

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

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL THOMAS DE' ARMOND JR.,  
Plaintiff,  
v.  
J. WHITE,  
Defendant.

Case No. 1:19-cv-01695-JLT-HBK (PC)  
FINDINGS AND RECOMMENDATIONS TO  
GRANT DEFENDANT'S EXHAUSTION-  
BASED MOTION FOR SUMMARY  
JUDGMENT<sup>1</sup>  
(Doc. No. 42)  
FOURTEEN-DAY OBJECTION PERIOD

Pending before the Court is Defendant's motion for summary judgment filed on November 5, 2021. (Doc. No. 42, "MSJ"). Plaintiff did not file any opposition and the time to do so has expired. *See* docket, *see also* L.R. 230(1). For the reasons below, the undersigned recommends the district court grant Defendant's MSJ.

**I. BACKGROUND**

**A. Summary of Plaintiff's Complaint**

Plaintiff, Michael Thomas De'Armond, Jr. ("De'Armond Jr." or "Plaintiff"), a state

---

<sup>1 1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

1 prisoner, is proceeding pro se on his initial complaint filed under 42 U.S.C. § 1983. (Doc. No. 1).  
2 Plaintiff's complaint alleged on December 19, 2018, Defendant White, a correctional officer at  
3 California Correctional Institute ("CCI"), "blind sighted" him by spraying him with chemical  
4 spray in response to Plaintiff referring to Defendant and his co-workers as the mythical prison  
5 gang, "The Green Wall." (Doc. No. 1 at 3). Once he was sprayed, Plaintiff immediately assumed  
6 the prone position on his own. (*Id.*). While in the prone position, Plaintiff alleges unnamed  
7 individuals repeatedly punched and kicked him and pulled his hair. (*Id.*). The Court's screening  
8 order found the Complaint stated a cognizable Eighth Amendment excessive use of force claim  
9 against Defendant White when he sprayed and beat Plaintiff without cause. (Doc. No. 11).

### 10 **B. Defendant's Exhaustion-Based Motion for Summary Judgment**

11 Defendant timely filed the instant MSJ. In support, Defendant included statements of  
12 undisputed facts (Doc. No. 42-1); *Rand* Notice; (Doc. No. 42-2); Declaration of Howard E.  
13 Moseley, Assistant Director of the Office of the Appeals (Doc. No. 42-3); Plaintiff's Appeal  
14 History (Doc. No. 42-3 at 5); Letter dated June 7, 2019 from the Office of Appeals with  
15 documents from the appeal process (Doc. No. 42-3 at 7-14); Declaration of Jennifer Stone,  
16 Grievance Coordinator for the Office of Grievances at California Correctional Institution (Doc.  
17 No. 42-4, 1-5); Appeals Tracking System for Plaintiff (Doc. No. 42-4 at 7); Memorandum dated  
18 January 26, 2019 with attachments regarding the second level response (Doc. No. 42-4 at 9-15);  
19 and Memorandum dated July 11, 2019 with attachments regarding the second level response  
20 (Doc. No. 42-4 at 17-27). Defendant contends the uncontroverted evidence proves Plaintiff did  
21 not fully exhaust his available administrative grievances regarding his Eight Amendment claim  
22 against Defendant White.

### 23 **C. Plaintiff's Opposition to Exhaustion-Based MSJ**

24 Plaintiff has not filed any opposition to Defendant's MSJ. *See* docket. Defendant served  
25 the MSJ on Plaintiff by First-Class Mail. (Doc. No. 42 at 10-11). The time for Plaintiff to file  
26 any opposition has long expired. L.R. 230(1).

27 ///

28 ///

1 **II. APPLICABLE LAW**

2 **A. SUMMARY JUDGMENT STANDARD**

3 Summary judgment is appropriate when there is “no genuine dispute as to any material  
4 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is  
5 material where it is (1) relevant to an element of a claim or a defense under the substantive law  
6 and (2) would affect the outcome of the suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
7 247 (1987). The party moving for summary judgment bears the initial burden of proving the  
8 absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
9 When the moving party has met this burden, the nonmoving party must go beyond the pleadings  
10 and set forth specific facts, by affidavits, deposition testimony, documents, or discovery  
11 responses, showing there is a genuine issue that must be resolved by trial. *See Fed. R. Civ. P.*  
12 *56(c)(1); Pacific Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th  
13 Cir. 2021). A mere “scintilla of evidence” in support of the nonmoving party’s position is  
14 insufficient. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Rather, the  
15 evidence must allow a reasonable juror, drawing all inferences in favor of the nonmoving party,  
16 to return a verdict in that party’s favor. *Id.*

17 In an exhaustion-based summary judgment motion, the defendant bears the initial burden  
18 of establishing “that there was an available administrative remedy, and that the prisoner did not  
19 exhaust that available remedy.” *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the  
20 defendant carries that burden, “the burden shifts to the prisoner to come forward with evidence  
21 showing that there is something in his particular case that made the existing and generally  
22 available administrative remedies effectively unavailable to him.” *Id.* The ultimate burden of  
23 persuasion remains, however, with defendant. *Id.*

24 The undersigned has carefully reviewed and considered all arguments, points and  
25 authorities, declarations, exhibits, statements of undisputed facts and responses thereto, if any,  
26 objections, and other papers filed by the parties. The omission to an argument, document, paper,  
27 or objection is not to be construed that the undersigned did not consider the argument, document,  
28 paper, or objection. Instead, the undersigned thoroughly reviewed and considered the evidence it

1 deemed admissible, material, and appropriate for purposes of issuing these Findings and  
2 Recommendations.

### 3 **C. Exhaustion Under the PLRA**

4 Under the PLRA, “[n]o action shall be brought with respect to prison conditions under [42  
5 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other  
6 correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.  
7 § 1997e(a). The exhaustion requirement “applies to all inmate suits about prison life.” *Porter v.*  
8 *Nussle*, 534 U.S. 516, 532 (2002). It is condition precedent to filing a civil rights claim.  
9 *Woodford v. Ngo*, 548 U.S. 81, 93 (2006).

10 The PLRA recognizes no exception to the exhaustion requirement, and the court may not  
11 recognize a new exception, even in “special circumstances.” *Ross v. Blake*, 578 U.S. 632, 648  
12 (2016). The one significant qualifier is that “the remedies must indeed be ‘available’ to the  
13 prisoner.” *Id.* at 639. A prison’s internal grievance process controls whether the grievance  
14 satisfies the PLRA exhaustion requirement. *Jones*, 549 U.S. at 218.

### 15 **D. CDCR Applicable Grievance Procedures**

16 CDCR’s administrative remedy process governs this action.<sup>2</sup> *See* Cal. Code Regs. tit. 15,  
17 § 3084.1 (2018). At the time relevant to this action, a prisoner was required to proceed through  
18 three formal levels of review, unless otherwise excused under the regulation, to exhaust available  
19 remedies. *Id.*, § 3084.5. A prisoner initiates the exhaustion process by submitting a CDCR Form  
20 602, Inmate/Parolee Appeal (“grievance”). *Id.*, §§ 3084.2(a), 3084.8(b). The grievance must  
21 “describe the specific issue under appeal and the relief requested” and “shall list all staff  
22 member(s) involved and shall describe their involvement in the issue.” *Id.*, § 3084.2(a). The  
23 prisoner “shall state all facts known and available to him/her regarding the issue being appealed at  
24 the time of submitting the Inmate/Parolee Appeal Form, and if needed, the Inmate Parolee/Appeal  
25 Form Attachment.” *Id.*, § 3084.2(a)(4).

---

26  
27 <sup>2</sup> The Court cites to the regulations in force at the relevant time period. In June 2020, these regulations  
28 were amended and changed the former three-step “appeal” process to a two-step process generally. *See*  
Cal. Code Regs. tit. 15, § 3480-3487 (2022).

1 If dissatisfied with the first-level response, the prisoner must appeal to the second level.  
2 Like the first level appeal, the second level is handled by the institution. *Id.*, § 3084.2(c). The  
3 appeal must be submitted within thirty calendar days of “[t]he occurrence of the event or decision  
4 being appealed,” or “[u]pon first having knowledge of the action or decision being appealed,” or  
5 “upon receiving an unsatisfactory department response to an appeal filed.” *Id.*, § 3084.8(b)(1)-  
6 (3).

7 After the second-level response, a dissatisfied prisoner must appeal to the third level of  
8 review. *Id.*, §§ 3084.2(d), 3084.7(c), 3084.8(d). This review is handled by CDCR’s Office of  
9 Appeals. *Id.*, § 3084.2(d). The appeal must be served by mail to the Appeals Chief, again within  
10 thirty calendar days. *Id.* §§ 3084.2(d), 3084(b)(1)-(3). It is this third level of review that  
11 exhausts administrative remedies. *Id.*, §§ 3084.1(b), 3084.7(d)(3).

### 12 III. ANALYSIS

13 As previously stated, the undersigned considers the entire record and deems only those  
14 facts true, which are properly supported by evidence.

#### 15 A. Plaintiff’s Failure to Oppose the Motion.

16 Plaintiff did not file an opposition to Defendant’s MSJ, (see docket; *see also* Doc. No. 42-  
17 2), nor did Plaintiff submit a separate statement of undisputed facts as required by Local Rule  
18 260(a). Where a party fails to oppose a motion for summary judgment, “Rule 56 is clear that  
19 although a court *may* deem facts admitted in the exercise of its discretion, it need not do so.”  
20 *Warkentin v. Federated Life Ins. Co.*, 594 F. App’x 900, 902–03 (9th Cir. 2014) (alteration in  
21 original); *see* Fed. R. Civ. P. 56 advisory committee’s note to 2010 amendment (“[T]he court may  
22 choose not to consider [a] fact as undisputed, particularly if the court knows of record materials  
23 that show grounds for genuine dispute”). A court, however, is not authorized to automatically  
24 grant summary judgment to a defendant solely because a plaintiff fails to oppose the motion.  
25 *Cristobal v. Siegel*, 26 F.3d 1488, 1494–95 & n.4 (9th Cir. 1994); *Martinez v. Stanford*, 323 F.3d  
26 1178, 1182 (9th Cir. 2003).

27 Where, as here, a party does not challenge the facts asserted by the moving party, the non-  
28 moving party may be deemed to have admitted the validity of those facts. *See* Fed. R. Civ. P.

1 56(e)(2). Further, Local Rule 230(1) provides that the “[f]ailure of the responding party to file an  
2 opposition or to file a statement of no opposition may be deemed a waiver of any opposition to the  
3 granting of the motion and may result in the imposition of sanctions.” Thus, the Court may grant  
4 Defendant’s unopposed motion for summary judgment if the supporting papers are themselves  
5 sufficient to warrant granting the motion and do not on their face reveal a genuine issue of material  
6 fact. *See Henry v. Gill Indus.*, 983 F.2d 943, 950 (9th Cir. 1993).

7 **B. Material Facts Regarding Exhaustion of Administrative Remedies**

8 Following a thorough review of the evidence submitted, the undersigned finds these  
9 material facts are deemed undisputed, unless otherwise indicated:

- 10 • Plaintiff was a state prisoner in the custody of CDCR and incarcerated at CCI at all  
11 times relevant to the instant action. (Doc. No. 1 at 1).
- 12 • On December 19, 2018, while at CCI, Plaintiff alleged an incident occurred between  
13 him and Defendant White where Defendant used excessive force by spraying Plaintiff  
14 with a chemical spray. (Doc. No. 1 at 3).
- 15 • On December 19, 2018, Plaintiff filed grievance log number CCI-0-18-03402 alleging  
16 that Defendant used excessive force against him. (Doc. No. 42-3 at 8; 42-4 at 4).
- 17 • On December 31, 2018, CCI Appeals Coordinator received grievance log number  
18 CCI-0-18-03402, which bypassed the first level of review because it was a staff  
19 grievance and accepted at the second level of review. (Doc. No. 42-4 at 4, 9-15).
- 20 • After an investigation, CCI Appeals Coordinator issued a finding that Defendant  
21 White did not violate institutional policy. The finding was sent to Plaintiff on  
22 February 13, 2019. (*Id.*).
- 23 • Plaintiff appealed grievance log number CCI-0-18-03402 to the third level, which was  
24 received by the Office of Appeals on March 18, 2019. (Doc. No. 42-1 at 2; 42-3 at 3 ¶  
25 8).
- 26 • The Office of Appeals rejected Plaintiff’s appeal and forwarded it to the Appeals  
27 Coordinator at CCI for an amended second level response. (Doc. No. 42-1 at 3; 42-3  
28 at 3 ¶ 8).

- 1 • On June 7, 2019, the Office of Appeals sent Plaintiff a letter informing him of its  
2 action and advising him if he was dissatisfied with the amended second level decision  
3 then he may re-submit an appeal within 30 calendar days of receipt of the amended  
4 second level response. (Doc. No. 42-1 at 3; 42-3 at 3 ¶ 9, 7-16).
- 5 • On July 15, 2019, an amended second level response was issued to Plaintiff. (Doc.  
6 No. 42-1 at 3; 42-4 at 4 ¶ 14, 17-25).
- 7 • As of December 20, 2020, Plaintiff did not submit a third level or any other appeal  
8 regarding excessive use of force by Defendant White. (Doc. No. 42-1 at 3; 42-3 at 3 ¶  
9 10, 5; 42-4 at 4 ¶ 15).

### 10 **C. Plaintiff Failed to Exhaust Grievance Log Number CCI-0-18-03402**

11 To properly exhaust his administrative remedies, Plaintiff must follow CDCR’s grievance  
12 process which requires inmates to submit an appeal through three levels of review. While  
13 Plaintiff was permitted to bypass the first level of review due to the nature of his claim, he was  
14 not permitted to bypass the second or third level of review. Further, while Plaintiff filed an  
15 appeal at the second level of review, uncontradicted evidence shows he did not successfully  
16 appeal to the third and final level of review.

17 CDCR’s administrative remedies were available to Plaintiff throughout the process. The  
18 availability of the remedies is supported by Plaintiff’s ability to file an appeal at the second level  
19 and his initial third level of review, which was rejected. And while Plaintiff filed an appeal at the  
20 third level, he never received a final decision from the OOA. The evidence conclusively shows  
21 that Appeal Log No. CCI-0-18-03402 was rejected by the OOA and sent back to the Appeals  
22 Coordinator at CCI for an amended second level response. A rejection of Appeal Log No. CCI-0-  
23 18-03402 by the OAA does not constitute a decision that is sufficient to constitute exhaustion at  
24 the third level of review. *See* Cal. Code Regs. tit. 15, §§ 3084.1(b) (2019).

25 Plaintiff was duly advised by written letter, dated June 7, 2019, that he would have to re-  
26 submit a third-level appeal if he was not satisfied with the amended second level response. (*See*  
27 Doc. No. 42-3 at 7) (“If not satisfied with the further action taken by the institution, please attach  
28 an amended Section “F” to your appeal, re-date Section “F”, and resubmit to the Office of

1 Appeals.”). After the amended second level response was issued to Plaintiff on July 15, 2019,  
2 Plaintiff did not re-submit an appeal to the third level. Therefore, Plaintiff did not fully exhaust  
3 his available administrative remedies and his Complaint must be dismissed pursuant to the PLRA.  
4 42 U.S.C. § 1997e(a); *Woodford*, 548 U.S. at 85-86, 90. Further, no evidence exists or suggests  
5 that prison officials thwarted Plaintiff’s grievance.

#### 6 IV. CONCLUSION

7 Defendant satisfied his burden of proving both that administrative remedies were available  
8 to Plaintiff and Plaintiff failed to fully exhaust his available administrative remedies as to  
9 Plaintiff’s Eighth Amendment excessive use of force claim against Defendant White. Plaintiff  
10 did not file an opposition to Defendant’s MSJ. Therefore, he has failed to come forward with any  
11 evidence to raise a question of material fact concerning either the availability or exhaustion of his  
12 administrative remedies. Based upon the undisputed evidence, Defendant’s exhaustion based  
13 MSJ is due to be granted.

14 Accordingly, it is **RECOMMENDED**:

15 Defendant’s motion for summary judgment (Doc. No. 42) be GRANTED.

#### 16 NOTICE TO PARTIES

17 These findings and recommendations will be submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
19 days after being served with these findings and recommendations, a party may file written  
20 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
21 Findings and Recommendations.” Parties are advised that failure to file objections within the  
22 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
23 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

24  
25 Dated: December 1, 2022

26   
27 HELENA M. BARCH-KUCHTA  
28 UNITED STATES MAGISTRATE JUDGE