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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND LEE GOINS,  
Plaintiff,  
v.  
D. RUTHERFORD, et al.,  
Defendants.

No. 2:18-cv-1750 TLN AC P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner incarcerated at California State Prison Corcoran (CSP-COR), under the authority of the California Department of Corrections and Rehabilitation (CDCR). Plaintiff proceeds pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983, challenging conditions of his prior confinement at California State Prison Sacramento (CSP-SAC). This action proceeds against four of the five defendants on plaintiff’s Eighth Amendment claims for the use of excessive force (against defendants Rutherford, Elizarraras, Hart and Saaverdra), and against defendant Saelee on plaintiff’s Eighth Amendment failure-to-protect claim. See ECF No. 7 et seq.

On August 22, 2019, defendants filed and served a motion for partial summary judgment on the ground that plaintiff failed to exhaust his administrative remedies against defendants Hart, Saavedra and Saelee before commencing this action. See ECF No. 30-2. The Prison Litigation Reform Act requires that prisoners exhaust “such administrative remedies as are available” before

1 commencing a suit challenging prison conditions. See 42 U.S.C. § 1997e(a). Defendants  
2 concede that plaintiff timely exhausted his administrative remedies on his excessive force claims  
3 against defendants Rutherford and Elizarraras. See ECF No. 30-2 at 7:3-5.

4 Plaintiff failed to oppose defendants' motion for summary judgment. On September 24,  
5 2019, the court so informed plaintiff and granted him additional time to file an opposition. ECF  
6 No. 32. The court informed plaintiff that failure to oppose defendants' motion may result in the  
7 dismissal of this action for failure to prosecute. Id. at 2. Thereafter plaintiff requested a further  
8 extension of time. ECF No. 33. On October 23, 2019, the court extended the deadline for  
9 plaintiff to file and serve his opposition to defendants' motion for summary judgment to  
10 November 22, 2019. ECF No. 34. That deadline has now passed yet plaintiff has not filed an  
11 opposition or otherwise responded to defendants' motion or the court's orders.<sup>1</sup>

12 Local Rule 230(l) provides that “[f]ailure of the responding party to file written opposition  
13 or to file a statement of no opposition may be deemed a waiver of any opposition to the granting  
14 of the motion.” See also Local Rule 110 (failure to comply with the Local Rules “may be  
15 grounds for imposition of any and all sanctions authorized by statute or Rule or within the  
16 inherent power of the Court”); Fed. R. Civ. P. Rule 41(b) (authorizing involuntary dismissal of a  
17 claim or action “if the plaintiff fails to prosecute or to comply with these rules or a court order”).

18 Pursuant to this legal authority, and defendants' prima facie showing they are entitled to  
19 the requested relief, the undersigned will recommend that defendants' motion for partial summary  
20 judgment be granted. Defendants' motion identifies all of plaintiff's administrative appeals  
21 during the relevant period. See ECF No. 30-2 at 3-4; see also ECF No. 30-3 (Defendants'  
22 Statement of Undisputed Facts (DSUF)). Of these, only one appeal, Log No. SAC-16-03611, is

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23  
24 <sup>1</sup> The undersigned has confirmed that plaintiff remains incarcerated at CSP-COR. See  
25 <http://inmatelocator.cdcr.ca.gov/> (Inmate Locator website operated by the California Department  
26 of Corrections and Rehabilitation). This Court may take judicial notice of facts that are capable  
27 of accurate determination by sources whose accuracy cannot reasonably be questioned. Fed. R.  
28 Evid. 201; see also *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1224 n.2 (9th Cir. 2004) (“We  
may take judicial notice of a record of a state agency not subject to reasonable dispute.”).

The undersigned has also confirmed that the court's pertinent orders were served on plaintiff at  
his CSP-COR address. Service of orders on plaintiff at his (verified) address of record is fully  
effective. See Local Rule 182(f).

1 relevant to this action. Defendants accurately note that, while the exhaustion of that appeal  
2 exhausted petitioner's administrative remedies on his excessive force claims against defendants  
3 Rutherford and Elizarraras, the appeal neither named nor reasonably identified defendants Hart,  
4 Saavedra or Saelee; nor did it identify conduct subsequent to the challenged conduct of  
5 defendants Rutherford and Elizarraras that could reasonably be attributed to other defendants.  
6 See ECF No. 30-2 at 7:3-5 (citing DSUF 4-6); see also ECF No. 30-4 (Decl. of J. Spaich, Acting  
7 Chief of CDCR's Office of Appeals, and copies of plaintiff's appeals attached thereto); id. at 8-  
8 16, Ex. 2 (Plaintiff's Appeal Log. No. SAC-16-03611, allegations and administrative decisions);  
9 ECF No. 30-5 (Decl. of L. O'Brian, CSP-SAC Appeals Coordinator, and copies of plaintiff's  
10 appeals attached thereto).

11 The undersigned finds that these exhibits support the affirmative defense that plaintiff  
12 failed to exhaust his administrative remedies on his claims against defendants Hart, Saavedra and  
13 Saelee. See Jones v. Bock, 549 U.S. 199, 211, 216 (2007). Defendants having met their initial  
14 burden of production regarding non-exhaustion, the burden shifts to plaintiff to show that  
15 administrative remedies were unavailable to him or that the defense otherwise fails. See Albino  
16 v. Baca, 697 F.3d 1023, 1030-31 (9th Cir. 2012). Plaintiff has not contested the fact of non-  
17 exhaustion as to defendants other than Rutherford and Elizarraras, nor has he made any showing  
18 in support of an exception to the exhaustion requirement.

19 Accordingly, plaintiff's claims against defendants Hart, Saavedra, and Saelee should be  
20 dismissed with prejudice, and this action should proceed only on the remaining claims that  
21 defendants Rutherford and Elizarraras used excessive force against plaintiff in violation of the  
22 Eighth Amendment.

23 Accordingly, IT IS HEREBY RECOMMENDED that:

- 24 1. Defendants' motion for partial summary judgment, ECF No. 30, be GRANTED.
- 25 2. Plaintiff's claims against defendants Hart, Saavedra and Saelee be DISMISSED WITH  
26 PREJUDICE due to plaintiff's failure to exhaust his administrative remedies against them before  
27 commencing this action, see 42 U.S.C. § 1997e(a), and plaintiff's failure to oppose defendants'  
28 motion, see Local Rule 230(l), Fed. R. Civ. P. 41(b).

1           3. This action should proceed on plaintiff's remaining claims that defendants Rutherford  
2 and Elizarraras used excessive force against plaintiff in violation of the Eighth Amendment.

3           These findings and recommendations are submitted to the United States District Judge  
4 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
5 days after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Such a document should be captioned  
7 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that  
8 failure to file objections within the specified time may waive the right to appeal the District  
9 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: December 10, 2019

11   
12 ALLISON CLAIRE  
13 UNITED STATES MAGISTRATE JUDGE  
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