

1 As previously stated, on February 12, 2020, Defendants filed the instant motion for summary
2 judgment. (ECF No. 16.) Plaintiff filed an opposition on March 4, 2020, and Defendants filed a reply
3 on March 10, 2020. (ECF Nos. 27, 28, 29.) On March 24, 2020, Plaintiff filed a second opposition
4 and a surreply.¹ (ECF Nos. 30, 31.)

5 II.

6 LEGAL STANDARD

7 A. Statutory Exhaustion Requirement

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

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

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

27 ¹ No further briefing on Defendants’ motion for summary judgment is permitted absent leave of court. The Court did not
28 grant Plaintiff leave to file a surreply, and the Court does not desire any further briefing on the motion. Accordingly,
Plaintiff’s surreply and second opposition were not properly filed and need not be considered.

1 judgment under Rule 56 only if the undisputed evidence, viewed in the light most favorable to the
2 plaintiff, shows he failed to exhaust. Id.

3 **B. Summary Judgment Standard**

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

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

25 **III.**

26 **DISCUSSION**

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

28 Plaintiff is a state prisoner in the custody of the California Department of Corrections and

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

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

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

19 **B. Summary of Allegations Underlying Plaintiff’s Claims**

20 On October 23, 2016, Plaintiff was informed by prison officials that another prisoner was
21 serving time for being a child molester.

22 Plaintiff filed a complaint to the prison law office on November 21, 2016, which resulted in an
23 investigation and video recording of Plaintiff.

24 On March 23, 2017, Plaintiff filed an inmate appeal against captain Gamboa and officer
25 Longoria for retaliation for filing prior inmate grievances.

26 On April 14, 2017, Plaintiff’s appeal was partially granted and Plaintiff was cleared of any
27 gang affiliation.

28 Plaintiff filed a third complaint with the prison law office for a murder cover-up.

In late 2017, two Black gang members who were known to be enemies were housed together
which resulted in one being killed. The incident was reported to the local news stations which caused

1 the victim's family to be contacted by members of the gang. Plaintiff filed several inmate appeals
2 against Warden D. Davey for misconduct.

3 On August 6, 2017, Plaintiff was attacked by inmate Abella while Plaintiff was secured and
4 strapped to an ambulance hospital gurney and was attacked by another inmate. Defendants C. Baker,
5 J. Navarro and John Does 1 and 2, permitted inmate Abella to be left unhandcuffed and to attack
6 Plaintiff in retaliation for filing prior complaints.

7 **C. Statement of Undisputed Facts**

8 1. The California Department of Corrections and Rehabilitation (CDCR) uses a program
9 called the Inmate Appeals Tracking System (IATS) to electronically log and track non-medical
10 appeals through all levels of review. (Pollard Decl. ¶ 4; Ceballos Decl. ¶ 4; Vasquez Decl. ¶ 3.)

11 2. At all relevant times, CDCR, Calipatria State Prison (CAL) and California State Prison,
12 Corcoran (CSP-COR) had an administrative process available for inmates to submit appeals. (Pollard
13 Decl. ¶ 4; Ceballos Decl. ¶ 4; Vasquez Decl. ¶ 3.)

14 3. The CAL and CSP-COR Appeals Office receive, review, and track all non-medical
15 inmate appeals submitted for first and second-level review concerning events there. Accepted first
16 and second-level appeals are assigned a log number in the institutions' IATS system (IATS I & II).
17 (Pollard Decl. ¶¶ 2-5; Ceballos Decl. ¶¶ 2-5.)

18 4. CDCR's Office of Appeals (OOA) receives, reviews, and maintains inmates' non-
19 medical appeals accepted at the third and final level of administrative review. When OOA receives an
20 appeal, it is assigned a third level tracking number and entered into OOA's computer tracking system
21 (IATS III). (Vasquez Decl. ¶¶ 2-3.)

22 5. The events that are the subject of this lawsuit occurred at CSP-COR on August 6, 2017.
23 (Am. Compl., ECF NO. 9 at 8.)

24 6. On September 5, 2017, Plaintiff transferred out of CSP-COR, and he arrived at CAL on
25 September 6, 2017. (Mathison Decl. ¶ 2, Ex. A.)

26 7. Plaintiff's administrative appeal of the lawsuit events, institutional log no. CAL-17-
27 01322, was received by the CAL Appeal Office on September 11, 2017. The appeal was forwarded to
28

1 the CSP-COR Appeals Office for review, with notice to Plaintiff of that action. (Pollard Decl. ¶ 7, Ex.
2 B.)

3 8. The appeal was received by the CSP-COR Appeals Office on September 15, 2017, and
4 assigned log no. CSPC-8-17-04927. In the appeal Plaintiff alleged that on August 6, 2017, as two
5 unknown correctional officers stood by, he was subjected to excessive force when another inmate
6 attempted to assault him. The appeal does not identify the names of any prison staff involved in the
7 incident. The appeal was bypassed for the first level review. In a second level decision dated October
8 20, 2017, the appeal was partially granted, in that an appeal inquiry (investigation) was conducted and
9 it was determined that prison staff did not violate CDCR policy with respect to the issues appealed. In
10 an amended second level decision dated March 17, 2018, the same decision was reached, adding a
11 note that on November 3, 2017, the investigation report was completed, and determined policy was not
12 violated and no further action was necessary. (Ceballos Decl. ¶ 7, Ex. B.)

13 9. The appeal was received by the OOA for third level review on April 20, 2018, and
14 assigned a Third Level Review No. 1805816. On July 17, 2018, the appeal was cancelled at the third
15 level for exceeding time constraints, because the appeal was initially submitted at the institutional
16 level more than thirty days after the appealed events occurred. The cancellation notice informed
17 Plaintiff that once an appeal had been cancelled it may not be resubmitted, but that a separate appeal
18 could be filed on the cancellation decision. (Vasquez Decl. ¶ 6.)

19 10. Plaintiff did not submit an appeal of the cancellation decision. (Vasquez Decl. ¶ 6.)

20 11. From the time of the subject events on August 6, 2017, until Plaintiff filed this lawsuit
21 on August 27, 2018, he submitted no other appeals that concerned the lawsuit events. (Pollard Decl. ¶
22 8; Ceballos Decl. ¶ 8; Vasquez Decl. ¶ 7.)

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

24 Defendants argue that Plaintiff's administrative appeal relating to the events at issue herein
25 was cancelled at the third level of review for exceeding the time limits, and Plaintiff did not appeal the
26 cancellation. In addition, the relevant appeal did not name or identify the Defendants in order to
27 properly put the prison on notice of the issues.
28

1 In opposition, Plaintiff argues that he filed the grievance on September 5, 2017, after being
2 retaliated against and subjected to excessive force. Plaintiff further submits that he was not given any
3 timely reports of the named correctional officers which is why he was not able to attach any of the
4 incident reports to his grievance.

5 Viewed in the light most favorable to Plaintiff, and drawing all reasonable inferences in
6 Plaintiff's favor for purposes of this motion, Defendants have not met their burden of proof in
7 demonstrating that Plaintiff failed to exhaust the "available" administrative remedies.

8 As an initial matter, there is no dispute that CAL and CSP-COR had an administrative process
9 available to Plaintiff and that Plaintiff availed himself of the process.

10 The parties agree that Plaintiff submitted Appeal Log No. CSPC-8-17-04927 concerning the
11 events at issue in this action. It is undisputed that the events at issue in this action took place on
12 August 6, 2017, which triggered the applicable 30-day deadline. Defendants submit the declaration of
13 D. Pollard, Appeals Coordinator at CAL, who declares that Plaintiff's appeal (Appeal Log No. CAL-
14 O-17-01322) on September 11, 2017, and the appeal was forwarded to CSP-COR Appeals Office for
15 review. (Pollard Decl. ¶ 7.) J. Ceballos, Appeals Coordinator at CSP-COR, declares that the appeal
16 was received at CSP-COR on September 15, 2017. (Ceballos Decl. ¶ 7.) The appeal was bypassed for
17 the first level of review. (Id.) It was then denied at the second level review on October 20, 2017.
18 (Id.) An amended second level decision was issued on March 17, 2018, the same decision was
19 reached, with a notation that on November 3, 2017, the investigations was completed and it was
20 determined that policy was not violated. (Id.) Plaintiff then submitted the appeal to the third and final
21 level of review. On July 17, 2018, the appeal was denied at the third level of review as untimely
22 finding that the appeal was not received until September 11, 2017. (Vasquez Decl. ¶ 6, Ex. B.)
23 Defendants argue that Plaintiff has not exhausted the administrative remedies because the appeal was
24 denied at the third level of review as untimely.

25 Defendants do not dispute (and it is therefore undisputed) that Log No. CSPC-8-17-04927 is
26 self-dated September 5, 2017. It is further undisputed that the appeal was stamped received by the
27 CAL Appeals Office on September 11, 2017, at the second level of review, which Defendants contend
28 was untimely under the 30-day deadline. However, Defendants reliance on section 3084.8 does not

1 support their argument. Section 3084.8(b), states “an inmate or parolee must submit the appeal within
2 30 calendar days of (1) [t]he occurrence of the evidence or decision being appealed...[¶].” Thus, the
3 plain language of the regulation states that Plaintiff need only *submit* the grievance within thirty
4 calendar days of the incident being appealed. The regulation does not contain language that supports
5 Defendants’ contention that the Appeals Office must actually *receive* the grievance by such date.
6 Defendants provide no evidence to determine the date in which Plaintiff submitted his appeal to the
7 second level of review, and the date of the appeal (i.e., September 5, 2017) is within the 30-day time
8 frame. Therefore, the rejection of Appeal Log No. CSPC-8-17-04927 as untimely was improper. See
9 McBride v. Lopez, 807 F.3d 982, 986 (9th Cir. 2015) (the third level decision rejecting Plaintiff’s
10 appeal as untimely was improper. A prison’s improper screening of a grievance can render the
11 administrative remedy process unavailable) (quoting Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir.
12 2010).

13 Defendants further argue that Plaintiff was required to appeal the third level cancellation of his
14 appeal and his failure to do so waived any claim that the cancellation was improper. However,
15 Defendants have failed to demonstrate that Plaintiff was required to appeal the cancellation in order to
16 exhaust the administrative remedies. Section 3084.6(e), cited in the third level cancellation, states that
17 “the application of the rules provided in subsection 3084.6(c) to the cancelled appeal may be
18 separately appealed..” Cal. Code Regs. tit. 15, § 3084.6(e). This language is permissive, not
19 mandatory, and Defendants provide no other authority that the third level cancellation must be
20 appealed in order to satisfy the exhaustion requirement.

21 Lastly, with regard to Defendants’ argument that Plaintiff failed to name the individuals in the
22 grievance, the Court finds it to be without merit. First, Plaintiff submitted Appeal Log No. CSPC-8-
23 17-04927 to all “available” levels, and the appeal was not rejected for failure to name any of the prison
24 officials. Because the appeal was improperly rejected as untimely, the Court declines to find that
25 Plaintiff failed to exhaust based on a procedural defect that was not imposed. Second, in the initial
26 appeal, Plaintiff specifically stated that he could not identify any of the staff members in the
27 immediate area and identified the individuals as unknown correctional officers who were standing by
28 the gurney and permitted the inmate to jump up and charge Plaintiff. (Vasquez Decl., Ex. B; Pl.’s

1 Opp'n, II.) The regulations require only that Plaintiff provide as much information as available to
2 him. See Cal. Code Regs. tit. 15, § 3084.2(a)(3) (“If the inmate or parolee does not have the requested
3 identifying information about the staff member(s) [name, title or position], he or she shall provide any
4 other available information that would assist the appeals coordinator in making a reasonable attempt to
5 identify the staff member(s) in question.”)

6 Based on the evidence in record, Defendants have filed to meet their burden to show that
7 Plaintiff did not exhaust the available administrative remedies, and Defendants’ motion for summary
8 judgment should be denied.

9 **IV.**
10 **RECOMMENDATION**

11 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants’ exhaustion-related
12 motion for summary judgment be DENIED.

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

20
21
22 IT IS SO ORDERED.

23 Dated: April 16, 2020


UNITED STATES MAGISTRATE JUDGE