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

DENNIS CURTIS HISLE,  
  
Plaintiff,  
  
v.  
  
MARYLYN CONANAN, et al.,  
  
Defendants.

Case No. 1:17-cv-01400-NONE-SAB-PC  
  
FINDINGS AND RECOMMENDATION  
RECOMMENDING DEFENDANT  
CONANAN’S MOTION FOR SUMMARY  
JUDGMENT FOR FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES BE  
GRANTED  
  
(ECF No. 107)

Plaintiff Dennis Curtis Hisle is appearing *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendant Dr. Conanon’s motion for summary judgment for failure to exhaust the administrative remedies, filed on March 2, 2020.

**I.**  
**RELEVANT BACKGROUND**

This action is proceeding against Defendants Dr. Marlyn Conanon (“Dr. Conanon” or “Defendant Conanon”) and Dr. Mushtaq Ahmed for deliberate indifference to a serious medical need in violation of the Eighth Amendment.

1 As previously stated, on March 2, 2020, Defendant Conanon filed a motion for summary  
2 judgment. (ECF No. 107). On April 20, 2020, Plaintiff filed an opposition, and Defendant  
3 Conanon filed a reply on May 1, 2020. (ECF Nos. 115, 120).

## 4 II.

### 5 LEGAL STANDARD

#### 6 A. Statutory Exhaustion Requirement

7 The Prison Litigation Reform Act of 1995 (“PLRA”) requires that prisoners exhaust  
8 “such administrative remedies as are available” before commencing a suit challenging prison  
9 conditions. 42 U.S.C. § 1997e(a); see Ross v. Blake, 136 S. Ct. 1850, 1862 (2016) (“An inmate  
10 need exhaust only such administrative remedies that are ‘available.’”). Exhaustion is mandatory  
11 unless unavailable. “The obligation to exhaust ‘available’ remedies persists as long as *some*  
12 remedy remains ‘available.’ Once that is no longer the case, then there are no ‘remedies . . .  
13 available,’ and the prisoner need not further pursue the grievance.” Brown v. Valoff, 422 F.3d  
14 926, 935 (9th Cir. 2005) (emphasis in original) (citing Booth v. Churner, 532 U.S. 731, 739  
15 (2001)).

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

21 The failure to exhaust is an affirmative defense, and the defendants bear the burden of  
22 raising and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino v. Baca, 747 F.3d  
23 1162, 1166 (9th Cir. 2014). “In the rare event that a failure to exhaust is clear from the face of  
24 the complaint, a defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at  
25 1166. Otherwise, the defendants must produce evidence proving the failure to exhaust, and they  
26 are entitled to summary judgment under Rule 56 only if the undisputed evidence, viewed in the  
27 light most favorable to the plaintiff, shows he failed to exhaust. Id.

#### 28 B. Summary Judgment Standard

1 Any party may move for summary judgment, and the Court shall grant summary  
2 judgment, “if the movant shows that there is no genuine dispute as to any material fact and the  
3 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); Albino, 747 F.3d at  
4 1166; Washington Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s  
5 position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to  
6 particular parts of materials in the record, including but not limited to depositions, documents,  
7 declarations, or discovery; or (2) showing that the materials cited do not establish the presence or  
8 absence of a genuine dispute or that the opposing party cannot produce admissible evidence to  
9 support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider  
10 other materials in the record not cited to by the parties, although it is not required to do so. Fed.  
11 R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir.  
12 2001); accord Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010).

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

### 23 III.

### 24 DISCUSSION

#### 25 A. Description of CDCR’s Administrative Remedy Process

26 Plaintiff is a state prisoner in the custody of the California Department of Corrections and  
27 Rehabilitation (“CDCR”), and CDCR has an administrative remedy process for inmate  
28 grievances. Cal. Code Regs. tit. 15, § 3084.1 (2014). Compliance with section 1997e(a) is

1 mandatory and state prisoners are required to exhaust CDCR’s administrative remedy process  
2 prior to filing suit in federal court. Woodford v. Ngo, 548 U.S. 81, 85–86 (2006); Sapp v.  
3 Kimbrell, 623 F.3d 813, 818 (9th Cir. 2010).

4 CDCR’s grievance policy outlines how an inmate must exhaust administrative remedies.  
5 (Gates Decl. ¶ 3, ECF No. 107-3). Before September 1, 2017, all inmate grievances about health  
6 care were governed by California Code of Regulations, title 15, §§ 3084–86. (Id.). Under these  
7 regulations, health care appeals were subject to three levels of administrative review before  
8 administrative remedies were deemed exhausted. (Id.). Section 3084.2 describes the process  
9 inmates must follow when preparing and submitting an inmate grievance. (Id. ¶ 4). Inmates must  
10 list all staff members involved in the action being appealed, inmates must describe each staff  
11 member’s involvement in the action being appealed, and inmates must state all facts known and  
12 available to them about the issue under appeal in the inmate appeal form. (Id.).

13 After September 1, 2017, CCHCS implemented new regulations for health care  
14 grievances. (Gates Decl. ¶ 5). These policies changed again in 2019, and can now be found at  
15 title 15, §§ 3999.225–.237 of the California Code of Regulations. (Id.). Now, inmate grievances  
16 about health care are subject to two levels of review; an institutional level and a headquarters  
17 level of review. (Id. ¶ 6). Inmates’ grievances about their health care are exhausted only after  
18 headquarters completes its review. (Id.). Like section 3084.2, section 3999.228(g) requires  
19 inmates to “document clearly and coherently all information known and available” to the inmate  
20 when preparing and submitting a health care grievance. (Id.).

## 21 **B. Summary of Allegations Underlying Plaintiff’s Claims**

22 Plaintiff repeatedly informed Dr. Conanán that he was suffering excruciating pain and  
23 could not breathe. Dr. Conanán performed an x-ray and discovered that Plaintiff had three  
24 broken ribs and internal bleeding that was not previously detected by staff at Community  
25 Regional Medical Center (“CRMC”). Despite the x-ray results, Plaintiff was ordered to return to  
26 his cell. However, two to three days later, Plaintiff was rushed to the hospital.

27 On or about May 21, 2016, Plaintiff was taken by ambulance to Mercy Hospital in  
28 Bakersfield for treatment of three broken ribs, internal bleeding, and removal of a developing

1 extra pleural hematoma. Dr. Mushtaq Ahmed kept Plaintiff chained to a bed with continuous  
2 internal bleeding, strained breathing and in great pain for two weeks because there was no bed  
3 space to be transferred to Memorial Hospital. When Plaintiff eventually arrived at Memorial  
4 Hospital, a surgical procedure was attempted by use of a large needle to extract the blood which  
5 if it had been done sooner would have worked. However, due to the length of delay in treatment  
6 removal required a much more serious surgical procedure. Dr. Ahmed would visit Plaintiff's  
7 room and state "he doesn't know what to do with me, and he actually suggest[ed] sending me  
8 back to (CDCR) PVSP because of the wait."

9 Dr. Conanen falsely stated that she ordered a medical lay-in to modify Plaintiff's  
10 movement so he could hear from his broken ribs and internal bleeding. Dr. Conanen also falsely  
11 stated that she issued an urgent referral for Plaintiff to see a pulmonologist.

12 **C. Statement of Material Undisputed Fact**

13 1. Plaintiff was an inmate at Pleasant Valley State Prison. On October 17, 2017,  
14 Plaintiff filed the first amended complaint and alleged that Dr. Marylyn Conanen was  
15 deliberately indifferent to Plaintiff's rib fractures. (First Am. Compl. at 3, ECF No. 7).

16 2. The Court recommended denying Defendant Conanen's motion for summary  
17 judgment. The Court concluded that Plaintiff had generated a dispute of material fact as to  
18 whether Dr. Conanen was deliberately indifferent by failing to provide a lay-in and urgent  
19 referral to see a pulmonologist as noted and reflected in her medical progress notes. (ECF No.  
20 92).

21 3. On April 13, 2020, the Court granted Plaintiff's motion to amend the complaint  
22 "to include his claim that Dr. Conanen failed to provide a lay-in order on May 5, 2016 as  
23 reflected in her medical progress notes as well as the urgent request to see pulminologist [sic]"  
24 and directed that the Second Amended Complaint, lodged on March 19, 2020, be filed. (ECF No.  
25 113).

26 4. Before September 1, 2017, all inmate grievances about health care services were  
27 governed by California Code of Regulations, title 15, §§ 3084–86. (Gates Decl. ¶ 6).

1           5.       In 2016, Section 3084.2 describes the process inmates must follow when  
2 preparing the inmate grievance. The inmate must list all staff members involved in the issue, the  
3 inmate must describe each staff member’s involvement in the issue under appeal, and the inmate  
4 also has to state all facts known and available to him regarding the issue under appeal at the time  
5 of submitting the inmate appeal form. (Gates Decl. ¶ 6).

6           6.       New procedures were officially enacted as regulations under Cal. Code Regs. tit.  
7 15, § 3087 on September 1, 2017; however, in 2019, the health care grievances section was  
8 changed without regulatory effect and can now be found at Title 15, §§ 3999.225–.237 of the  
9 California Code of Regulations. (Gates Decl. ¶ 7).

10          7.       Under these regulations, inmates may grieve complaints regarding health care  
11 policies, decisions, actions, conditions, or omissions using a CDCR 602 HC form. Such  
12 complaints are subject to two levels of review, an institutional level of review. Health care  
13 grievances are subject to a headquarters’ disposition before administrative remedies are deemed  
14 exhausted. Under § 3999.227(g), inmates must “document clearly and coherently all information  
15 known and available to him” when preparing and submitting inmate health care grievances.  
16 (Gates Decl. ¶ 7).

17          8.       Plaintiff submitted a grievance under inmate log number PSVP HC 16052007 on  
18 August 18, 2016. (Gates Decl. ¶ 9, Ex. B).

19          9.       Although Plaintiff’s grievance was initially cancelled for Plaintiff’s failure to  
20 submit the grievance within thirty days’ time of the injury, Plaintiff appealed the cancellation  
21 and was allowed to submit a grievance.<sup>1</sup> (Gates Decl. ¶ 9, Ex. B).

22          10.       Plaintiff’s grievance bypassed the first level of review. At the second level of  
23 review, the appeals office found that Plaintiff’s care was appropriate and timely and denied  
24 Plaintiff’s grievance. (Gates Decl. ¶ 10).

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25  
26 <sup>1</sup> Plaintiff disputes numerous facts on the ground that Defendant Conanan failed to provide proper medical treatment  
27 and/or falsified documentation. However, Plaintiff cannot create a disputed of fact by merely challenging the  
28 credibility of the Defendant’s facts without citing to any contradictory evidence. Nat’l Union Fire Ins. Co. of  
Pittsburgh, Pa. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983). Nor is a fact disputed because Plaintiff  
disagrees with it. Plaintiff must point to specific evidence that creates a dispute of fact.

1           11. Plaintiff subsequently appealed the second level of review’s decision to the third  
2 and final level of review. The third level denied Plaintiff’s grievance as articulated in his  
3 grievance form. Specifically, the third-level of review concluded that “[Plaintiff’s] alleged  
4 negligent care; however [he] did not provide documentation to support [his] allegation, and it is  
5 refuted by professional health care staff familiar with [Plaintiff’s] medical history, as well as  
6 [his] medical records.” (Gates Decl. ¶ 11).

7           12. Between the denial of inmate log number PSVP HC 16052007 and February  
8 2020, Plaintiff filed one additional grievance about Dr. Conan’s treatment. (Gates Decl. ¶ 12).

9           13. In this grievance, submitted on January 13, 2020, Plaintiff alleged that Dr.  
10 Conan “used false statements of fact and fraudulent (PCP) notes.” Plaintiff specifically alleged  
11 that Dr. Conan’s notes about her providing Plaintiff with a lay-in order were fraudulent and  
12 that she committed perjury. (Gates Decl. ¶ 12).

13           14. On January 22, 2020, Plaintiff filed a document entitled “Motion to Extend  
14 Exhaustion Motion Deadline.” Plaintiff signed this motion under penalty of perjury and declared  
15 that he needed an “extension of time to exhaust” his allegation that Dr. Conan failed to provide  
16 him with a lay-in order. (ECF No. 103).

17           15. Plaintiff submitted this grievance through the normal grievance process. The  
18 appeals office at Valley State Prison rejected the grievance and instructed Plaintiff to submit the  
19 grievance to the health care appeals office. (Gates Decl. ¶ 13).

20           16. On January 29, 2020, the Health care Grievance Office received Plaintiff’s inmate  
21 grievance. The grievance was accepted and processed under inmate grievance log number VSP-  
22 HC-20000074. Plaintiff alleges that the Primary Care Progress notes authored by Dr. Conan  
23 were fraudulent, and that she never prescribed a lay-in order for Plaintiff. (Gates Decl. ¶ 14).

24           17. The Office of Health Care Appeals has not completed the initial review of  
25 grievance log number VSP-HC-2000074. The office anticipates completing its initial review by  
26 April 2020. (Gates Decl. ¶ 15).

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1           **D.     Analysis of Defendant’s Motion**

2           Defendant Conanán argues that Plaintiff’s 2016 grievance did not include allegations that  
3 Dr. Conanán falsified medical records, failed to provide him with a lay in, and failed to urgently  
4 refer him to a pulmonologist. In addition, Plaintiff’s January 2020 grievance, submitted three  
5 years after the instant action was filed, does not serve to exhaust his new claims because it was  
6 not exhausted prior to filing the action and/or amending the complaint.

7           In opposition, Plaintiff argues that his 2016 and/or 2017 grievances sufficiently grieved  
8 his claim that Defendant Conanán falsified medical records. Plaintiff also argues that “special  
9 circumstances” excuse him from the exhaustion requirement.

10           1.     Inmate Grievance Log Number PSVP HC 16052007

11           In this grievance, Plaintiff alleged the following:

12           I was assaulted by inmate Crosby, on 4-28-16 and driven to Fresno Hospital for a  
13 physical exam. Their quasi exam misdiagnosed three broken ribs and internal  
14 bleeding in my plu[ra]l membranous sac. I suffered 2½ w[ee]k[s] having three  
15 broken ribs and bleeding internally, during which I complained to CDCR but was  
16 ignored. CDCR finally concedes to an x-ray and discover the 3-broken ribs and  
17 developing hematoma. With deliberate indifference to the findings I’m sent back to  
18 my cell with Tylenol for pain. With my right lung on the verge of collapse I can only  
19 take short breaths now, I tell medical staff and the Asian doctor sends me home  
20 again. I’m given another x-ray, the radiologist Quency [sic] sees what[sic] now a  
large plueral hematoma and pneumonia in my lungs. He says I need to be  
hospitalized and makes a call to doctors. Once again, I’m just sent back to my cell.  
The Asian doctor sees me again and for the third time displays deliberate  
indifference. X-ray tech Quincy must of convinced somebody at the CTC of my  
condition because two days later, I’m rushed to the hospital. Mercy hospital informs  
me that too much time has passed and I will need surgery [sic]. Now I spend 1-  
month in hospital.

21 (ECF No. 115 at 40).<sup>2</sup>

22           At the second level, Plaintiff’s grievance was denied on the merits, in relevant part, as  
23 follows:

24           Review of your electronic Unit Health Record (eUHR) indicates you were sent to  
25 CRMC on 4/28/2016 due to head trauma and possible loss of consciousness. At this  
26 visit, you were given a CT scan of your head, abdomen and pelvic region. The  
27 results indicated there were no lacerations of your lungs and no blood in your  
28 stomach. You were discharged on 4/29/2016.

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<sup>2</sup> Page numbers refer to ECF page numbers stamped at the top of the page.



1 You were seen again by your Primary Care Physician (PCP) on 5/2/2016. At this  
2 visit, your results were discussed with you. At this visit, you reported pain on your  
3 lower ribs and stated you heard a popping sound. Your PCP explained that your  
4 chest CT and x-ray results were normal. A repeat x-ray of your chest was ordered at  
5 this visit.

6 You were seen again on 5/5/2016 to discuss your x-ray results. At this visit, your  
7 PCP explained your x-ray results showed three rib fractures. However, it is noted  
8 that the injuries were new and not visualized on the CT exam from 4/29/2016.  
9 Therefore, there is no indication of a misdiagnosis at CRMC. Your PCP prescribed  
10 Tylenol #3 as well as Ibuprofen as needed for your pain. It is noted that you refused  
11 your pain medications on 5/9/2016 in order to check your level of pain.

12 A repeat x-ray was ordered on 5/12/2016 and you were seen by your PCP on  
13 5/19/2016. At this visit, your PCP reviewed your x-ray and found new right lung  
14 opacity. It is noted you were in stable condition and an urgent referral to  
15 Pulmonology was completed. You were sent to TTA on 5/20/2016 due to shortness  
16 of breath and sent to Mercy Hospital. The recommendation from Mercy Hospital  
17 was for elective evacuation of the clot.

18 Further review of your eUHR indicates care was appropriate and timely. You alleged  
19 negligent care; however, you did not provide documentation to support your  
20 allegation and it is refuted by professional health care staff familiar with your  
21 medical history, as well as a review of your medical records. While you may not  
22 agree with the medical decisions of your treatment team, it does not constitute staff  
23 misconduct or deliberate indifference to your medical needs.

24 (Gates Decl. Ex. D, ECF No. 107-3 at 25–26). At the third level, Plaintiff’s grievance was denied  
25 on the merits, finding that the “Second Level Response thoroughly addressed the health care  
26 provided to [Plaintiff] in relation to the complaint, and is sustained at the Director’s Level.”  
27 (ECF No. 115 at 38).

28 Although inmate grievance log number PSVP HC 16052007 was exhausted through the  
third level of review, the grievance did not include allegations that Defendant Conanon falsified  
medical records, failed to provide Plaintiff with a lay in, and failed to urgently refer Plaintiff to a  
pulmonologist. Accordingly, Defendant has met her initial burden of proof in demonstrating that  
Plaintiff failed to exhaust the administrative remedies as to these claims. The burden now shifts  
to Plaintiff “to come forward with evidence showing that there is something in his particular case  
that made the existing and generally available administrative remedies effectively unavailable to  
him.” Albino, 747 F.3d at 1166.

In his opposition, Plaintiff apparently concedes that his claims regarding Defendant  
Conanon’s falsification of medical records, failure to provide Plaintiff with a lay in, and failure

1 to urgently refer Plaintiff to a pulmonologist is unexhausted. (ECF No. 115 at 6). Plaintiff  
2 argues, however, that Defendant Conanon should be estopped from asserting the affirmative  
3 defense of exhaustion due to fraud and misrepresentation. (Id. at 8–16).

4 Failure to exhaust may be excused where the administrative remedies have been rendered  
5 “unavailable,” and in such a case, the plaintiff bears the burden of demonstrating that the  
6 grievance process was unavailable to him through no fault of his own. Sapp v. Kimbrell, 623  
7 F.3d 813, 822–23 (9th Cir. 2010); see also Ward v. Chavez, 678 F.3d 1042, 1044–45 (9th Cir.  
8 2012) (exhaustion excused where futile); Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010)  
9 (warden’s mistake rendered prisoner’s administrative remedies “effectively unavailable”);  
10 Brown, 422 F.3d at 939–40 (plaintiff not required to proceed to third level where appeal granted  
11 at second level and no further relief was available). Aside from this single exception, “the  
12 PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any  
13 ‘special circumstances.’... [a]nd that mandatory language means a court may not excuse a failure  
14 to exhaust, even to take such circumstances into account.” Ross, 136 S. Ct. at 1856.

15 Ross recognized three circumstances in which administrative remedies that are on the  
16 books may not be capable of use to obtain relief. 136 S. Ct. at 1859. First, where it operates as a  
17 simple dead end with officers unable or consistently unwilling to provide any relief to aggrieved  
18 inmates. Id. “When the facts on the ground demonstrate that no such potential exists, the inmate  
19 has no obligation to exhaust the remedy.” Id. Second, an administrative remedy might be so  
20 opaque that it is incapable of use. Id. This occurs where there is a system in place, but no  
21 ordinary prisoner can discern or navigate it. Id. Finally, the administrative process is unavailable  
22 when prison administrators thwart inmates from taking advantage of the process through  
23 machination, misrepresentation, or intimidation. Id. at 1860. That is, when “officials misle[a]d or  
24 threaten[] individual inmates so as to prevent their use of otherwise proper procedures.” Id.

25 Plaintiff has failed to submit evidence to support a finding that prison administrators  
26 thwarted Plaintiff from taking advantage of the administrative process through fraud or  
27 misrepresentation. See Ross, 136 S. Ct. at 1860 & n.3. Plaintiff’s allegations are belied by the  
28 evidence in the record. Plaintiff has pursued one grievance against Defendant Conanon through

1 the third level of review and has another grievance currently under review. This demonstrates  
2 that the grievance process remained available to him and did not prevent Plaintiff's use of the  
3 proper procedures. Accordingly, Plaintiff has failed to demonstrate that any fraud or  
4 misrepresentation excused him from exhausting the administrative remedies.

5 2. Inmate Grievance Log Number MCSP HC-17051394

6 In this grievance, Plaintiff alleged the following:

7 Since the end of April, I've yet received "all" requested records. After submitting  
8 a 7385 form and subsequent CDCR 22 Forms inquiring why I have not received  
9 those three CDCR form 22s; however, to minimize the appearance of collusion,  
10 N. Voss concedes to provide me with some records. I requested records covering  
11 4-26-16 to 8-1-16. N. Voss tactfully failed to provide May and June. So N. Voss  
12 gave me End of April—holds back May and half of June. And continues giving  
13 me all of July. How do you unintentionally withhold May/June. And continues  
14 giving me June. This is a deliberate attempt not to make available May and June.  
15 So for the record any collusion to obstruct, alter for the purpose or findings of  
16 medical facts, deny or provide personal provide medical records to anyone  
17 without proper authorization is an actionable offense.

14 (ECF No. 115 at 30). In response, the third level of review noted "[Plaintiff] alleged falsified  
15 information in your medical records, but failed to state facts, specify an act, or provide  
16 documents consistent with the allegation." (Id. at 26). This grievance fails to notify the prison  
17 about the specific claim Plaintiff now seeks to make about Dr. Conanan.

18 Further, even if the vague offering Plaintiff made about "collusion to obstruct, alter  
19 medical facts" placed the prison on notice of the claim that Dr. Conanan had falsified her  
20 progress notes, Plaintiff failed to exhaust this allegation *before* he initiated this lawsuit.  
21 "[E]xhaustion requirements are [...] routinely enforced by 'dismissing a suit that begins too  
22 soon, even if the plaintiff exhausts administrative remedies while the litigation is pending."  
23 Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006). According to Plaintiff's own exhibit,  
24 the third level decision was not issued until February 2018. (ECF No. 115 at 26). Thus, Plaintiff  
25 acknowledges he was trying to exhaust this allegation as he was litigating his lawsuit against Dr.  
26 Conanan.

27 Based on the foregoing, Plaintiff has not exhausted his claims regarding Defendant  
28 Conanon's falsification of medical records, failure to provide Plaintiff with a lay in, and failure

1 to urgently refer Plaintiff to a pulmonologist. Therefore, Defendant Conanon’s motion for  
2 summary judgment should be granted.

3 **IV.**

4 **RECOMMENDATION**

5 Accordingly, the undersigned HEREBY RECOMMENDS that:

- 6 1. Defendant Conanon’s motion for summary judgment (ECF No. 107) be GRANTED; and  
7 2. The claims regarding Defendant Conanon’s falsification of medical records, failure to  
8 provide Plaintiff with a lay in, and failure to urgently refer Plaintiff to a pulmonologist be  
9 DISMISSED WITHOUT PREJUDICE for failure to exhaust the administrative remedies.

10 This Findings and Recommendation is submitted to the assigned United States District  
11 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
12 Rules of Practice for the United States District Court, Eastern District of California. Within  
13 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file  
14 written objections with the court and serve a copy on all parties. Such a document should be  
15 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the  
16 objections shall be served and filed within fourteen (14) days after service of the objections. The  
17 assigned District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C.  
18 § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time  
19 may waive the right to appeal the District Court’s order. Wilkerson v. Wheeler, 772 F.3d 834,  
20 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21  
22 IT IS SO ORDERED.

23 Dated: July 31, 2020

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