

1 plaintiff for filing a grievance against Baraceros, based on detailed allegations set forth in the second
2 amended complaint. (ECF No. 12.) Specifically, plaintiff alleges that defendant Baraceros allegedly
3 and improperly cancelled plaintiff's morphine prescription in retaliation for plaintiff submitting
4 inmate appeals complaining about defendant Baraceros' conduct at the California Medical Facility
5 ("CMF"). Further, plaintiff alleges that, in violation of the Eighth Amendment, defendants Baraceros
6 and Dr. Ko were deliberately indifferent to plaintiff's serious medical needs by causing the
7 cancellation of plaintiff's chronic pain medications.

8 On March 14, 2017, the undersigned found that plaintiff's allegations state potentially
9 cognizable First and Eighth Amendment claims for relief. (ECF No. 13.)

10 On January 25, 2018, defendants filed a motion for summary judgment on the grounds
11 that plaintiff failed to exhaust his administrative remedies as to (1) his medical deliberate
12 indifference and retaliation claims against defendant Ko;¹ and (2) his medical deliberate
13 indifference claim against defendant Baraceros.² (ECF No. 33.) On February 22, 2018, plaintiff
14 filed an opposition, a separate statement of undisputed and disputed facts, and a request for
15 judicial notice. (ECF Nos. 36-38.) On March 2, 2018, respondent filed a reply to the opposition,
16 and a reply to the separate statement of facts. (ECF Nos. 39-40.)

17 III. Legal Standard for Summary Judgment

18 Summary judgment is appropriate when it is demonstrated that the standard set forth in
19 Federal Rule of Civil Procedure 56 is met. "The court shall grant summary judgment if the
20 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
21 judgment as a matter of law." Fed. R. Civ. P. 56(a).

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23 ¹ In their motion, defendants construed plaintiff's pleading as alleging a retaliation claim against
24 Dr. Ko. The court did not identify such claim in its screening order. (ECF No. 13 at 1.) In his
25 opposition, plaintiff confirmed that he did not allege that Dr. Ko retaliated against plaintiff. (ECF
26 No. 36 at 14.) Therefore, the undersigned does not address defendants' arguments addressing
retaliation claims.

27 ² Defendants did not move for summary judgment on plaintiff's retaliation claim against
28 defendant Baraceros because it is undisputed that plaintiff exhausted his administrative remedies
as to such claim.

1 Under summary judgment practice, the moving party always bears
2 the initial responsibility of informing the district court of the basis
3 for its motion, and identifying those portions of “the pleadings,
4 depositions, answers to interrogatories, and admissions on file,
5 together with the affidavits, if any,” which it believes demonstrate
6 the absence of a genuine issue of material fact.

7 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
8 56(c)). “Where the nonmoving party bears the burden of proof at trial, the moving party need
9 only prove that there is an absence of evidence to support the non-moving party’s case.” Nursing
10 Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376,
11 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory
12 committee’s notes to 2010 amendments (recognizing that “a party who does not have the trial
13 burden of production may rely on a showing that a party who does have the trial burden cannot
14 produce admissible evidence to carry its burden as to the fact”). Indeed, summary judgment
15 should be entered, after adequate time for discovery and upon motion, against a party who fails to
16 make a showing sufficient to establish the existence of an element essential to that party’s case,
17 and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322.
18 “[A] complete failure of proof concerning an essential element of the nonmoving party’s case
19 necessarily renders all other facts immaterial.” Id. at 323.

20 Consequently, if the moving party meets its initial responsibility, the burden then shifts to
21 the opposing party to establish that a genuine issue as to any material fact actually exists. See
22 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
23 establish the existence of such a factual dispute, the opposing party may not rely upon the
24 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the
25 form of affidavits, and/or admissible discovery material in support of its contention that such a
26 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
27 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
28 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
(1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return

1 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
2 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d
3 1564, 1575 (9th Cir. 1990).

4 In the endeavor to establish the existence of a factual dispute, the opposing party need not
5 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
6 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
7 trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary judgment is to ‘pierce
8 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
9 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
10 amendments).

11 In resolving a summary judgment motion, the court examines the pleadings, depositions,
12 answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R.
13 Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at
14 255. All reasonable inferences that may be drawn from the facts placed before the court must be
15 drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587; Walls v. Central Costa
16 County Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011). Nevertheless, inferences are not
17 drawn out of the air, and it is the opposing party’s obligation to produce a factual predicate from
18 which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,
19 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a
20 genuine issue, the opposing party “must do more than simply show that there is some
21 metaphysical doubt as to the material facts. . . . Where the record taken as a whole could
22 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for
23 trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

24 By contemporaneous notice provided on January 25, 2018 (ECF No. 33-6), plaintiff was
25 advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal
26 Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*);
27 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

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1 IV. Undisputed Facts³ (“UDF”)

2 1. Between September 10, 2014, and May 20, 2016 (“the relevant period” in plaintiff’s
3 complaint), plaintiff Benjamin Ellis was a prisoner in the custody of the California Department of
4 Corrections and Rehabilitation (“CDCR”) at CMF in Vacaville, California.

5 2. During the relevant period, defendant Ko was employed by CDCR as a medical doctor
6 at CMF before transferring to CSP-Solano.

7 3. During the relevant period, defendant Baraceros was employed by CDCR as a
8 Licensed Vocational Nurse (“LVN”) at CMF.

9 4. During the relevant period, plaintiff submitted one health care appeal, log number
10 CMF-SC-15000675, that was accepted, adjudicated, and exhausted through all three levels of
11 review. (ECF No. 33-4 at 2-8; 10-21.)

12 5. In health care appeal, log number CMF-SC-15000675, plaintiff alleged that defendant
13 Baraceros retaliated against him after he threatened to submit a staff complaint against her for
14 falsely accusing plaintiff of hiding his medications which led to custody staff searching Plaintiff’s
15 cell. (ECF No. 33-4 at 14-16.)

16 6. Plaintiff did not name or reasonably identify defendant Ko, or any other medical doctor
17 at CMF as a party or witness. Plaintiff also did not raise any allegations that defendants
18 Baraceros, Ko, or any other member of the medical staff at CMF, cancelled plaintiff’s morphine
19 medication. (ECF No. 33-4 at 14-16.)

20 7. Plaintiff also did not raise any allegations that defendants Baraceros, Ko, or any other
21 member of the medical staff at CMF, cancelled plaintiff’s morphine medication. (Id.)

22 8. Plaintiff also submitted seven health care appeals for First and/or Second Level review,
23 but not Third Level review, during the relevant period, including log numbers: (1) CMF-HC-
24 16041731 (ECF No. 33-4 at 25-33), (2) CMF-HC-15041522 (ECF No. 33-4 at 39-45), (3) CMF-
25 SC-15000693 (ECF No. 33-4 at 47-62), (4) CMF-HC-16041883 (ECF No. 33-5 at 2-4), (5) CMF-

27 ³ For purposes of summary judgment, the undersigned finds these facts are undisputed, unless
28 otherwise indicated.

1 HC-15040483 (ECF No. 33-5 at 10-15), (6) CMF-HC-15040798 (ECF No. 33-5 at 17-24), and
2 (7) CMF-HC-15040609 (ECF No. 33-5 at 31-35).⁴ (ECF Nos. 33-3 at 3-4, ¶ 9; 33-4; 33-5.)

3 9. Defendants contend that three of those seven appeals included allegations concerning
4 plaintiff's morphine prescription. (ECF No. 40 at 4.) Plaintiff contends six of his appeals include
5 allegations of plaintiff's morphine: (1) CMF-HC-15000675 (ECF No. 33-4 at 2-8; 10-21); (2)
6 CMF-HC-16041731 (ECF No. 33-4 at 25-33); (3) CMF-HC-15041522 (ECF No. 33-4 at 41-45);
7 (4) CMF-HC-15000693 (ECF No. 33-4 at 47-62); (5) CMF-HC-16041883 (ECF No. 33-5 at 2-4)
8 (but outside relevant period); and (6) CMF-HC-15040798 (ECF No. 33-5 at 17-24). (ECF No. 37
9 at 3.)

10 10. In the first health care appeal, log number CMF-HC-16041731, signed December 30,
11 2015, plaintiff confirmed that Dr. Ko prescribed plaintiff morphine as PRN (take as needed), but
12 that for unknown reasons, a non-defendant medical doctor, Dr. Saukhla, changed the prescription
13 from PRN to take every evening.⁵ (ECF No. 33-4 at 28-29.) Plaintiff requested to know what
14 reason Dr. Saukhla had for changing the prescription from PRN, why Dr. Saukhla or LVN
15 Baraceros did not inform plaintiff of such changes, and "why the discontinues." (ECF No. 33-4
16 at 28.)⁶

17 ⁴ Defendants claim this list also includes CMF-HC-15040434; plaintiff claims he never filed a
18 Health Care appeal CMF-HC-15040434. (ECF No. 37 at 3.) Plaintiff concedes that appeals
19 CMF-HC-16041883 and CMF-HC-15040609 fall outside the relevant period and should be
disregarded. (ECF No. 36 at 19:4.)

20 ⁵ In this appeal, plaintiff claims Dr. Saukhla changed the prescription from PRN to "MSER."
21 (ECF No. 33-4 at 25-33.) However, "MSER" is the medical acronym for Morphine Sulfate
22 Extended-Release. The first level response confirms that the change was from PRN to "every
evening." (ECF No. 33-4 at 31.)

23 ⁶ On February 19, 2016, the First Level Response identified two issues: (1) disagreement with
24 treatment: why prescription changed from PRN to every night; and (2) why medication was
25 discontinued. (ECF No. 33-4 at 31.) The reviewer noted that the prescription change from PRN
26 to every evening on August 18, 2015, was "due to clerical error," and that the morphine
27 prescription was stopped on October 27, 2015, due to violation of plaintiff's pain contract, refusal
28 of "spot urine toxicology screening." (ECF No. 33-4 at 31.) Plaintiff expressed his
dissatisfaction with this response, stating that he did not challenge the 10/27/15 cancellation, but
rather why Dr. Saukhla had plaintiff's medical chart for two weeks, and why did Dr. Saukhla
discontinue plaintiff's medication on 8/19/15 and 8/27/15, when Dr. Ko was plaintiff's primary
care physician. (ECF No. 33-4 at 30.)

1 11. On April 4, 2016, health care appeal, log number CMF-HC-16041731, was partially
2 granted at the Second Level of review after prison officials reviewed plaintiff's medications.
3 (ECF No. 36 at 37-38.) However, in that health care appeal, plaintiff did not allege that defendant
4 Ko, or any other medical doctor, at CMF retaliated against him and/or took inappropriate actions
5 to cancel plaintiff's morphine prescription. (ECF Nos. 33-4 at 25-33; 36 at 37-38.)

6 12. In the second health care appeal, log number CMF-HC-15041522, plaintiff requested
7 a renewal of his morphine prescription. However, in that health care appeal, plaintiff did not
8 allege that defendants Ko, Baraceros, or any other member of the medical staff at CMF, took
9 inappropriate actions to cancel plaintiff's morphine prescription. (ECF No. 33-4 at 38-40.)

10 13. On March 3, 2016, health care appeal, log number CMF-HC-15041522, was granted
11 at the Second Level of review after the Second Level Examiner found that plaintiff's primary care
12 physician had already renewed plaintiff's morphine prescription. (ECF No. 33-4 at 35-36.)⁷

13 14. In the third health care appeal, log number CMF-SC-15000693, plaintiff alleged
14 constant harassment from the nursing staff and submitted a staff complaint specifically against
15 defendant Baraceros for retaliation. (ECF No. 33-4 at 50-51.)

16 15. In health care appeal, log number CMF-SC-15000693, plaintiff alleged that Baraceros
17 emailed defendant Ko to report that plaintiff was not taking his morphine medication as
18 prescribed. However, in that health care appeal, plaintiff did not allege that defendant Ko, and/or
19 any other medical doctor at CMF, took inappropriate actions to cancel his morphine prescription.
20 (ECF No. 33-4 at 47-62.)

21 16. Other than the above-mentioned health care appeals, plaintiff did not submit any
22 additional health care appeals that were accepted and adjudicated at the First and/or Second-
23 Levels of Review at CMF. (ECF No. 33-3 at 5, ¶ 13.)

24 17. Other than the above-mentioned health care appeals, no other health care appeals
25 submitted by plaintiff were accepted and adjudicated at the Third-Level during the relevant
26 period. (ECF No. 33-3 at 5, ¶ 14.)

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28 ⁷ Plaintiff disputes this fact by citing to the denial of the first level appeal and arguing the merits
of his claim, but his arguments do not change the outcome of the second level appeal.

1 18. Plaintiff did not submit a health care appeal alleging that any of his health care
2 appeals were improperly canceled by the CMF health care Appeals Office, or by any individual
3 Appeals Coordinator. (ECF No. 33-3 at 5, ¶ 15.)⁸

4 19. In health care appeal, log number CMF-SC-15000693, plaintiff alleged that Baraceros
5 interfered with plaintiff's medication by emailing defendant Dr. Ko to report that plaintiff was not
6 taking his morphine medication for two weeks. (ECF No. 33-4 at 50-51.) However, in that
7 health care appeal, plaintiff did not allege that defendant Ko, and/or any other medical doctor at
8 CMF, took inappropriate actions to cancel his morphine prescription. (ECF Nos. 33-3 at 5, ¶ 14;
9 33-4 at 47-62.)

10 V. Exhaustion of Administrative Remedies

11 A. Exhaustion Standards

12 The Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), requires a
13 prisoner challenging prison conditions to exhaust available administrative remedies before filing
14 suit. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); 42 U.S.C. § 1997e(a) ("No action
15 shall be brought with respect to prison conditions under section 1983 of this title, or any other
16 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
17 administrative remedies as are available are exhausted."). Exhaustion is a precondition to suit;
18 exhaustion during the pendency of the litigation is insufficient. McKinney, 311 F.3d at 1199-
19 1200. This requirement promotes the PLRA's goal of efficiency by: "(1) 'giv[ing] prisoners an
20 effective incentive to make full use of the prison grievance process'; (2) reducing prisoner suits as
21 some prisoners are 'persuaded by the proceedings not to file an action in federal court'; and (3)
22 improving the quality of any remaining prisoner suits 'because proper exhaustion often results in
23 the creation of an administrative record that is helpful to the court.'" Nunez v. Duncan, 591 F.3d
24 1217, 1226 (9th Cir. 2010) (quoting Woodford v. Ngo, 548 U.S. 81, 94-95 (2006)).

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27 ⁸ Plaintiff disputes this fact by citing appeals that were rejected, and which he subsequently re-
28 submitted. But plaintiff points to no appeal where he claimed a rejected health care appeal had
been improperly cancelled.

1 “Proper exhaustion demands compliance with an agency’s deadlines and other critical
2 procedural rules.” Woodford, 548 U.S. at 90. These rules are defined by the prison grievance
3 process itself, not by the PLRA. Jones v. Bock, 549 U.S. 199, 218 (2007). “[A] prisoner must
4 ‘complete the administrative review process in accordance with the applicable procedural rules,
5 including deadlines, as a precondition to bringing suit in federal court.’” Harvey v. Jordan, 605
6 F.3d 681, 683 (9th Cir. 2010) (quoting Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009)).
7 In California, a grievance must be timely appealed through the third level of review to complete
8 the administrative review process. Harvey, 605 F.3d at 683; Cal. Code Regs. tit. 15, § 3084.1(b).
9 The State of California provides its inmates and parolees the right to administratively appeal
10 “any policy, decision, action, condition, or omission by the department or its staff that the inmate
11 or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or
12 welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative
13 remedies, a prisoner must proceed through three formal levels of appeal and receive a decision
14 from the Secretary of the CDCR or his designee. Id. § 3084.1(b), § 3084.7(d)(3).

15 The amount of detail in an administrative grievance necessary to properly exhaust a claim
16 is determined by the prison’s applicable grievance procedures. Jones, 549 U.S. at 218; see also
17 Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (“To provide adequate notice, the prisoner
18 need only provide the level of detail required by the prison’s regulations”). California prisoners
19 are required to lodge their administrative complaint on a CDCR-602 form (or a CDCR-602 HC
20 form for a health-care matter). The level of specificity required in the appeal is described in a
21 regulation:

22 The inmate or parolee shall list all staff member(s) involved and shall
23 describe their involvement in the issue. To assist in the identification
24 of staff members, the inmate or parolee shall include the staff
25 member’s last name, first initial, title or position, if known, and the
26 dates of the staff member’s involvement in the issue under appeal. If
27 the inmate or parolee does not have the requested identifying
28 information about the staff member(s), he or she shall provide any
other available information that would assist the appeals coordinator
in making a 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).⁹ An inmate has thirty calendar days to submit his or her
2 appeal from the occurrence of the event or decision being appealed, or “upon first having
3 knowledge of the action or decision being appealed.” Cal. Code Regs. tit. 15, § 3084.8(b).

4 However, the Ninth Circuit has held that “a prisoner exhausts such administrative
5 remedies as are available . . . under the PLRA despite failing to comply with a procedural rule if
6 prison officials ignore the procedural problem and render a decision on the merits of the
7 grievance at each available step of the administrative process.” Reyes v. Smith, 810 F.3d 654,
8 658 (9th Cir. 2016); see also Franklin v. Foulk, 2017 WL 784894, at *4-5 (E.D. Cal. Mar. 1,
9 2017); Franklin v. Lewis, 2016 WL 4761081, at *6 (N.D. Cal. Sept. 13, 2016). Thus, a prisoner’s
10 failure to list all staff members involved in an incident in his inmate grievance, or to fully
11 describe the involvement of staff members in the incident, will not necessarily preclude his
12 exhaustion of administrative remedies. Reyes, 810 F.3d at 958; Foulk, 2017 WL 784894, at *4
13 (“[T]he court in Reyes found that even though the plaintiff’s grievance failed to name two
14 physicians on the prison’s three-person pain committee, prison officials were put on notice of the
15 nature of the wrong alleged in the suit -- that the plaintiff was wrongfully denied pain
16 medication.”); Lewis, 2016 WL 4761081, at *6 (“[T]o the extent Defendants argue that Plaintiff
17 failed to comply with a procedural requirement by not naming Defendants in [his appeal], this
18 deficiency is not necessarily fatal to Plaintiff’s claim pursuant to Reyes”); Grigsby v. Munguia,
19 2016 WL 900197, at *11-12 (E.D. Cal. Mar. 9, 2016) (appeal pursued through all three levels of
20 review challenged the excessive force incident, and prison officials aware of defendant Baker’s

21 ⁹ California prison regulations governing inmate grievances were revised on January 28, 2011.,
22 Cal. Code Regs. tit. 15, § 3084.7. Several Ninth Circuit cases refer to California prisoners’
23 grievance procedures as not specifying the level of detail necessary and instead requiring only
24 that the grievance “describe the problem and the action requested.” See Wilkerson v. Wheeler,
25 772 F.3d 834, 839 (9th Cir. 2014) (quoting Cal. Code Regs. tit. 15, § 3084.2); Sapp, 623 F.3d at
26 824 (“California regulations require only that an inmate ‘describe the problem and the action
27 requested.’ Cal. Code Regs. tit. 15, § 3084.2(a)’); Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th
28 Cir. 2009) (when prison or jail’s procedures do not specify the requisite level of detail, “‘a
grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought”).
Such cases are distinguishable because they did not address the regulation as it existed at the time
of the events complained of in plaintiff’s complaint. Whatever the former requirements may have
been, in California since January 28, 2011, the operative regulation set forth above requires
specificity in administrative appeals.

1 involvement); see also Bulkin v. Ochoa, 2016 WL 1267265, at *1-2 (E.D. Cal. Mar. 31, 2016)
2 (declined to dismiss reckless endangerment claims based on failure to name two defendants in
3 appeal because prison officials addressed the claim on the merits, were alerted to the problem,
4 knew the actors involved, and were given an opportunity to rectify the alleged wrong); see also
5 McClure v. Chen, 246 F.Supp.3d 1286, 1292-94 (E.D. Cal. Mar. 28, 2017) (claim that prison
6 officials failed to provide adequate medical attention for an eye injury suffered after falling from
7 his bunk, the same as raised in his federal complaint and pursued until the appeals were granted,
8 was sufficient to exhaust remedies).

9 Nonetheless, for administrative remedies to be exhausted by California prisoners as to
10 defendants who were not identified in the inmate grievance, there must be a “sufficient
11 connection” between the claim in the appeal and the unidentified defendants such that prison
12 officials can be said to have had “notice of the alleged deprivation” and an “opportunity to
13 resolve it.” Reyes, 810 F.3d at 959 (finding that plaintiff had satisfied PLRA exhaustion
14 requirements as to two prison doctors despite not having identified them in his inmate appeals
15 because there was a sufficient connection between plaintiff’s appeal based on inadequate pain
16 management, and the doctors, who served on the prison committee that had denied plaintiff
17 medication); McClure, 246 F.Supp 3d at 1293-94 (remedies exhausted even though doctors not
18 named in appeal; prison was placed on notice)).

19 An inmate must exhaust available remedies, but is not required to exhaust unavailable
20 remedies. Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014) (*en banc*). “To be available, a
21 remedy must be available ‘as a practical matter’; it must be ‘capable of use; at hand.’” Id.
22 (quoting Brown v. Valoff, 422 F.3d 926, 936-37 (9th Cir. 2005)). “Accordingly, an inmate is
23 required to exhaust those, but only those, grievance procedures that are ‘capable of use’ to obtain
24 ‘some relief for the action complained of.’” Ross v. Blake, 136 S. Ct. 1850, 1858 (2016) (quoting
25 Booth v. Churner, 532 U.S. 731, 738 (2001)).

26 Failure to exhaust under the PLRA is “an affirmative defense the defendant must plead
27 and prove.” Jones, 549 U.S. at 204. It is the defendant’s burden to prove that there was an
28 available administrative remedy, and that the prisoner failed to exhaust that remedy. Albino, 747

1 F.3d at 1172. “Once the defendant has carried that burden, the prisoner has the burden of
2 production. That is, the burden shifts to the prisoner to come forward with evidence showing that
3 there is something in his particular case that made the existing and generally available
4 administrative remedies effectively unavailable to him.” Id. If the court concludes that the
5 prisoner failed to exhaust available administrative remedies, the proper remedy is dismissal
6 without prejudice. See Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th
7 Cir. 2005).

8 B. Discussion

9 Plaintiff argues that he exhausted his medical deliberate indifference claims against
10 defendants Dr. Ko and Baraceros by filing health care appeals, log numbers CMF-HC-15041522
11 and CMF-SC-1500675, respectively.¹⁰ Plaintiff also argues that health care appeal, log numbers
12 CMF-SC-15000693 and CMF-HC-15040798 complained about defendant Baraceros’ deliberate
13 indifference to plaintiff’s medical needs when she took steps to interfere with his medication, and
14 appears to argue that such appeals, taken together with CMF-SC-1500675, put prison staff on
15 notice of plaintiff’s medical claims against Baraceros. (ECF No. 36 at 19.)

16 1. Did CMF-HC-15041522 Exhaust Medical Claims as to Dr. Ko?

17 Defendants argue that appeal, log number CMF-HC-15041522, cannot exhaust plaintiff’s
18 deliberate indifference claim because plaintiff simply requested a renewal of his morphine
19 prescription, plaintiff received the renewal of morphine, and plaintiff failed to allege that Dr. Ko
20 or any other medical doctor at CMF took inappropriate action to cancel his morphine prescription.
21 (ECF No. 39 at 3-4.) Defendants argue that because it is undisputed that plaintiff failed to raise
22 his deliberate indifference claims in the appeal, the Reyes exception cannot apply. (ECF No. 39
23 at 4.)

24 It is undisputed that in appeal, log number CMF-HC-15041522, signed November 2,
25 2015, plaintiff requested a renewal of his morphine prescription, and did not allege that defendant

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28 ¹⁰ Plaintiff conceded that he did not raise any medical deliberate indifference allegations against
Dr. Ko in health care appeal, log number CMF-SC-1500675. (ECF No. 36 at 12:16-18.)

1 Dr. Ko or any other member of the medical staff at CMF took inappropriate actions to cancel
2 plaintiff's morphine prescription. (UDF 12.) Specifically, in his appeal, plaintiff wrote:

3 Discontinuation of medication, [without] proper notification.

4 For months I've been receiving morphine, PRN, one pill at night for
5 pain. However, I was never notified said meds were no longer PRN
6 which resulted in said medication being discontinued. Two days
7 after being discontinued, said medication was renewed. Into the
8 second day of the renewed meds, Ellis missed day two (2) which
9 resulted in said meds, again, being discontinued.

10 (ECF No. 33-4 at 38, 40.) Plaintiff noted he takes 15 mg of morphine at night for pain. Because
11 plaintiff is a wheelchair-bound paraplegic, he gets up at 2:30 a.m. in order to report to work at
12 4:00 a.m., and the lack of morphine prevents him from getting rest due to the pain he sustains at
13 night. (ECF No. 33-4 at 40.) He also asked the following questions: "Isn't it policy for a patient
14 to be notified by her/his nurse when changes are made to his/or her medication, such as, no longer
15 being PRN?" and "Isn't it policy that a patient can't miss 50q or more of medication in a seven
16 (7) day period (and not just this one (1) day after being prescribed the medication)? (ECF No. 33-
17 4 at 40.)

18 Prior to Reyes, this appeal would be insufficient as to Dr. Ko, because plaintiff did not
19 name Dr. Ko or "list all staff member(s) involved" as required by Cal. Code Regs., tit. 15,
20 § 3084.2. But with the decision in Reyes, the Ninth Circuit now no longer requires such strict
21 adherence to procedural rules under all circumstances. Rather, "a prisoner exhausts such
22 administrative remedies as are available under the PLRA despite failing to comply with a
23 procedural rule if prison officials ignore the procedural problem and render a decision on the
24 merits of the grievance at each available step of the administrative process." Reyes, 810 F.3d at
25 658.

26 Despite his failure to name Dr. Ko, plaintiff did identify his issue as the "discontinuation
27 of medication," and identified that his prescription for morphine had been changed from PRN
28 ("as needed"), without notice. In this appeal, plaintiff asks whether the nurse is responsible to
notify plaintiff of medication changes, but only a doctor can discontinue, stop, cancel, prescribe,
or make changes to a prescription to morphine. (ECF No. 33-4 at 40.) Plaintiff explained that

1 without the .15 mg of morphine at night, it was difficult for him to rest up for work the next day
2 due to the pain he suffers at night. (ECF No. 33-4 at 40.) Moreover, in the first level response,
3 the reviewer noted that plaintiff disputed the reasons why the prescription had been stopped, and
4 the reviewer discussed the reasons Dr. Ko stopped plaintiff's prescription. (ECF No. 33-4 at 41.)
5 In the request for second level review, plaintiff denied telling Dr. Ko to stop all medications
6 rather than submit to a urine test, and reiterated that Dr. Ko's nurse did not explain to plaintiff the
7 protocol for urine tests. (ECF No. 33-4 at 39.) Plaintiff wrote that although the medication was
8 renewed on October 28, 2015, it was discontinued again on October 29, 2015. (Id.) At the
9 second level of review, the appeal was granted because plaintiff's prescription to morphine had
10 been renewed, which obviated plaintiff's need to pursue an appeal to the third level of review,
11 because no further relief was available.

12 The undersigned concludes that Reyes applies because at each level of review, prison
13 officials addressed plaintiff's claim on the merits, thereby voiding Dr. Ko's ability to later pursue
14 a procedural bar against this claim. See Reyes, 810 F.3d at 657 (“[W]hen prison officials address
15 the merits of a prisoner's grievance instead of enforcing a procedural bar, the state's interests in
16 administrative exhaustion have been served.”). The appeal responses demonstrate that prison
17 officials were alerted to the problem, knew of the actor involved – Dr. Ko – and were given the
18 opportunity to rectify the alleged wrong through internal means, and it was rectified. See id. at
19 659 (“The grievance process is only required to ‘alert prison officials to a problem, not to provide
20 personal notice to a particular official that he may be sued.’”) (quoting Jones, 549 U.S. at 219).
21 The reviewing official did not reject plaintiff's request for second level review based on adding
22 factual allegations; rather, the reviewer addressed and rectified the problem. Because the intent
23 of the PLRA was fulfilled, id. at 657, the undersigned finds that defendant Dr. Ko cannot now
24 seek dismissal of plaintiff's claim based on his failure to name Dr. Ko, or plaintiff's failure to
25 articulate his allegations in the appeal as “Dr. Ko inappropriately cancelled the morphine
26 prescription.”

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1 2. Did CMF-SC-1500675 Exhaust Medical Claims as to Baraceros?

2 Plaintiff argues that this appeal exhausts his medical claim as to defendant Baraceros
3 because plaintiff alleged that Baraceros falsely accused plaintiff of hiding his medications,
4 engaged in a campaign of harassment, and unprofessional conduct when handling plaintiff's
5 medications. (ECF No. 36 at 13.) Plaintiff argues that he did not have to use the words
6 "deliberate indifference" in his appeal.

7 Defendants counter that plaintiff makes contradictory assertions in his opposition. (ECF
8 No. 39 at 2.) Plaintiff first states that health care appeal, log number CMF-SC-1500675, was
9 submitted on [A]pril 30, 2015, against Baraceros, only, for retaliation and harassment . . . Plaintiff
10 never stated nowhere in his complaint [alleging] Baraceros discontinued Ellis' meds, but rather,
11 defendant Baraceros [kept] interfering with Ellis meds." (ECF No. 36 at 12:15-21.) Defendants
12 argue that plaintiff submitted this appeal because he complained that Baraceros retaliated against
13 him for submitting previous inmate appeals, not because she took any inappropriate actions to
14 cancel his morphine prescription. (ECF No. 39 at 2.) Further, defendants contend that plaintiff's
15 allegations in such appeal are consistent with his retaliation claim, not a medical deliberate
16 indifference claim, because plaintiff did not include an allegation that Baraceros took any action
17 to improperly cancel plaintiff's morphine prescription.

18 In his appeal, log number CMF-SC-1500675, plaintiff identified the subject of his
19 complaint as "complaint against staff for retaliation/harassment (nurse)." (ECF No. 33-4 at 14.)
20 in his explanation of the issue, he stated, "I exercised my First Amendment right when I told
21 Baraceros (LVN) I will file a 602 appeal against her if she continues harassing me by falsely
22 accusing me of hiding my medication, although she observed me taking meds, drinking water,
23 etc." (ECF No. 33-4 at 15-16.) Plaintiff then set forth various ways he alleged Baraceros
24 retaliated against and harassed plaintiff, including issuing him the wrong medication. (ECF No.
25 33-4 at 16.) The second and third level appeal responses addressed plaintiff's appeal solely as a
26 retaliation claim. (ECF No. 33-4 at 10, 18.) In his request for second level review, plaintiff did
27 not object to the appeal being addressed solely in the context of retaliation (ECF No. 33-4 at 17),
28 and nowhere in his appeal did plaintiff allege that defendant Baraceros denied plaintiff his

1 morphine medication by deliberately passing his cell, or caused plaintiff's morphine prescription
2 to be changed, discontinued, or cancelled inappropriately, as plaintiff alleges in the operative
3 pleading (ECF No. 12 at 13, 15-17). Although plaintiff was not required to use the legal terms
4 "deliberate indifference" in his appeal, he was required to put prison officials on notice of the
5 factual allegations underlying his claim. Because plaintiff included no specific allegations as to
6 defendant Baraceros' alleged interference with plaintiff's prescription to morphine, as alleged
7 herein, prison officials were not put on notice that defendant Baraceros was being deliberately
8 indifferent to plaintiff's serious medical needs by her actions. Rather, prison officials treated the
9 appeal as a complaint that defendant Baraceros was retaliating against plaintiff based on his filing
10 of appeals against her in violation of the First Amendment, as he expressly invoked in his appeal.
11 Therefore, the undersigned finds that appeal, log number CMF-SC-1500675, did not exhaust
12 plaintiff's medical deliberate indifference claims against defendant Baraceros.

13 3. Did CMF-SC-15000693 Exhaust Medical Claims as to Baraceros?¹¹

14 Plaintiff argues that he did raise allegations concerning his morphine prescription in
15 appeal, log number CMF-SC-15000693. (ECF No. 36 at 18.) Defendants counter that it is
16 undisputed that plaintiff failed to submit such health care appeal to the third level of review.
17 (ECF No. 39 at 5.) Because plaintiff failed to properly exhaust such appeal, defendants argue that
18 plaintiff's medical deliberate indifference claim against defendant Baraceros should be dismissed
19 as unexhausted.

20 It is undisputed that in this appeal, plaintiff alleged constant harassment by nursing staff, a
21 staff complaint specifically against Baraceros for retaliation, and also alleged that Baraceros
22 emailed Dr. Ko to report plaintiff was not taking his morphine as prescribed. (UDF 14, 15.) On
23 February 11, 2016, a second level appeal response issued, but plaintiff did not seek a third level
24 review. (ECF No. 33-4 at 47-49.) Although the second level response indicated that plaintiff's
25 appeal was partially granted in that an appeal inquiry into the allegations was conducted, plaintiff
26 was also informed that staff personnel matters are confidential, but that allegations of staff

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28 ¹¹ In this appeal, plaintiff did not allege that defendant Ko or any other medical doctor at CMF
took inappropriate actions to cancel his morphine prescription. (ECF No. 33-4 at 47-62.)

1 misconduct do not restrict the availability of further relief through the appeals process.
2 Therefore, plaintiff was instructed to submit the staff complaint appeal through all three levels of
3 review if plaintiff wished to appeal the decision. He was also informed that a decision at the third
4 level of review would exhaust his administrative remedies. (ECF No. 33-4 at 48.) In plaintiff's
5 opposition, plaintiff did not address why he failed to pursue this appeal to the third level, or
6 otherwise argue that he should be excused from exhausting appeal, log number CMF-SC-
7 15000693.

8 4. Did CMF-HC-15040798 Exhaust Medical Claims as to Baraceros?

9 Plaintiff argues that in appeal, log number CMF-HC-15040798, he complained about
10 defendant Baraceros' deliberate indifference to plaintiff's serious medical needs when she took
11 steps to interfere with his medication. (ECF No. 36 at 19.) Defendants counter that this appeal is
12 not relevant because plaintiff complained that Baraceros did not allow plaintiff to observe her
13 preparing his medications during her medication pass rotations. (ECF No. 39 at 5.)

14 In this appeal, plaintiff explained his issue as "Nurse Baraceros (LVN) continues to refuse
15 to come directly to my cell door . . . so I can observe her preparing my medication." (ECF No. 36
16 at 74.) Plaintiff also complained that Baraceros held the medicine cup by the rim and not the
17 side. Review of the entire appeal confirms defendants' position that plaintiff raised no claims
18 relevant to the instant allegations against defendant Baraceros. Moreover, plaintiff failed to
19 pursue this appeal to the third level of review. (ECF No. 36 at 73.)

20 Because appeal, log number CMF-HC-15040798, included none of the factual allegations
21 plaintiff raises in the instant action, it cannot serve to exhaust plaintiff's medical deliberate
22 indifference claims against defendant Baraceros.

23 Finally, plaintiff appears to argue that prison officials were put on notice of his medical
24 deliberate indifference allegations against defendant Baraceros because of the factual allegations
25 set forth in appeals CMF-SC-15000693 and CMF-HC-15040798, when read together with his
26 appeal CMF-SC-1500675. (ECF No. 36 at 19.) However, plaintiff cites no legal authority for
27 such theory, and the court is unaware of one. Rather, as set forth above, each inmate appeal is

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1 reviewed individually to determine whether the prisoner exhausted his claims raised in the civil
2 rights pleading filed in federal court.

3 VI. Conclusion

4 The undersigned finds that plaintiff failed to exhaust his administrative remedies as to his
5 medical deliberate indifference claim against defendant Baraceros, but not as to defendant Dr.
6 Ko. Under the PLRA, plaintiff's failure to pursue and exhaust his administrative remedies
7 requires dismissal of plaintiff's medical deliberate indifference claim against defendant Baraceros
8 without prejudice. If these findings and recommendations are adopted, this action will proceed
9 on plaintiff's retaliation claims against defendant Baraceros, and plaintiff's medical deliberate
10 indifference claims against defendant Dr. Ko.

11 Accordingly, IT IS HEREBY RECOMMENDED that:

12 1. Defendants' motion for summary judgment (ECF No. 33) be granted as to plaintiff's
13 medical deliberate indifference claims against defendant Baraceros, and such claims be dismissed
14 without prejudice;

15 2. Defendants' motion for summary judgment as to plaintiff's medical deliberate
16 indifference claims against defendant Dr. Ko (ECF No. 33) be denied; and

17 3. This action be remanded to the undersigned for further scheduling.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
20 after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
23 objections shall be filed and served within fourteen days after service of the objections. The
24 parties are advised that failure to file objections within the specified time may waive the right to
25 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

26 Dated: June 19, 2018

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28 
KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE