



1 On May 12, 2020, the Court issued the discovery and scheduling order. (ECF No. 64.)

2 On June 2, 2020, the Court set this case for a settlement conference before Magistrate Judge  
3 Barbara A. McAuliffe on September 22, 2020, at 9:30 a.m., and stayed the case. (ECF No. 71.)

4 After the case did not settle, the Court issued an amended discovery and scheduling order on  
5 September 23, 2020.

6 Defendants Usher and Rimbach filed the instant motion for summary judgment for failure to  
7 exhaust the administrative remedies on December 22, 2020. Plaintiff filed an opposition on February  
8 24, 2021, and Defendants filed a reply on March 1, 2021.

## 9 II.

### 10 LEGAL STANDARD

#### 11 A. Statutory Exhaustion Requirement

12 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (“PLRA”) provides that “[n]o  
13 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other  
14 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such  
15 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is  
16 mandatory unless unavailable. Exhaustion is required regardless of the relief sought by the prisoner  
17 and regardless of the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and  
18 the exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 534  
19 U.S. 516, 532 (2002).

20 Section 1997e(a) also requires “proper exhaustion of administrative remedies, which ‘means  
21 using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues  
22 on the merits).” Woodford v. Ngo, 548 U.S. 81, 90 (2006) (citation omitted). “Proper exhaustion  
23 demands compliance with an agency’s deadlines and other critical procedural rules because no  
24 adjudicative system can function effective without imposing some orderly structure on the course of  
25 its proceedings.” Id. at 90-91. “[I]t is the prison’s requirements, and not the PLRA, that define the  
26 boundaries of proper exhaustion.” Jones v. Bock, 549 U.S. 199, 218 (2007). “The obligation to  
27 exhaust ‘available’ remedies persists as long as *some* remedy remains ‘available.’ Once that is no  
28 longer the case, then there are no ‘remedies ... available,’ and the prisoner need not further pursue the

1 grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis in original) (citing Booth  
2 v. Churner, 532 U.S. 731, 739 (2001)).

3 The failure to exhaust is an affirmative defense, and the defendant or defendants bear the  
4 burden of raising and proving the absence of exhaustion. Jones v. Bock, 549 U.S. at 216; Albino v.  
5 Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). “In the rare event that a failure to exhaust is clear on the  
6 face of the complaint, a defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at  
7 1166. Otherwise, the defendant or defendants must produce evidence proving the failure to exhaust,  
8 and they are entitled to summary judgment under Rule 56 only if the undisputed evidence, viewed in  
9 the light most favorable to the plaintiff, shows the plaintiff failed to exhaust. Id.

#### 10 **B. Summary Judgment Standard**

11 Any party may move for summary judgment, and the Court shall grant summary judgment if  
12 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
13 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino, 747 F.3d at  
14 c1166; Wash. Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position,  
15 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of  
16 materials in the record, including but not limited to depositions, documents, declarations, or discovery;  
17 or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or  
18 that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.  
19 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to  
20 by the parties, although it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. S.F. Unified  
21 Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d  
22 1011, 1017 (9th Cir. 2010). “The evidence must be viewed in the light most favorable to the  
23 nonmoving party.” Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir. 2014).

24 Initially, “the defendant’s burden is to prove that there was an available administrative remedy,  
25 and that the prisoner did not exhaust that available remedy.” Albino, 747 F.3d at 1172. If the  
26 defendant meets that burden, the burden of production then shifts to the plaintiff to “come forward  
27 with evidence showing that there is something in his particular case that made the existing and  
28 generally available administrative remedies effectively unavailable to him.” Id. However, the

1 ultimate burden of proof on the issue of administrative exhaustion remains with the defendant. Id. “If  
2 undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a  
3 defendant is entitled to summary judgment under Rule 56.” Id. at 1166. However, “[i]f material facts  
4 are disputed, summary judgment should be denied, and the district judge rather than a jury should  
5 determine the facts.” Id.

### 6 III.

### 7 DISCUSSION

#### 8 A. Summary of CDCR’s Administrative Appeal Process<sup>1</sup>

9 A prisoner in the custody of the California Department of Corrections and Rehabilitation  
10 (“CDCR”) satisfies the administrative exhaustion requirement for a non-medical appeal or grievance  
11 by following the procedures set forth in California Code of Regulations, title 15, §§ 3084-3084.9.

12 California Code of Regulations, title 15, § 3084.1(a) provides that “[a]ny inmate ... under  
13 [CDCR’s] jurisdiction may appeal any policy, decision, action, condition, or omission by the  
14 department or its staff that the inmate ... can demonstrate as having a material adverse effect upon his  
15 or her health, safety, or welfare.” An inmate is required to use a CDCR Form 602 to “describe the  
16 specific issue under appeal and the relief requested.” Cal. Code Regs. tit. 15, § 3084.2(a). An inmate  
17 is limited to one issue, or related set of issues, per each CDCR Form 602 and the inmate “shall state all  
18 facts known and available to [them] regarding the issue being appealed at the time of submitting” the  
19 CDCR Form 602. Cal. Code Regs. tit. 15, § 3084.2(a)(1) & (a)(4). Further, the inmate “shall list all  
20 staff member(s) involved and ... describe their involvement in the issue.” Cal. Code Regs. tit. 15, §  
21 3084.2(a)(3). If known, the inmate must include the staff member’s last name, first initial, title or  
22 position, and the dates of the staff member’s involvement in the issue being appealed. Id. If the  
23 inmate does not know the staff member’s identifying information, the inmate is required to “provide  
24 any other available information that would assist the appeals coordinator in making a reasonable  
25 attempt to identify the staff member(s) in question.” Id.

---

26  
27 <sup>1</sup> On March 25, 2020, the grievance procedure outlined in § 3084.1, *et seq.*, was repealed effective June 1, 2020, as an  
28 emergency by the CDCR pursuant to Penal Code § 5058.3. See CCR, tit. 15, § 3084.1, ¶ 13 (June 26, 2020). However, the  
parties do not dispute that the events alleged in the complaint took place before the repeal took effect.

1 Unless the inmate grievance falls within one of the exceptions stated in California Code of  
2 Regulations, title 15, §§ 3084.7(b)(1)-(2) and 3084.9, all inmate grievances are subject to a three-step  
3 administrative review process: (1) the first level of review; (2) the second level appeal to the Warden  
4 of the prison or their designee; and (3) the third level appeal to the Secretary of CDCR, which is  
5 conducted by the Secretary's designated representative under the supervision of the third level  
6 Appeals Chief. Cal. Code Regs. tit. 15, §§ 3084.1(b), 3084.7(a)-(d). Unless the inmate grievance  
7 deals with allegations of sexual violence or staff sexual misconduct, an inmate must submit the CDCR  
8 Form 602 and all supporting documentation to each the three levels of review within 30 calendar days  
9 of the occurrence of the event or decision being appealed, of the inmate first discovering the action or  
10 decision being appealed, or of the inmate receiving an unsatisfactory departmental response to a  
11 submitted administrative appeal. Cal. Code Regs. tit. 15, §§ 3084.2(b)-(e), 3084.3, 3084.6(a)(2),  
12 3084.8(b). When an inmate submits an administrative appeal at any of the three levels of review, the  
13 reviewer is required to reject the appeal, cancel the appeal, or issue a decision on the merits of the  
14 appeal within the applicable time limits. Cal. Code Regs. tit. 15, §§ 3084.6(a)-(c), 3084.8(c)-(e). If an  
15 inmate's administrative appeal is rejected, the inmate is to be provided clear instructions about how to  
16 cure the appeal's defects. Cal. Code Regs. tit. 15, §§ 3084.5(b)(3), 3084.6(a)(1). If an inmate's  
17 administrative appeal is cancelled, the inmate can separately appeal the cancellation decision. Cal.  
18 Code Regs. tit. 15, § 3084.6(a)(3) & (e).

19 **B. Summary of Relevant Factual Allegations of Plaintiff's Complaint**

20 Plaintiff arrived at Kern Valley State Prison (KVSP) around March 5, 2015 and was labeled  
21 "high risk" medical and had a medical chrono which noted that Plaintiff was cocci area two ineligible.  
22 Defendants Usher and Rimbach had access to Plaintiff's C file and were aware of his medical chrono.  
23 Around September 6, 2015, Plaintiff complained to Defendant German that he had flu like symptoms,  
24 chest pain and weight loss. Plaintiff was denied treatment and it was not until November 16, 2015 that  
25 Plaintiff was taken to an outside hospital and diagnosed with Valley Fever and pneumonia.

26 Plaintiff's inmate appeals for an N-95 mask, pain medication, soil stabilization, cleaning of  
27 vents, and a medical transfer out of the Central Valley were denied. Plaintiff contends that the  
28 defendants knowing failed to protect him from the risk of contracting Valley Fever while knowing that

1 he was high risk inmate.

2 **C. Statement of Undisputed Facts<sup>2</sup>**

3 1. Plaintiff is, and was at all times relevant to this action, a prisoner incarcerated within  
4 the California Department of Corrections and Rehabilitation (CDCR). (Compl. at 1; First. Am.  
5 Compl. at 13.)

6 2. Plaintiff was, at all times relevant to this action, an inmate at Kern Valley State Prison.  
7 (Id.)

8 3. While at KVSP, Plaintiff submitted only two non-health care appeals/grievances that  
9 relate to valley fever (coccidioidomycosis), any cocci restriction, a request to transfer from KVSP,  
10 and/or that identify Defendants Usher or Rimbach: KVSP-O-16-02915 and KVSP-O-17-00803.  
11 (Declaration of A. Leyva (Leyva Decl.) ¶¶ 7-9; IATS Log. Ex. A to Leyva Decl.)

12 4. By way of the appeal/grievance with Log No. KVSP-O-16-02915, Plaintiff requested a  
13 medical transfer out of the Central Valley due to valley fever. Plaintiff does not name Usher or  
14 Rimbach in this appeal/grievance, and does not assert in the appeal/grievance that either did anything  
15 that resulted in his exposure to valley fever at KVSP. (Leyva Decl. ¶ 10 & Ex. B.)

16 5. By way of the appeal/grievance with Log No. KSVP-O-17-00803, Plaintiff was  
17 requesting whether he was Cocci Area 1 or 2 restricted. Plaintiff also requested vent cleaning and soil  
18 stabilization. Although Plaintiff asserts that he had given a Form 22 to Usher asking whether he was  
19 Cocci Area 1 or 2 restricted, but that she had not yet responded, he does not assert that Usher did  
20 anything that resulted in his exposure to valley fever at KVSP. The appeal/grievance with Log No.  
21 KVSP-O-17-00803 does not mention or otherwise identify Rimbach. (Leyva Decl. ¶ 11 & Ex. C.)

22 6. Plaintiff did not obtain a decision at the third and final level of review for either KVSP-  
23 O-16-02915 or KVSP-O-17-00803, or any other non-health care appeal/grievance that he might have  
24 submitted arising out of KVSP. (Declaration of H. Moseley (Moseley Decl.) ¶¶ 6-7 & Ex. A.)

25 7. While at KVSP, Plaintiff submitted only five health care appeals/grievances that relate  
26 to valley fever (coccidioidomycosis), any cocci restriction, a request to transfer from KVSP, and/or  
27

---

28 <sup>2</sup> Hereinafter referred to as “UDF.”

1 that identify Defendants Usher and Rimbach: KVSP HC 16037589, KVSP HC 16037697, KVSP HC  
2 16037685, KVSP HC 16037970, and KVSP HC 17038037. (Declaration of K. Martin (Martin Decl.)  
3 ¶¶ 8-10 & Ex. A.)

4 8. Of these appeals/grievances, only KVSP HC 17038037 even mentions Usher and  
5 Rimbach. Plaintiff states that his doctor told him he was Cocci Area 2 restricted, but that his  
6 counselor, Usher, had told him he was Cocci Area 1 restricted, and he wanted to know which was  
7 correct. (Martin Decl. ¶¶ 11-15 & Exs. B-F.)

8 9. Plaintiff does not allege in appeal/grievance KVSP HC 16037589, KVSP HC  
9 16037697, KVSP HC 16037685, KVSP HC 16037970, or KVSP HC 17038037 that either Usher or  
10 Rimbach had done anything that resulted in his exposure to valley fever at KVSP or otherwise caused  
11 him harm. (Martin Decl. ¶¶ 11-15 & Exs. B-F.)

12 **D. Analysis of Defendants' Motion**

13 Defendants Usher and Rimbach argue that they are entitled to judgment as a matter of law  
14 because Plaintiff failed to properly exhaust administrative remedies related to his claims against them  
15 as required by the Prison Litigation Reform Act.

16 In opposition, Plaintiff argues that appeal/grievances KVSP HC 16037589, KVSP HC  
17 16037685, and KVSP HC 1703803, exhaust his claims against Defendants Usher and Rimbach.

18 As stated in the Court's screening order, Plaintiff contends that Defendants Usher and Rimbach  
19 had access to his C-file indicating that he is a high medical risk and Cocci Area 2 ineligible (i.e., they  
20 knew about his Cocci Area 2 ineligibility), yet subjected him to cocci exposure at Kern Valley State  
21 Prison. (ECF No. 19, 4:23-28.)

22 It is undisputed that while at KVSP, Plaintiff submitted only two non-health care  
23 appeals/grievances that relate to valley fever, any cocci restriction, a request to transfer from KVSP, and/or  
24 that identify Defendants Usher or Rimbach: KVSP-O-16-02915 and KVSP-O-17-00803. (UDF 3.) In  
25 appeal/grievance Log No. KVSP-O-16-02915, Plaintiff requested a medical transfer out of the Central  
26 Valley due to valley fever. Plaintiff did not name Usher or Rimbach in this appeal/grievance, and does not  
27 attest that either did anything that resulted in his exposure to valley fever at KVSP. (UDF 4.) In  
28 appeal/grievance Log No. KVSP-O-17-00803, Plaintiff was requesting whether he was Cocci Area 1 or 2

1 restricted. (UDF 5.) Although Plaintiff asserted that he had given a Form 22 to Usher seven days prior  
2 asking whether he was Cocci Area 1 or 2 restricted, but that she had not yet responded, there are no  
3 allegations that Usher did anything that resulted in his exposure to valley fever at KVSP, or otherwise  
4 engaged in any act or omission that caused Plaintiff harm. (UDF 5.) In addition, this appeal does not  
5 mention or otherwise identify Defendant Rimbach. (Id.) Moreover, Plaintiff did not obtain a decision at  
6 the third and final level of review for either KVSP-O-16-02915 or KVSP-O-17-00803, or any other non-  
7 health care appeal/grievance that he might have submitted while at KVSP. (UDF 6.)

8 It is further undisputed that while at KVSP, Plaintiff submitted only five health care  
9 appeals/grievances that relate to valley fever, any cocci restriction, a request to transfer from KVSP, and/or  
10 that identify Defendants Usher or Rimbach: KVSP HC 16037589, KVSP HC 16037697, KVSP HC  
11 16037685, KVSP HC 16037970, and KVSP HC 17038037. (UDF 7.) Only Log No. KVSP HC 17038037  
12 mentions Usher or Rimbach in that Plaintiff alleged his doctor told him he was Cocci Area 2 restricted, but  
13 that his counselor Usher, had told him he was Cocci Area 1 restricted, and he wanted to know which was  
14 correct. (UDF 8.) Plaintiff does not allege in appeal/grievance KVSP HC 16037589, KVSP HC  
15 16037697, KVSP HC 16037685, KVSP HC 16037970, and KVSP HC 17038037 that either Defendants  
16 Usher or Rimbach had done anything that resulted in his exposure to valley fever at KVSP or otherwise  
17 caused him harm. (UDF 9.)

18 In appeal/grievance Log No. KVSP HC 16037589, Plaintiff contended that he had valley fever and  
19 requested a medical transfer out of the Central Valley. This grievance does not name Usher or Rimach or  
20 allege either of them transferred him to KVSP or did anything that resulted in his exposure to valley fever.  
21 (citation.) In appeal/grievance Log No. KVSP HC 16037685, Plaintiff claimed that he was not receiving  
22 adequate medical treatment for his valley fever. However, Plaintiff did not name Usher or Rimbach  
23 (neither of whom are medical providers), nor allege that they did anything that resulted in his exposure to  
24 valley fever. (citation.)

25 Although appeal/grievance Log No. KVSP HC 17038037 mentions Defendant Usher, Plaintiff  
26 alleged only that his doctor told he was Cocci Area 2 restricted, but his counselor, Usher, told him he was  
27 Cocci Area 1 restricted. Plaintiff simply requested to be informed which was correct. Plaintiff did not  
28 allege that Defendant Usher (or Rimbach) failed to protect him from exposure to valley fever, or otherwise  
engaged in any act or omission that caused him harm. Under the PLRA, a grievance ‘suffices if it alerts



1 the prison to the nature of the wrong for which redress is sought.’ ” Reyes v. Smith, 810 F.3d 654, 659  
2 (9th Cir. 2016) (quoting Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010)). “A grievance ... need  
3 not contain every fact necessary to prove each element of an eventual legal claim.” Griffin v. Arpaio,  
4 557 F.3d 1117, 1120 (9th Cir. 2009). “The primary purpose of a grievance is to alert the prison to a  
5 problem and facilitate its resolution, not to lay groundwork for litigation.” Id. Plaintiff did not put  
6 prison officials on notice that he believed either Defendant Usher or Rimbach were involved in his  
7 exposure to valley fever. See McCollum v. California Dep't of Corr. & Rehab., 647 F.3d 870, 876  
8 (9th Cir. 2011) (although administrative appeals mentioned in passing that the prison lacked a Wiccan  
9 chaplain, they did not exhaust claim because they “do not provide notice that the source of the  
10 perceived problem is the absence of a paid Wiccan chaplaincy”); Griffin v. Arpaio, 557 F.3d 1117,  
11 1119 (9th Cir. 2009) (administrative appeal demanding better access to top bunk did not alert prison  
12 officials that officers had disregarded assignment to lower bunk); Brown v. Johnson, 537 F. App'x  
13 705, 707 (9th Cir. 2013) (where administrative appeals “focused entirely on [plaintiff's] medical and  
14 housing complaints,” and only in passing mentioned that plaintiff was allowed out of his cell without  
15 an escort, “that statement was simply a description of the events leading up to [plaintiff's] fall down  
16 the stairs; it was not a complaint about being let out of his cell...without an escort”). The nature of this  
17 appeal would only provide notice to a reasonable prison official that Plaintiff requested to know if he  
18 was Cocci Area 1 or 2 restricted. This grievance would not have served to notify the prison that  
19 Defendants Usher or Rimbach intentionally exposed Plaintiff to valley fever or did nothing to prevent  
20 his exposure to valley fever resulting in harm to Plaintiff. Accordingly, the instant motion for  
21 summary judgment shall be granted, and the claims against Defendants Usher and Rimbach will be  
22 dismissed, without prejudice.

23 **IV.**

24 **ORDER**

25 Based on the foregoing, it is HEREBY ORDERED that:

- 26 1. Defendants’ instant motion for summary judgment is granted;
- 27 2. The claims against Defendants Usher and Rimbach are dismissed from the action,  
28 without prejudice, for failure to exhaust the administrative remedies; and

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. Plaintiff's objection to the Court's February 4, 2021, order denying his request to postpone ruling on the instant motion is overruled. (ECF No. 98.) For the reasons explained above, Plaintiff has failed to exhaust his claims against Defendants Usher and Rimbach and there is no showing that material discovery exists which would defeat the instant motion. Accordingly, Plaintiff's objection to the Court's February 4, 2021, denying his request to defer ruling on the instant motion is overruled.

IT IS SO ORDERED.

Dated: March 17, 2021

  
UNITED STATES MAGISTRATE JUDGE