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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAIME BELTRAN,

Plaintiff,

v.

ERIC R. BAKER et al.,

Defendants.

No. 2:17-cv-1520 TLN AC P

ORDER AND FINDINGS &
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding through counsel with a civil rights action pursuant to 42 U.S.C. § 1983.

I. Procedural History

Plaintiff initiated this civil rights action against defendants on July 13, 2017.¹ ECF No. 1. Currently before the court is defendants’ motion for summary judgment for failure to exhaust administrative remedies, ECF No. 46, which plaintiff opposes, ECF No. 52. Defendants’ reply in support of their summary judgment motion was accompanied by a motion to strike portions of plaintiff’s declaration, ECF No. 58-2, and a request for judicial notice, ECF No. 58-3. Plaintiff has moved to strike defendants’ reply to plaintiff’s response to the statement of facts, request for

¹ Since plaintiff was proceeding pro se at the time he filed the complaint, this date reflects application of the prisoner mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner’s court document is deemed filed on the date the prisoner delivered the document to prison officials for mailing).

1 judicial notice, all declarations submitted with the reply, and all portions of the reply that rely on
2 the documents plaintiff seeks to strike. ECF No. 59. Both motions to strike are opposed. ECF
3 Nos. 60, 61.

4 II. Plaintiff's Allegations

5 Plaintiff alleges that on November 4, 2015, he was a victim of attempted murder by two
6 inmates who stabbed him twenty-five times, causing serious injuries. ECF No. 1 at 5-6, ¶ 9. He
7 alleges defendants were assigned to the area and deliberately failed to intervene or stop the assault
8 while it was occurring, and did not respond at all until four minutes after it ended. Id. at 4-7, ¶¶ 5,
9 12-13. Plaintiff required extensive medical care and suffered a series of serious medical
10 complications from this assault and now proceeds on an Eighth Amendment failure to protect
11 claim against defendants based on their failure to intervene.² Id. at 9-12, ¶¶ 20-26, 28.

12 III. Motion for Summary Judgment

13 A. Defendants' Arguments

14 Defendants move for summary judgment on the ground that plaintiff did not exhaust his
15 administrative remedies before filing suit. ECF No. 46-1. They argue that plaintiff's third-level
16 appeal was cancelled as untimely, and plaintiff failed to challenge its cancellation. Id. at 6-7.

17 B. Plaintiff's Response

18 Plaintiff opposes the motion and argues that he exhausted his available administrative
19 remedies when his appeal was referred to the Office of Internal Affairs (OIA) for an investigation
20 at the second level of review, thus leaving no further remedies available. ECF No. 52 at 8-15. In
21 the alternative, he asserts that the California Department of Corrections and Rehabilitation
22 (CDCR) improperly cancelled his third-level appeal and thwarted him through misrepresentation.
23 Id. at 15-17.

24 C. Defendants' Reply

25 In reply to the opposition, defendants argue that even though the appeal was referred to
26 the OIA, plaintiff was required to pursue his appeal through the third level of review because

27 ² Plaintiff voluntarily dismissed his claim that defendants failed to protect him by preventing the
28 assault. ECF No. 14.

1 there were administrative remedies available at the third level. ECF No. 58 at 7-13. They further
2 argue that plaintiff's appeal was not thwarted through improper cancellation or misrepresentation.
3 Id. at 13-21.

4 IV. Legal Standards for Summary Judgment

5 Summary judgment is appropriate when the moving party "shows that there is no genuine
6 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
7 Civ. P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden
8 of proving the absence of a genuine issue of material fact." In re Oracle Corp. Sec. Litig., 627
9 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The
10 moving party may accomplish this by "citing to particular parts of materials in the record,
11 including depositions, documents, electronically stored information, affidavits or declarations,
12 stipulations (including those made for purposes of the motion only), admissions, interrogatory
13 answers, or other materials" or by showing that such materials "do not establish the absence or
14 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
15 support the fact." Fed. R. Civ. P. 56(c)(1).

16 "Where the non-moving party bears the burden of proof at trial, the moving party need
17 only prove that there is an absence of evidence to support the non-moving party's case." Oracle
18 Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B).
19 Indeed, summary judgment should be entered, "after adequate time for discovery and upon
20 motion, against a party who fails to make a showing sufficient to establish the existence of an
21 element essential to that party's case, and on which that party will bear the burden of proof at
22 trial." Celotex, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element
23 of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323. In such
24 a circumstance, summary judgment should "be granted so long as whatever is before the district
25 court demonstrates that the standard for the entry of summary judgment, as set forth in Rule
26 56(c), is satisfied." Id.

27 If the moving party meets its initial responsibility, the burden then shifts to the opposing
28 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.

1 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the
2 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
3 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or
4 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.
5 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a
6 fact “that might affect the outcome of the suit under the governing law,” and that the dispute is
7 genuine, i.e., “the evidence is such that a reasonable jury could return a verdict for the nonmoving
8 party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

9 In the endeavor to establish the existence of a factual dispute, the opposing party need not
10 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
11 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
12 trial.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987)
13 (quoting First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968). Thus, the
14 “purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see
15 whether there is a genuine need for trial.” Matsushita, 475 U.S. at 587 (citation and internal
16 quotation marks omitted).

17 “In evaluating the evidence to determine whether there is a genuine issue of fact, [the
18 court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” Walls
19 v. Cent. Contra Costa Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the
20 opposing party’s obligation to produce a factual predicate from which the inference may be
21 drawn. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
22 demonstrate a genuine issue, the opposing party “must do more than simply show that there is
23 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586 (citations
24 omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the
25 non-moving party, there is no ‘genuine issue for trial.’” Id. at 587 (quoting First Nat’l Bank, 391
26 U.S. at 289).

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1 V. Legal Standards for Exhaustion

2 A. Exhaustion Under the Prison Litigation Reform Act

3 Because plaintiff is a prisoner suing over the conditions of his confinement, his claims are
4 subject to the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Under the PLRA,
5 “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or
6 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
7 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); Porter v.
8 Nussle, 534 U.S. 516, 520 (2002) (“§ 1997e(a)’s exhaustion requirement applies to all prisoners
9 seeking redress for prison circumstances or occurrences”). “[T]hat language is ‘mandatory’: An
10 inmate ‘shall’ bring ‘no action’ (or said more conversationally, may not bring any action) absent
11 exhaustion of available administrative remedies.” Ross v. Blake, 578 U.S. 632, 638 (2016)
12 (quoting Woodford v. Ngo, 548 U.S. 81, 85 (2006)).

13 Failure to exhaust is “an affirmative defense the defendant must plead and prove.” Jones
14 v. Bock, 549 U.S. 199, 204, 216 (2007). “[T]he defendant’s burden is to prove that there was an
15 available administrative remedy, and that the prisoner did not exhaust that available remedy.”
16 Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) (citing Hilao v. Estate of Marcos,
17 103 F.3d 767, 778 n.5 (9th Cir. 1996)). “[T]here can be no ‘absence of exhaustion’ unless *some*
18 relief remains ‘available.’” Brown v. Valoff, 422 F.3d 926, 936 (9th Cir. 2005) (emphasis in
19 original). Therefore, the defendant must produce evidence showing that a remedy is available “as
20 a practical matter,” that is, “it must be capable of use; at hand.” Albino, 747 F.3d at 1171
21 (citations and internal quotations marks omitted). “[A]side from [the unavailability] exception,
22 the PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any
23 ‘special circumstances.’” Ross, 578 U.S. at 639. “[M]andatory exhaustion statutes like the
24 PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion.” Id. (citation
25 omitted).

26 For exhaustion to be “proper,” a prisoner must comply with the prison’s procedural rules,
27 including deadlines, as a precondition to bringing suit in federal court. Woodford, 548 U.S. at 90
28 (“Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural

1 rules.”). “[I]t is the prison’s requirements, and not the PLRA, that define the boundaries of
2 proper exhaustion.” Jones, 549 U.S. at 218; see also Marella v. Terhune, 568 F.3d 1024, 1027
3 (9th Cir. 2009) (“The California prison system’s requirements ‘define the boundaries of proper
4 exhaustion’” (quoting Jones, 549 U.S. at 218)).

5 As long as some potential remedy remained available through the administrative appeals
6 process, even if it was not the remedy he sought, plaintiff was required to exhaust his remedies.
7 Booth v. Churner, 532 U.S. 731, 741 & n.6 (2001) (“Congress has provided in § 1997e(a) that an
8 inmate must exhaust irrespective of the forms of relief sought and offered through administrative
9 avenues.”). The Supreme Court has identified “three kinds of circumstances in which an
10 administrative remedy, although officially on the books, is not capable of use to obtain relief.”
11 Ross, 578 U.S. at 643. “First, . . . an administrative procedure is unavailable when (despite what
12 regulations or guidance materials may promise) it operates as a simple dead end—with officers
13 unable or consistently unwilling to provide any relief to aggrieved inmates.” Id. (citing Booth,
14 532 U.S. at 736). “Next, an administrative scheme might be so opaque that it becomes,
15 practically speaking, incapable of use.” Id. Finally, administrative remedies are unavailable
16 “when prison administrators thwart inmates from taking advantage of a grievance process through
17 machination, misrepresentation, or intimidation.” Id. at 644.

18 When the district court concludes that the prisoner has not exhausted administrative
19 remedies on a claim, “the proper remedy is dismissal of the claim without prejudice.” Wyatt v.
20 Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled on other grounds by
21 Albino, 747 F.3d at 1168.

22 B. California Regulations Governing Exhaustion of Administrative Remedies

23 Exhaustion requires that the prisoner complete the administrative review process in
24 accordance with all applicable procedural rules. Woodford, 548 U.S. at 90. This review process
25 is set forth in the California Code of Regulations. In 2016, those regulations allowed prisoners to
26 “appeal any policy, decision, action, condition, or omission by the department or its staff that the
27 inmate or parolee can demonstrate as having a material adverse effect upon his or her health,

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1 safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2015).³

2 At the time plaintiff was proceeding through the appeals process, it was comprised of
3 three levels of review for most types of appeals. Id. § 3084.7.⁴ “The second level [was] for
4 review of appeals denied or not otherwise resolved to the appellant’s satisfaction at the first level,
5 or for which the first level [was] otherwise waived by [the] regulations.” Id. § 3084.7(b).
6 Relevant to the issues here, the third level was “for review of appeals not resolved at second
7 level” or appeals of “a third level cancellation decision or action.” Id. § 3084.7(c). An inmate
8 was required to “submit the appeal within 30 calendar days of: (1) The occurrence of the event or
9 decision being appealed, or; (2) Upon first having knowledge of the action or decision being
10 appealed, or; (3) Upon receiving an unsatisfactory departmental response to an appeal filed.” Id.
11 § 3084.8(b).

12 If an appeal described staff misconduct, a determination would be made whether it should
13 be processed as a routine appeal, processed as a staff complaint appeal inquiry, or referred to
14 Internal Affairs for investigation or inquiry. Id. § 3084.5(b)(4). In the event the OIA declined to
15 investigate, the allegations were subject to a confidential inquiry. Id. § 3084.9(i)(3). The
16 response to a staff complaint informed the inmate of either: (1) the referral for investigation,
17 status of the investigation, and outcome of the investigation at its conclusion; or (2) the decision
18 to conduct a confidential inquiry and whether the staff in question was found to have violated
19 departmental policy. Id. § 3084.9(i)(4).

20 Each prison was required to have an “appeals coordinator” whose job was to “screen all
21 appeals prior to acceptance and assignment for review.” Id. § 3084.5(b). The appeals coordinator
22 could refuse to accept an appeal, whereupon “the inmate or parolee [would] be notified of the
23 specific reason(s) for the rejection or cancellation of the appeal.” Id. §§ 3084.5(b)(3), 3084.6(a).
24 An appeal could be cancelled if “[t]ime limits for submitting the appeal [were] exceeded even

25 ³ Unless otherwise noted, all citations to Title 15 of the California Code of Regulations are to the
26 2015 version, which was in effect at the time plaintiff was pursuing his administrative remedies.
27 Significant amendments, which largely went into effect in late 2016, followed plaintiff’s appeal.

28 ⁴ Section 3084.7 was subject to emergency amendment on June 2, 2016. However, the
subsection subject to amendment did not apply to plaintiff’s appeal and the regulation otherwise
remained identical to the 2015 version.

1 though the inmate . . . had the opportunity to submit within the prescribed time constraints.” Id.
2 § 3084.6(c)(4). Once cancelled, an appeal was not to be accepted unless it was determined that
3 the cancellation was in error or new information made the appeal eligible for further review. Id.
4 § 3084.6(a)(3), (e). However, the cancellation of the appeal could be separately appealed. Id.
5 § 3084.6(e). A cancellation decision did not exhaust administrative remedies. Id. § 3084.1(b).

6 VI. Evidentiary Issues

7 A. Defendants’ Motion to Strike

8 Defendants move to strike paragraph three of plaintiff’s declaration on various grounds,
9 ECF No. 58-2, which plaintiff opposes, ECF No. 60. Paragraph three states “I did not receive the
10 second level response to Appeal # SAC-C-16-00599 until about February 26, 2016 because the
11 response was mailed on February 19 from a different institution than where I reside and because
12 of delays in the mailroom at the institution where I reside.” ECF No. 52-3 at 1.

13 Because this evidence relates to the timeliness of plaintiff’s third-level appeal—and, as
14 discussed below, this issue is moot, see infra Section VIII—it is unnecessary for the court to
15 address the sufficiency of the evidence. Accordingly, defendants’ motion to strike paragraph
16 three of plaintiff’s declaration will be denied.

17 B. Request for Judicial Notice

18 Defendants request the court take judicial notice of plaintiff’s housing assignment history,
19 the distance between various institutions, and the versions of Title 15 and the CDCR Department
20 Operations Manual that were in effect at the times relevant to exhaustion. ECF No. 58-3.

21 Plaintiff opposes the request on the ground that it seeks to introduce new facts. ECF No. 59.

22 “The court may judicially notice a fact that is not subject to reasonable dispute because it:
23 (1) is generally known . . . or (2) can be accurately and readily determined from sources whose
24 accuracy cannot be reasonably questioned.” Fed. R. Evid. 201(b). Because plaintiff’s housing
25 assignment history and the distance between various institutions relate to the timeliness of
26 plaintiff’s third-level appeal—and, as discussed below, this issue is moot, see infra Section
27 VIII—it is unnecessary for the court to take judicial notice of these facts. With respect to the
28 applicable regulations, they constitute legal authority and judicial notice is therefore not

1 necessary. See Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv., 653 F. Supp. 2d 1066,
2 1079 (E.D. Cal. 2009) (judicial notice of statutory legal authorities unnecessary). Finally,
3 because the historical CDCR Department Operations Manual is a matter of public record and its
4 accuracy is not subject to reasonable dispute, the court takes judicial notice of only those sections
5 actually cited by defendants in their reply. See Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442
6 F.3d 741, 746 n.6 (9th Cir. 2006) (court may take notice of matters of public record).

7 C. Plaintiff’s Motion to Strike

8 Plaintiff moves to strike defendants’ reply to plaintiff’s response to the statement of facts,
9 request for judicial notice, all declarations submitted with the reply, and the portions of the reply
10 that rely on those documents, ECF No. 59, and defendants oppose the motion, ECF No. 61.

11 Plaintiff seeks to strike defendants’ separate reply to his response to the statement of facts
12 on the ground that it is impermissible because the Local Rules do not provide for a separate reply
13 in support of the statement of facts. ECF No. 59 at 3. The motion will be denied on this ground
14 because defendants were granted leave to file their reply to plaintiff’s response to their statement
15 of facts as a separate document. ECF No. 57. The motion will also be denied as to the request
16 for judicial notice, which has been addressed above. See supra Section VI.B.

17 With respect to the remaining portions of the reply, plaintiff argues that the attachments
18 and relevant sections of the reply should be struck because they introduce new facts that were not
19 included in the summary-judgment motion, thereby depriving him of an opportunity to respond.
20 ECF No. 59. Defendants argue the evidence is not new because it was submitted in response to
21 evidence presented in the opposition. ECF No. 61 at 2-4.

22 The Ninth Circuit has held that “[w]here new evidence is presented in a reply to a motion
23 for summary judgment, the district court should not consider the new evidence without giving the
24 [non-]movant an opportunity to respond.” Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir.
25 1996) (alteration in original) (quoting Black v. TIC Inv. Corp., 900 F.2d 112, 116 (7th Cir.
26 1990)). To the extent plaintiff moves to strike new evidence regarding the timeliness of his third-
27 level appeal, as discussed below, the timeliness issue is moot, see supra Section VIII, and it is
28 therefore unnecessary for the court to consider the additional evidence presented by defendants in

1 their reply. With regard to the new facts related to the availability of additional relief on third-
2 level review (TLR), plaintiff was given an opportunity to respond to the evidence during oral
3 argument. Accordingly, plaintiff's motion to strike will be denied.

4 VII. Undisputed Material Facts

5 The facts as they relate to exhaustion are largely undisputed, but the parties disagree on a
6 few key distinctions. The parties agree that plaintiff pursued an appeal related to the claims in the
7 complaint, and they agree on most of the timeline for that appeal as set forth below. The parties
8 disagree on the timeliness of the third-level appeal and whether additional remedies remained
9 available after the appeal was referred to the OIA at the second level. Other facts have been
10 obtained from the documentation, of which the parties dispute some details, as discussed below.

11 At all times relevant to the complaint, plaintiff was a prisoner in custody of the CDCR.
12 ECF No. 1 ¶¶ 1-2. On February 9, 2016, the CSP-Sacramento Appeals Office received plaintiff's
13 inmate appeal regarding his claim against defendants. Defendants' Statement of Undisputed
14 Facts ("DSUF") (ECF No. 46-2) ¶¶ 10-11; Response to DSUF (ECF No. 52-1) ¶¶ 10-11. The
15 appeal requested as follows: (1) the assignment of an unbiased party to investigate plaintiff's
16 allegations; (2) freedom from retaliation; (3) compensation for damages; and (4) medical
17 accommodation. DSUF ¶ 12; Response to DSUF ¶ 12. This appeal was designated as a "staff
18 complaint." ECF No. 46-3 at 17-18.

19 Plaintiff's staff complaint bypassed first-level review. DSUF ¶ 13; Response to DSUF
20 ¶ 13. The second-level review (SLR) response partially granted plaintiff's appeal and referred the
21 matter to the OIA "for follow-up and possible investigation."⁵ DSUF ¶ 14; ECF No. 46-3 at 17.

22
23 ⁵ Plaintiff does not dispute that the SLR response was partially granted but instead disputes that it
24 was sent for "possible" investigation. Response to DSUF ¶ 14. He argues that in the
25 "Determination of Issue" section of the response, it states that the "appeal was referred for an
26 investigation" such that there was no inclusion of the word "possible." *Id.* However, the
27 response states in two places that it was referred for possible investigation and explains that the
28 OIA may choose to not investigate and instead send it back to the institution for a confidential
inquiry. ECF No. 46-3 at 17. Accordingly, it appears that at the time the response was issued it
was referred for possible investigation by the OIA. Regardless, the material fact, which is not in
dispute, is that the appeal was referred to the OIA, not whether the OIA was required to or did in
fact conduct an investigation.

1 The SLR response also stated that

2 [a]lthough you have the right to submit a staff complaint, a request
3 for administrative action regarding staff or the placement of
4 documentation in a staff member’s personnel file is beyond the scope
5 of the staff complaint process. Allegations of staff misconduct do
6 not limit or restrict the availability of further relief via the inmate
7 appeals process. If you wish to appeal the decision, you must submit
8 your staff complaint appeal through all levels of appeal review up to,
9 and including, the Secretary’s Level of Review. Once a decision has
10 been rendered at the Third Level, your administrative remedies will
11 be considered exhausted.

12 ECF No. 46-3 at 18. The appeal indicates that it was “mailed/delivered” to plaintiff on February
13 19, 2016.⁶ Id. at 14.

14 Plaintiff submitted his appeal for third-level review (TLR) on March 22, 2016. DSUF
15 ¶ 19; Response to DSUF ¶ 19. His third-level appeal stated the following: “I am dissati[s]fied
16 with the response at the Second Level Review – and reiterate all my claims and actions requests
17 herein. I expect, upon consideration, that the reviewers will do what is necessary and just and
18 within their authority.” ECF No. 46-4 at 9; DSUF ¶ 20; Response to DSUF ¶ 20. On April 27,
19 2016, a response to plaintiff’s staff complaint was issued that notified him of the outcome and
20 stated as follows:

21 Our review indicates that a violation of California Department of
22 Corrections (CDCR) policy did occur. As a result of the policy
23 violation, appropriate action was taken. California law prevents
24 disclosure of additional information related to this finding

25 **This response does not limit or restrict the availability of further
26 relief via the inmate appeals process.** If you have not already done
27 so, and you wish to further appeal the decision; you must submit your
28 staff complaint appeal through all levels of appeal review up to, and
including, the Secretary’s Level of Review.

With the rendering of a decision at the Third Level of Review your
administrative remedies will be considered exhausted.

ECF No. 46-3 at 19 (emphasis in original).

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⁶ The parties dispute whether the response was received by plaintiff on February 19, 2016, or mailed to plaintiff on that date and received on a later date. DSUF ¶ 18; Response to DSUF ¶ 18.

1 On July 5, 2016, plaintiff's third-level appeal was cancelled as untimely.⁷ DSUF ¶ 21;
2 Response to DSUF ¶ 21. Plaintiff was required to submit the third-level appeal within thirty
3 calendar days of receiving the SLR response. DSUF ¶ 21; Response to DSUF ¶ 21. Plaintiff was
4 informed that he could appeal the cancellation of his grievance by submitting a separate appeal
5 within thirty calendar days from the date of the cancellation. DSUF ¶ 22; Response to DSUF
6 ¶ 22. The cancellation notice included an advisement that "once an appeal has been cancelled,
7 that appeal may not be resubmitted. However, a separate appeal can be filed on the cancellation
8 decision. . . . The original appeal may only be resubmitted if the appeal on the cancellation is
9 granted." ECF No. 46-4 at 7. Plaintiff did not appeal the cancellation. DSUF ¶ 23; Response to
10 DSUF ¶ 23.

11 VIII. Discussion

12 It is undisputed that at the time plaintiff was pursuing his appeal, the CDCR's
13 administrative remedy process generally required inmates to proceed through three levels of
14 review to exhaust an inmate appeal and that plaintiff attempted to proceed to the third level but
15 was unsuccessful.⁸ Defendants have thus satisfied their initial burden of demonstrating a failure
16 to complete the state's exhaustion process. See Reyes v. Smith, 810 F.3d 654, 657 (9th Cir.
17 2016) (a California inmate exhausts administrative remedies by obtaining a decision at each of
18 the three available levels of review). Accordingly, the burden shifts to plaintiff to "come forward
19 with evidence showing that there is something in his particular case that made the existing and
20 generally available administrative remedies effectively unavailable to him." Albino, 747 F.3d at
21 1172.

23 ⁷ Though plaintiff disputes whether his appeal was in fact untimely, he does not dispute that it
24 was cancelled on that ground or that he had thirty calendar days from his receipt of the SLR
25 response to submit his appeal. DSUF ¶ 21 is therefore deemed undisputed.

26 ⁸ During oral argument, plaintiff argued that when his staff complaint was referred to the OIA at
27 SLR, he expected to be interviewed as part of the investigation. He then filed his TLR appeal
28 after it began to appear he would not be interviewed. It appears that plaintiff may have been
attempting to argue that he was satisfied by the SLR response and his TLR appeal was merely a
"reminder grievance" under Harvey v. Jordan. See 605 F.3d 681, 685 (9th Cir. 2010). However,
the court will not address this argument as it has not been fully briefed.

1 An available remedy must be “capable of use; at hand.” Id. at 1171 (quoting Brown v.
2 Croak, 312 F.3d 109, 113 (3d Cir. 2002)). “[A]n inmate is required to exhaust those, but only
3 those, grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action
4 complained of,’” Ross, 578 U.S. at 642 (quoting Booth, 532 U.S. at 738), and a majority of courts
5 within this Circuit have held that a prisoner’s administrative remedies for pursuing a staff
6 complaint appeal are exhausted when an OIA investigation is ordered because no further
7 remedies remain available, see, e.g., Walker v. Whitten, No. 2:09-cv-0642 WBS GGH P, 2011
8 WL 1466882, at *3-5, 2011 U.S. Dist. LEXIS 41759, at *9-16 (E.D. Cal. Apr. 18, 2011) (finding
9 that “ a number of courts have found that an appeal of a complaint categorized as a ‘staff
10 complaint’ was exhausted once an investigation was ordered” and holding defendants did not
11 meet burden of showing additional relief remained available) (collecting cases)).

12 Here, plaintiff contends that referral of his staff complaint to the OIA exhausted his
13 administrative remedies because after referral for investigation there were no further
14 administrative remedies available. ECF No. 52 at 8-14. Defendants argue that plaintiff was
15 required to exhaust his appeal through TLR because he was expressly informed of this
16 requirement in the SLR decision and further remedies remained available. ECF No. 46-1 at 6;
17 ECF No. 58 at 8-13. However, defendants have not identified any concrete, additional relief that
18 would have been available to plaintiff on a TLR of his staff complaint. Without the availability
19 of such relief, defendants’ theory of non-exhaustion cannot prevail.

20 Defendants argue that timely TLR would have allowed the Office of Appeals to issue an
21 order modifying the SLR response to inform plaintiff of the OIA investigation status, or address
22 plaintiff’s requests for compensation and medical accommodation. ECF No. 58 at 10-12. This
23 argument fails. A status update regarding the investigation simply does not constitute additional
24 relief. And plaintiff was independently entitled to notification of the results of the investigation
25 referral. See Cal. Code Regs. tit. 15, § 3084.9(i)(4) (inmate is to be notified of outcome at
26 conclusion of an investigation or confidential inquiry); ECF No. 46-3 at 17 (staff complaint
27 response notifying plaintiff he would be notified of outcome). Furthermore, defendants conceded
28 at oral argument that plaintiff could not have received medical accommodation at TLR because it

1 was not a healthcare appeal, and it is well established that inmates cannot receive compensation
2 through the administrative appeals process, see, e.g., Brown, 422 F.3d at 931 (CDCR appeal
3 response stated that “[i]t is beyond the scope of the appeals process to grant you monetary
4 compensation.); Canister v. Beck, No. 2:16-cv-3053 JAM DMC P, 2019 WL 250534, at *2, 2019
5 U.S. Dist. LEXIS 8699, at *6 (E.D. Cal. Jan. 17, 2019) (response to CDCR inmate’s 2016 appeal
6 stated “[y]our request for monetary compensation is beyond the scope of the appeals process and
7 will not be addressed in this appeal response.”). A statement that unavailable relief is
8 unavailable, like a status update on an investigation referral that has already been made, is not
9 additional “relief” in any sense of the word.

10 This case is analogous to Dixon v. Oleachea in which the court found that “plaintiff
11 exhausted his available administrative remedies . . . when he was informed by the SLR decision
12 that the claim was being investigated by the OIA.” No. 2:15-cv-2372 KJM AC P, 2020 WL
13 5604276, at *13, 2020 U.S. Dist. LEXIS 171553, at *32 (E.D. Cal. Sept. 18, 2020), adopted in
14 full, 2021 WL 2941164, 2021 U.S. Dist. LEXIS 130585 (E.D. Cal. July 13, 2021). In Dixon, as
15 here, plaintiff’s staff complaint was referred to the OIA, and plaintiff received a notice that he had
16 to appeal the decision through all levels to exhaust his administrative remedies. Id., at *11, 2020
17 U.S. Dist. LEXIS 171553, at *27. However, defendants failed to identify any available relief that
18 was available at TLR and the court therefore found that plaintiff had exhausted all available
19 administrative remedies. Id., at *11-13, 2020 U.S. Dist. LEXIS 171553, at *27-32. Here, as in
20 Dixon, the undersigned finds that defendants have not shown additional remedies were available
21 and that “[i]t is insufficient for defendants to rely on language informing plaintiff that he must
22 pursue further administrative review if no further relief is available.” Dixon, 2020 WL 5604276,
23 at *11, 2020 U.S. Dist. LEXIS 171553, at *29 (citation omitted).

24 For all these reasons, the court finds that plaintiff has met his burden of demonstrating that
25 “the existing and generally available administrative remedies [were] effectively unavailable to
26 him.” Albino, 747 F.3d at 1172. Defendants bear the ultimate burden of proving that a prisoner
27 failed to exhaust his administrative remedies, id., and their failure to identify what further relief
28 was available to plaintiff at the third level defeats their non-exhaustion defense. “This lack of

1 clarity must be borne by defendants. It is defendants' burden to show that some practical relief
2 remained available to plaintiff regarding his grievance against them at the third level of review."
3 Cato v. Darst, No. 2:17-cv-1873 TLN EFB P, 2020 WL 2772089, at *10, 2020 U.S. Dist. LEXIS
4 93522, at *27 (E.D. Cal. Mar. 23, 2020) (finding that defendants had "not discharged their burden
5 of showing that plaintiff failed to exhaust *available* remedies" (emphasis in original)), adopted in
6 full, 2020 WL 2770372, 2020 U.S. Dist. LEXIS 93523 (E.D. Cal., May 28, 2020).

7 For all the reasons explained above, the court finds that defendants have failed to show
8 that additional remedies remained at the third level of review, and plaintiff exhausted his
9 available administrative remedies when he was informed by the SLR decision that the claim was
10 being investigated by the OIA. Because, plaintiff's administrative remedies were exhausted by
11 the SLR decision, any arguments as to the timeliness of plaintiff's third-level appeal and
12 misrepresentation of the time to appeal are moot.

13 CONCLUSION

14 Accordingly, IT IS HEREBY ordered that:

15 1. Defendants' motion to strike, ECF No. 58-2, is DENIED.

16 2. Defendants' request for judicial notice, ECF No. 58-3, is GRANTED to the extent the
17 court takes judicial notice of the sections of the Department Operations Manual specifically
18 identified in their reply. The motion is otherwise DENIED.


19 3. Plaintiff's motion to strike, ECF No. 59, is DENIED.

20 IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment,
21 ECF No. 46, be DENIED.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
27 objections shall be served and filed within fourteen days after service of the objections. The
28 parties are advised that failure to file objections within the specified time may waive the right to

1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 DATED: November 12, 2021

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4 ALLISON CLAIRE
5 UNITED STATES MAGISTRATE JUDGE
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