



1 As stated above, on August 15, 2017, Defendants filed a motion for summary judgment for  
2 failure to exhaust the administrative remedies. Plaintiff filed an opposition on September 11, 2017,  
3 and Defendants filed a reply on September 18, 2017. On September 25, 2017, Plaintiff filed a  
4 surreply.<sup>1</sup>

## 5 II.

### 6 LEGAL STANDARD

#### 7 A. Statutory Exhaustion Requirement

8 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such  
9 administrative remedies as are available” before commencing a suit challenging prison conditions.”  
10 42 U.S.C. § 1997e(a); see Ross v. Blake, \_\_\_ U.S. \_\_\_ 136 S.Ct. 1850 (June 6, 2016) (“An inmate need  
11 exhaust only such administrative remedies that are ‘available.’”). Exhaustion is mandatory unless  
12 unavailable. “The obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains  
13 ‘available.’ Once that is no longer the case, then there are no ‘remedies ... available,’ and the prisoner  
14 need not further pursue the grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis  
15 in original) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

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

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23 <sup>1</sup> Parties do not have the right to file surreplies and motions are deemed submitted when the time to reply has expired.  
24 Local Rule 230(l). The Court generally views motions for leave to file a surreply with disfavor. Hill v. England, No.  
25 CVF05869 REC TAG, 2005 WL 3031136, at \*1 (E.D. Cal. 2005) (citing Fedrick v. Mercedes-Benz USA, LLC, 366  
26 F.Supp.2d 1190, 1197 (N.D. Ga. 2005)). However, district courts have the discretion to either permit or preclude a  
27 surreply. See U.S. ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1203 (9th Cir. 2009) (district court did not abuse  
28 discretion in refusing to permit “inequitable surreply”); JG v. Douglas County School Dist., 552 F.3d 786, 803 n.14 (9th  
Cir. 2008) (district court did not abuse discretion in denying leave to file surreply where it did not consider new evidence  
in reply); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without  
giving the non-movant an opportunity to respond). Although Plaintiff does not have a right to file a surreply, in this  
instance the Court will exercise its discretion and consider the sur-reply in ruling on Defendants’ motion for summary  
judgment. Accordingly, Defendants’ motion to strike the filing of the surreply should be denied.

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

8           **B. Summary Judgment Standard**

9           Any party may move for summary judgment, and the Court shall grant summary judgment if  
10 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
11 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino, 747 F.3d at  
12 1166; Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position,  
13 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of  
14 materials in the record, including but not limited to depositions, documents, declarations, or discovery;  
15 or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or  
16 that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.  
17 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to  
18 by the parties, although it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco  
19 Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609  
20 F.3d 1011, 1017 (9th Cir. 2010).

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

1 should be denied, and the district judge rather than a jury should determine the facts.” Id.

2 **III.**

3 **DISCUSSION**

4 **A. Description of CDCR’s Administrative Remedy Process**

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

16 The inmate or parolee shall list all staff member(s) involved and shall describe their  
17 involvement in the issue. To assist in the identification of staff members, the inmate or parolee  
18 shall include the staff member’s last name, first initial, title or position, if known, and the dates  
19 of the staff member’s involvement in the issue under appeal. If the inmate or parolee does not  
20 have the requested identifying information about the staff member(s), he or she shall provide  
any other available information that would assist the appeals coordinator in making a  
reasonable attempt to identify the staff member(s) in question.

21 Cal. Code Regs. tit. 15, § 3084.2(a)(3).

22 **B. Summary of Allegations Underlying Plaintiff’s Constitutional Claims**

23 On Saturday, January 9, 2016, Plaintiff, along with his cellmate Hill, were confined to their  
24 cell and were engaging in the exercise of their religious practices. At approximately 0732 hours,  
25 correctional officers Robles and Hernandez approached their cell stating, “Get the fuck down  
26 motherfucker.” Without any further promoting, delay or hesitation, Hernandez began administering  
27 chemical restraints for a prolonged period of time.  
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1 Correctional officer Legaspi opened the cell door allowing the chemical agent to be  
2 administered. Plaintiff was placed in “a submissive lock, one knee was placed in the center of [his]  
3 back, while the other knee rested on [his] outer back thigh, and it appeared to be a forearm positioned  
4 on my neck.” Plaintiff was experiencing difficulties breathing, decrease in circulation of blood flow  
5 and his heart rated dropped causing him to feel on the brink of death. Officer Hernandez applied  
6 extreme pressure and force showing him further into the concrete floor causing Plaintiff to lose  
7 consciousness. When he awake, Plaintiff was unreasonable forced to his feet then escorted by officer  
8 Robles. Robles elevated Plaintiff’s arms and his hands were physically restrained by handcuffs that  
9 were unreasonably tight around his wrists, restricting the circulation of blood flow. Both of Plaintiff’s  
10 hands grew completely numb causing him to lose any sense of feeling, while Robles was  
11 simultaneously applying an unreasonable amount of force to the back of his neck causing unbearable  
12 pain.

13 Although Plaintiff was escorted by Robles to the shower area, he never received a  
14 decontamination shower. Officer Hernandez entered the shower area alone, and he forcibly turned  
15 Plaintiff around placing him in a compromising position. He then yanked down Plaintiff garments and  
16 trousers and forcibly spread his buttocks probing his anal area with a cellphone.

17 After the intrusion, Plaintiff was escorted to the program office where he made contact with  
18 sergeant W. Sullivan and before securing Plaintiff in a holding cell he refused to comply with the  
19 officer’s orders to conduct an unclothed body search. Plaintiff also refused to open his mouth as  
20 directed by the officer.

21 On January 12, 2016, Plaintiff began experiencing depression. Days later, Plaintiff had to go  
22 on crisis bed/watch because he was experiencing suicidal thoughts.

23 On January 13, 2016, Plaintiff submitted an emergency inmate appeal alleging the use of  
24 excessive force and sexual misconduct.

25 On January 17, 2016, Plaintiff received a visit from his wife and he told her about the incident  
26 on January 9, 2016.

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1 On January 19, 2016, Plaintiff's wife called the Kern Valley State Prison program office  
2 because she was concerned about Plaintiff's welfare regarding the incident of excessive force and  
3 sexual misconduct, and the information was relayed to the investigative services unit.

4 On January 20, 2016, Plaintiff was seen by Dr. Camaco of the mental health department, and  
5 on January 21, 2016, Plaintiff was transferred to the mental health crisis bed.

6 On February 2, 2016, Plaintiff received legal mail which had been unreasonable ransacked and  
7 searched outside of his presence. Plaintiff believes this action was an indirect message sent by prison  
8 officials that he can be touched for alleging officer's misconduct. Plaintiff perceived this as an  
9 immediate threat and filed an emergency inmate appeal on February 3, 2016.

10 On February 4, 2016, Plaintiff was transferred to California State Prison, LAC enhanced  
11 outpatient program to receive mental health treatment.

12 On February 23, 2016, Plaintiff submitted a claim to the internal affairs office. On this same  
13 date, a video interview was conducted regarding the alleged use of excessive force and sexual  
14 misconduct.

15 On February 28, 2016, Plaintiff's submitted a claim to the Victim's Advocate.

16 **C. Defendants' Statement of Undisputed Facts**

17 1. During all times relevant to the complaint, Plaintiff Demareale James Turner (K-53249)  
18 was an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR),  
19 incarcerated at Kern Valley State Prison (KVSP). (Pl.'s Compl., ECF No. 1 at 2; Decl. of C.  
20 Gonzales, ¶ 5.)

21 2. During all times relevant to the complaint, Defendants Robles and Hernandez were  
22 employed by CDCR as correctional officers at KVSP. (Pl.'s Compl., ECF No. 1 at 2.)

23 3. Plaintiff claims that Defendants used excessive force against him during a cell search at  
24 KVSP on January 9, 2016. (Pl.'s Compl., ECF No. 1 at 7-14.)

25 4. All CDCR institutions, including KVSP, have an administrative grievance process for  
26 grieving issues that affect inmates. The grievance process contains three levels of review. (Decl. of  
27 C. Gonzales, ¶ 2; Decl. of M. Voong, ¶¶ 1-3; see also Cal. Code Regs. tit. 15, §§ 3084 et seq. (2016);  
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1 see also Pl.’s Compl., ECF No. 1 at 2 (“Is there a grievance procedure available at your institution?”  
2 Yes X”).

3 5. Plaintiff submitted Appeal No. KVSP-O-16-00209 on or about January 13, 2016.  
4 (Decl. of C. Gonzales, ¶ 8; see also Pl.’s Compl., ECF No. 1 at 73.)

5 6. In Appeal No. KVSP-O-16-00209, Plaintiff claimed that on January 9, 2016, he “was  
6 the victim of excessive force” by Officer Hernandez and Robles” at KVSP. (Decl. of C. Gonzales, ¶  
7 10; see also Decl. of M. Voong, ¶ 9; see also Pl.’s Compl., ECF No. 1 at 73.)

8 7. In the “Action requested” field, Plaintiff requested seven forms of relief: (1) to not be  
9 retaliated against by custody staff when his family comes to visit; (2) for Officer Hernandez to be  
10 investigated and criminally prosecuted for violation of Title 15, section 3401.5 (Employee Sexual  
11 Misconduct); (3) for Officer Robles to be investigated for not reporting the alleged sexual misconduct  
12 by Officer Hernandez; (4) for Officer Hernandez to be investigated for using excessive force, in  
13 violation of Title 15, section 3268 (Use of Force); (5) for Officer Robles to be investigated for not  
14 preventing Officer Hernandez’s alleged excessive use of force, in violation of Title 15, section 3268;  
15 (6) to make a video statement; and (7) an emergency transfer to the California Health Care Facility  
16 (Stockton) or the California Medical Facility (Vacaville) for treatment for being a victim of sexual  
17 assault. (Decl. of C. Gonzales, ¶ 11.)

18 8. Because Appeal No. KVSP-O-16-00209 contained allegations of staff misconduct, it  
19 was categorized as a staff complaint and, pursuant to CDCR regulations, bypassed the first level of  
20 review. (Decl. of C. Gonzales, ¶ 12; see also Pl.’s Compl., ECF No. 1 at 73.)

21 9. On or about February 16, 2016, the second level of review partially granted Appeal No.  
22 KVSP-O-16-00209 insofar as the Investigative Services Unit (ISU) interviewed Plaintiff and other  
23 witnesses, an inquiry was conduct, and it was determined that staff did not violate CDCR policy.  
24 (Decl. of C. Gonzales, ¶ 13; see also Pl.’s Compl., ECF No. 1 at 70-71.)

25 10. The second level of review did not grant any of the other relief that Plaintiff had  
26 requested. (Decl. of C. Gonzales, ¶ 13.)

27 11. The second level response informed Plaintiff: “If you wish to appeal the decision  
28 and/or exhaust administrative remedies, you must submit your staff complaint appeal through all

1 levels of appeal review up to, and including, the Secretary's/Third Level of Review.” (Decl. of C.  
2 Gonzales, ¶ 14; see also Pl.’s Compl., ECF No. 1 at 71.)

3 12. Plaintiff submitted Appeal No. KVSP-O-16-00209 to CDCR’s Office of Appeals  
4 (OOA), which serves as the third level of review, on or about March 7, 2016. (Decl. of M. Voong, Ex.  
5 B at Voong.005 (“Date Submitted: 3-7-2016”); see also Pl.’s Compl., ECF No. 1 at 74.)

6 13. In Section F of the appeal, entitled, “If you are dissatisfied with the Second Level  
7 response,” Plaintiff stated: that the second level of review did not complete “a full investigation”; that  
8 the second level of review did not conduct a video interview of inmate Turner the same day they took  
9 his statement; that staff failed to inform him of his “right to be represented by Victims Advocates”;  
10 that the investigation was a “cover up by the Kern Valley State Prison ISU to protect his friend ISU  
11 Officer Hernandez”; and that he requested five million dollars in punitive damages. (Decl. of M.  
12 Voong, ¶ 9.)

13 14. Appeal No. KVSP-O-16-00209 was first received by OOA on March 23, 2016. (Decl.  
14 of M. Voong, ¶ 10; see also Pl.’s Compl., ECF No. 1 at 73.)

15 15. On July 15, 2016, OOA rejected Appeal No. KVSP-O-16-00209 for: (1) improperly  
16 attaching additional pages that were not part of the original appeal; and (2) for failing to attach a  
17 CDCR Form 1858 – Rights and Responsibility Statement. (Decl. of M. Voong, ¶ 11; see also Pl.’s  
18 Compl., ECF No. 1 at 69.)

19 16. Under CDCR regulations, erroneous acceptance or processing of an appeal at a lower  
20 level of review does not preclude OOA from rejecting or cancelling the appeal. (Decl. of M. Voong, ¶  
21 14.)

22 17. Under CDCR regulations, inmates may only submit an appeal on a CDCR Form 602  
23 Inmate/Parolee Appeal, and, if additional space is necessary, a CDCR Form 602-A – Inmate/Parolee  
24 Appeal Form Attachment. An inmate is limited to the space on the Form 602 and one Form 602-A,  
25 and may not attach additional documents unless otherwise permitted by the regulations. (Decl. of M.  
26 Voong, ¶ 12.)

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1 18. CDCR regulations require that inmates sign and attach a Rights and Responsibility  
2 Statement to all inmate appeals that allege staff misconduct and that are categorized as a staff  
3 complaint. (Decl. of M. Voong, ¶ 13.)

4 19. The Rights and Responsibilities Statement is an important component of all staff  
5 complaint appeals, because it notifies the inmate of California Penal Code section 148.6, which makes  
6 it a misdemeanor to knowingly submit a false accusation against a peace officer. (Decl. of M. Voong,  
7 ¶ 15.)

8 20. Inmates who knowingly submit a false accusation against a peace officer may also be  
9 subject to administrative discipline through the institution's internal disciplinary process. (Decl. of M.  
10 Voong, ¶ 15.)

11 21. The Rights and Responsibilities Statement deters inmates from making false or  
12 frivolous allegations of staff misconduct. (Decl. of M. Voong, ¶ 16.)

13 22. False or frivolous staff complaints frustrate CDCR's ability to timely investigate and  
14 resolve allegations of staff misconduct. (Decl. of M. Voong, ¶¶ 17-18.)

15 23. OOA's July 5, 2016 rejection letter informed Plaintiff that he "should take the  
16 corrective action necessary and resubmit the appeal within the timeframes specified" under CDCR  
17 regulations. (Decl. of M. Voong, ¶ 19; see also Pl.'s Compl., ECF No. 1 at 69.)

18 24. Under CDCR regulations, an inmate has thirty days to correct and resubmit a rejected  
19 appeal. (Decl. of M. Voong, ¶ 21.)

20 25. The July 5, 2016 rejection letter for Appeal No. KVSP-O-16-00209 was mailed to  
21 Plaintiff on July 7, 2016. (Decl. of M. Voong, ¶ 20; see also Pl.'s Compl., ECF No. 1 at 69.)

22 26. Although Plaintiff did resubmit his corrected appeal, he did not do so until December  
23 23, 2016. (Decl. of M. Voong, ¶ 22.)

24 27. OOA did not receive the corrected appeal until December 27, 2016—after Plaintiff  
25 filed the instant lawsuit. (Decl. of M. Voong, ¶ 22.)

26 28. On January 27, 2017, OOA cancelled Appeal No. KVSP-O-16-00209 for Plaintiff's  
27 failure to correct and return the rejected appeal within the thirty-day window. (Decl. of M. Voong, ¶  
28 23.)

1           29.     The January 27, 2017 cancellation letter informed Plaintiff that he could file a separate  
2 appeal to challenge the cancellation. (Decl. of M. Voong, ¶ 24.)

3           30.     OOA did not accept for review an appeal submitted by Plaintiff relative to the  
4 cancellation Appeal of No. KVSP-O-16-00209. (Decl. of M. Voong, ¶ 25.)

5           31.     Plaintiff submitted Appeal No. KVSP-O-16-00521 on or about February 3, 2016.  
6 (Decl. of C. Gonzales, ¶ 15.)

7           32.     Plaintiff claimed that on February 2, 2016, staff at California State Prison – Los  
8 Angeles County (CSP-LAC) had destroyed his legal mail in “retaliation for the excessive force and  
9 sexual assault claim [he] made against I.S.U. Officer Hernandez in KVSP.” (Decl. of C. Gonzales, ¶  
10 17; Decl. of M. Voong, ¶ 26.)

11          33.     In the Action requested field, Plaintiff requested: “a[n] Internal Affairs investigation”;  
12 charges brought against the officers; “to remain housed at CMF”; to have the rest of his property from  
13 KVSP inspected; and for the remainder of his property at KVSP to be forwarded to CMF. (Decl. of C.  
14 Gonzales, ¶ 18.)

15          34.     Because Appeal No. KVSP-O-16-00521 contained allegations of staff misconduct, it  
16 was categorized as a staff complaint and, pursuant to CDCR regulations, bypassed the first level of  
17 review. (Decl. of C. Gonzales, ¶ 19.)

18          35.     On or about March 21, 2016, the second level of review partially granted KVSP-O-16-  
19 00521 insofar as Plaintiff was interviewed, an inquiry was conducted, and it was determined that staff  
20 did not violate CDCR policy. (Decl. of C. Gonzales, ¶ 20.)

21          36.     Plaintiff submitted Appeal No. KVSP-O-16-00521 to OOA on or about April 7, 2016.  
22 (Decl. of M. Voong, Ex. C at Voong.032 (“Date Submitted: 4-7-16”).)

23          37.     In Section F of the appeal, entitled, “If you are dissatisfied with the Second Level  
24 response,” Plaintiff stated: “I still feel like this was a death threat, I[’]m asking for punitive damages  
25 for P.D.S. also I will like to be housed at C.S.P. CMF where I feel safe.” (Decl. of M. Voong, ¶ 27.)

26          38.     OOA denied Appeal No. KVSP-O-16-00521 on June 3, 2016, exhausting Plaintiff’s  
27 administrative remedies as to the February 6, 2016 incident of alleged retaliation. (Decl. of M. Voong,  
28 ¶ 29.)

1           **D. Findings on Defendants’ Motion**

2           Defendants argue that Plaintiff failed to timely submit his grievance to the third level of review  
3 after it was rejected for failing to attach a necessary document. Furthermore, when he did resubmit his  
4 grievance, it was after he filed the instant action.

5           It is undisputed that KVSP has an administrative grievance process for grieving issues. (UDF  
6 4.)<sup>2</sup> Plaintiff submitted three inmate appeals—Appeal Nos. KVSP-O-16-00209, KVSP-O-16-00521,  
7 and KVSP-O-16-03078.)

8           1.       Appeal No. KVSP-O-16-00209

9           Plaintiff submitted Appeal No. KVSP-O-16-00209 on or about January 13, 2016. (UDF 5.)  
10 The appeal was received at the second level of review on January 19, 2016, and Plaintiff was  
11 interviewed this same date. (Decl. of C. Gonzales, Ex. B at Gonzales.005-006.) Plaintiff claimed that  
12 on January 9, 2016, he was sexually assaulted and relevant here that he “was the victim of excessive  
13 force” by Defendants Hernandez and Robles. (UDF 6.) In the “Action requested” portion, Plaintiff  
14 requested seven forms of relief: (1) to not be retaliated against by custody staff when his family comes  
15 to visit; (2) for Officer Hernandez to be investigated and criminally prosecuted for violation of Title  
16 15, section 3401.5 (Employee Sexual Misconduct); (3) for Officer Robles to be investigated for not  
17 reporting the alleged sexual misconduct by Officer Hernandez; (4) for Officer Hernandez to be  
18 investigated for using excessive force, in violation of Title 15, section 3268 (Use of Force); (5) for  
19 Officer Robles to be investigated for not preventing Officer Hernandez’s alleged excessive use of  
20 force, in violation of Title 15, section 3268; (6) to make a video statement; and (7) an emergency  
21 transfer to the California Health Care Facility (Stockton) or the California Medical Facility (Vacaville)  
22 for treatment for being a victim of sexual assault.” (UDF 7.)

23           Because this appeal pertained to allegations of staff misconduct, it was categorized as a staff  
24 complaint and, pursuant to CDCR regulations, bypassed the first level of review. (UDF 8.) On or  
25 about February 16, 2016, the second level of review partially granted Appeal No. KVSP-O-16-00209  
26 insofar as the Investigative Services Unit (ISU) interviewed Plaintiff and other witnesses, an inquiry  
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28 <sup>2</sup> “UDF” refers to the Statement of Undisputed Facts set forth above in section C.

1 was conduct, and it was determined that staff did not violate CDCR policy. (UDF 9.) The second  
2 level of review did not grant any of the other relief that Plaintiff had requested. (UDF 10.)  
3 The second level response informed Plaintiff: “If you wish to appeal the decision and/or exhaust  
4 administrative remedies, you must submit your staff complaint appeal through all levels of appeal  
5 review up to, and including, the Secretary’s/Third Level of Review.” (UDF 11.) On or about March  
6 7, 2016, Plaintiff submitted this appeal to CDCR’s OOA which serves as the third level of review.  
7 (UDF 12.) In section F of the appeal, Plaintiff stated: there was not a full investigation at the second  
8 level of review; there was no video interview of Plaintiff the same day his statement was taken; staff  
9 failed to inform him of his right to be represented by Victim’s Advocates; the investigation was a  
10 cover up by the KVSP ISU to protect officer Hernandez; and Plaintiff sought five million dollars in  
11 punitive damages. (UDF 13.) The appeal was received by OOA on March 23, 2016. (UDF 14.)

12 On July 5, 2016, OOA rejected Appeal No. KVSP-O-16-00209 for: (1) improperly attaching  
13 additional pages that were not part of the original appeal; and (2) for failing to attach a CDCR Form  
14 1858 – Rights and Responsibility Statement. (UDF 15.) Although the lower level of review could  
15 have also rejected the appeal for failing to attach the Rights and Responsibilities Statement, under  
16 CDCR regulations the erroneous acceptance or processing of an appeal at a lower level of review does  
17 not preclude OOA from rejecting or cancelling the appeal. (UDF 16.) The appeal was properly  
18 rejected because under CDCR regulations, an inmate is limited to the space on the Form 602 and one  
19 Form 602-A, and may not attach additional documents unless otherwise permitted by the regulations.  
20 (UDF 17.) Although the second level accepted Plaintiff’s appeal as submitted, the “[e]rroneous  
21 acceptance of an appeal at a lower level does not preclude the next level of review from taking  
22 appropriate action, including rejection or cancellation of the appeal.” Cal. Code Regs. tit. 15, §  
23 3084.6(a)(5). Thus, the third level of review was allowed to reject Plaintiff’s appeal for  
24 noncompliance with the appeal procedures. In addition, the appeal was properly rejected for  
25 Plaintiff’s failure to sign and attach a Rights and Responsibility Statement to the appeal because it  
26 involved allegations of staff misconduct. (UDF 18.) An appeal may be rejected when “[t]he appeal is  
27 incomplete or necessary supporting documents are not attached.” Cal. Code Regs. tit. 15, §  
28 3084.3(c)(5). Plaintiff’s refusal to sign and submit the Rights and Responsibilities statement prevented

1 review of his appeal. In his opposition, Plaintiff contends that because this appeal was an “Emergency  
2 Appeal” it did not need a Rights and Responsibilities Statement, making the third-level rejection of his  
3 grievance improper. Plaintiff is mistaken. Pursuant to CDCR regulations, “any appeal alleging  
4 misconduct by a departmental peace officer ... shall be accompanied by the ... Rights and  
5 Responsibility Statement.” Cal. Code Regs. tit. 15, § 3084.9(i) (2016).

6 In any event, even assuming an emergency appeal did not require a Rights and Responsibility  
7 Statement, Plaintiff fails to establish that his grievance was categorized as an emergency appeal.  
8 Under CDCR regulations, the appeals coordinator determines whether emergency processing is  
9 warranted, and simply writing “emergency” on the grievance form does not unilaterally render the  
10 appeal to emergency processing. Cal. Code Regs. tit. 15, § 3084.9(a) (2016); see also Decl. of C.  
11 Gonzales, Ex. B at Gonzales.005, ECF No. 25-4 at 10.<sup>3</sup> As required by section 3084.9(a)(3), Plaintiff  
12 was notified that the appeal was being processed as a staff complaint. Cal. Code Regs. tit. 15, §  
13 3084.9(a)(3). In this instance, Appeal No. KVSP-O-16-00209 clearly alleged staff misconduct, and  
14 was properly classified as a staff complaint which required a Rights and Responsibilities Statement.<sup>4</sup>

15 The July 5, 2016 rejection letter advised Plaintiff that he “should take the corrective action  
16 necessary and resubmit the appeal within the timeframes specified” under CDCR regulations, and  
17 Plaintiff had thirty days to resubmit the rejected appeal. (UDF 23, 24.) The July 15, 2016 letter was  
18 mailed to Plaintiff on July 7, 2016. (UDF 25.) Plaintiff did not timely resubmit his corrected  
19 grievance because it was resubmitted on December 23, 2016. Further, Plaintiff fails to explain why  
20 the third-level cancellation of the grievance for untimeliness was improper. Rather, Plaintiff contends  
21 that he did not receive a copy of the July 2016 letter until November 9, 2016. (Pl.’s Opp’n at 5, ¶ 20.)

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23 <sup>3</sup> Plaintiff also argues that because his grievance contained allegations of sexual misconduct (in addition to excessive  
24 force), it automatically became an emergency appeal, citing section 3084.9(a)(5) of CDCR’s regulations. (Pl.’s Opp’n at  
25 11, ECF No. 33.) However, the regulation cited by Plaintiff was not promulgated until 2017, and therefore was not in  
26 effect in 2016, when Plaintiff’s grievance was being processed. See Cal. Code Regs. tit. 15, § 3084.9(a) (2016)  
(subsections (a)(5)-(a)(5)(B)(7)-adding staff sexual misconduct appeals, and amendment of Note filed *10-20-2016*;  
operative *10-20-2016* pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 43).

27 <sup>4</sup> In the surreply, Plaintiff contends that the Inmate Appeals Office failed to follow California Code of Regulations, Title  
28 15, section 3401.5, which deals with reporting of staff sexual misconduct. Section 3401.5 explicitly identifies the penalties  
for sexual misconduct by institutional employees and the consequences for failing to report such conduct. This section  
does not deal with the handling and/or processing of inmate grievances.

1 However, Plaintiff's claim is belied by the fact that Plaintiff attached the July 5, 2016 rejection letter  
2 to his complaint, which was filed in October 2016. (ECF No. 1 at 69.) Plaintiff therefore must have  
3 received the July 5, 2016 rejected letter no than October 20, 2016-the date he signed his complaint.  
4 (ECF No. 1 at 3.) In any event, even assuming that Plaintiff received the July 2016 letter on October  
5 20, 2016, he fails to explain why he waited until December 23, 2016 (an additional two months) to  
6 resubmit his corrected appeal to the third level of review. (UDF 26; ECF No. 25-3 at 5.) Furthermore,  
7 Plaintiff fails to acknowledge the fact that the appeal was cancelled at the third level as untimely, nor  
8 does Plaintiff explain why he never appealed the cancellation decision despite being informed of the  
9 ability to do so.

10 Plaintiff contends that after the appeal was denied at the third level of review, he "knew at that  
11 time it was time to file a complaint in this court, because "KVSP and CDCR was [sic] not going to  
12 give Plaintiff the relief the Plaintiff was seeking and is still seeking." (ECF No. 33 at 14, ¶ 60.)  
13 However, the grievance was not denied on the merits by the third level review; rather, it was initially  
14 rejected because Plaintiff failed to attach a Rights and Responsibility Statement, and directed him to  
15 correct and resubmit it, but it was cancelled when Plaintiff failed to timely do so. (UDF Nos. 15, 23-  
16 29, ECF No. 25-3 at 4-5.) Plaintiff did not appeal the cancellation decision. (UDF 30.) Accordingly,  
17 Appeal No. KVSP-O-16-00209 did not serve to exhaust the administrative remedies for the claim in  
18 this action.

19 Furthermore, even if the Court found that Plaintiff exhausted the administrative remedies by  
20 way of Appeal No. KVSP-O-16-00209, the instant action is still subject to dismissal because  
21 exhaustion of the administrative remedies must occur prior to filing suit. See McKinney v. Carey, 311  
22 F.3d 1198, 1200-01 (9th Cir. 2002) (an inmate must exhaust the available administrative remedies  
23 before he filed suit, and even if the inmate fully exhausts while the suit is pending the case is still  
24 subject to dismissal); Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (same).

25 2. Appeal No. KVSP-O-16-00521

26 Plaintiff's second grievance, Appeal No. KVSP-O-16-00521, does not serve to exhaust the  
27 administrative remedies, because it does not concern the issue presented in the complaint.  
28

1 A grievance must provide enough information to alert the prison to the nature of the wrong for  
2 which redress is sought, and to allow prison officials to take appropriate responsive measures. Reyes  
3 v. Smith, 810 F.3d 654 (9th Cir. 2016).

4 In Appeal No. KVSP-O-16-00521, Plaintiff mentions Defendants and the January 9, 2016  
5 incident at KVSP; however, the crux of the appeal is an alleged incident of retaliation involving  
6 different officers at a different institution. (UDF 32-33.) It is clearly not a duplicate of Appeal No.  
7 KVSP-O-16-00209 because when the KVSP's appeals office asked Plaintiff to clarify whether it was  
8 indeed a duplicate Plaintiff responded: "[I']m going to rewrite this [appeal] so you can understand  
9 what I[']m appealing[.] I hope this clears it up for you." (UDF 33, Decl. of C. Gonzales, Ex. C at  
10 Gonzales.018.) In responding to the appeal, the prison addressed only the alleged retaliation claim,  
11 and not the alleged excessive force claim by Defendants at KVSP. (Decl. of C. Gonzales, Ex. C at  
12 Gonzales.025.) Indeed, the second level response stated, in pertinent part, the following:

13 You contend on February 2, 2016, after having been re-located from Kern Valley State Prison  
14 (KVSP) to California State Prison, Los Angeles County (CSP-LAC) you received a box of  
15 legal mail. At said time, when the box of legal mail was opened in your presence, you noticed  
16 the legal documents inside were "demolished." Furthermore, you contend you consider the  
17 damage done to your legal mail as a death threats [sic] for filing inmate appeals. All issues  
unrelated to the allegation of staff misconduct must be appealed separately and will not be  
addressed in this response.

18 (Decl. of C. Gonzales, Ex. C at Gonzales.025.) The appeal was thereafter denied at the third level of  
19 review on June 3, 2016. (UDF 38.) Because this appeal did not relate to the incident at issue in this  
20 case, it cannot and does not serve to exhaust the administrative remedies.

21 3. Appeal No. KVSP-O-16-03078

22 In his opposition, Plaintiff contends that Appeal No. KVSP-O-16-03078 exhausted his  
23 administrative remedies, and Defendants failed to mention such grievance thereby misleading the  
24 Court. Defendants respond that they did not address this appeal in their motion because it was not one  
25 of the two grievances identified by Plaintiff in his complaint.<sup>5</sup>

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26  
27 <sup>5</sup> In his complaint and attached exhibits, Plaintiff referenced Appeal Nos. KVSP-O-16-00209 and KVSP-O-16-00521 as  
28 the two appeals that exhausted his administrative remedies. (Compl., ECF No. 1 at 22-23, 69-89.) There was no mention  
of Appeal No. KVSP-O-16-03078.

1 Irrespective of whether this appeal was mentioned in Defendants' motion, it does not serve to  
2 exhaust the administrative remedies for the claim at issue in this action. This grievance does mention  
3 Defendant Hernandez, but it relates to a disciplinary violation regarding the underlying excessive force  
4 incident, not the actual use of force itself. (Pl.'s Opp'n at 17-23; ECF No. 25-3 at 6-7.) Furthermore,  
5 the appeal was cancelled at the third of level of review. (Pl.'s Opp'n at 7; ECF No. 25-3 at 6-7.)  
6 Accordingly, Appeal No. KVSP-O-16-03078 did not serve to exhaust Plaintiff's administrative  
7 remedies.

8 **IV.**

9 **RECOMMENDATIONS**

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

- 11 1. Defendants' motion for summary judgment be granted; and  
12 2. The instant action be dismissed, without prejudice, for failure to exhaust the  
13 administrative remedies.

14 These Findings and Recommendations will be submitted to the United States District Judge  
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after  
16 being served with these Findings and Recommendations, the parties may file written objections with  
17 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and  
18 Recommendations." The parties are advised that failure to file objections within the specified time  
19 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
20 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21  
22 IT IS SO ORDERED.

23 Dated: October 3, 2017

24   
25 \_\_\_\_\_  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28