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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAMIAN T. DOSTER,

1:15-cv-01415-DAD-GSA-PC

Plaintiff,

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT BE GRANTED
IN PART AND DENIED IN PART
(ECF No. 29.)**

vs.

JEFFREY A. BEARD, et al.,

Defendants.

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS**

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I. BACKGROUND

Damian T. Doster (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on September 17, 2015. (ECF No. 1.) This case now proceeds with Plaintiff’s First Amended Complaint filed on March 25, 2016, against defendants Chief Deputy Warden F. Vasquez, Yard Captain P. Llamas, Sergeant Sarah Leon, and Maintenance Engineer Ric Pavich (collectively, “Defendants”), on Plaintiff’s claims for adverse conditions of confinement under the Eighth Amendment and related negligence claims. (ECF No. 13.)

On September 30, 2016, Defendants filed a motion for summary judgment for failure to exhaust administrative remedies. Fed. R. Civ. P. 56. (ECF No. 29.) On June 8, 2017, Plaintiff

1 filed an opposition, and on June 15, 2017, Defendants filed a reply.¹ (ECF Nos. 54, 55.) The
2 motion has been submitted upon the record without oral argument pursuant to Local Rule 230(l),
3 and for the reasons that follow, Defendants' motion should be granted in part and denied in part.

4 **II. ALLEGATIONS IN THE FIRST AMENDED COMPLAINT (FAC)²**

5 Plaintiff is presently incarcerated at Pelican Bay State Prison. The events at issue occurred
6 at Corcoran State Prison (CSP) in Corcoran, California, when Plaintiff was incarcerated there.

7 On May 18, 2015, the hot water was shut off to the housing unit and in Plaintiff's cell,
8 number 10. Moreover, Plaintiff's cold water was shut off as well, thus depriving him of drinking
9 water until May 20, 2015, when only the cold water was turned back on in the cell.

10 The plumbing was in such disrepair that every time other inmates flushed their toilets,
11 human bodily waste would back up into Plaintiff's toilet causing it to overflow, covering his cell
12 floor and the tier in front of his cell with water contaminated by human bodily waste.

13 Plaintiff was forced to eat, sleep, and live in other people's human bodily waste and
14 saturated fumes for over two months. Plaintiff was also deprived of any cleaning supplies which
15 would prevent germs and diseases.

16 On Wednesday, June 3, 2015, defendants Vasquez and Leon were informed that Plaintiff's
17 cell had no hot or warm water, cleaning supplies, nor soap. In response, defendants Vasquez and
18 Leon told Plaintiff the hot/warm water would be back on in a week or in a few days, and to quit
19 crying and complaining. This went on for months while Plaintiff's requests for interviews went
20 unanswered.

21 On June 6, 2015, Plaintiff sent a CDCR form 22 request for interview to defendant Llamas.
22 Plaintiff told Llamas of the events at issue; however, defendant Llamas' response was that it is a
23 maintenance issue and could not be corrected at her level.

24 ¹ Concurrently with their motion for summary judgment, Defendants served Plaintiff with the requisite notice of the
25 requirements for opposing the motion. Woods v. Carey, 684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154
26 F.3d 952, 960-61 (9th Cir. 1998). (ECF No. 29-5.)

27 ² Plaintiff's First Amended Complaint is verified and his allegations constitute evidence where they are based on his
28 personal knowledge of facts admissible in evidence. Jones v. Blanas, 393 F.3d 918, 922-23 (9th Cir. 2004). The
summarization of Plaintiff's claim in this section should not be viewed by the parties as a ruling that the allegations
are admissible. The court will address, to the extent necessary, the admissibility of Plaintiff's evidence in the sections
which follow.

1 On July 1, 2015, Plaintiff resubmitted a CDCR form 22 request for interview to defendant
2 Pavich, telling him about not having hot/warm water and sometimes no cold drinking water, since
3 May 18, 2015. From May 18, 2015, through July 25, 2015, the hot and/or warm water was
4 completely shut off. Sometimes the cold water would also turn off, leaving Plaintiff without
5 drinking water for over 24 hours and forcing him to sleep in overflow from other inmates' toilets.
6 Plaintiff also did not have cleaning supplies or soap, so he could not clean the cell or himself.

7 He also contends that his underwear could not be cleaned properly without hot water. As a
8 result, Plaintiff broke out in rashes, sores, and bumps on his legs and back. During this time,
9 Plaintiff was in a solitary confinement and in a special handling unit, and was forced to stay in his
10 cell for more than 95 hours at a time without exercise or fresh air.

11 On June 3, 2015, defendants Vasquez and Leon were informed that Plaintiff's cell had no
12 hot/warm water and told Plaintiff that it would be back on in a week or in a few days, and to quit
13 crying and complaining. This went on for over one month while Plaintiff's requests for interviews
14 went unanswered. On June 6, 2015, Plaintiff sent a request for interview to defendant Llama,
15 who told Plaintiff that it was a maintenance issue and she could not correct it at her level.

16 On July 1, 2015, Plaintiff resubmitted the request for interview to defendant Pavich.
17 Plaintiff told him about the water issues, and his response was that he was working on the hot
18 water loop and would have the hot water running by July 30, 2015.

19 Defendants Vasquez, Llamas, Leon, and Pavich all had the authority to "red line"
20 Plaintiff's cell, i.e., declare it unsafe for occupancy until the hot water and the plumbing were
21 restored. Defendants' actions were deliberately indifferent and negligent.

22 Defendants' actions did not advance any legitimate correctional goal. This violation of
23 Plaintiff's rights under the Eighth Amendment resulted in physical injuries, mental and emotional
24 pain, humiliation, and fear.

25 Plaintiff requests monetary damages and declaratory relief.

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1 **III. SUMMARY JUDGMENT BASED ON EXHAUSTION**

2 **A. Legal Standards**

3 **1. Statutory Exhaustion Requirement**

4 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA) provides that “[n]o
5 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
6 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
7 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are
8 required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 549
9 U.S. 199, 211, 127 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th
10 Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner and regardless of
11 the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and
12 the exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 534
13 U.S. 516, 532, 122 S.Ct. 983, 993 (2002).

14 “[T]o properly exhaust administrative remedies prisoners ‘must complete the
15 administrative review process in accordance with the applicable procedural rules,’ []—rules that
16 are defined not by the PLRA, but by the prison grievance process itself.” Jones, 549 U.S. at 218
17 (quoting Woodford v. Ngo, 548 U.S. 81, 88, 126 S.Ct. 2378, 2386, 165 L.Ed.2d 368 (2006)). See
18 also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (“The California prison system’s
19 requirements ‘define the boundaries of proper exhaustion.’”). An untimely or otherwise
20 procedurally defective appeal will not satisfy the exhaustion requirement. Woodford, 548 U.S. at
21 90. However, the Ninth Circuit has made clear: A grievance need not include legal terminology
22 or legal theories unless they are in some way needed to provide notice of the harm being grieved.
23 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). A grievance also need not contain every
24 fact necessary to prove each element of an eventual legal claim. Id.

25 Moreover, the Ninth Circuit has recognized that a grievance suffices to exhaust a claim if it
26 puts the prison on adequate notice of the problem for which the prisoner seeks redress. To provide
27 adequate notice, the prisoner need only provide the level of detail required by the prison’s
28 regulations. Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (citing Jones, 549 U.S. at 218).

1 The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution,
2 not to lay groundwork for litigation. Id.; Griffin, 557 F.3d at 1120; see also Jones, 549 U.S. at 219
3 (citing Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) (“We are mindful that the primary
4 purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a
5 particular official that he may be sued; the grievance process is not a summons and complaint that
6 initiates adversarial litigation.”). Thus, in this case “[t]he California prison system’s requirements
7 define the boundaries of proper exhaustion.” Marella, 568 F.3d at 1027).

8 A prisoner may be excused from complying with the PLRA's exhaustion requirement if he
9 establishes that the existing administrative remedies were effectively unavailable to him. See
10 Albino v. Baca, 747 F.3d 1162, 1172-73 (9th Cir. 2014). When an inmate’s administrative
11 grievance is improperly rejected on procedural grounds, exhaustion may be excused as
12 “effectively unavailable.” Sapp, 623 F.3d at 823; see also Nunez v. Duncan, 591 F.3d 1217,
13 1224–26 (9th Cir. 2010) (warden’s mistake rendered prisoner’s administrative remedies
14 “effectively unavailable”); Ward v. Chavez, 678 F.3d 1042, 1044-45 (9th Cir. 2012) (exhaustion
15 excused where futile); Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required
16 to proceed to third level where appeal granted at second level and no further relief was available);
17 Marella, 568 F.3d 1024 (excusing an inmate’s failure to exhaust because he did not have access to
18 the necessary grievance forms to timely file his grievance). In such a case, “the inmate cannot
19 pursue the necessary sequence of appeals.” Sapp, 623 F.3d at 823.

20 A California prisoner is required to submit an inmate appeal at the appropriate level and
21 proceed to the highest level of review available to him. Butler v. Adams, 397 F.3d 1181, 1183
22 (9th Cir. 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002); see also Cal. Code Regs.
23 tit. 15, § 3084.1(b) (explaining that a cancellation or rejection of an inmate’s appeal “does not
24 exhaust administrative remedies”). However, a prisoner need not “press on to exhaust further
25 levels of review once he has received all ‘available’ remedies at an intermediate level of review or
26 has been reliably informed by an administrator that no remedies are available.” Brown, 422 F.3d at
27 936 (citing Booth, 532 U.S. at 736–739; see also Finley v. Skolnik, 616 Fed. Appx. 263, 264 (9th
28 Cir. 2012 (Reversing dismissal for failure to exhaust).

1 In submitting an inmate grievance, California regulations require a prisoner to “list all staff
2 members involved” and to “describe their involvement in the issue.” Cal. Code Regs. tit. 15, §
3 3084.2(3). However, the Ninth Circuit has recently held that “a prisoner exhausts such
4 administrative remedies as are available . . . under the PLRA despite failing to comply with a
5 procedural rule if prison officials ignore the procedural problem and render a decision on the
6 merits of the grievance at each available step of the administrative process.” Reyes v. Smith, 810
7 F.3d 654, 658 (9th Cir. 2016); see also Franklin v. Foulk, 2017 WL 784894, at *4-5 (E.D. Cal.
8 Mar. 1, 2017); Franklin v. Lewis, 2016 WL 4761081, at *6 (N.D. Cal. Sept. 13, 2016). Thus, a
9 prisoner’s failure to list all staff members involved in an incident in his inmate grievance, or to
10 fully describe the involvement of staff members in the incident, will not necessarily preclude his
11 exhaustion of administrative remedies. Reyes, 810 F.3d at 958; Franklin v. Foulk, 2017 WL
12 784894, at *4 (“[T]he court in Reyes found that even though the plaintiff’s grievance failed to
13 name two physicians on the prison’s three-person pain committee, prison officials were put on
14 notice of the nature of the wrong alleged in the suit—that the plaintiff was wrongfully denied pain
15 medication.”); Franklin v. Lewis, 2016 WL 4761081, at *6 (“[T]o the extent Defendants argue that
16 Plaintiff failed to comply with a procedural requirement by not naming Defendants in [his appeal],
17 this deficiency is not necessarily fatal to Plaintiff’s claim pursuant to Reyes”); Grigsby v.
18 Munguia, No. 2:14-cv-0789 GAB AC P, 2016 WL 900197, at *11-12 (E.D. Cal. Mar. 9, 2016);
19 see also Bulkin v. Ochoa, 2016 WL 1267265, at *1-2 (E.D. Cal. Mar. 31, 2016).

20 Nonetheless, for administrative remedies to be exhausted by California prisoners as to
21 defendants who were not identified in the inmate grievance, there must be a “sufficient
22 connection” between the claim in the appeal and the unidentified defendants such that prison
23 officials can be said to have had “notice of the alleged deprivation” and an “opportunity to resolve
24 it.” Reyes, 810 F.3d at 959 (finding that plaintiff had satisfied PLRA exhaustion requirements as
25 to two prison doctors despite not having identified them in his inmate appeals because there was a
26 sufficient connection between plaintiff’s appeal based on inadequate pain management, and the
27 doctors, who served on the prison committee that had denied plaintiff medication); McClure v.

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1 Chen, No. 1:14-cv-00932-DAD-GSA-PC, 2017 WL 1148135, (E.D. Cal. March 28, 2017)
2 (remedies exhausted even though doctors not named in appeal; prison was placed on notice)) .

3 **2. California Department of Corrections and Rehabilitation (CDCR)**
4 **Administrative Grievance System**

5 The court takes judicial notice of the fact that the State of California provides its prisoners
6 and parolees the right to appeal administratively “any policy, decision, action, condition, or
7 omission by the department or its staff that the inmate or parolee can demonstrate as having a
8 material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, §
9 3084.1(a). The process is initiated by submitting a CDCR Form 602. Id. at § 3084.2(a).

10 California prisoners are required to submit appeals within thirty calendar days of the event
11 being appealed, and the process is initiated by submission of the appeal at the first level. Id. at §§
12 3084.7(a), 3084.8(c). Three levels of appeal are involved, including the first level, second level,
13 and third level. Id. at § 3084.7. The third level of review exhausts administrative remedies. Id. at
14 § 3084.7(d)(3). A final decision at the third level³ of review satisfies the exhaustion requirement
15 under 42 U.S.C. § 1997e(a). Lira v. Herrera, 427 F.3d 1164, 1166 (9th Cir. 2005). In order to
16 satisfy § 1997e(a), California state prisoners are required to use this process to exhaust their claims
17 prior to filing suit. Woodford, 548 U.S. at 85 (2006); McKinney, 311 F.3d. at 1199-1201.

18 **3. Motion for Summary Judgment for Failure to Exhaust**

19 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
20 which defendants have the burden of raising and proving the absence of exhaustion. Jones, 549
21 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). On April 3, 2014, the Ninth
22 Circuit issued a decision overruling Wyatt with respect to the proper procedural device for raising
23 the affirmative defense of exhaustion under § 1997e(a). Albino (“Albino II”), 747 F.3d at 1168–
24 69. Following the decision in Albino II, defendants may raise exhaustion deficiencies as an
25 affirmative defense under § 1997e(a) in either (1) a motion to dismiss pursuant to Rule 12(b)(6)⁴
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27 ³ The third level is sometimes known as the Director’s level.

28 ⁴ Motions to dismiss under Rule 12(b)(6) are only appropriate “[i]n the rare event a failure to exhaust is clear on the face of the complaint.” Albino II, 747 F.3d at 1162.

1 or (2) a motion for summary judgment under Rule 56. Id. If the court concludes that Plaintiff has
2 failed to exhaust, the proper remedy is dismissal without prejudice of the portions of the complaint
3 barred by § 1997e(e). Jones, 549 U.S. at 223–24; Lira, 427 F.3d at 1175–76.

4 Summary judgment is appropriate when it is demonstrated that there “is no genuine dispute
5 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
6 56(a); Albino II, 747 F.3d at 1169 (“If there is a genuine dispute about material facts, summary
7 judgment will not be granted.”) A party asserting that a fact cannot be disputed must support the
8 assertion by “citing to particular parts of materials in the record, including depositions, documents,
9 electronically stored information, affidavits or declarations, stipulations (including those made for
10 purposes of the motion only), admissions, interrogatory answers, or other materials, or showing
11 that the materials cited do not establish the absence or presence of a genuine dispute, or that an
12 adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).
13 In judging the evidence at the summary judgment stage, the court “must draw all reasonable
14 inferences in the light most favorable to the nonmoving party.” Comite de Jornaleros de Redondo
15 Beach, 657 F.3d at 942. The court must liberally construe Plaintiff’s filings because he is a pro se
16 prisoner. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010).

17 In a summary judgment motion for failure to exhaust administrative remedies, the
18 defendants have the initial burden to prove “that there was an available administrative remedy, and
19 that the prisoner did not exhaust that available remedy.” Albino II, 747 F.3d at 1172. If the
20 defendants carry that burden, “the burden shifts to the prisoner to come forward with evidence
21 showing that there is something in his particular case that made the existing and generally
22 available administrative remedies effectively unavailable to him.” Id. The ultimate burden of
23 proof remains with defendants, however. Id. “If material facts are disputed, summary judgment
24 should be denied, and the district judge rather than a jury should determine the facts.” Id. at 1166.

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1 **B. Undisputed Facts**

2 Unless otherwise noted, the following facts are undisputed by the parties or as determined
3 by the court based on a thorough review of the record.⁵

4 1. Plaintiff was previously housed in the California State Prison, Corcoran (CSP-Corcoran)
5 Security Housing Unit (SHU), building 4A2R. (First Am. Compl., March 25, 2016, ECF No. 13,
6 p. 7, ¶ 3.)

7 2. Beginning on May 18, 2015, the hot and cold water in Plaintiff's building was shut off.
8 (ECF No. 13 at p. 9, ¶ 10.)

9 3. Plaintiff alleged that he was deprived of drinking water until May 20, 2015, when the
10 cold water was turned back on. (ECF No. 13 at p. 9, ¶ 10.)

11 4. In addition, Plaintiff alleged that the plumbing in his housing unit was in such disrepair
12 that when other inmates flushed their toilets, human waste would back-up into his toilet and
13 overflow, covering his cell floor with contaminated waste. (ECF No. 13 at p. 9, ¶ 11.)

14 5. Plaintiff alleged that he was forced to live in these conditions for over two months and
15 that he was denied access to cleaning supplies. (ECF No. 13 at p. 9, ¶¶ 12-13.)

16 6. Plaintiff claims that he told Defendants Vasquez and Leon, on June 3, 2015, that his cell
17 did not have hot water, that human waste had been backing up into his cell, and that he had been
18 denied cleaning supplies. (ECF No. 13 at p. 9, ¶ 14.)

19 7. Defendants Vasquez and Leon informed Plaintiff that his hot water would be turned
20 back on in a week. (ECF No. 13 at p. 10, ¶ 15.)

21 8. On June 6, 2015, Plaintiff sent a request for interview to Defendant Llamas notifying her
22 of the plumbing problems, but she told Plaintiff that she could not do anything at her level to help
23 him because it was a maintenance issue. (ECF No. 13 at p. 10, ¶ 16.)

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27 ⁵ These facts are taken from Defendant's Separate Statement of Undisputed Facts, ECF No. 29-2, and Plaintiff's
28 Undisputed Facts, ECF No. 54 at 10-12. The court has considered all declarations and exhibits submitted in support
of each statement. These facts are undisputed only for purposes of Defendants' motion for summary judgment.

1 9. As a result, Plaintiff resubmitted his request for interview to Defendant Pavich on July
2 1, 2015, who advised Plaintiff that the hot water would be running by July 30, 2015. (ECF No. 13
3 at p. 10, ¶ 17.)

4 10. Plaintiff believes that the Defendants should have deemed his cell unsafe for
5 occupancy and rehoused him until the hot water was restored. (ECF No. 13 at pp. 10-11, ¶ 18.)

6 11. Plaintiff contends that he exhausted all available administrative remedies by submitting
7 Appeal CSPC-5-15-03990. (ECF No. 13, p. 2, ¶ II.)

8 12. Plaintiff stated that Appeal CSPC-5-15-03990 was granted in full at the first level of
9 review. (ECF No. 13, p. 2, ¶ II.)

10 13. In addition, Plaintiff produced a copy of Appeal CSPC-5-15-03990 with his required
11 initial disclosures. (Samson Decl., ¶ 3, Ex. A, pp. 17-19.)

12 14. In Appeal CSPC-5-15-03990, Plaintiff stated that he had been harmed by the prison
13 officials in his Facility SHU yard, 4A2R-10, as a result of not having any running hot or warm
14 water in his cell or the shower for 55 days. (Samson Decl., ¶ 3, Ex. A, p. 17.)

15 15. Plaintiff requested that the hot water in his cell and shower area be turned on. (Samson
16 Decl., ¶ 3, Ex. A, p. 17.)

17 16. CSP-Corcoran Chief Engineer I, Lemoine, and Associate Warden of Business Services,
18 Jennings, responded to Plaintiff's appeal on July 27, 2015, and informed Plaintiff that his appeal
19 was granted in full at the first level of review because the hot water issues had been repaired and
20 hot water had been restored to the Level 4A housing units. (Samson Decl., ¶ 3, Ex. A, p. 19.)

21 **C. Defendants' Motion**

22 Defendants argue that Plaintiff did not exhaust his remedies for all of the claims in his
23 First Amended Complaint. Defendants assert that Plaintiff only filed one form 602 appeal
24 concerning the events at issue in the FAC, appeal CSPC-5-15-03990, and the appeal only
25 addressed Plaintiff's claim that he did not have hot/warm water in his cell or shower. Defendants
26 assert that the appeal did not address Plaintiff's other claims concerning lack of cold water, the
27 presence of raw sewage, or lack of cleaning supplies. Defendants also argue that Plaintiff only
28 identified defendants Llamas and Leon, the Facility A Captain and Sergeant, in the appeal,

1 because he stated in the appeal that he had only “been harmed by the prison officials in this
2 Facility SHU-Yard 4A2TR-10.” (ECF 29-4 at 18.).⁶ In support of these arguments, Defendants
3 cite Plaintiff’s allegations in the FAC (ECF No. 13), and Plaintiff’s Initial Disclosures (ECF No.
4 29-4, Exh. A to Sampson Decl.), which include a copy of Plaintiff’s appeal CSPC-5-15-03990
5 (ECF No. 29-4 at 18-20.)

6 In appeal CSPC-5-15-03990, submitted on July 12, 2015, Plaintiff explained his issue:

7 I have been harmed by the prison officials in this Facility SHU-Yard 4A2R-
8 10 due to the torturous indifference of not having any running hot or warm
9 water in-cell or the shower in over 55 days now is unsanitary and
unreasonable.

10 Plaintiff requested as action:

11 Due to my Form 22’s being given the run-around and disregarded I’ll ask
12 again to please turn on the running hot water in cell 10 and the shower area
to clean myself and my cell. I also plan to file a tort.

13 (Id. at 18.)

14 On July 27, 2015, the prison responded to appeal CSPC-5-15-03990 at the First Level of
15 review:

16 **Appeal Issue:** You contend that you have not had any running hot water in
17 4A2R cell 10 of the shower in over 55 days.

18 **Action Requested:** You requested the hot water be turned on in cell 10 and
19 shower area.

20 **Appeal Response:** Your appeal, the attachments, and the California Code
21 of Regulations (CCR) Title 15 have been reviewed. On or about May 18,
22 2015, the Institutional hot water system suffered a significant failure on the
lines feeding Level 4A yard. Those lines were isolated to prevent the loss
23 of over 4,000 gallons of potable water every hour. The State of California
is in the fourth year of a severe drought and due to the loss of a significant
24 amount of water, the lines were isolated until such time repairs can be
completed. The isolation valves have been installed and the hot water
25 restored to Level 4A housing units.

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28 ⁶ All page numbers cited herein are assigned by the court’s CM/ECF system and not based on the parties’ pagination
of their briefing materials.

1 **Decision:** Based on the above information, your appeal is GRANTED at
2 the First Level of review.

3 (Id. at 20.)

4 In sum, Defendants argue that Plaintiff only exhausted his administrative remedies for his
5 claim against defendants Llamas and Leon for lack of hot/warm water in his cell and shower area.

6 **D. Defendants' Burden**

7 The court finds that Defendants have carried their initial burden to prove that there was an
8 available administrative remedy and that Plaintiff did not exhaust that available remedy.
9 Therefore, the burden shifts to Plaintiff to come forward with evidence showing that there is
10 something in his particular case that made the existing and generally available administrative
11 remedies effectively unavailable to him.

12 **E. Plaintiff's Opposition**

13 Plaintiff claims that when he submitted his CDCR appeal CSPC-5-15-03990, he included a
14 602-A continuation page that was attached to the appeal, but when the appeal was returned to him,
15 the attached page was missing. Plaintiff claims that the continuation page addressed all of the
16 issues in the FAC, including the denial of hot water and drinking water, the non-functioning
17 plumbing, the sewage overflow, and the lack of cleaning supplies. Plaintiff alleges that
18 Defendants removed the 602-A continuation page from the grievance under a state-wide policy of
19 mishandling inmate appeals to defeat administrative exhaustion, to prevent resolution of Plaintiff's
20 complaints about drinking water, sewage, plumbing, and sanitation supplies. Plaintiff argues that
21 this action by Defendants rendered the administrative remedies unavailable to Plaintiff.

22 As evidence, Plaintiff cites his allegations in the FAC (ECF No. 16); his own declaration
23 of June 4, 2017 (ECF No. 54 at 76-77); declarations of other inmates Matthew M. Dennis (ECF
24 No. 29-4 at 10), Ernesto Munoz, Jr. (ECF No. 54 at 46), Carlos Montelongo, (Id. at 47), Clarence
25 E. Reese (Id. at 45, 70), Gilfredo Barocio Magana (Id. at 71), and Kavin M. Rhodes (Id. at 73-74);
26 Plaintiff's prison medical records (Id. at 49-68); Plaintiff's declaration of July 17, 2015 (ECF No.

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1 29-4 at 2-8); form 22 requests for interview (ECF No. 54 at 37-43), and appeal CSPC-5-15-03990
2 (Id. at 35; ECF No. 29-4 at 18-20).⁷

3 Plaintiff argues that he was not required to submit his appeal CSPC-5-15-03990 to the
4 second or third levels of review to exhaust his remedies, because the appeal was granted at the first
5 level of review. Plaintiff also argues that he was not required to name all of the defendants in the
6 appeal to exhaust his remedies against them, because Defendants did not adhere to or require
7 Plaintiff to comply with the sometimes-implemented rule that all persons the claimant intends to
8 sue must be named.

9 Plaintiff states in his declaration dated June 4, 2017:

10 On or about July 12, 2015, upon my initial submission of Appeal CSPS 5-
11 15-03990, attached to that Appeal was a 602-A continuation attachment
12 page, upon which, I made known my claims concerning drinking water, raw
13 sewage, and cleaning supplies. Upon my receiving that Appeal back from
14 the Appeals Coordinator, the 602-A page had been removed. Subsequently,
15 I learned that that was a ruse by the Appeal's reviewer, to prevent having to
16 make a response to those claims, and thus, to also prevent exhaustion of
17 administrative remedies.

18 (ECF No. 54 at 76-77.)

19 Further, Plaintiff claims that his form 22 requests for interview, included in his Initial
20 Disclosures, are part of his administrative grievances, to wit:

21 **6/28/2015 Form 22 Request for Interview, addressed to P. Llamas:**

22 Since May 18th 2015 over 40 days the physical conditions of this security
23 housing unit and isolated confinement is in violation of the U.S.
24 Constitution. Corcoran SHU has intentionally and purposely deprived me
25 of warm and/or hot water for 40 days which is unreasonable and constitutes
26 an infringement of civil rights of a prisoner(s) in violation of the 8th
27 Amendment to cruel and unusual punishment. We can only shower 3 times
28 a week and it's cold water only, that's torture! Hot water is a necessity to
help clean one's self and the cell. Without it, it creates unhygienic
conditions that has [*sic*] caused my skin break out badly. Your [*sic*] liable
civilly for this tort. This is my second request, the first went unanswered.

26 ⁷ Plaintiff's medical records, Plaintiff's declaration of July 17, 2015, and the declarations of inmates
27 Matthew M. Dennis, Ernesto Munoz, Jr., Carlos Montelongo, Clarence E. Reese, Gilfredo Barocio Magana, and
28 Kavin M. Rhodes relate only to the merits of Plaintiff's claims under the Eighth Amendment in this case and therefore
are not relevant to the issue in Defendants' motion for summary judgment, whether Plaintiff exhausted his
administrative remedies before filing suit as required by the PLRA, 42 U.S.C. § 1997e(a).

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Staff response dated 6/29/15:

This is a maintenance issue that cannot be corrected at my level. You may forward your concerns to that department. I am being told it may be a couple more weeks before the hot water is restored.

(Id. at 35.)

2/16/16 Form 22 Request for Interview, addressed to Sgt. Leon or Cpt. Llamas or D.

Davy:

This is an ongoing health risk & accumulation of issues, conditions w 4A-2R still alive & present as mentioned months ago. The bottom tier has not been afforded an opportunity to exercise my right to recreational yard since 2/7/16 over 95 hours of not being able to move around staying stagnate & inactive created a serious physical health problem with me. It's common knowledge & it results to pulmonary disease & heart disease according to CDC & NEH & most scientific health experts & studies couples with the facts the entire A Section still has not been thoroughly disinfected & cleaned since 5/15 properly with bleach & the constant overflow of urine/feces & body waste in A Section in front of cell 10.

(Id. at 37.)

3/9/16 Form 22 Request for Interview, addressed to Facility A Capt. Llamas

As mentioned before in a prior CDCR 22 form dated 2-16-16 & signed by C/O Aldama in regards to the continued unsanitary living conditions nothing noted has changed positively. Again on 3-4-16 the hot water went completely out with no notice & did not come back on until 5-9-16. Not only does this cause continued health conditions to worsen, my stress level is up. The lack of housing units hot water hinders me from eating my breakfast, Kosher meals which has to be cooked with hot water. Nor did Sgt. Leon or any other prison official respond to my last CDCR 22 form.

(Id. at 39.)

5/10/16 Form 22 Request for Interview, addressed to Sgt. Leon (4A2R)

This acts as a reminder and further notice to you then previously given verbally. The hot/drinkable water. Today is Tuesday night 5/10/16 over 6 days and more than 24 hours still after you became aware of this ongoing issue. Please have the hot/drinkable water restored ASAP for basic necessary living in-cell.

(Id. at 41.)

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1 **F. Defendants' Objections to Plaintiff's Evidence**

2 On June 15, 2017, Defendants lodged objections to Plaintiff's evidence on hearsay
3 grounds, for lack of foundation, as irrelevant, for failure to create a triable issue of fact, for lack of
4 authentication, as inadmissible character evidence, and as excluded under F.R.E. 401. (ECF No.
5 55-1.) The court notes Defendants' objections. If the court refers to any of Plaintiff's evidence in
6 this order without addressing the objections, by implication the objections to that evidence are
7 overruled.

8 **G. Discussion**

9 Defendants reply that Plaintiff's argument that he was excused from exhaustion because
10 his appeal was granted at the first level is misplaced. Because Plaintiff still sought administrative
11 remedies concerning lack of cleaning supplies, he was required to exhaust his appeal through the
12 third level of review. Defendants also argue that Plaintiff's assertion that a 602-A continuation
13 page to his appeal, containing the remaining allegations that Plaintiff did not exhaust, was
14 removed from the appeal, does not negate his failure to exhaust. Defendants also argue that their
15 motion for summary judgment should be granted because Plaintiff's opposition fails to comply
16 with Local Rule 260(b) which required him to "reproduce the itemized facts in the Statement of
17 Undisputed Facts and admit those facts that are undisputed and deny those that are disputed,
18 including with each denial a citation to the particular portions of any pleading, affidavit,
19 deposition, interrogatory answer, admission, or other document relied upon in support of that
20 denial." L.R. 260(a).

21 Even drawing all reasonable inferences in the light most favorable to Plaintiff, the court
22 must concur that Plaintiff failed to exhaust all of his remedies before filing suit, because he had
23 administrative remedies still available to him before filing suit, and he did not complete the
24 appeals process for all of his claims in the FAC. Plaintiff alleges in the FAC that (1) he was
25 deprived of hot water in his cell and the showers, (2) he was deprived of cold drinking water, (3)
26 every time other inmates flushed their toilets, human bodily waste would back up into Plaintiff's
27 toilet causing it to overflow, and (4) he was deprived of cleaning supplies. (See FAC, ECF No.
28 13.) Plaintiff declares that on or about July 12, 2015, he submitted appeal CSPC-5-15-03990 to

1 prison authorities addressing all four of these issues. (ECF No. 54 at 76.) Plaintiff claims that
2 when he received the appeal back from the first level of review, his attached 602-A continuation
3 page, which addressed the issues about cold water, overflowing toilets, and cleaning supplies, had
4 been removed from the appeal, and those issues were not responded to by the appeals coordinator.

5 Although Plaintiff's appeal was granted at the first level of review as to the hot water issue,
6 Plaintiff still had remedies available to him for the other issues. Plaintiff, however, did not contest
7 the fact that all of his complaints had not been addressed, or submit the appeal to the second and
8 third levels of review before filing suit on September 17, 2015. Thus, Plaintiff only completed the
9 appeals process for his claim concerning deprivation of hot water in his cell and the showers.⁸
10 Plaintiff asserts that he subsequently learned that the removal of his attached 602-A continuation
11 page "was a ruse by the Appeal's reviewer, to prevent having to make a response to those claims,
12 and thus, to also prevent exhaustion of administrative remedies." (Pltf's Decl., ECF No. 54 ¶5.)
13 This bare assertion, without any supporting facts, is not sufficient to show that further
14 administrative remedies were not available to Plaintiff before he filed suit.

15 Defendants argue that Plaintiff did not exhaust his remedies as to defendants Vasquez and
16 Pavich because he did not name them in the appeal or otherwise indicate they were responsible for
17 Plaintiff's lack of hot water. Plaintiff's appeal CSPC-5-15-03990 does not identify any of the
18 Defendants by name. However, Defendants argue that Plaintiff sufficiently identified defendants
19 Captain Llamas and Sgt. Leon, who both work in Facility A, by Plaintiff's statement in the appeal,
20 "I have been harmed by the prison officials in this Facility SHU-Yard 4A2R-10 due to the
21 torturous indifference of not having any running hot or warm water in-cell or the shower in over
22 55 days now." (ECF No. 29-4 at 18.) The court concurs that Plaintiff sufficiently identified
23 defendants Llamas and Leon in the appeal. However, the court also finds that there is a "sufficient
24 connection" between the hot water claim in the appeal and defendants Vasquez and Pavich such
25 that prison officials can be said to have had "notice of the alleged deprivation" and an
26 "opportunity to resolve it." Reyes, 810 F.3d at 959. While Plaintiff did not name Vasquez or

27 ⁸ A prisoner need not "press on to exhaust further levels of review once he has received all 'available' remedies at an
28 intermediate level of review or has been reliably informed by an administrator that no remedies are available."
Brown, 422 F.3d at 936.

1 Pavich in the appeal, he alleges in the FAC that he personally notified these defendants about the
2 hot water issue and that they “had the authority to ‘Red Line’ my cell (i.e., ‘declare it unsafe for
3 occupancy’) until the hot water was restored.” (ECF No. 13 at 10-11 ¶18.) Therefore, the court
4 finds that Plaintiff’s appeal exhausted his remedies for the hot water issue as to all four of the
5 Defendants.

6 Plaintiff’s argument that his form 22 requests for interview are part of his administrative
7 grievances is unpersuasive. “The California prison system’s requirements ‘define the boundaries
8 of proper exhaustion,’” Marella, 568 F.3d at 1027, and form 22 requests for interview are not
9 included as part of the CDCR’s appeals process, Cal. Code Regs. tit. 15, § 3084, *et seq.*
10 California prisoners are required to use and submit a CDCR Form 602, Inmate/Parolee Appeal, to
11 initiate the appeals process. Id. at § 3084.2(a). Further, the form 22 requests for interview
12 submitted by Plaintiff on February 16, 2016, March 9, 2016, and May 10, 2016, were submitted
13 *after* Plaintiff filed this case on September 19, 2015, and therefore could not have exhausted
14 Plaintiff’s remedies *before* he filed suit. Accordingly, none of Plaintiff’s form 22 requests for
15 interview are evidence of exhaustion of Plaintiff’s administrative remedies. See Woodford, 548
16 U.S. at 91, 93 (exhaustion under the PLRA requires “compliance with an agency’s deadlines and
17 other critical procedural rules”); Wilson v. Wann, 2008 WL 4166886, *2 (E.D.Cal. Sept.8, 2008)
18 (letters to Internal Affairs and warden were insufficient to show exhaustion); see also Lees v.
19 Felker, 2009 WL 2824862, *5 (E.D.Cal. Sept.1, 2009) (letter to warden is not an alternative
20 method to the inmate grievance process for exhausting administrative remedies).

21 **IV. RECOMMENDATIONS AND CONCLUSION**

22 The court finds, based on the record before it, that Plaintiff exhausted his available
23 administrative remedies for his claim against defendants Pavich, Vasquez, Leon, and Llamas
24 concerning deprivation of hot water, as required by the Prison Litigation Reform Act, 42 U.S.C. §
25 1997e(a). However, the court finds that Plaintiff did not exhaust his available administrative
26 remedies for his claims concerning lack of cold water, Plaintiff’s toilet backing up and
27 overflowing, or lack of cleaning supplies. Therefore, Defendants’ motion for summary judgment,
28 filed on September 30, 2016, should be granted in part and denied in part, and the case should

1 proceed only on Plaintiff's claim concerning deprivation of hot water, against defendants Pavich,
2 Vasquez, Leon, and Llamas, and related negligence claims. Plaintiff's remaining claims should be
3 dismissed without prejudice.

4 Accordingly, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 5 1. Defendants' motion for summary judgment based on Plaintiff's failure to exhaust
6 administrative remedies, filed on September 30, 2016, be granted in part and denied
7 in part;
- 8 2. Defendants' motion for summary judgment be granted as to Plaintiff's claims
9 concerning lack of cold water, Plaintiff's toilet backing up and overflowing, and
10 lack of cleaning supplies, and related negligence claims;
- 11 3. Defendants' motion for summary judgment be denied as to Plaintiff's claims
12 against defendants Pavich, Vasquez, Leon, and Llamas concerning deprivation of
13 hot water in his cell and shower, and related negligence claims;
- 14 4. This case proceed only on Plaintiff's claim concerning deprivation of hot water,
15 against defendants Pavich, Vasquez, Leon, and Llamas, and related negligence
16 claims;
- 17 5. All remaining claims be dismissed without prejudice for failure to exhaust
18 administrative remedies; and
- 19 6. This case be referred back to the Magistrate Judge for further proceedings.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within fourteen**
22 **(14) days** after being served with these findings and recommendations, any party may file written
23 objections with the court. Such a document should be captioned "Objections to Magistrate Judge's
24 Findings and Recommendations." Any reply to the objections shall be served and filed within ten
25 days after service of the objections. The parties are advised that failure to file objections within

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

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IT IS SO ORDERED.

Dated: July 24, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE