most favorable to the plaintiff, shows he failed to
26 exhaust. Id.

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2. Summary Judgment Standard

Any party may move for summary judgment, and the Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino, 747 F.3d at 1166; Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of materials in the record, including but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to by the parties, although it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

The defendants bear the burden of proof in moving for summary judgment for failure to exhaust, Albino, 747 F.3d at 1166, and they must “prove that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy,” id. at 1172. If the defendants carry their burden, the burden of production shifts to the plaintiff “to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him.” Id. “If the undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.” Id. at 1166. However, “[i]f material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.” Id.

In arriving at this recommendation, the Court has carefully reviewed and considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument, document, paper, or objection is not to be construed to the effect that this Court did not consider the argument, document, paper, or objection. This Court thoroughly reviewed and considered the evidence it deemed admissible, material, and appropriate.

1 **D. Description of CDCR’s Administrative Remedy Process**

2 Plaintiff is a state prisoner in the custody of the California Department of Corrections and
3 Rehabilitation (“CDCR”). CDCR has an administrative remedy process for inmate grievances. Cal.
4 Code Regs. tit. 15, § 3084.1 (2014). Compliance with section 1997e(a) is mandatory and state
5 prisoners are required to exhaust CDCR’s administrative remedy process prior to filing suit in federal
6 court. Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); Sapp v. Kimbrell, 623 F.3d 813, 818 (9th Cir.
7 2010). CDCR’s administrative grievance process for non-medical appeals consists of three levels of
8 review: (1) first level formal written appeals; (2) second level appeal to the Warden or designees; and
9 (3) third level appeal to the Office of Appeals (OOA). Inmates are required to submit appeals on a
10 standardized form (CDCR Form 602), attach necessary supporting documentation, and submit the
11 appeal within thirty days of the disputed event. Cal. Code Regs. tit. 15, §§ 3084.2, 3084.3(a),
12 3084.8(b).

13 The appeal must “describe the specific issue under appeal and the relief requested,” and the
14 inmate “shall list all staff member(s) involved and shall describe their involvement in the issue.” Tit.
15 15, § 3084.2(a). Furthermore, the inmate “shall state all facts known and available to him/her
16 regarding the issue being appealed at the time of submitting the Inmate/Parolee Appeal Form, and if
17 needed, the Inmate Parolee/Appeal Form Attachment.” Tit. 15, § 3084.2(a)(4).

18 **E. Summary of Allegations Underlying Plaintiff’s Constitutional Claims**

19 Plaintiff contends that over a three year period of time he was administered his medications,
20 which included prescribed narcotic pain medication in a crush and flow form which caused him to
21 suffer side effects. The side effects caused Plaintiff to suffer hallucinations and numbness to his
22 mouth, tongue, face, nerves and muscles.

23 Plaintiff filed several inmate grievances and complaints which were not appropriately
24 addressed. Defendant Flores was assigned to investigate Plaintiff’s allegations regarding his
25 medication. Flores interviewed Plaintiff with a legal affairs advocate. Flores informed Plaintiff she
26 would have a meeting with the warden after the interview, and would “let the warden know if
27 [Plaintiff] can be transferred.” Defendant Flores took no action to have Plaintiff treated or seen by a
28 doctor or specialist, despite being advised of Plaintiff’s complaints.

1 Defendant Jeffrey Wang, Chief Medical Officer, was made aware of Plaintiff's complaints and
2 the pending investigation. Dr. Wang visited Plaintiff while he was in the acute care hospital in August
3 and September of 2012. However, Dr. Wang took no steps to have Plaintiff treated for the side effects
4 of the administration of his medication.

5 On February 2, 2015, Plaintiff received an investigation package which included findings and
6 exhibits from the Office of Internal Affairs into a licensed vocational nurse. This packet included
7 information that Defendants intentionally withheld from Plaintiff. These documents contained
8 information that the above identified individuals played roles in the decision making process to
9 penalize an employee who had intentionally misappropriated medications to inmate patients, including
10 Plaintiff.

11 In February 2015, Plaintiff received memorandum that the allegations against the staff
12 employee had been "sustained."

13 Defendant correctional officer Brad Vickjord was assigned to the investigative services unit
14 and was responsible for investigating Plaintiff's complaints and allegations of staff misconduct.
15 Vickjord interviewed Plaintiff and Plaintiff requested some form of action. Vickjord was already
16 aware of the staff member's misconduct and had previously received complaints from Plaintiff's
17 family members.

18 On June 8, 2012, Plaintiff's family spoke with Defendant Vickjord on behalf of the warden.
19 Vickjord discouraged Plaintiff from speaking to any staff regarding his complaints because
20 information is passed around among staff which makes investigating those accused of misconduct
21 difficult. Despite knowledge of Plaintiff's medical problems, Defendant Vickjord did not take any
22 action to remedy the problems.

23 On or around October 31, 2011, and November 4, 2011, Defendant Whitford interviewed
24 Plaintiff regarding the allegations of staff misconduct in general. Plaintiff advised Whitford that he
25 was given medications in excessive of what was prescribed and in crushed and mixed form which
26 caused him injuries. Defendant Whitford is the supervisor of Defendant Vickjord. Defendant
27 Whitford failed to take any action to remedy the harm to Plaintiff and failed to properly train and
28 supervise Defendant Vickjord.

1 Defendants Lau and Garnett are registered nurse supervisors and are responsible to supervise
2 certain employees, including the employee who misappropriated Plaintiff's medications. Defendants
3 Lau and Garnett were aware of the employee misappropriating his medications but failed to correct the
4 actions.

5 Plaintiff suffered hallucinations, numbness and spasms to his mouth, tongue, face, nerves and
6 muscles as a result of the misappropriation of his medications.

7 **F. Defendants' Statement of Undisputed Facts**

8 1. During discovery, Plaintiff identified several inmate appeals that he claims exhausted
9 his administrative remedies against Defendants: (1) COR SC 12001313; (2) CSPC-15-12-4888; (3)
10 COR SC 12001333; (4) COR SC 12001377; (5) COR SC 13001467; (6) COR HC 14056477; (7) COR
11 HC 15057592; (8) COR HC 14057160; (9) COR HC 15057861; (10) COR HC 15058256; and (11)
12 COR HC 15058908. (Decl. of Erick J. Rhoan ¶ 4, Exs. A & C, ECF No. 55-5.)

13 2. Log No. COR HC 15057592 was rejected at the third level of review because Plaintiff
14 attempted to bypass the required lower levels of review prior to seeking a third level decision.² (Decl.
15 of R. Robinson ¶ 11, Ex. G, ECF No. 55-8.)

16 3. Plaintiff submitted Log No. COR SC 12001313 on July 24, 2012, where he alleged that
17 a non-Defendant Licensed Vocational Nurse (LVN) Tassej, was a Mexican Mafia sympathizer and
18 conspired with them to harm Plaintiff's family, as well as gave him excess narcotics medications, such
19 as morphine and Gabapentin, resulting in mental health issues.³ This appeal was exhausted at the
20 Third Level of Review. (Decl. of R. Robinson, Ex. B.)

21 4. Plaintiff submitted Log No. COR SC 12001333, where he alleged that a non-Defendant
22 LVN revealed to him that Tassej knew about his mental health issues, such as hearing voices, in front
23 of other inmates thereby breaching medical confidentiality. Plaintiff also alleged that Tassej and
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25
26 ² Plaintiff attempts to dispute this fact and objects to the use of the declaration by R. Robinson. However, Plaintiff's
response does not place this fact, as stated, in dispute, and Plaintiff's objection is overruled.

27 ³ Plaintiff attempts to dispute this fact and objects to the use of the declaration by R. Robinson. However, Plaintiff's
28 response does not place this fact, as stated, in dispute, and Plaintiff's objection is overruled.

1 other, unrelated medical staff were conspiring against him. This appeal was exhausted at the Third
2 Level of Review.⁴ (Decl. of R. Robinson, Ex. C.)

3 5. Plaintiff submitted Log No. COR SC 12001377 on November 1, 2012, where he
4 alleged that a non-Defendant LVN retaliated against him by withholding medications and therapy,
5 disclosing sensitive information in his Central File, and used this information to defend Tassej while
6 Tassej was under investigation. This LVN also fabricated a Rules Violation Report against him and
7 made improper references to Tassej's collaboration with Mexican Mafia gang members to harm
8 Plaintiff's family. Plaintiff requested that this LVN and other unrelated staff be reprimanded for their
9 unethical behavior. This appeal was exhausted at the Third Level of Review. (Decl. of R. Robinson,
10 Ex. D.)

11 6. Plaintiff submitted Log No. COR SC 13001467 on March 21, 2013, in which he
12 alleged that he brought a prior complaint against non-Defendant LVN Gonzalez, but that Defendant
13 Garnett did not adequately investigate LVN Gonzalez for her retaliatory actions against him. Plaintiff
14 further alleged that LVN Gonzalez withheld medications, made up inappropriate rumors about him,
15 and made false accusations that Plaintiff threatened her. This appeal was exhausted at the Third Level
16 of Review. (Decl. of R. Robinson, Ex. E.)

17 7. Plaintiff submitted Log No. COR HC 14057160 on October 28, 2014, where he alleged
18 that he was having physical and mental health troubles. Plaintiff requested medical treatment for his
19 head, eyes, jaw, neck, stomach, shoulder, legs, and constipation. This appeal was exhausted at the
20 Third Level of Review.⁵ (Decl. of R. Robinson, Ex. H.)

21 8. Plaintiff submitted Log No. COR HC 15057861 on March 25, 2015, which alleged that
22 he was denied adequate medical treatment for unnamed medical problems as well as being issued
23 unknown medications that were not prescribed to him. Plaintiff alleged that he was not given
24 treatment because when he originally submitted another, prior inmate appeal pertaining to these issues,

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26 ⁴ Plaintiff correctly notes that Defendants incorrectly referenced this appeal number as COR SC 12001313, instead of COR
SC 12001333, however, such mistaken does not render this statement of fact as presented by Defendant disputed.

27 ⁵ Plaintiff attempts to dispute this fact by stating that he addressed his suffering side effects; however, Plaintiff's statement
28 does not dispute this statement of fact as presented by Defendants, and Plaintiff's objection is overruled.

1 that appeal's investigation was subsequently handled by the Office of Internal Affairs (OIA). As a
2 result, he was experiencing several adverse medical conditions. Plaintiff mentions the OIA files
3 produced to him during discovery in Estrada v. Gipson, Eastern District of California Case No. 1:13-
4 cv-00919, to allege that his medical symptoms have gone untreated. This appeal was exhausted at the
5 Third Level of Review.⁶ (Decl. of R. Robinson, Ex. I.)

6 9. Log No. COR HC 15057861 received a Third Level decision on November 5, 2015.
7 (Decl. of R. Robinson, Ex. I.)

8 10. Plaintiff submitted Log No. COR HC 15058256 on March 29, 2015, which alleged that
9 non-Defendants T. Macias and Nurse Grajeda retaliated against him for submitting prior inmate
10 appeals. Plaintiff also alleged that he was receiving inadequate medical treatment for heart problems
11 as well as being treated inappropriately by non-Defendant psychological staff members. This appeal
12 was exhausted at the Third Level of Review. (Decl. of R. Robinson, Ex. J.)

13 11. Log No. COR HC 15058909 received a Third Level decision on February 10, 2016.
14 (Decl. of R. Robinson, Ex. K.)

15 **G. Plaintiff's Statement of Undisputed Facts⁷**

16 1. Plaintiff submitted health care inmate appeal COR-SC-120011313 on July 24, 2012
17 which as a staff complaint against non-peace officer (licensed vocational nurse Delorise P. Tassej)
18 made his complaint clear that LVN D. Tassej was engaged in staff misconduct and that LVN D.
19 Tassej provided him excess narcotic and other medications he was not prescribed which were often
20 times mixed with his prescription narcotic and nerve pain medication, that were prescribed to be
21 dispensed in a crushed and float form, for several years, were causing the plaintiff to suffer serious
22 side effects and also mental breakdowns and that these problems are ongoing. (Pl. Opp'n to Defs.'
23 Mot. for Summ. J, Ex. B.)

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25
26 ⁶ Plaintiff correctly notes that Defendants incorrectly referenced this appeal number as COR HC 14057160, instead of
27 COR HC15057861; however, such mistake does not render this statement of fact as presented by Defendant disputed.

28 ⁷ For clarity purposes, the Court notes that it has included all facts for which Defendants submit are undisputed but
irrelevant. The relevancy of any facts will be determined only, if necessary, in the analysis portion of this decision.

1 2. On August 1, 2012 Health Care Appeals Office sent Plaintiff a staff complaint
2 assignment notice second level SC appeal with a due date of September 10, 2012. (Pl. Opp'n to Defs.'
3 Mot. for Summ J. Ex. B; Defs.' Mot. for Summ J. at Decl. of R. Robinson in Support of Defs.' Mot.
4 for Sum. J. Ex. B.)

5 3. On August 21, 2012 chief executive officer (CEO) Teresa Macias sent Plaintiff a
6 memorandum as a "Staff Complaint Response" that does not indicate if this notice or response serves
7 as a second level response as required by California Code of Regulations (CCR) Title 15 sections
8 3084.7(b)(c). Within the memorandum Teresa Macias informs the plaintiff his inmate appeal is being
9 referred to the Office of Internal Affairs (OIA) for investigation and that the Plaintiff will be notified
10 of the outcome and or notified upon the completion of the inquiry if a confidential inquiry is made by
11 the institution. The last paragraph also states that "allegations of staff misconduct do not limit or
12 restrict the availability of further relief via the inmate appeals process. (Pl. Opp'n to Defs.' Mot. for
13 Summ. J., Ex B page 2; Defs.' Mot. for Summ. J at Decl. of R. Robinson and Ex. B.)

14 4. On September 10, 2012 R. Madruga, SS Health Care Appeals Office sent the Plaintiff a
15 memorandum which provided a detailed explanation of how this inmate appeal would be handled
16 pursuant to CCR Title 15 3084.9(i)(4)(A) which states the following: "The referral for investigation
17 and the status of the investigation. Additionally, the appellant shall be notified of the outcome at the
18 conclusion of the investigation." (Pl. Opp'n to Defs.' Mot. for Summ. J. Ex. B, page 1); Defs.' Mot.
19 for Summ. J. at Decl. of R. Robinson and Ex. B.)

20 5. On November 26, 2012 Plaintiff attached to a CDCR-602 inmate appeal a letter to the
21 Director's level – third level review stating his original due date was September 10, 2012 and that he
22 was not given a due date by OIA, he also attached the response/memorandum Teresa Macias, CEO,
23 sent him. (Pl. Opp'n to Defs.' Mot. for Summ. J. Ex. B page 9; Defs.' Mot. for Summ. J at Decl. of R.
24 Robinson and Ex. B; Decl. of D. Goree; Decl. of Voong; Decl. of Erick J. Rhoan.)

25 6. On January 13, 2013, L. D. Zamora, Chief of Office of Third level appeals for health
26 care provided Plaintiff a third level response, however, L. D. Zamora provides Plaintiff two conflicting
27 answers: 1). Is that after contacting Mr. Madruga and Defendant Whitford, "Captain" of the
28 Investigative Services Unit[,] it was discovered OIA accepted the appeal of investigation and there is a

1 due date of September 2014; 2). Is that L. D. Zamora denied inmate appeal COR SC 12001313
2 therefore making it an exhausted appeal which lacked a full review that was meaningful.

3 7. Under the CCR Title 15 3084(c) right to appeal “material adverse effect means a harm
4 or injury that is measurable or demonstrable or the likelihood of such harm or injury. In either case,
5 the harm or injury must be due to any policy, decision, action, condition, or omission by the
6 department of its staff.” In this instance the Plaintiff had to seek out discovery in Estrada v. Gipson, et
7 al., case no. 1:13-cv-00919-LJO-DLB E.D. Cal., and find out that the investigation by OIA, Defendant
8 Flores, had concluded and Teresa Macias CEO of Health care had imposed penalties and sustained
9 allegations against LVN Tassej for the misappropriations of medications to inmate-patients. (Pl.
10 Opp’n to Defs.’ Mot. for Summ. J. Exs A, B, C, D, E, F, G, and U.)

11 8. Plaintiff inquired as to the status of his inmate appeal COR SC 12001313 by notifying
12 Defendant Whitford on December 27, 2012 via CDCR 22 inmate/parolee request for interview.
13 Defendant Whitford responded on January 15, 2013 stating in part “this appeal was postponed and you
14 should have received notification from the appeals office.” (Pl. Opp’n to Defs.’ Mot. for Summ. J. Ex.
15 C page 1.)

16 9. Inmate Appeal COR SC 12001313 was reviewed at the third level by Health Care
17 Appeals Coordinator on January 3, 2013 and denied and exhausted, at least in part.

18 10. Plaintiff put the prison on notice of LVN Tassej and LVN F. Sauermilch’s making fun
19 of Plaintiff’s suffering side effects from LVN Tassej misappropriating excess medications to him.

20 11. Defendants Garnett and Defendant Lau were the supervisors of LVN Tassej and LVN
21 Sauermilch. (Pl. Opp’n to Defs.’ Mot. for Summ. J., Ex. Log No. CSPC 5-12-4888.)

22 12. Investigative Services Unit (ISU) correctional officer C. Love investigated and
23 conducted a confidential inquiry on or around December 13, 2012 and concluded the appeal be denied.
24 (Pl. Opp’n to Defs.’ Mot. for Summ. J., Ex. J.)

25 13. Plaintiff filed Log No. COR SC 12001377 stating LVN S. Gonzalez continued to
26 retaliate on him for filing of COR SC 12001313 (Pl. Opp’n to Defs.’ Mot. for Summ. J. Ex. B) against
27 LVN Tassej, by refusing to administer his prescription narcotic medications to him and also falsifying
28

1 rules violation reports and intentionally call the Plaintiff names in the presence of inmates in an effort
2 to have Plaintiff hurt by inmates.

3 14. Defendant Garnett failed to train and supervise licensed vocational nurse (LVN) S.
4 Gonzales (Thomas) Maria Gray and D. Reynoso who were named COR SC 12001377. (Pl. Opp'n to
5 Defs.' Mot. for Summ. J. Ex. K.)

6 15. Plaintiff filed inmate appeal COR SC 13001467 on March 21, 2013, on licensed
7 vocational nurse S. Gonzales (Thomas) a staff complaint and Defendant Evangene Garnett reviewed
8 and responded to this appeal at the second level and again Defendant Garnett failed to train and
9 supervise licensed vocational nurse S. Gonzales (Thomas) who continued to retaliate on Plaintiff for
10 the filing of COR SC 12001313. (Pl. Opp'n to Defs.' Mot. for Summ. J, Ex. B, K, L, O.)

11 **H. Findings on Defendant's Motion for Summary Judgment**

12 Defendants argue that during the discovery process Plaintiff identified several appeals in which
13 he claims exhausted his claims against each Defendant. However, Defendants submit that Plaintiff's
14 identified appeals do not mention Defendants or their alleged malicious conduct as alleged in the first
15 amended complaint.

16 As an initial matter, there is no dispute that there was available administrative remedy system
17 at CDCR by submitting a CDCR Form 602 "Inmate/Parolee Appeal, and Plaintiff was aware of the
18 inmate appeals process." Albino, 747 F.3d at 1172. It is undisputed that during discovery, Plaintiff
19 identified the following inmate appeals in which he claims exhausted his administrative remedies
20 against Defendants: (1) COR SC 12001313; (2) CSPC-15-12-4888; (3) COR SC 12001333; (4) COR
21 SC 12001377; (5) COR SC 13001467; (6) COR HC 14056477; (7) COR HC 15057592; (8) COR HC
22 14057160; (9) COR HC 15057861; (10) COR HC 15058256; and (11) COR HC 15058908. (Decl. of
23 Erick J. Rhoan ¶ 4, Exs. A & C, ECF No. 55-5.)

24 At the outset, the Court notes that in the first amended complaint Plaintiff admits that he
25 became aware of Defendants' alleged misconduct and involvement in the misappropriation of his
26 medication and lack of medical care on February 2, 2015 (well after the majority of grievances were
27 filed), which negates against a finding that any prior appeals exhausted the claims as to those
28 Defendants. (ECF No. 16 at 9, ¶¶ 2-24.) Although the first amended complaint includes allegations

1 that pre-date February 2015, Plaintiff submits that he did not become aware of such actions until 2015,
2 rendering any appeals prior to such date suspect as to exhaustion. In any event, for the reasons
3 explained below, the Court finds that Plaintiff has failed to exhaust the administrative remedies as to
4 all Defendants, except Defendant Garnett.

5 1. Appeal Log No. COR SC 12001313

6 It is undisputed that in Appeal Log No. COR SC 12001313, alleged that a non-Defendant
7 Licensed Vocational Nurse (LVN) Tassej, was a Mexican Mafia sympathizer and conspired with
8 them to harm Plaintiff's family, as well as gave him excess narcotics medications, such as morphine
9 and Gabapentin, resulting in mental health issues. This appeal was exhausted at the Third Level of
10 Review. (Decl. of R. Robinson, Ex. B.)

11 Here, even liberally construing the allegations set forth in this appeal, it did provide prison
12 officials with adequate notice as to his claims against Defendants in this action. Indeed, the appeal did
13 not reference any Defendant or any of Defendants' conduct, and therefore could not and did not serve
14 to exhaust the claims against Defendants. Rather, this grievance challenged *only* the misconduct by
15 LVN Tassej, which is immaterial to whether Plaintiff exhausted the separate and distinct claims of
16 deliberate indifference against Defendants in this case. While Tassej's conduct may have been
17 ongoing, there are not sufficient factual allegations or reasonable inferences therefrom to find that
18 Plaintiff grieved any of the medical claims against Defendants in this action.

19 In opposition, Plaintiff alleges that that he informed Defendants Whitford, Vickjord and Flores
20 of LVN Tassej's misappropriation of medications in 2011, prior to the filing of appeal log no. COR
21 SC 12001313; however, such claim does not establish exhaustion of the administrative remedies, and
22 this appeal made no mention of Defendants or their alleged misconduct. Plaintiff further states that
23 this appeal initiated an investigation by the OIA into Tassej; however, this appeal and the OIA
24 investigation do not demonstrate exhaustion of the claims against Defendants in the instant action.
25 Indeed, the Office of Internal Affairs is not part of the inmate appeals process, and cannot be deemed
26 proper exhaustion of the administrative remedies. See, e.g., Panaro v. City of North Las Vegas, 432
27 F.3d 949, 953 (9th Cir. 2005) (participating in Internal Affairs investigation did not exhaust
28 administrative remedies). Nor are confidential inquires necessary for an inmate to obtain third level

1 review. Cal. Code. Regs. tit. 15, § 3084.9(i)(B)(1)-(2). Thus, the fact that Defendants Whitford,
2 Vickjord and Flores may have participated in an internal investigation to which Plaintiff verbally
3 complained does not suffice to exhaust the administrative remedies. In addition, Plaintiff attaches a
4 Form 22 request to appeal log no. COR SC 12001313 which was signed by Defendant Whitford, a
5 Form 22 request is not a form level of review for administrative relief and does not exhaust the
6 administrative remedies. Cal. Code. Regs. tit. 15, §§ 3086(e)(2), 3086(i). In any event, the Form 22 is
7 dated after the issuance of the third level decision on this appeal and certainly cannot and does not
8 serve to exhaust any claim against Defendant Whitford.⁸ (Opp'n, Ex. C.) Accordingly, this appeal did
9 not exhaust the administrative remedies against any of the Defendants in this action.

10 2. Appeal Log No. CSPC-15-12-4888

11 In Appeal Log No. CSPC-15-12-4888, Plaintiff alleged that non-Defendants, Correctional
12 Officers Martinez and Rodriguez, threatened and retaliated against him for reporting sexual
13 misconduct against Tassej. This appeal was exhausted at the Third Level of Review on January 17,
14 2013. (Decl. of D. Goree ¶ 9, Ex. B; Decl. of M. Voong ¶ 7, Ex. B.)

15 In analyzing Plaintiff's appeal, the Third Level of review stated the following:

16 It is appellant's position Corcoran State Prison (COR) Correctional Officer (CO) R. M.
17 Rodriguez and CO R. Martinez have subjected him to retaliation and harassment due to a
18 sexual misconduct complaint he filed on Licensed Vocational Nurse (LVN) D. Tassej. The
19 appellant stated LVN Tassej is providing information to the Mexican Mafia prison gang about
20 his debriefing process. The appellant contends that on July 15, 2012, while being escorted to
21 an outside hospital by Cos Rodriguez and Martinez, Rodriguez made comments that he
22 (appellant) was some she hated and used a cellular phone she had in her pocket to text
23 (presumably) LVN Tassej. The appellant claims CO Rodriguez then stated, "Estrada you
24 fucked up." The appellant continued by stating he had to be transferred to another hospital and
25 CO Rodriguez began texting again upon the arrival there and stated, "You're a straight fucking
26 rat and rats eat cheese and my girl said to you want some." The appellant added that CO
27 Rodriguez attempted to talk to him about LVN Tassej being "cool." Additionally, the
28 appellant alleges the officers are retaliating to deter him from reporting further staff
misconduct. The appellant requests the following: COs Rodriguez and Martinez be removed
from the Security Housing Unit Yard; CO Rodriguez provides copies of the text messages she
made on July 15, 2012; an Office of Internal Affairs investigation and monetary compensation.

(Decl. of D. Goree ¶ 9, Ex. B; Decl. of M. Voong ¶ 7, Ex. B.)

⁸ Furthermore, the Form 22 merely requested status of his appeal. (Id.)

1 The appeal was denied because Plaintiff's allegations were reviewed and evaluated by the
2 administrative staff and an appeal inquiry was completed by the second level review. (Id.)

3 Plaintiff attempts to dispute this appeal by arguing that Defendants failed to disclose the report
4 from the confidential inquiry dated December 12, 2012. (Pl. Opp'n to Defs' Stmt. Undisputed Facts, at
5 ¶ 5, ECF No. 67.) However, any confidential inquiry is not at issue, and the fact remains that this
6 appeal did not grieve facts relating to the conduct against Defendants at issue in this case.

7
8 3. Appeal Log No. COR SC 12001333

9 It is undisputed that in Appeal Log No. COR SC 12001333, Plaintiff alleged that a non-
10 Defendant Licensed Vocational Nurse (LVN) Tassej, was a Mexican Mafia sympathizer and
11 conspired with them to harm Plaintiff's family, as well as gave him excess narcotics medications, such
12 as morphine and Gabapentin, resulting in mental health issues. This appeal was exhausted at the Third
13 Level of Review. (Decl. of R. Robinson, Ex. B.)

14 This appeal does not mention Defendants or their conduct as set forth in the first amended
15 complaint, and therefore cannot and did not serve to exhaust the administrative remedies. This appeal
16 focused solely on the misconduct by non-Defendant LVN Tassej. There is no mention or reasonable
17 inference of any alleged misconduct by any Defendants in this action. One of the purposes of the
18 exhaustion requirement is to provide the institution an opportunity resolve issues informally. See
19 Woodford, 584 U.S. at 89. In order to accomplish this goal, an inmate must "describe the *specific*
20 issue under appeal and the relief requested." Cal. Code Regs. tit. 15, §§ 3084.2(a)(4) (emphasis
21 added). Plaintiff cannot expect the institution to guess or read into Plaintiff's claim relating to LVN
22 Tassej's conduct to include involvement of others absent such specific factual allegations, not present
23 here.

24 4. Appeal Log No. COR SC 12001377

25 It is undisputed that in Appeal Log No. COR SC 12001377, Plaintiff alleged that a non-
26 Defendant LVN retaliated against him by withholding medications and therapy, disclosing sensitive
27 information in his Central File, and used this information to defend Tassej while Tassej was under
28 investigation. This LVN also fabricated a Rules Violation Report against him and made improper

1 references to Tassey’s collaboration with Mexican Mafia gang members to harm Plaintiff’s family.
2 Plaintiff requested that this LVN and other unrelated staff be reprimanded for their unethical behavior.
3 This appeal was exhausted at the Third Level of Review. (Decl. of R. Robinson, Ex. D.)

4 This appeal does not identify any Defendant or describe their conduct as alleged in the first
5 amended complaint, and therefore cannot and did not serve to exhaust the administrative remedies.

6 5. Appeal Log No. COR SC 13001467

7 In Appeal Log. No. COR SC 13001467, Plaintiff alleged that he brought a prior complaint
8 against non-Defendant LVN Gonzalez, but that Defendant Garnett did not adequately investigate LVN
9 Gonzalez for her retaliatory actions against him. Plaintiff further alleged that LVN Gonzalez withheld
10 medications, made up inappropriate rumors about him, and made false accusations that Plaintiff
11 threatened her. This appeal was exhausted at the Third Level of Review. (Decl. of R. Robinson, Ex.
12 E.)

13 Defendants acknowledge that this appeal identifies Defendants Garnett, and state “[a]side from
14 Defendant Garnett, Log No. COR SC 1300147 does not describe any Defendants’ conduct mentioned
15 in the First Amended Complaint.” (Defs’ Stmt. Undisputed Facts, ¶ 12.) Indeed, in Appeal Log No.
16 COR SC 13001467, Plaintiff stated the following:

17 On 2-20-13 I submitted a staff complaint on LVN S. Gonzalez who continues to retaliate
18 against me. I have not received a log # and I spoke with SRN II Garnett on February 21 and
19 22nd 2013 regarding my having to file a staff complaint on LVN Gonzalez, S., because the 602
20 (HC 12001377) that had been already submitted on her on the same issues she obviously
discovered no matter how unethical/unprofessional she treats inmate/patients there are no
worries of supervisory staff holding LVN S. Gonzalez accountable for her actions.

21 On February 18, 2013, LVN S. Gonzalez refused to issue me my medications (this supports my
22 prior complaints) and started telling nurses and custody staff that I belong in a management
23 cell with an extended food port and Plexiglas, she again continues to label me a sex offender
24 by telling staff & inmates. I’m not and her actions are stigmatizing and are in reference to my
juvenile record, which has a document from an inmate (Marcos Martua) who is a sex offender
and who attempted to allege I had assaulted him. These allegations are part of my juvenile file
and the only way LVN S. Gonzalez would know about this is by custody disclosing it to her.
25 Even this in addition to her openly labeling me is in violation of Welfare & Institution Code
26 827(b). I am also retaliated on by LVN S. Gonzalez for a protected right to report misconduct
which I have also requested confidentiality for (Gov. Code 6254(f)(2) & PC 293.5), she is
27 alleging also that I threatened her but there are no threats against her on record. LVN S.
28

1 Gonzalez is manipulating, willfully and maliciously to have staff harass me. She is masking
2 her complaints in order to have custody cause me harm and problems.

3 (Decl. of R. Robinson, Ex. E.)

4 At the second level of review, the appeal was granted in part in that an appeal inquiry was
5 conducted and it was determined that there was no violation of CDCR policy with respect to one or
6 more of the issues appealed. (Id.) It was specifically stated that on “[y]ou were interviewed on
7 4/25/13 by SRN Garnett and you stated that LVN Gonzalez refused to administer your medications on
8 1/28/13. That she is retaliation on you, being slandered by her and she had been manipulating the
9 custody staff to harass him, cause problem and to harm him.” (Id.)

10 In seeking review at the third level, Plaintiff stated the following:

11 I did address this issue previously with SRN II E. Garnett in COR SC
12 12001377/COR12051473 about LVN S. Gonzalez retaliating on me, labeling me a sex
13 offender intentionally withholding my narcotics on several occasion because she was
14 vindictively finding reasons to deny me dosages. In addition, he aided LVN Delorise Tassej
15 in covering up her criminal activities knowingly and alleged directing in front of me LVN D.
16 Tassej would not mess with him (Estrada) she doesn’t hook up with sex offenders Estrada is a
17 rapist and she only messes with the other guys not those type nodding her head in my direct
18 [sic].

19 I didn’t detail everything within the prior complaint, please keep in mind I filed an appeal COR
20 SC 12001313 requesting confidentiality per CCR 3401.5(a)-(f) and Gov. Code 6254(f)(2) and
21 exercised what is left of my rights and expected your (third level review) office to fill in the
22 blanks or gaps through a thorough inquiry with integrity, yet here I am. LVN S. Gonzalez’s
23 actions were unethical. She covered up Delorise Tassej’s actions, aided her over 3 years,
24 failed to report those criminal activities and is now continuing to retaliate on me by making
25 unfounded allegations, masking her complaints behind rules she is tipping in her favor and
26 presenting them to custody who already are known to retaliate on inmates and abusing her
27 discretion to her advantage to carry out acts of vindictiveness, her motives are masked and her
28 behavior has caused me to be moved, as predicted into a management cell, lose property as a
result of her complaints (staff intentionally lost my property). I understand supervisory staff
are protecting their subordinates from any real investigation, and I also don’t expect third level
review to do more than as always deny my appeal under the appeal inquiry directive. In this
case I am to be respected and we all are expected to carry ourselves accordingly CCR and
state/federal law truly dictates what violations have been made even those that superseded
policy, she disrespected me, retaliated on me for using the 602 process to report on her and
Delorise Tassej (ask ISU) and placed my life in danger by labeling me a sex offender, also
disclosed juvenile records privacy rights violations.

(Id.)

1 Plaintiff's appeal was denied at the third level of review on May 20, 2013. (Id.)

2 With regard to supervising registered nurse, Defendant Garnett, Plaintiff contends that she
3 failed to properly supervise Tassej while she was misappropriating Plaintiff's medications and failed
4 to provide medical treatment. (ECF No. 7, at 17-19.) More specifically, Defendant Garnett handled
5 "several" staff complaints Plaintiff filed against the "former employee" and that involved "the former
6 employee." (Id. at 25.) Defendant Garnett was aware Plaintiff's bodily integrity was violated by the
7 former employee's misappropriating medications to him and took no action while this former
8 employee concealed these acts. (Id.)

9 The Court finds that liberally construing the allegations of Plaintiff's appeal and drawing all
10 inferences reasonably supported by the evidence in Plaintiff's favor, this appeal exhausts Plaintiff's
11 Eighth Amendment claim against Defendant Garnett. Defendant Garnett interviewed Plaintiff
12 regarding the allegations and Plaintiff appealed such determination to the third and final level of
13 review. The second level review decision as well as the factual allegations in seeking third level
14 review reflect Defendant Garnett's involvement in failing to properly investigate and treat Plaintiff's
15 medical condition. Accordingly, Defendant Garnett's motion for summary judgment should be
16 denied.

17 6. Appeal Log No. COR HC 14056477

18 In Appeal Log No. COR HC 14056477 Plaintiff claimed that on July 16, 2014, Doctor Aye
19 denied him medical treatment. (Decl. of R. Robinson, Ex. F.) Plaintiff stated that he complained to
20 LVN Singh about his nerves causing his brain, neck, spine and teeth to go into "muscle spasms." (Id.)
21 Plaintiff requested that Doctor Aye be held responsible for denying Plaintiff's medical treatment. (Id.)

22 Plaintiff appeal was partially granted at the first level of review, stated the following:

23 The First Level Appeal, received on 7/22/2014 indicated the subject of this appeal is to receive
24 medical treatment. This appeal was deemed to not be a staff complaint. The response stated
25 you were assessed by Dr. Clark. You stated the issue is primarily pain and the "feeling" of the
26 pain. Ibuprofen was added to your medication regiment. You already have methadone as part
27 of your treatment plan. You stated the nausea had improved. There is no medical criterion
28 met to justify the referral to a neurologist at this time. At the First Level of Review this appeal
was partially granted.

1 (Id.) Plaintiff appealed to the second level of review. (Id.) The appeal was partially granted at the
2 second level of review as follows:

3 The Second Level Appeal, received on 9/2/2014 indicated you are dissatisfied with the First
4 Level response. For the Second Level we have reviewed your appeal with attachment(s), Unit
5 Health Record (eUHR), and all pertinent departmental policies and procedures. Your
6 symptoms, physical exam findings and radiology tests were all taken into consideration when
7 determined whether or not your requests would be granted. Cervical X-rays were taken on
8 9/9/2014. It does show moderate degenerative disc changes. You also have recurring
9 dislocation of the shoulder. The range of motion to the neck is normal however it is believed
10 you are in early stages of arthritis to the neck. You state the nausea has improved. You have
11 been offered partial treatment for your shoulder in the past by two different medical centers
12 which you refused them both. You have been given a 7410 chrono for a lower bunk, extra
13 mattress, wedge pillow and waist chains for all safety and comfort. You have Ibuprofen for the
14 arthritis and headaches plus Methadone for more severe pain. At this time there is no medical
15 indication for the referral to neurology. You are receiving treatment for issues 1-3 [nerves,
16 shoulder, and nausea].

17 (Id.)

18 Plaintiff sought review at the third level of review and sought treatment for nerves, treatment
19 for the screws in your right shoulder, and treatment for nausea and a feeling of chemotherapy
20 treatment. (Id.) The appeal was denied, in pertinent part, as follows:

21 Your appeal file and documents obtained from your Unit Health Record were reviewed by
22 licensed clinical staff. These records indicate:

23 Documentation is supportive of you receiving Primary Care Provider (PCP) evaluation and
24 treatment as determined medically indicated for your appeal issues. You received PCP follow-
25 up evaluation and treatment to November 24, 2014.

26 Records indicate you are currently enrolled in the Chronic Care Program (CCP) where your
27 medical conditions and medication needs are closely monitored.

28 Your pharmacy profile indicates you are currently prescribed numerous medications, including
methadone to address your health care concerns.

You will continue to be evaluated and treatment will be provided based on your clinician's
evaluation, diagnosis, and recommended treatment plan, in accordance with appropriate
policies and procedures.

On December 4, 2013, you filed for a writ of habeas corpus in Kings County Superior Court.

The Receiver first responded to your petition, addressing your concerns regarding your right
shoulder on March 6, 2014. Therefore, the office of Third Level Appeals-Health Care will not

1 respond to this matter as your appeal issues are being addressed by the Kings County Superior
2 Court.

3 (Id.) (emphasis omitted).

4 Although Defendant Dr. Wang, as Chief Medical Executive, was one of the two individuals
5 who denied this appeal at the second level of review, it is irrelevant as whether Plaintiff exhausted the
6 claims set forth in the first amended complaint. With regard to Defendant Dr. Wang, in the first
7 amended complaint, Plaintiff alleges that he visited Plaintiff while he was in the Acute Care Hospital
8 in August and September 2012, but failed to take any measures to treat Plaintiff for the side effects.
9 Dr. Wang “took no steps to get Plaintiff the treatment he needed and continues to need for being
10 misappropriated medications without his consent. Defendant Wang did not provide Plaintiff any due
11 process throughout [the] inmate appeal.” (ECF No. 7, at 21.)

12 However, in this appeal, Plaintiff complained of lack of medical treatment by Doctor Aye in
13 2014, for his shoulder and other pain. Thus, only focus of this appeal was on the actions or lack
14 thereof by Doctor Aye. Nothing in this appeal alerted prison officials to the factual basis for his
15 claims against any of the Defendants in this action, and Defendant Wang’s review of such appeal is
16 immaterial and cannot serve to exhaust any claim against him.

17 7. Appeal Log No. COR HC 15057592

18 Defendants argue that this appeal cannot serve to exhaust Plaintiff’s claim because it was
19 rejected at the third level of review. However, Plaintiff argues that he was “satisfied” with the
20 appeal’s first level denial, and cites Harvey v. Jordan, 605 F.3d 681 (9th Cir. 2010) to support his
21 argument. (Pl. Opp’n at 8, ECF No. 59.) In Harvey, the Ninth Circuit held that an inmate is not
22 required to seek further levels of review if he is satisfied with a lower level’s decision. Id. at 685.
23 Although Plaintiff’s appeal was granted at the first level review in that Plaintiff was provided copies of
24 certain documents from his medication file, the staff complaints of retaliation were not granted.
25 Indeed, by virtue of Plaintiff’s appeal to the third level of review it is clear that he was not satisfied
26 with the second level review. See Cleveland v. Lam, No. C 14-1369 CRB (PR), 2015 WL 628340, *4
27 (N.D. Cal. Feb. 12, 2015) (“... as evidenced by his continued appeals ..., at no point was [the inmate]
28 satisfied by the partial grant of his appeals at the first level of review.”) Thus, irrespective of the

1 content of this appeal, it was not exhausted at the third and final level of review because it was
2 rejected for Plaintiff's failure to seek review at the second level. An appeal that is rejected and/or
3 cancelled does not serve to exhaust the administrative remedies. Cal. Code Regs. tit. 15, § 3084.1(b).
4 Accordingly, this appeal cannot and did not serve to exhaust any claims against Defendants in this
5 action.

6 8. Appeal Log No. COR HC 14057160

7 In Appeal Log No. COR HC 14057160, Plaintiff alleged that he was having physical and
8 mental health troubles. Plaintiff requested medical treatment for his head, eyes, jaw, neck, stomach,
9 shoulder, legs, and constipation. This appeal was exhausted at the Third Level of Review. (Decl. of
10 R. Robinson, Ex. H.) Plaintiff contends that he also alleged he was suffering side effects.

11 Plaintiff's appeal was denied at the first level as follows:

12 You were interviewed on November 24, 2014, E. Clark, MD, regarding this appeal. You were
13 seen, evaluated, and your eUHR was reviewed. You are requesting to have this appeal treated
14 as an emergency and to be evaluated for these issues by a doctor. You were medically
15 evaluated on November 10, 2014 by Dr. Ulit. In August of 2014 you had lab work which was
16 normal. You were seen at Riverside County orthopedic for your shoulder. Fusion was
17 recommended but you declined this treatment. Although you have the right to refuse
18 treatment, there is no provision under the California Code of Regulations (CCR), Title 15,
19 which gives you the right to choose the health care provider administering care. However, by
20 refusing treatment you run the risk of delaying your medical treatment.

21 **Issue 1: Denied.** You indicated your appeal was to be considered an emergency. Following a
22 review of the issues, it was found not to have met the emergency criteria as described in
23 California Code of Regulations (CCR), 3084.5(b)(2). Your appeal was processed as a routine
24 matter.

25 **Issue 2:** Your request to be seen by the doctor for the above listed issues is granted in that you
26 were medically evaluated on November 24, 2014. At this visit you have been prescribed
27 Dulcolax tablets, for your constipation. You are encouraged to follow up with Dr. Ulit for any
28 symptoms you continue to have. Your PCP who is a board certified medical professional has
prescribed you a medication and or treatment regime deemed appropriate for your medical
condition.

29 (Id.)

30 In seeking relief at the second level of review, Plaintiff stated the following:

31 My initial belief is that the constipation caused these symptoms because I constantly am
32 forcing myself to have bowel movements to the point where I almost pass out from dizziness.
33 My head eyes neck and jaw are feeling like my nerves or something in the skin or muscle

1 makes those areas static like shock with irritation and pain and at times it feels as if something
2 is driving and it causes itching. I have no idea why my ... feels this way. But all this
happened after taking Valley Fever medication.

3 (Id.)

4 The appeal was denied at the second level of review. (Id.) Plaintiff sought review at the third
5 level of review stating the following:

6 I submitted COR SC 12001313 in 2012 addressing issues dealing with an LVN
7 misappropriating inmate/patient medications without prescription. I am currently experiencing
8 p[hysical] and some sort of side effects to my jaw, eyes, head and neck and I recently have
9 received a CDCR 403 signed by CEO Teresa Macias 4/22/13 showing she had knowledge of
this action yet refused to treat me or notify doctors I need treatment.

10 (Id.)

11 Plaintiff's appeal was denied at the third level of review based on the following:

12 Your appeal file and documents obtained from your Unit Health Record were reviewed by
13 licensed clinical staff. These records indicate:

14 As stated in your Second Level Review, you were seen on November 24, 2014, where you
15 were ordered a prescription of dulcolax as a stimulant for constipation caused by opiates. You
16 were encouraged to follow up with your PCP for your concerns regarding your head eyes, jaw
and ears.

17 On February 11, 2015, you were seen by a Registered Nurse (RN) in response to a Health Care
Services Request Form (CDC 7362) regarding complaints of head hurts, dizzy and eye ache.

18 The plan of care included the medication Tylenol for pain and a Request for Services (RFS)
19 was completed for optometry referral. You were informed to follow up if your symptoms
20 worsened.

21 On March 5, 2015, you were seen and evaluated by your PCP for ear pain. Your PCP found no
22 neurologic deficits, dizziness resolved, right external ear infection with plan to treat with ear
23 drops. There is no documentation you brought up any complaints regarding head, eye, jaw,
neck, stomach and leg issues.

24 On March 13, 2015, you were seen by a RN in response to a CDC 7362 regarding problems
25 with your jaw and ears, headaches and blurred vision. The plan of care included refilling the
26 medication Tylenol, referral to the PCP for the medication loratadine for renewal to your PCP.
You were informed to report any worsening symptoms.

27 On March 25, 2015, you were seen and evaluated by your PCP for pain on both ears. The
28 treatment plan was to give you Cortisporin Otic and continue to observe. There is no

1 documentation you brought up any complaints regarding head, eye, jaw, neck, stomach and leg
2 issues.

3 On April 3, 2015, you transferred to the California Medical Facility.

4 On April 6, 2015 labs were drawn.

5 On April 24, 2015, you transferred to the California State Prison Corcoran.

6 On May 20, 2015, you were seen and evaluated by your PCP regarding issues unrelated to your
7 appeal. There is no documentation you brought up any complaints regarding head, eye, jaw,
8 neck, stomach and leg issues.

9 Your pharmacy profile shows you are prescribed baclofen and ibuprofen for your pain
10 management.

11 You are advised to utilize the CDCR 7362, Health Care Services Request Form, process to
12 access health care services, as required by department policy, for additional health care
13 concerns.

14 You will continue to be evaluated and treatment will be provided based on your clinician's
15 evaluation, diagnosis, and recommended treatment plan, in accordance with appropriate
16 policies and procedures.

17 (Id.)

18 This appeal did not grieve any facts set forth in the first amended complaint against the
19 Defendants in this action. Although Plaintiff requested medical treatment, he did not identify any
20 Defendant or allege any facts to support a claim that any Defendant in particular was denying him
21 medical care or failed to investigate the allegations against LVN Tassej. Accordingly, this appeal did
22 not exhaust any claims against any Defendant in this action.

23 9. Appeal Log No. COR HC 15058256

24 Plaintiff submitted Log No. COR HC 15058256 on March 29, 2015, in which he alleged that
25 non-Defendants T. Macias and Nurse Grajeda retaliated against him for submitting prior inmate
26 appeals. Plaintiff also alleged that he was receiving inadequate medical treatment for heart problems
27 as well as being treated inappropriately by non-Defendant psychological staff members. (Decl. of R.
28 Robinson, Ex. J.) Plaintiff requested staff accountability, staff be removed, staff be fired, staff to
cease complaining to custody, staff to cease disrespect and disclosure, staff to cease mentioning

1 litigation information, the appeal to be treated as an emergency, and to be transferred out of Corcoran
2 State Prison. (Id.)

3 The first level of review was bypassed, and at the second level of review the appeal was
4 partially granted, in pertinent part, as follows:

5 **Issue 1:** Your request for staff accountability, staff be removed, staff fired, staff to cease
6 complaining to custody, staff to cease disrespect and disclosure, and for staff to cease
7 mentioning litigation information is partially granted. Staff are held accountable. However,
8 your appeal was reviewed and evaluated by the Hiring Authority and the issue was deemed not
9 to meet staff complaint criteria. During the review of the appeal there is no evidence or burden
10 of proof of misconduct by staff or a violation of policy and procedure. On 3/20/2015 it is
11 noted on the refusal form you refused to be searched before your escort to be medically
12 evaluated. This is a security issue, and under custody's jurisdiction. On 3/25/2015 you were
13 seen by your provider in which it was noted there were no palpitations or chest pain.

14 (Id.)

15 Plaintiff's appeal was denied at the third and final level of review on September 14, 2015. (Id.)

16 Nothing in this appeal identified Defendants or set forth sufficient factual allegations to
17 provide prison officials notice of any alleged misconduct by Defendants as set forth in the first
18 amended complaint. Indeed, Plaintiff identified by name and title several individuals who are not
19 Defendants in this action. Accordingly, this appeal did not serve to exhaust any claim against any
20 Defendant in this action.

21 10. Appeal Log Nos. COR HC 15057861 & COR HC 15058908

22 Defendants argue that Appeal Log Nos. COR HC 15057861 and COR HC 15058908 cannot
23 serve to exhaust Plaintiff's claims in the first amended complaint because a third level decision was
24 not rendered until after the amended complaint was filed on October 30, 2015.

25 Although these two appeals reference the OIA investigation that is alleged in the first amended
26 complaint, no Defendant is mentioned in the appeals themselves. Nor is any conduct described
27 anywhere in these appeals that could be attributed to any Defendant or would have put the prison on
28 notice of Defendants' possible role in any alleged violation. Accordingly, these two appeals did not
serve to exhaust any claim against any Defendant in this action.

1 Furthermore, the undisputed evidence shows that Plaintiff's Appeal Log Nos. COR HC
2 15057861 and COR HC 15058908 on were denied on November 5, 2015 and February 10, 2016,
3 respectively, which is after the first amended complaint was filed in this case. (Decl. of R. Robinson,
4 Exs. I, K; ECF No. 16.)⁹

5 In his opposition, Plaintiff references this argument but argues only that the first amended
6 complaint was filed on October 30, 2015, and Defendants did not file an answer until almost forty-five
7 days thereafter. (Pl.'s Opp'n at 9:19-21.) However, the filing of Defendants' answer to the amended
8 complaint is irrelevant to Plaintiff's requirement to fully exhaust the administrative remedies before
9 filing an amended complaint. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (An action
10 must be dismissed unless the prisoner exhausted his available administrative remedies before he filed
11 suit, even if the prisoner fully exhausts while the suit is pending.); see also Cano v. Taylor, 739 F.3d
12 1214, 1220-21 (9th Cir. 2014). Therefore, Appeal Log Nos. COR HC 15057861 and COR HC
13 15058908, did not serve to exhaust any claims in the instant action because such grievances were not
14 fully exhausted until after the filing of the amended complaint.

15 Based on a review of these appeals, the Court finds that Defendants have meet their initial
16 burden of establishing non-exhaustion as to all Defendants except Garnett, and the burden now shifts
17 to Plaintiff to come forward with evidence showing that a genuine dispute of material fact regarding
18 exhaustion exists or that something in his particular case made the existing administrative remedies
19 unavailable to him. See Albino, 747 F.3d at 1172. On summary judgment, Plaintiff is entitled to all
20 reasonable inferences that can be drawn from the evidence, after careful review of the entire record,
21 including Defendants' motion, Plaintiff's opposition, and Defendants' reply, there is no showing of a
22 genuine issue of material fact of exhaustion as to Defendants Doctor Wang, Vickjord, Whitford, Lau
23 and Flores. Accordingly, Defendants' motion for summary judgment for failure to exhaust the
24 administrative remedies should be granted as to Defendants Doctor Wang, Vickjord, Whitford, Lau
25 and Flores, and denied as to Defendant Garnett.

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28 ⁹ As previously stated, the first amended complaint was filed on October 30, 2015. (ECF No. 16.)

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I. Motions to Compel

On August 22, 2016, and August 25, 2016, Plaintiff filed motions to compel merits-based discovery. (ECF Nos. 56, 58.) On September 13, 2016, the Court stayed all merits-based discovery and granted Defendants thirty days following final resolution to respond to Plaintiff’s motions to compel, if necessary. (ECF No. 65.)

Because it is recommended that Defendants’ motion for summary judgment for failure to exhaust the administrative remedies be denied as to Defendant Garnett, it is recommended that only Defendant Garnett file a response to Plaintiff’s motion to compel, filed August 22, 2016, within thirty days following final resolution of the instant recommendation. Because Plaintiff’s motion to compel, filed August 25, 2016, relates only to Defendant Vickjord who is subject to dismissal for failure to exhaust the administrative remedies it is recommended that the motion be denied as moot.

**III.
RECOMMENDATIONS**

Based on the foregoing, it is HEREBY RECOMMENDED that:

- 1. Defendants’ motion for judgment on the pleadings be DENIED as to exhaustion of the administrative remedies and GRANTED as to dismissal of official capacity claims;
- 2. Plaintiff’s motion to file opposition and exhibits under seal be GRANTED as to exhibits F, G and V and DENIED in all other respects;
- 3. Plaintiff’s motion to hold Defendants in contempt be DENIED;
- 4. Defendants’ motion for summary judgment for failure to exhaust the administrative remedies be GRANTED as to Defendants Doctor Wang, Vickjord, Whitford, Lau and Flore and DENIED as to Defendant Garnett;

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