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

RELMON H. DAVIS, III., ) Case No.: 1:18-cv-00610-LJO-SAB (PC)  
 )  
Plaintiff, )  
 )  
v. ) FINDINGS AND RECOMMENDATION  
 ) RECOMMENDING DEFENDANT OLIVERA’S  
 ) MOTION FOR SUMMARY JUDGMENT BE  
GIBSON, et.al., ) GRANTED  
 )  
Defendants. ) [ECF No. 67]  
 )  
 )  
 )  
 )

Plaintiff Relmon H. Davis, III. 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 Olivera’s motion for summary judgment, filed April 26, 2019.

**I.  
RELEVANT BACKGROUND**

This action is proceeding on Plaintiff’s due process claim against Defendants K. Dicks, P. Sanchez, J. Vanderpool, M. Oliveira, K. Matta, and T. Campbell.

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1 On November 19, 2018, Defendants K. Dicks, P. Sanchez, J. Vanderpool, K. Matta, and T.  
2 Campbell, filed an answer to the complaint.<sup>1</sup>

3 On December 18, 2018, Defendant M. Oliveira, filed an answer to the complaint.<sup>2</sup>

4 After an unsuccessful settlement conference, the Court issued the discovery and scheduling  
5 order on January 24, 2019.

6 As previously stated, on February 7, 2019, Defendants K. Dicks, P. Sanchez, J. Vanderpool, K.  
7 Matta, and T. Campbell, filed an exhaustion-related motion for summary judgment. Plaintiff filed an  
8 opposition on March 6, 2019, and Defendants filed a reply on March 12, 2019.

9 On April 25, 2019, the undersigned issued Findings and Recommendations recommending that  
10 Defendants' motion for summary judgment be granted.

11 On April 26, 2019, Defendant Oliveira filed an exhaustion-related motion for summary  
12 judgment. Plaintiff filed an opposition on May 28, 2019, and Defendant filed a reply on May 31,  
13 2019.

## 14 II.

### 15 LEGAL STANDARD

#### 16 A. Statutory Exhaustion Requirement

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

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27 <sup>1</sup> These Defendants are represented by Deputy Attorney General, Justin W. Walker.

28 <sup>2</sup> This Defendant is represented by Janine K. Jeffrey, Esq.

1 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter v.  
2 Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by the  
3 prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and  
4 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing Porter,  
5 534 U.S. at 524).

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

### 13 **B. Summary Judgment Standard**

14 Any party may move for summary judgment, and the Court shall grant summary judgment if the  
15 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
16 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino, 747 F.3d at 1166;  
17 Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position, whether it  
18 be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of materials  
19 in the record, including but not limited to depositions, documents, declarations, or discovery; or (2)  
20 showing that the materials cited do not establish the presence or absence of a genuine dispute or that the  
21 opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1)  
22 (quotation marks omitted). The Court may consider other materials in the record not cited to by the  
23 parties, although it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified  
24 Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011,  
25 1017 (9th Cir. 2010).

26 The defendants bear the burden of proof in moving for summary judgment for failure to exhaust,  
27 Albino, 747 F.3d at 1166, and they must “prove that there was an available administrative remedy, and  
28 that the prisoner did not exhaust that available remedy,” id. at 1172. If the defendants carry their burden,

1 the burden of production shifts to the plaintiff “to come forward with evidence showing that there is  
2 something in his particular case that made the existing and generally available administrative remedies  
3 effectively unavailable to him.” Id. “If the undisputed evidence viewed in the light most favorable to  
4 the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.”  
5 Id. at 1166. However, “[i]f material facts are disputed, summary judgment should be denied, and the  
6 district judge rather than a jury should determine the facts.” Id.

### 7 **III.**

### 8 **DISCUSSION**

#### 9 **A. Description of CDCR’s Administrative Remedy Process**

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

22 The inmate or parolee shall list all staff member(s) involved and shall describe their  
23 involvement in the issue. To assist in the identification of staff members, the inmate or parolee  
24 shall include the staff member’s last name, first initial, title or position, if known, and the dates  
25 of the staff member’s involvement in the issue under appeal. If the inmate or parolee does not  
26 have the requested identifying information about the staff member(s), he or she shall provide  
27 any other available information that would assist the appeals coordinator in making a  
28 reasonable attempt to identify the staff member(s) in question. [¶] The inmate or parolee shall  
state all facts known and available to him/her regarding the issue being appealed at the time of  
submitting the Inmate/Parolee Appeal form, and if needed, the Inmate/Parolee Appeal Form  
Attachment.

1 Cal. Code Regs. tit. 15, § 3084.2(a) (3-4).

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

3 On or about September 9, 2014, Lieutenant Dicks authorized an administrative segregation  
4 placement order for disciplinary reasons. Dicks violated Plaintiff’s due process rights by later acting  
5 as the senior hearing officer at his Rules Violation Report (RVR) hearing and for refusing to postpone  
6 the RVR hearing until after the District Attorney’s Office finished its investigation. Plaintiff further  
7 alleges that Defendants Vanderpool, Sanchez, and Oliveira, also denied his requests to postpone the  
8 RVR hearing, and initiated a Secured Housing Unit (SHU) term that was not authorized.

9 **C. Statement of Undisputed Facts**

10 1. At all relevant times, Plaintiff Relmon Davis III has been an inmate in the custody of  
11 the CDCR. (Third Am. Compl, ECF No. 28 at 1.)

12 2. Plaintiff filed his third amended complaint pursuant to 42 U.S.C. § 1983 alleging that  
13 Defendant M. Oliveira violated Plaintiff’s Fourteenth Amendment rights. (Third Am. Compl., ECF  
14 No. 28 at 6.)

15 3. In his third amended complaint Plaintiff alleges that on November 20, 2014, Oliveira  
16 violated Plaintiff’s due process rights by imposing an unauthorized SHU term and in so doing ignored  
17 the deficiencies of a prior disciplinary hearing and Plaintiff’s postponement request. (Third Am.  
18 Compl., ECF No. 28 at 6-7.)

19 4. In California, inmates and parolees have the right to administratively appeal any policy,  
20 decision, action, condition, or omission by the department or its staff that the inmate or parolee can  
21 demonstrate as having a material adverse effect upon his or her health, safety or welfare. (Goree Decl.  
22 ¶ 3; Cal. Code Regs. tit. 15 § 3084.1(a)).

23 5. CDCR provides for a three-step grievance process to exhaust administrative remedies  
24 within the prison grievance system. The process requires a: (1) formal written appeal on a CDCR’s  
25 Inmate/Parolee Appeal Form (CDCR 602); (2) second level appeal to the institution head or designee;  
26 and (3) third level appeal to the director of CDCR. The third level appeal is the highest level of  
27 review, is final, and exhausts all administrative remedies available to the inmate. (Goree Decl., ¶ 3;  
28 Voong Decl., ¶ 4; Cal. Code Regs. tit. 15, §§ 3084.1, 3084.2, 3084.7.)

1           6.       To submit a grievance, an inmate must complete a CDCR Form 602, Inmate/Parolee  
2 Appeal. (Goree Decl., ¶ 4.)

3           7.       In the 602 form, Plaintiff is required to identify by name and title or position each staff  
4 member alleged to be involved in the issue being appealed, along with the dates each staff member  
5 was involved in the issue being appealed. The inmate must also state all facts known and available to  
6 him regarding the issue being appealed at the time submitting the Inmate/Parolee Appeal form.  
7 Plaintiff has thirty (30) calendar days to submit his appeal from the occurrence of the event or decision  
8 being appealed, or upon first knowledge of the action or decision being appealed. (Goree Decl., § 4;  
9 Cal. Code Regs. tit. 15, § 2084.8(b).)

10          8.       Between September 1, 2014 and January 15, 2016, Plaintiff did not submit for third  
11 level review any appeal relating to his due process allegations against Oliveira as it relates to the  
12 November 20, 2014, Segregated Housing Unit term. (Voong Decl., ¶¶ 6-10, Ex. A.)

13          9.       Between September 1, 2014 and January 15, 2016, at the institutional level, Plaintiff  
14 submitted one appeal, log number COR-15-03219, dated June 4, 2015, which included allegations that  
15 Plaintiff's due process rights were violated because he was improperly housed and/or classified at  
16 CSP-Corcoran. (Goree Decl., ¶ 10, Exs. A, B.)

17          10.      The appeal, log number COR-15-03219, was denied at the first institutional level of  
18 review at CSP-Corcoran. Plaintiff did not seek further review of the appeal. (Goree Decl., ¶¶ 8, 11,  
19 12, Exs. A, B.)

20          11.      Between September 2014 and January 2016, Plaintiff submitted appeals to each of the  
21 three levels of review relating to other issues. (Goree Decl., ¶¶ 4, 8-12, Exs. A, B; Voong Decl., ¶¶ 6,  
22 7, 9, 10, Ex. A.)

23          12.      On December 18, 2018, Oliveira filed his answer to Plaintiff's third amended  
24 complaint. In the answer, Oliveira pled failure to exhaust as an affirmative defense.

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

2           Defendant Oliveira argues that Plaintiff did not submit for third level review any appeal  
3 relating to his due process allegations against Oliveira as it relates to the November 20, 2014 ICC  
4 hearing.

5           As an initial matter, the Court finds that there were available administrative remedies at CSP-  
6 Corcoran, as Plaintiff filed several administrative appeals within the relevant time-period. Albino, 747  
7 F.3d at 1172. In fact, during the relevant time frame, Plaintiff exhausted two administrative appeals  
8 through the third level of review. (Voong Decl. ¶¶ 7-9.) Therefore, the administrative remedies were  
9 available to Plaintiff.

10           Since August 1, 2008, the Inmate Correspondence and Appeals Branch receives, reviews and  
11 maintains all final level appeals related to health care, dental, or mental-health issues, while the Chief  
12 of the Office of Appeals (“OOA”) receives, reviews and maintains all final level appeals related to  
13 non-health care issues. (Voong Decl. ¶¶ 1-2.) OOA keeps an electronic record of each inmate  
14 grievance that has proceeded through the final third level of review. When a grievance is received by  
15 OOA, it is assigned a third level tracking number—whether it is screened out or accepted—and  
16 entered into the computer tracking system. The computer system for tracking accepted grievances was  
17 commenced in 1993. The following information is kept in the electronic record: grievance log  
18 number, the category (nature/subject) of the grievance, institutional log numbers, inmate’s name and  
19 CDCR number, the institution where the grievance arose, the date that the grievance was received and  
20 closed, and final disposition of the grievance. (Id. at ¶ 3.)

21           When an appeal is properly and timely submitted at the first formal level of review, it is  
22 immediately assigned a log number, regardless of its disposition, for tracking purposes and to prevent  
23 inmates from asserting that staff lost the appeal. (D. Goree Decl. at ¶ 5.) It is the practice of the CSP-  
24 Corcoran Appeals Office to log and track all received appeals in a computerized database called the  
25 Inmate/Parolee Appeals Tracking System Level I & II (“IATS”). The IATS also includes information  
26 regarding screened out appeals including the reason for the screen out. (Id. ¶ 6.) If an inmate submits  
27 an appeal that is duplicative, untimely, lacks critical information, or otherwise does not comply with  
28 regulations governing the appeal process, the appeal may be screened out and rejected or cancelled. A

1 rejected appeal is returned to the inmate with the reason(s) for the rejection, and a notification that the  
2 inmate may correct and resubmit the appeal within the statutory deadlines. A cancelled appeal is  
3 returned to the inmate with the reason(s) for the cancellation, and a notification that the inmate may  
4 separately appeal the cancellation decision within the statutory deadlines. (Id. at ¶ 7.)

5 OOA is charged with screening, reviewing, and adjudicating all non-health care inmate appeals  
6 at the third level of review. The third level is the final level of review in CDCR's administrative  
7 inmate appeal process, and a decision at this level is generally required to exhaust an inmate's  
8 administrative remedies. (Voong Decl. at ¶ 4.) All inmate appeals are reviewed for acceptance by the  
9 OOA for the third level review and, if accepted, are processed through this office. (Id.) Voong is  
10 familiar with the record keeping system at the OOA and can verify the status of a California inmate's  
11 third level, non-health care appeal. (Id.) Under prison regulations governing inmate appeals, when  
12 OOA receives an inmate appeal for the third level decision that does not comport with procedural  
13 requirements, OOA will screen-out and return the appeal to the submitting inmate without rendering a  
14 decision on it; the appeal is returned with a letter instructing the inmate on how to cure the deficiency,  
15 if a cure is possible. (Voong Decl. at ¶ 5.)

16 During the relevant period, Plaintiff received two third level decisions in non-health care  
17 appeals numbers COR-15-2715 and COR-15-00953. (Voong Decl. ¶ 7.) Plaintiff also submitted three  
18 additional non-health care appeals (Appeal Cor-14-06057, Appeal COR-14-06564 and Appeal COR  
19 15-00953) that were screened-out, rejected, and/or cancelled at the third level during the relevant time  
20 period. (Voong Decl. ¶ 7, Ex. A.) Plaintiff submitted a total of seven non-health care appeals that  
21 were accepted and adjudicated at the first and/or second level of review. (D. Goree Decl. at ¶ 9.)  
22 Those appeals include the following: (1) Appeal COR-14-06057; (2) Appeal COR-14-06564; (3)  
23 Appeal COR-14-07167; (4) Appeal COR-15-00953; (5) Appeal COR-15-01547; (6) Appeal COR 15-  
24 02715; and (7) Appeal COR 15-03219. (Id.) Plaintiff also submitted nine non-health care appeals that  
25 were screened-out and/or cancelled at the first level of review during the relevant time period. (D.  
26 Goree Decl. ¶ 12.)

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1 Defendant argues that none of these appeals exhausted his claim against M. Oliveira, and for  
2 the reasons explained below the Court agrees. The Court will address each appeal below.<sup>3</sup>

3 1. Appeals Accepted at the Third Level of Review

4 During the relevant time-period, Plaintiff received third level decisions on two non-health care  
5 appeals—COR-15-02715 and COR-15-00953. (ECF No. 59-5, Voong Decl. ¶¶ 7-9, Exs. 1-3.)

6 In Appeal No. **COR-15-02715**, Plaintiff challenged a Rules Violation Report, dated March 26,  
7 2015, for willfully delaying a peace officer/refusing to accept assigned housing. Plaintiff argued that  
8 the senior hearing office inappropriately found him guilty of the charge because he was not required to  
9 share a cell with another inmate. (ECF No. 59-5, Voong Decl., Ex. 2.)

10 In Appeal No. **COR-15-00953**, Plaintiff argued that Corcoran State Prison inappropriately  
11 denied his personal property within the security housing unit. Plaintiff requested reimbursement for  
12 the food packets, lotion, baby powder, chili peppers, mayonnaise, tooth brush, mouth wash, hair  
13 grease, conditions, legal documents and artwork. (ECF No. 59-5, Voong Decl., Ex. 3.)

14 As illustrated, neither of these appeals deal with Plaintiff’s allegation that Defendant Oliveira  
15 violated his due process rights by imposing an improper SHU term and ignored the deficiencies of the  
16 disciplinary hearing and Plaintiff’s postponement request.

17 2. Appeals Rejected at the Third Level of Review

18 During the relevant time-period, Plaintiff submitted three additional non-health care appeals  
19 that were screened-out, rejected, and/or cancelled at the third-level—COR-14-6057, COR-14-6564  
20 and COR-15-00953. (ECF No. 59-5, Voong Decl. ¶ 10, Exs. 1, 4-6.)

21 In Appeal No. **COR-14-6057**, Plaintiff challenged a rules violation report for fighting claiming  
22 it should have been classified as an assault and battery and not mutual combat. The appeal was  
23 rejected at the third level on March 13, 2015, because it was determined that he was attempting to  
24 submit an appeal that had been previously cancelled which was considered misuse or abuse of the  
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26 <sup>3</sup> The Court takes judicial notice of Plaintiff’s inmate appeals as identified in the April 25, 2019, Findings and  
27 Recommendations that were submitted with Defendants Campbell, Dicks, Sanchez, Matta, and Vanderpoel’s motion for  
28 summary judgment, filed on February 7, 2019, and Plaintiff’s opposition thereto. (ECF Nos. 59, 61, 65.); see Reyn’s Pasta  
Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (proper subjects of judicial notice include “court  
filings and other matters of public record.”)

1 appeal process pursuant to California Code of Regulations section 3084.4. (ECF No. 59-5, Voong  
2 Decl., Ex. 4.)

3 In Appeal No. **COR-14-6564**, Plaintiff claimed that on September 3, 2014, the cell extraction  
4 took place without a sergeant present and that there was insufficient evidence to support the rules  
5 violation report for possession of a weapon. The appeal was initially rejected on March 13, 2015,  
6 because Plaintiff failed to attach supporting documentation. (ECF No. 61, Pl. Opp'n, Ex. 4.) The  
7 appeal was then subsequently rejected as untimely on July 1, 2015. It was specifically noted “[t]he  
8 Office of Appeals rejected and returned the appeal to the inmate on March 20, 2015. The envelope  
9 addressed to The Office of Appeals was signed by staff on May 15, 2015 and was postmarked on May  
10 18, 2015. The envelope was received in our office on May 26, 2015. This exceeds time constraints to  
11 submit for third level review.” Even if this appeal addressed the allegations against Lieutenant Dicks,  
12 it was properly rejected as untimely, and does not serve to exhaust the administrative remedies. In  
13 addition, there is no evidence that Plaintiff appealed the cancellation. (ECF No. 59-5, Voong Decl. ¶  
14 11, Ex. A.)

15 The Court need not address Appeal No. **COR-15-00953** because although it was initially  
16 rejected at the third level review, it was resubmitted and subsequently addressed on the merits on  
17 September 17, 2015. Furthermore, it is clear this appeal does not address the claim at issue against  
18 Defendant Oliveira.

19 3. Appeals Accepted and Adjudicated at First and Second Levels of Review

20 During the relevant period, Plaintiff submitted a total of seven non-health care appeals that  
21 were accepted and adjudicated at the first and/or second level of review by the Office of Appeal at  
22 CSP-Corcoran—COR-14-06057, COR-14-06564, COR-14-07167, COR-15-00953, COR-15-01547,  
23 COR-15-02715, and COR-15-03219. (ECF No. 59-4, Ceballos Decl. ¶ 8, Exs. 1-8.) As stated above,  
24 Appeal No. **COR-15-02715** was denied at the third level of review, and Appeal Nos. **COR-14-06057**,  
25 **COR-14-6564**, and **COR-15-00953**, were rejected at the third level of review and will not be  
26 addressed again.

27 In Appeal No. **COR-14-07167**, Plaintiff contended that he was not paid for the months of July  
28 or August 2014, while he was assigned to the Facility 3B yard crew. Plaintiff also contended that he

1 did not receive pay for the months of October and November 2013. (ECF No. 59-4, Ceballos Decl.,  
2 Ex. 4.) Plaintiff therefore requested to receive payment and be credited restitution for those months.  
3 (Id.) The appeal was denied granted in part at the first level of review on December 9, 2014, and  
4 denied at the second level of review on January 12, 2015. (Id.) The appeal was subsequently  
5 cancelled as untimely at the third level of review on April 16, 2015, pursuant to Cal. Code Reg. tit. 15,  
6 §§ 3084.8(b)(1)-(2), 3084.6(a)(5). (Id.)

7 In Appeal No. **COR-15-01547**, Plaintiff contended that he received a \$300.00 deposit on  
8 February 20, 2015, but on March 10, 2015, not all of the funds were present before his canteen  
9 purchase as they should have been. The appeal was granted at the first level of review on April 9,  
10 2015. (ECF No. 59-4, Ceballos Decl., Ex. 6.)

11 In Appeal No. **COR-15-03219**, Plaintiff raised the due process challenges alleged in the instant  
12 complaint. (ECF No. 59-4, Ceballo Decl., Ex. 8.) The appeal was initially screened at the first level  
13 of review on June 10, 2015, and returned to Plaintiff noting that the appeal was received with two  
14 dates June 4, 2015 and May 26, 2015. (Id.) Plaintiff was instructed to correct the date to reflect the  
15 original submission. (Id.) Plaintiff resubmitted the appeal with the notation that the original  
16 submission date was May 26, 2015. (Id.) The appeal was then denied at the first level of review on  
17 July 6, 2015, finding there was no merit to Plaintiff's contentions. (Id.)

18 As illustrated above, of these seven appeals, Appeal No. **COR-15-03219**, is the only appeal  
19 that included Plaintiff's allegations that he was denied due process and/or improperly housed and/or  
20 classified at CSP-Corcoran. (ECF No. 59-4, Ceballos Decl. ¶ 9, Ex. 8.) This appeal was denied at the  
21 first institutional level of review at CSP-Corcoran on July 16, 2015. (ECF No. 59-4, Ceballos Decl. ¶  
22 9, Ex. 8.) The appeal was screened out a second time on July 23, 2015, and Plaintiff was specifically  
23 instructed to "clearly state why you are dissatisfied with your First Level review and resubmit your  
24 appeal within 30 days."<sup>4</sup> (ECF No. 61, Pl. Opp'n, Ex. 12.) Plaintiff did not seek further timely review  
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27 <sup>4</sup> Indeed, Section D of the inmate appeals form specifically states, in relevant part, "[i]f you are dissatisfied with the First  
28 Level response, explain the reason below[.]" (ECF No. 61, Pl. Opp'n, Ex. 12.) California Code of Regulations, Title 15  
section 3084.6 provides that an appeal may be rejected if it "makes a general allegation, but fails to state facts or specify an  
act or decision consistent with the allegations." Cal. Code Regs. tit. 15, § 3084.6(6).

1 of Appeal No. COR-15-03219, and therefore this appeal does not serve to exhaust the administrative  
2 remedies. (ECF No. 59-4, Ceballos Decl. ¶ 9, Ex. 8.)

3 4. Appeals Screened Out at the First Level of Review

4 According to the Inmate Appeals Tracking System, Plaintiff filed the following nine appeals  
5 during the relevant time frame which were screened out at the first level of review: (1) CSPC-3-14-  
6 00960 (issue classified as legal); (2) CSPC-5-15-00067 (issue classified as living conditions); (3)  
7 CSPC-5-15-00192 (issue classified as living conditions); (4) CSPC-5-15-00602 (issue classified as  
8 case info/records; (5) CSPC-5-15-01420 (issue classified as funds); (6) CSPC-5-15-01987 (issue  
9 classified as custody/classification); (7) CSPC-5-15-02083 (issue classified as legal); (8) CSPC-5-15-  
10 02437 (issue classified as living conditions); (9) CSPC-5-15-02939 (issue classified as  
11 custody/classification). (ECF No. 59-4, Ceballos Decl., Ex. 1.)

12 Appeal No. **CSPC-3-14-00960**, was rejected at the first level of review on February 11, 2014,  
13 with instructions for Plaintiff to submit a form 22 to his assigned counselor requesting a copy of his  
14 Appeal Log No. 13-6883 which was returned to him on February 5, 2014. (ECF No. 59-4, Ceballos  
15 Decl., Ex. 9.)

16 Appeal No. **CSPC-5-15-00067**, was rejected at the first level of review on January 6, 2015,  
17 with instructions for Plaintiff “to submit a Form 22 to his assigned CCI and ensure it is completed  
18 through section D prior to resubmission of this appeal. Upon completion, you may resubmit this  
19 appeal within 30 days of the last signature on the Form 22.” (ECF No. 59-4, Ceballos Decl., Ex. 10.)

20 Appeal No. **CSPC-5-15-00192**, was rejected at the first level of review on January 12, 2015,  
21 because Plaintiff had exceeded the allowable number of appeals filed in a 14-calendar day period  
22 pursuant to CCR 3084.1(f). Plaintiff was instructed that he could resubmit the appeal within the  
23 appropriate time constraints. (ECF No. 59-4, Ceballos Decl., Ex. 11.)

24 Appeal No. **CSPC-5-15-00602**, was rejected at the first level of review on February 2, 2015,  
25 pursuant to Cal. Code Regs., tit. 15, § 3084.6(b)(9), because it was obscured by pointless verbiage or  
26 voluminous unrelated documentation such that the reviewer could not reasonably be expected to  
27 identify the issue under appeal. Plaintiff was specifically instructed to “remove the one page lined  
28 legal filing page you are using to address your issue as you are only allowed one 602 and 602A to

1 address the issue. Likewise, you are instructed to submit a Form 22 to your assigned CCI requesting a  
2 copy of the appeal 13-06883 along with a signed Trust Withdrawal. You may resubmit this appeal  
3 within 30 days of the last signature on the Form 22. Prior to resubmission, you are instructed to attach  
4 a copy of your certified Trust Statement.” (ECF No. 59-4, Ceballos Decl., Ex. 12.)

5 Appeal No. **CSPC-5-15-01420**, was rejected at the first level of review on March 13, 2015,  
6 pursuant to Cal. Code Regs. tit. 15, § 3084.6(b)(8), because it involved multiple issues that did not  
7 derive from a single event, or were not directly related and cannot be reasonably addressed in a single  
8 response due to this fact. Plaintiff was advised that he could resubmit the unrelated issues separately  
9 using separate appeals. Plaintiff was further advised that he was still subject to the submission of one  
10 non-emergency appeal every 14 calendar days. (ECF No. 59-4, Ceballos Decl., Ex. 13.) The rejection  
11 notice also specifically stated that Plaintiff’s “issue regarding [his] restitution being incorrect is an  
12 unrelated issue to [his] legal mail charges. You must line through your issue regarding your legal mail  
13 and submit it on a new CDCR 602 at the lowest level possible for review. You have 30 days to correct  
14 and resubmit.” (Id.)

15 Appeal No. **CSPC-5-15-01987**, was cancelled at the first level of review on April 13, 2015,  
16 pursuant to Cal. Code Regs. tit. 15, § 3084.6(c)(4), because it exceeded the time limits even though  
17 Plaintiff had the opportunity to submit it within the prescribed time constraints. (ECF No. 59-4,  
18 Ceballos Decl., Ex. 14.)

19 Appeal No. **CSPC-5-15-02083**, was initially rejected at the first level of review on April 17,  
20 2015, pursuant to Cal. Code Regs. tit. 15, § 3084.6(b)(8), because it involved multiple issues that do  
21 no derive from a single event, or are not directly related and could not be reasonably addressed in a  
22 single response due to that fact. Plaintiff was advised that he could “resubmit the unrelated issues  
23 separately using separate appeals[,]” and he was “still submit to the submission of one non-emergency  
24 appeal every 14 calendar days.” Plaintiff was also specifically advised to “choose which issue to  
25 appeal and provide specifics relative [to] who, what and when.” (ECF No. 59-4, Ceballos Decl., Ex.  
26 15.)

27 The appeal was subsequently cancelled at the first level of review on April 27, 2015, pursuant  
28 to Cal. Code Regs. tit. 15, § 3084.6(c)(3), stating “[y]ou continue to submit a rejected appeal while

1 disregarding appeal staff's previous instructions to correct the appeal." It was further stated that the  
2 appeal was "cancelled for failure to follow instructions as provided in 695 04/17/2015. You have  
3 returned the appeal without clarification or choosing which issue to appeal. It is noted the 695 is black  
4 and the appeal was not clarified." (ECF No. 59-4, Ceballos Decl., Ex. 15.)

5 Appeal No. **CSPC-5-15-02437**, was rejected at the first level of review on May 5, 2015,  
6 pursuant to Cal. Code Regs. tit. 15, § 3084.6(b)(2), because he failed to demonstrate a material adverse  
7 effect upon his welfare. Material adverse effect was defined as "harm or injury that is measurable or  
8 demonstrable, or the reasonable likelihood of such harm or injury. In either case, the harm or injury  
9 must be due to any policy, decision, action, condition, or omission by the department or its staff."  
10 (ECF No. 59-4, Ceballos Decl., Ex. 16.)

11 Appeal No. **CSPC-5-15-02939**, was rejected at the first level of review on June 1, 2015,  
12 pursuant to Cal. Code Regs. tit. 15, § 3084.6(b)(11), because the appeal documentation was defaced or  
13 contaminated with physical/organic objects or samples as described in Cal. Code Regs. tit. 15, §  
14 3084.2(b)(4). Plaintiff was advised that he was "subject to disciplinary action and/or criminal charges  
15 when you submit an appeal with hazardous or toxic material that present a threat to the safety and  
16 security of staff, inmates, or the institution. Pursuant to CCR 3084.4 you are advised that this appeal  
17 is considered misuse or abuse of the appeals process. Repeated violations may lead to your being  
18 placed on appeal restriction as described in CCR 3084.4(g)." Plaintiff was further instructed "to  
19 rewrite your appeal and only attach this CDCR 695 to your new appeal. You have 30 days to correct  
20 and resubmit." (ECF No. 59-4, Ceballos Decl., Ex. 17.)

21 In each of the rejection/cancellation notices, Plaintiff was advised as follows:

22 Be advised that you cannot appeal a rejected appeal, but should take the corrective action  
23 necessary and resubmit the appeal within the timeframes specified in CCR 3084.6(a) and CCR  
24 3084.8(b). Pursuant to CCR 3084.6(c), once an appeal has been cancelled, that appeal may not  
25 be resubmitted. However, a separate appeal can be filed on the cancellation decision. The  
26 original appeal may only be resubmitted if the appeal on the cancellation is granted.

27 (ECF No. 59-4, Ceballos Decl., Exs. 9-17.)

28 Based on the evidence set forth above, Defendant M. Oliveira has met his burden that Plaintiff  
failed to exhaust the administrative remedies, and the burden now shift to Plaintiff "to come forward

1 with evidence showing that there is something in his particular case that made the existing and  
2 generally available administrative remedies effectively unavailable to him.” Albino, 747 F.3d at 1166.

3 Plaintiff initially argues that the appeal forms were not “always” readily available. (ECF No.  
4 70, Pl. Opp’n at 3.) Although exhaustion of the administrative remedies may be excused if the inmate  
5 prisoner can demonstrate that he did not have access to the grievance forms to file a timely grievance,  
6 Plaintiff fails to demonstrate that he should be excused. Here, Plaintiff makes nothing more than a  
7 conclusory and bald contention that the appeal forms were not always available. However, Plaintiff  
8 fails to set forth any plausible argument that he lacked access to the appropriate forms or knowledge of  
9 the procedural requirements. Indeed, Plaintiff fails to set forth a single instance in which he did not  
10 have access to the grievance forms. See, e.g., Marella v. Terhune, 568 F.3d 1024, 1026-17 (9th Cir.  
11 2009) (the prisoner spent more than fifteen working days in the hospital, in the infirmary, and then in  
12 administrative segregation after the incident grieved in the complaint. The Ninth Circuit remanded the  
13 case back to the district court to make factual findings “as to whether Marella had access to the  
14 necessary forms and whether he had the ability to file during his stay in the hospital and prison  
15 infirmary, or during the administrative lockdown.”); Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004)  
16 (exhaustion excused because inmate submitted affidavit establishing his efforts to obtain appeal forms  
17 including identifying each prison employees from whom he requested forms, the specific forms he  
18 requested, and providing summaries of each of the responses thereto); Miller v. Norris, 247 F.3d 736,  
19 738, 740 (8th Cir. 2001) (inmate established excuse when submitted evidence demonstrating his  
20 efforts to obtain the grievance forms including written request seeking an appeal form, that the prison  
21 did not respond, and that his mother attempted unsuccessfully to obtain the forms for him). Plaintiff  
22 has not met his burden in demonstrating that he should be excused because he lacked access to the  
23 appeal forms. In fact, Plaintiff’s assertion that prison official did not always allow him access to the  
24 appeals form is belied by his own appeal record. During the relevant time period, Plaintiff submitted a  
25 total of 16 grievances for institutional review and a total of 5 appeals for third level review. (ECF No.  
26 67-4, Goree Decl. ¶¶ 7-12, Ex. A; ECF No. 67-5, Voong Decl. ¶¶ 6-10, Ex. A.)

27 Plaintiff contends that the administrative remedies were rendered effectively unavailable  
28 because his appeals were improperly cancelled. See Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir.

1 2010) (screening out an inmate’s appeals for improper reasons may render administrative remedies  
2 unavailable.) Plaintiff specifically argues that because he was denied copies of necessary documents  
3 and requests for interviews, his appeals were cancelled due to evidentiary deficiencies, and therefore  
4 he was prevented from exhausting his administrative remedies. (ECF No. 70, Pl. Opp’n at 7-10.)

5 Plaintiff claims that he submitted inmate appeals regarding the cancellation of Appeal No.  
6 **COR 15-03219**, and cites to Exhibits 4, 5, 6, and 7 attached to his opposition. (Id. at 6.) However,  
7 none of these appeals demonstrate that Plaintiff properly appealed the cancellation of Appeal No.  
8 **COR 15-03219**, such that he exhausted the administrative remedies. Rather, Appeal No. CSPC-5-16-  
9 4404, was rejected at the first level of review on September 2, 2016, because it was “obscured by  
10 pointless verbiage or voluminous unrelated documentation such that the reviewer cannot be reasonably  
11 expected to identify the issue under appeal.” (ECF No. 70, Pl. Opp’n, Ex. 4.) It was rejected again at  
12 the first level of review on September 20, 2016, because the issue and requested could not be  
13 determined, and Plaintiff attached a multitude of inappropriate/irrelevant documents. (Id.) Plaintiff  
14 was instructed to “remove all irrelevant documentation to include previous appeals, and  
15 clarify/simplify your issue/requested action. You have thirty days to correct and resubmit.” (Id.)  
16 Plaintiff’s appeal was again rejected on September 28, 2016, because it contained to contain multiple  
17 issues that did not derive from a single event or were not related and could not be reasonably  
18 addressed in a single appeal. Plaintiff was advised to resubmit the unrelated issues using separate  
19 appeals. (Id.) There is no evidence that Plaintiff properly resubmitted or properly appealed the  
20 cancellation such that it can be deemed exhausted at the third level of review.

21 Appeal No. CSPC-5-16-00712, dated August 8, 2016, was rejected at the first level of review  
22 on February 9, 2016, with instructions for Plaintiff to remove a 2-page declaration used to supplement  
23 the appeal, and explain why the appeal is not a duplicate to 16-00302. (ECF No. 70, Pl. Opp’n Ex. 5.)  
24 It was also noted that Plaintiff appeared to be appealing issues within multiple 128Gs which are  
25 beyond time constraints to appeal. (Id.) The appeal was again cancelled at the first level of review on  
26 February 12, 2016, because it was a duplicate of a previous appeal upon which a decision had been  
27 rendered or was pending. (Id.) The appeal was cancelled again at the first level of review on February  
28 18, 2016, noting that he was attempting to submit an appeal that had been previously cancelled. (Id.)



1 Appeal No. CSPC-7-16-00302, dated January 17, 2016, was rejected at the first level of review  
2 on January 19, 2016, because it involved multiple issues that did not derive from a single event or  
3 were not directly related and could not be addressed in a single response. It also claimed untimely  
4 issues. (ECF No. 70, Pl. Opp'n, Ex. 6.) Plaintiff was specifically instructed "line through all  
5 references which are outside of the 12/29/2015 action. This appeal also has duplicate issues  
6 previously mentioned in COR 15-03219 which must be removed." (Id.) Thus, this appeal was not a  
7 proper review of Appeal No. COR 15-3219, which was rejected on July 23, 2015, because it was not  
8 timely filed.

9 Appeal No. CSPC-5-15-04273, dated July 21, 2015, was rejected at the first level of review on  
10 July 23, 2015, because Plaintiff was appealing the cancellation of an appeal at third level of review.  
11 (ECF No. 70, Pl. Opp'n, Ex. 7.) Plaintiff was instructed to follow the instruction within Section F of  
12 the CDCR 602 and mail the appeal directly to Third Level at the address provided. (Id.)

13 Plaintiff also attaches Appeal No. CSPC-7-16-00035, which was rejected on January 4, 2016,  
14 because it involved multiple issues. (ECF No. 70, Pl. Opp'n, Ex. 13.) Further, this appeal pertained to  
15 the loss of privilege and is immaterial to appeal COR-15—03219 and Plaintiff's due process claims  
16 against Defendant Oliveira. In addition, this appeal is untimely as it is dated six months after the July  
17 6, 2015 denial of appeal COR-15-03219 at the first level of review and more than 13 months after the  
18 November 20, 2014 hearing date, which serves as the basis for Plaintiff's due process claim.

19 While several of Plaintiff's inmate appeals were screened-out and/or cancelled during the  
20 relevant time period, the appeals did not include allegations against Defendant Oliveira, and even if  
21 any appeal was improperly cancelled it would not serve to exhaust the administrative remedies.<sup>5</sup>  
22 Thus, the screen-out letters for the inmate appeals attached to Plaintiff's opposition do not demonstrate  
23 exhaustion or excuse Plaintiff's failure to exhaust. In addition, the merits of Plaintiff's claims have no  
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26 <sup>5</sup> The cancellation itself does not render the administrative process unavailable when an inmate still has some remaining  
27 remedy. Cal. Code Regs. tit. 15, § 3084.6(a)(3), (c), (3). Because CDCR allows the inmate to appeal the rejection and/or  
28 cancellation decisions, in order to exhaust Plaintiff would have to establish that he appealed the cancellation. See, e.g.,  
Wilson v. Zubiate, 718 Fed App'x 479, 482 (9th Cir. 2017) ("[Plaintiff] had the possibility of appealing the cancellation  
decision and therefore cannot show that he was 'thwarted by improper screening.'"). Plaintiff did not appeal any cancelled  
appeal during the relevant time frame. (ECF No. 67-5, Voong Decl. ¶¶ 6, 10, Ex. A.)

1 relevance on whether he exhausted the administrative remedies.<sup>6</sup> Plaintiff’s conclusory allegations fail  
2 to excuse his failure to exhaust the available administrative remedies. Plaintiff had the opportunity to  
3 appeal the rejection and/or cancellation decisions but failed to properly do so. (ECF No. 67-5, Voong  
4 Decl. ¶ 10, Ex. A.); see, e.g., Cortinas v. Portillo, 754 Fed. Appx. 525, 528 (9th Cir. Oct. 31, 2018)  
5 (improper cancellation of an appeal does not necessarily render administrative remedies unavailable  
6 when an inmate can appeal an improper cancellation); see also Wilson v. Zubiata, 718 Fed. Appx. 479,  
7 482 (9th Cir. 2017) (same). Furthermore, the fact that Plaintiff continued to disobey and not follow  
8 the instructions provided to him does not excuse his requirement to exhaust the administrative  
9 remedies.

10       There is no evidence and nothing in the record demonstrates that Plaintiff was prevented from  
11 or hindered in complying with the exhaustion requirement by any act or omission on the part of any  
12 prison officials. Rather, the record and evidence demonstrate that Plaintiff’s failure to comply is  
13 attributable to his own actions and/or omissions. The totality of the documents submitted by both  
14 parties demonstrates that Plaintiff failed to exhaust the administrative remedies. Plaintiff’s  
15 unsubstantiated and conclusory allegations that the administrative remedies were somehow  
16 “unavailable” to him is insufficient to excuse the mandated exhaustion requirement. Accordingly,  
17 Plaintiff has not met his burden of proof in demonstrating that he exhausted the available  
18 administrative remedies or that his failure to do so should be excused. Rather, the undisputed facts  
19 demonstrate that Plaintiff failed to exhaust the available administrative remedies, and Defendant’s  
20 motion for summary judgment should be granted.

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27 <sup>6</sup> The Auditor’s Action, dated February 8, 2016, is irrelevant and does not excuse the mandated and timely requirement to  
28 exhaust the administrative remedies. (ECF No. 70, Pl. Opp’n at 8.)

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**IV.**

**RECOMMENDATIONS**

Based on the foregoing, it is HEREBY RECOMMENDED that:

1. Defendant Oliveira’s motion for summary judgment be granted; and
2. The claims against him be dismissed, without prejudice, for failure to exhaust the administrative remedies.

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

IT IS SO ORDERED.

Dated: June 6, 2019

  

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UNITED STATES MAGISTRATE JUDGE