

1 unauthorized reply to that response, which the magistrate judge struck. (Doc. Nos. 71 & 72.)

2 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
3 *de novo* review of this case. Having carefully reviewed the file, including plaintiff’s objections
4 and defendant’s response to those objections, the court declines to adopt the findings and
5 recommendations.

6 DISCUSSION

7 A. General Standards for Exhaustion

8 The Prison Litigation Reform Act of 1995 (“PLRA”), 42 U.S.C. § 1997e, provides that
9 “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or
10 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
11 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). California’s
12 regulations define what constitutes proper exhaustion. *Marella v. Terhune*, 568 F.3d 1024, 1027
13 (9th Cir. 2009

14 Because only *available* administrative remedies must be exhausted prior to filing suit, a
15 prisoner need not exhaust unavailable administrative remedies. The United States Supreme Court
16 has noted three general grounds for unavailability. *Ross v. Blake*, ___U.S.____, 136 S. Ct. 1850,
17 1859 (2016). First, administrative procedure may be “a simple dead end—with officers unable or
18 consistently unwilling to provide any relief to aggrieved inmates.” *Id.* Second, “an
19 administrative scheme might be so opaque that it becomes, practically speaking, incapable of
20 use.” *Id.* Third, administrative procedures are unavailable “when prison administrators thwart
21 inmates from taking advantage of an administrative grievance process through machination,
22 misrepresentation, or intimidation.” *Id.* at 1860. This list of how administrative remedies may be
23 rendered unavailable to a prisoner is non-exhaustive. *Andres v. Marshall*, 867 F.3d 1076, 1079
24 (9th Cir. 2017).

25 B. Plaintiff’s Failure to File Grievance Within Thirty Days

26 Under the then-existing regulations for the California Department of Corrections and
27 Rehabilitation, plaintiff was required to submit his inmate appeal on a 602 form within 30

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1 calendar days of the relevant event. Cal. Code Reg. tit 15 § 3084.8(b) (2016).² The parties agree
2 that plaintiff did not submit an inmate appeal within thirty days of his allegedly being shot on
3 March 3, 2016 at Wasco State Prison (WSP). The central dispute in connection with the pending
4 motion for summary judgment is whether administrative remedies were available to plaintiff.

5 In his declaration submitted in opposition to the motion plaintiff states that he was in the
6 hospital and CTC (presumably, the Correctional Treatment Center at WSP)³ for a total of 47
7 days. (Doc. No. 40 at 12.) It is undisputed that plaintiff lacked access to 602 inmate appeal
8 forms while he was hospitalized for seven days, and defendant admitted that the hospital “did not
9 have the inmate 602 appeal process established by CDCR under Title 15 of the California Code
10 of Regulations. (*Id.* at 3 (plaintiff’s declaration), 206 (defendant’s response to request for
11 admission number 4).) Thus, for the first seven days, the inmate grievance procedure was
12 unavailable to plaintiff. *See Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (reversing
13 the district court’s grant of motion for summary judgment on the issue of exhaustion and
14 remanding for further factfinding because the plaintiff stated that the hospital he was in lacked
15 inmate grievance forms and holding that “[i]f Marella was unable to file within the fifteen-day
16 [now 30-day] filing period, his failure to file timely does not defeat his claim”).

17 Plaintiff argues that after he was transferred to CTC, administrative remedies were still
18 unavailable to him because he had no way of knowing the proper procedure to file them. Plaintiff
19 was issued a handbook that contained information concerning the inmate grievance process when
20 he first arrived in prison on February 16, 2016. (Doc. No. 40 at 1 (plaintiff’s declaration).) On
21 March 3, 2016—just over two weeks later—plaintiff was shot. After leaving the hospital, he was
22 admitted to CTC. There, he was not permitted to have in his possession either the inmate
23 handbook or any of his other property for his first 30 days at CTC. (*Id.* at 4 (plaintiff’s

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25 ² On March 25, 2020, and effective as of June 1, 2020, California Code of Regulations title 15,
26 §§ 3084 through 3084.9 were repealed. *See* Cal. Code Regs. tit. 15, § 3084.6 at ¶ 10. All citations
to the California Code of Regulations in this order refer to the code before the repeal.

27 ³ In defendant’s response to a request for admission that refers to “CTC,” defendant assumed that
28 CTC referred to the Correctional Treatment Center of plaintiff’s institution of confinement. (Doc.
No. 40 at 207, response to request for admission number 8.)

1 declaration), 207 (defendant’s response to request for admission number 9).) Plaintiff avers that
2 there were no posters or other information in CTC that alerted him to the inmate grievance
3 procedure. (*Id.* at 3 (“While at CTC I did not see any informational posters informing of the
4 grievance process, I did not have knowledge of the process, I did not have a Title 15 orientation
5 handbook, I was never given a 602, nor even writing materials.”).) Accordingly, plaintiff argues
6 that the administrative process remained unavailable to him while he was at CTC. (*Id.* at 48.)

7 Defendant argues that plaintiff’s ignorance of the regulations is not an excuse and that he
8 had been given the relevant orientation manual. (Doc. No. 49 at 6.)

9 Remedies that are “essentially unknowable—so that no ordinary prisoner can make sense
10 of what it demands” are “unavailable.” *Ross*, 136 S. Ct. at 1859. In the Ninth Circuit, “the
11 particular circumstances of the prisoner’s case must be considered when deciding whether
12 administrative remedies were properly exhausted,” including whether the inmate grievance
13 procedure is “essentially unknowable.” *Fuqua v. Ryan*, 890 F.3d 838, 850 (9th Cir. 2018); *see*
14 *also Albino v. Baca*, 747 F.3d 1162, 1177 (9th Cir. 2014) (administrative remedies at jail were
15 unavailable where the manual describing procedure was available only to staff and inmate
16 grievance forms had to be requested by detainees but were not given to the plaintiff upon his
17 request); *cf. Wilson v. Zubiato*, 718 F. App’x 479, 482 (9th Cir. 2017) (administrative scheme was
18 *not* “essentially unknowable” because, in part, prisoner “had access to CDCR regulations”).⁴

19 Here, plaintiff admits that he was given a handbook that had the details about how to file
20 inmate grievances. (*See* Doc. No. 40 at 1.) However, viewing the evidence in the light most
21 favorably to plaintiff as the non-moving party, administrative remedies were unavailable to him
22 for the first 37 days of his incarceration at CTC. The evidence on summary judgment is that
23 plaintiff was not permitted to have his handbook at CTC and he avers that there were no posters
24 or other available information describing the proper procedure. (*Id.* at 3.) Without any
25 reasonable way to know what the relevant administrative grievance system is, plaintiff cannot be
26 said to have had access to it.

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28 ⁴ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

1 Defendant argues that ignorance of the requirements is no defense, citing the decision in
2 *Stowers v. Hrabko*, 2:18-cv-2177-DB P, 2020 WL 6075654 at * 6 (E.D. Cal. Oct. 15, 2020),
3 *report and recommendation adopted*, 2020 WL 6582265 (E.D. Cal. Nov. 10, 2020). (Doc. No.
4 49 at 6.) That case is not on point, since there, “there [wa]s no competent evidence that the legal
5 standards for administrative appeals and regarding the exhaustion requirement were not available
6 to plaintiff.” *Stowers*, 2020 WL 6075654 at * 6. Here, plaintiff would have to have read and
7 remembered the requirements appearing in the prison handbook that he had access to for only
8 approximately two weeks upon his arrival. That expectation is unreasonable and unsupported by
9 case law. Even lawyers and judges must regularly consult legal texts to study their details. Thus,
10 the court finds that plaintiff has carried his burden to show that administrative remedies were
11 unavailable to him for the first 37 days after the alleged incident occurred.

12 **C. Appeal Log Number WSP-O-17-02402**

13 Nevertheless, even if prisoners cannot file an inmate appeal within 30 days, they are still
14 not necessarily excused from exhaustion of administrative remedies. Late appeals may be
15 accepted when an inmate lacked “the opportunity to submit within the prescribed time
16 constraints.” Cal. Code Reg., tit. 15 § 3084.6(c)(4); *cf. Marella*, 568 F.3d at 1027 (holding that
17 under this section and prison’s interpretation of it, “the prison’s regulations explicitly create an
18 exception to the timely filing requirement”). Thus, plaintiff was still required to file an inmate
19 appeal outside the prescribed time constraints, if such an appeal was available, in order to exhaust
20 his administrative remedies. Plaintiff contends that his appeal log number WSP-O-17-02402 did
21 so.

22 1. Relevant Facts

23 Plaintiff filed WSP-O-17-02402 on a form 602 as a reasonable accommodation request on
24 June 26, 2017 from Pelican Valley State Prison (PVSP), which is where plaintiff was confined at
25 the time. (Doc. No. 25-6 at 3 ¶ 10.) That appeal was routed to WSP, which is where plaintiff was

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1 shot. (*Id.*) There, prison officials converted the request to a 602 appeal. (Doc. No. 25-6 ¶ 10.)⁵

2 The appeal stated as follows:

3 I need help filing disability because I can't work a formal two
4 handed job the rest of my life unless I can get this fixed. I need the
5 state to be accountable for its actions: Excessive force, shooting me
6 in the head, paralysis. I need help performing basic activities. I
7 need everyone to stop playing stupid and figure out what you
8 caused because my hand hurts all day long. I can't sleep, I can't
9 eat, I can't function normally. I need an MRI.

10 (Doc. No. 25-6 at 59 (spelling and punctuation modified).)

11 On June 27, 2017, prison officials cancelled the inmate grievance. The stated reason was
12 because plaintiff was “appealing an issue which occurred on March 3, 2016.” (*Id.* at 57 (spelling
13 corrected).) According to F. Feliciano, the appeals coordinator at WSP, “[t]he WSP office sent a
14 letter to Plaintiff on June 27, 2017, notifying him that Appeal No. WSP-[O]-17-024202 was
15 cancelled as untimely.” (Doc. No. 25-6 at 3 ¶ 10.) Plaintiff contends he did not receive that letter
16 until after he filed this lawsuit in 2019. (Doc. No. 40 at 29, 60).

17 Appeals coordinator Feliciano also states that he is “informed and believe[s]” that plaintiff
18 told interviewers that he did not believe excessive force was used and that he was “just attempting
19 to address his medical needs as a result of the incident.” (Doc. No. 25-6 at 4 ¶ 13.) Plaintiff
20 disputes this contention in his declaration. (Doc. No. 40 at 57.)

21 2. Untimeliness of Appeal

22 Under the then-existing regulations, an inmate appeal could be cancelled if it was not filed
23 in time “even though the inmate or parolee had the opportunity to submit within the prescribed
24 time constraints.” Cal. Code Reg. tit. 15 § 3084.6(c). The court has already determined that
25 plaintiff did not have the opportunity to submit his inmate appeal within the prescribed time
26 constraints. Thus, the first issue is whether plaintiff waited too long to file WSP-O-17-02402.

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28 ⁵ Defendants do not argue that WSP-O-17-02402 was improper as being filed as a reasonable accommodation request. (*See* Doc. No. 25-1 at 7–8 (in memorandum in support of motion for summary judgment, referring to the reasonable accommodation request as an inmate grievance); 49 at 7–9 (arguing WSP-O-17-02402 did not exhaust administrative remedies, but for other reasons).)

1 In *Warner v. Cate*, No. 1:12-cv-01146-LJO-MJS (PC), 2015 WL 9480625, at *3–5 (E.D.
2 Cal. Dec. 29, 2015), *report and recommendation adopted*, 2016 WL 696422 (E.D. Cal. Feb. 22,
3 2016), an inmate complained of an incident that occurred on January 19, 2011. However, the
4 plaintiff was unable to file a timely inmate appeal until February 25, 2011, which was over 30
5 days later. *Id.* at *4–5. The plaintiff eventually filed an appeal in December 2011—around nine
6 months after he was able to do so. *Id.* at *5–6. The defendants argued that the plaintiff did not
7 exhaust his administrative remedies because December 2011 was too late to file the inmate
8 appeal. The court found that the appeal was improperly cancelled as untimely because the
9 plaintiff “did not have the ability or the opportunity to file an appeal within the first thirty days,
10 excusing the untimeliness of his appeal.” *Id.* at *6.

11 The same logic applies here. Plaintiff was unable to file an appeal within 30 days but
12 filed many months after he became able to do so. The relevant regulations did not give a timeline
13 for when plaintiff had to file an inmate grievance given his initial lack of opportunity to submit a
14 timely grievance. Defendant points to no regulations or case law establishing any such
15 timeframe. Thus, as in *Warner*, the untimeliness of appeal WSP-O-17-02402 does not defeat
16 plaintiff’s claims.

17 Defendant next argues that plaintiff filed other inmate grievances between when he was
18 released from CTC and June 26, 2017, indicating that plaintiff was aware of the grievance system
19 and could have used it earlier. However, as noted above, defendant points to no regulations or
20 case law establishing the proper timeframe for the filing of excusably late appeals. It is CDCR’s
21 responsibility to craft such regulations; the court cannot create regulations that do not exist. *See*
22 *Marella*, 568 F.3d at 1027 (holding that California’s regulations define proper exhaustion). Thus,
23 defendant has not shown WSP-O-17-02402 was untimely.

24 3. Appeal of Cancellation

25 Defendant also argues that plaintiff was required to file an inmate appeal concerning his
26 cancelled grievance, and his failure to do so means he did not exhaust his administrative
27 remedies. (Doc. No. 49 at 8–9.) A similar issue arose in *Garland v. California Department of*
28 *Corrections*, No. 2:16-cv-01856-JAM-AC P, 2017 WL 283395 (E.D. Cal. June 30, 2017), *report*

1 *and recommendation adopted*, Doc. No. 36 (E.D. Cal. Sept. 29, 2017). There, the plaintiff
2 contended he had never received a cancellation notice, and the defendants did not submit
3 evidence to refute that contention. *Id.* at *6–7. The court noted that the cancellation notice did
4 not contain plaintiff’s address and that the appeals coordinator’s declaration “states in pertinent
5 part only that ‘a true copy of the cancellation letter sent to Plaintiff regarding appeal . . . is
6 attached as Exhibit C.’ ” *Id.* at *6. Accordingly, the court found a disputed issue of material fact
7 as to whether the cancellation notice had been received and recommended denying the
8 defendants’ motion for summary judgment on exhaustion grounds. *Id.* at *7–8.

9 Here too, plaintiff has created a genuine dispute of material fact about whether he received
10 the cancellation notice. As in *Garland*, plaintiff declares he did not receive the notice. (Doc. No.
11 40 at 29, 60.) And, as in *Garland*, the notice itself does not show it was sent. It contains no
12 address or other indications of being sent; there is no attached envelop; and appeals coordinator
13 Feliciano’s declaration that “[t]he WSP office sent a letter to Plaintiff on June 27, 2017, notifying
14 him that Appeal No. WSP-B-17-024202 was cancelled as untimely,” (Doc. No. 25-6 ¶ 10), is
15 substantially the same as the appeals coordinator’s declaration submitted in *Garland*.
16 Accordingly, viewing the facts most favorably to plaintiff, he was not required to file an appeal
17 with respect to the cancellation.

18 4. Appeal Itself

19 Next, defendant contends that appeal log number WSP-O-17-02402 was defective because
20 it did not comply with prison regulations and because it failed to put prison authorities on notice
21 that plaintiff was alleging that the defendant used excessive force. (Doc. No. 49 at 7–8.)

22 To exhaust administrative remedies, an inmate grievance must provide the prison with
23 adequate notice of the problem and provide the level of detail required by the prison’s
24 regulations. *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010). There are two relevant caveats.
25 The first caveat is that “a prisoner exhausts ‘such administrative remedies as are available’ under
26 the PLRA despite failing to comply with a procedural rule if prison officials ignore the procedural
27 problem and render a decision on the merits of the grievance at each available step of the
28 administrative process.” *Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016) (quoting 42 U.S.C.

1 § 1997e(a)). The court in *Reyes* relied on the rationales underlying the inmate grievance system.
2 “[T]he primary purpose of a grievance is to alert the prison to a problem and facilitate its
3 resolution, not to lay groundwork for litigation.” *Id.* at 659. Moreover, “[t]he grievance process
4 is only required to alert prison officials to a problem, not to provide personal notice to a particular
5 official that he may be sued.” The second caveat is that when prison officials improperly screen
6 an appeal, they “render[] administrative remedies effectively unavailable such that exhaustion is
7 not required under the PLRA.” *Sapp*, 623 F.3d at 823. That is because improperly screened
8 appeals deny inmates the opportunity to “pursue the necessary sequence of appeals, and
9 administrative remedies are therefore plainly unavailable.” *Id.*

10 Here, defendant contends that plaintiff’s appeal was insufficient for several reasons. First,
11 defendant argues that the inmate appeal did not notify prison officials that plaintiff complained
12 about defendant’s alleged use of excessive force. (Doc. No. 49 at 8.) That is incorrect because
13 prison officials clearly knew what situation plaintiff was referring to. It is true that the appeal did
14 not mention WSP or the date plaintiff was shot. However, PVSP officials routed the appeal to
15 WSP, and officials cancelled the appeal as untimely because it concerned “an issue which
16 occurred on March 3, 2016.” (Doc. No. 25-6 at 57 (spelling corrected).) Thus, the appeal clearly
17 put prison officials on notice that plaintiff was complaining about the March 3, 2016 incident at
18 WSP.

19 Second, defendant contends that the appeal concerned a request for medical assistance and
20 did not relate to excessive use of force. However, prison officials treated the appeal as raising a
21 claim of excessive use of force when they routed it to WSP and denied it as untimely. Moreover,
22 the appeal itself clearly stated that plaintiff wanted the state to be “accountable” for the
23 “[e]xcessive force, shooting me in the head, paralysis.” (Doc. No. 25-6 at 59.)

24 Defendant further argues the appeal was about medical assistance because, according to
25 appeals coordinator Feliciano’s declaration, plaintiff told unnamed prison officials that the appeal
26 concerned a request for medical assistance, not the use of excessive force. This argument fails no
27 better. The relevant part of Feliciano’s declaration was made on information and belief, not
28 personal knowledge. (Doc. No. 25-6 at 4 ¶ 13 (“As a part of that use of force appeal inquiry, I am

1 informed and believe Mr. Felde was interviewed . . .”).) Statements made “on information and
2 belief” are not entitled to any weight on summary judgment because declarants lack personal
3 knowledge. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir.1995). Even if that
4 declaration were based on personal knowledge, plaintiff disputes this contention in his opposition.
5 (Doc. No. 40 at 57 (averring that he told staff he believed excessive force was used).)

6 Finally, defendant argues that plaintiff’s failure to follow the prison’s regulations rendered
7 the screening proper. Indeed, plaintiff failed to “list all staff member(s) involved and [to]
8 describe their involvement in the issue.” Cal. Code Reg. tit. 15 § 3084.2(a)(3). However, the
9 court must again assume plaintiff did not receive the cancellation notice. Had he received it, he
10 could have provided a reason why his untimely inmate appeal should have been accepted. *See*
11 Cal. Code. Reg. tit. 15 § 3084.6(a)(3) (“[A] cancelled appeal may later be accepted if a
12 determination is made that cancellation was made in error or new information is received which
13 makes the appeal eligible for further review.”). Eventually, his appeal would have been
14 reviewed. It might thereafter have been rejected for failing to provide enough information. *See*
15 Cal. Code of Regs., tit. 15, § 3084.6(b)(6) (appeal may be rejected when it “makes a general
16 allegation, but fails to state facts or specify an act or decision consistent with the allegation”).
17 But prison officials must give notice for the deficiencies in rejected appeals and provide inmates
18 the opportunity to correct those deficiencies. *Id.* § 3094.6(a)(2) (“An appeal that is rejected
19 pursuant to subsection 3084.6(b) may later be accepted if the reason noted for the rejection is
20 corrected and the appeal is returned by the inmate or parolee to the appeals coordinator within 30
21 calendar days of rejection.”). Failing to provide plaintiff with the cancellation notice deprived
22 him of the opportunity to exhaust these remedies. Such improper screening “render[ed]
23 administrative remedies effectively unavailable such that exhaustion is not required under the
24 PLRA.” *Sapp*, 623 F.3d at 823.

25 **D. Evidentiary Hearing**

26 Defendant requests that the court hold an evidentiary hearing to resolve any genuine
27 disputes of material fact that preclude the granting of summary judgment with respect to
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1 exhaustion. (Doc. No. 25-1 at 8.) Such a hearing is proper in this situation. *See Albino*, 747 F.3d
2 at 1169–71.

3 **CONCLUSION**

4 Accordingly,

- 5 1. The findings and recommendations issued on March 26, 2021 (Doc. No. 67) are
6 not adopted;
- 7 2. Defendant Wilkins’s motion for summary judgment due to plaintiff’s alleged
8 failure to exhaust available administrative remedies (Doc. No. 25) is denied
9 without prejudice; and
- 10 3. This case is referred back to the magistrate judge for the scheduling of an
11 evidentiary hearing on the issue of exhaustion, the making of factual findings in
12 that regard and further proceedings as deemed necessary and appropriate.

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14 IT IS SO ORDERED.

15 Dated: July 30, 2021

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18 UNITED STATES DISTRICT JUDGE
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