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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES ALEXANDER RIALS,
Plaintiff,
v.
J. LOZANO, et al.,
Defendants.

No. 2:19-cv-02152-TLN-CKD P

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This case is proceeding on plaintiff’s first amended complaint alleging an Eighth Amendment sexual abuse claim against defendant Bowen and a failure to protect claim, also under the Eighth Amendment, against defendants Lozano and Footman. See ECF Nos. 15 (screening order), 21 (order adopting Findings and Recommendations dismissing remaining defendants and claims).

Currently pending before the court are defendants’ motions for summary judgment based on plaintiff’s failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act (“PLRA”). ECF Nos. 57, 60. Plaintiff has filed an opposition and defendants have filed replies. ECF Nos. 75, 79, 80. For the reasons explained below, the undersigned recommends granting the motion for summary judgment filed by defendants Lozano and Footman. ECF No. 57. The court further recommends granting, in part, and denying, in part,

1 defendant Bowen’s separately filed motion for summary judgment.

2 **I. Ancillary Matters**

3 Before addressing the pending summary judgment motions, the court will address several
4 outstanding non-dispositive motions filed by the parties. On October 7, 2021, the court issued a
5 discovery and scheduling order governing this case. ECF No. 48. Discovery closed on February
6 11, 2022 and all pretrial motions were to be filed on or before May 6, 2022. ECF No. 48.
7 Several weeks prior to the close of discovery, plaintiff filed a request for the issuance of four
8 subpoenas duces tecum to various non-parties. ECF No. 56. That same week, defendants filed a
9 joint motion to stay all merits-based discovery and to vacate all pending deadlines until their
10 pending summary judgment motions on exhaustion were resolved. ECF No. 61. The court
11 granted defendants’ joint motion on February 2, 2022 and stayed the discovery period as it related
12 to the merits of plaintiff’s claims and vacated the deadlines set by the discovery and scheduling
13 order. ECF No. 48. The court noted that an amended discovery and scheduling order would be
14 set as necessary after a ruling on defendants’ summary judgment motions. ECF No. 48.

15 In light of the court’s order granting a stay of all merits-based discovery, plaintiff’s
16 request for subpoenas is premature because none of the requested documents pertain to the
17 exhaustion issue pending before the court. As a result, the court denies plaintiff’s request for
18 subpoenas at this time.

19 Plaintiff also filed a request for judicial notice of facts related to voyeurism and various
20 CDCR regulations and policies. ECF No. 55. Defendants filed a joint opposition to this motion.
21 ECF No. 62. The court denies plaintiff’s request for judicial notice as the facts to be noticed are
22 not relevant to the resolution of the pending summary judgment motions on exhaustion. See Ruiz
23 v. City of Santa Maria, 160 F.3d 543, 548 n. 13 (9th Cir. 1998).

24 By order dated November 2, 2021, the court denied plaintiff’s motion for an extension of
25 time to file a reply to defendants’ answers by informing him that “no reply is necessary as the
26 court has not ordered one.” ECF No. 51 (citing Fed. R. Civ. P. 7(a)(7)). Despite this court order,
27 plaintiff filed two separate replies to defendants’ answers. See ECF Nos. 52, 54. On January 18,
28 2022, defendants filed a joint motion to strike plaintiff’s replies to their answers as unauthorized

1 pleadings. ECF No. 64. Because these pleadings were filed in violation of a court order,
2 defendants' motion to strike is granted. The court will direct the Clerk of Court to strike these
3 pleadings from the docket.

4 **II. Motions for Summary Judgment**

5 In their motion for summary judgment, defendants Lozano and Footman assert that the
6 undisputed material facts demonstrate that plaintiff failed to exhaust his administrative remedies
7 with respect to the Eighth Amendment failure to protect claims against them. ECF No. 57.
8 Defendants submit that plaintiff's "relevant appeal only concerned allegations against defendant
9 Bowen regarding alleged staff misconduct for November 29, 2018, and plaintiff added new
10 claims regarding alleged subsequent events involving Bowen after he appealed to the Office of
11 Appeals." ECF No. 57-1 at 1.

12 In a separately filed motion for summary judgment, defendant Bowen asserts that plaintiff
13 failed to properly exhaust his administrative remedies because he added new claims of sexual
14 misconduct that occurred after November 29, 2018 in his appeal to the third level of
15 administrative review. ECF No. 60. According to defendant Bowen, CDCR regulations required
16 plaintiff to submit a new 602 administrative grievance concerning these subsequent sexual
17 misconduct allegations. ECF No. 60 at 8. Defendant Bowen expressly concedes that "[a]s of the
18 date the original Complaint was filed on October 24, 2019, the only claim that was arguably
19 exhausted by the filing of Appeal Log Number CMF-M-19-00128 was Plaintiff's claim that C.
20 Bowen asked Plaintiff to undress without giving any reasonable justification related to legitimate
21 penological interest." ECF No. 60 at 9. As to this claim, defendant Bowen argues that the factual
22 allegations do not rise to the level of an Eighth Amendment violation because there was no
23 alleged touching or physical injury that plaintiff suffered. ECF No. 60 at 10. Defendant Bowen
24 equates the Eighth Amendment sexual abuse claim against him to a claim of mere verbal
25 harassment. ECF No. 60 at 9-10. Therefore, defendant Bowen seeks summary judgment on the
26 merits of the Eighth Amendment sexual abuse claim against him. ECF No. 60 at 10.

27 In his opposition to the summary judgment motions, plaintiff explains that his failure to
28 protect claims against defendants Lozano and Footman are based on their decision to allow

1 defendant Bowen “unfettered access” to plaintiff after he filed his administrative grievance in
2 January. ECF No. 75 at 5. Plaintiff does not explain how he exhausted his administrative appeal
3 with respect to the claims against defendants Lozano and Footman. Regarding his exhaustion of
4 his administrative remedies, plaintiff contends that his 602 grievance “included all facts known
5 and available to him regarding the sexual misconduct, naming Bowen as the staff member
6 responsible and [he] exhausted that appeal up to and including the Third Level of Review.” ECF
7 No. 75 at 2. He acknowledges adding additional incidents of “physical contact and intensified
8 sexual harassment by defendant C. Bowen” into his appeal from the second level of
9 administrative review filed on April 6, 2019. ECF No. 75 at 4. With respect to the merits of the
10 Eighth Amendment claim against defendant Bowen, plaintiff contends that “Bowen’s admitted
11 solicitation of a sexual act from plaintiff on November 29, 2018 and subsequent sexual fondling
12 far exceed the threshold of a constitutional violation....” ECF No. 75 at 3.

13 Plaintiff separately filed a request for the court to defer resolution of the pending summary
14 judgment motions in accordance with Local Rule 260(b) because additional discovery is
15 necessary. ECF No. 75-1. In support of this request, plaintiff points to defendants’ Statement of
16 Undisputed Facts In Support of Summary Judgment re: Exhaustion.” ECF No. 75-1 at 3.
17 However, plaintiff admits all but two of these undisputed facts, one of which pertains to the
18 merits of the claim against defendant Bowen. ECF No. 75-2. Concerning the issue of
19 exhaustion, plaintiff argues that “discovery is needed to determine if the Office of Appeals did
20 provide information of the alleged conduct of C. Bowen after Plaintiff reported it at the T[hird]
21 L[evel of] R[eview] to the Office of Internal Affairs (OIA) who then notified Defendant J.
22 Lozano....” ECF No. 75-2 at 3.

23 In reply to plaintiff’s opposition, defendant Bowen submits that he “has met his burden to
24 prove that there was an available administrative remedy, and that Plaintiff did not exhaust that
25 available remedy as to events that allegedly occurred after November 29, 2018. ECF No. 79 at 1-
26 2. With respect to plaintiff’s request for further discovery, defendant Bowen argues that this
27 motion does not meet the requirements of Rule 56(f) of the Federal Rules of Civil Procedure, and
28 it should be denied. ECF No. 79 at 2-3. Lastly, defendant Bowen requests summary judgment

1 on the merits of the Eighth Amendment claim pertaining to the events of November 29, 2018.
2 ECF No. 79 at 3-4.

3 Defendants Footman and Lozano filed a separate reply to plaintiff’s opposition. ECF No.
4 80. These defendants first counter that plaintiff failed to comply with Local Rule 260 by
5 reproducing Defendants’ Statement of Undisputed Facts or submitting specific evidence in
6 support of the disputed facts. ECF No. 80 at 2. Without regard to form, defendants point out that
7 “[p]laintiff also did not provide any additional factual information concerning [d]efendants
8 Lozano and Footman’s motion in his opposition...” ECF No. 80 at 2. Specifically, plaintiff fails
9 to demonstrate how Appeal Log No. CMF-M-19-00128 alleged any wrongdoing on the part of
10 defendants Lozano or Footman. ECF No. 80 at 3. Thus, the prison was not alerted to the specific
11 failure to protect claims against them. Plaintiff’s new factual allegations submitted at the third
12 level of administrative review did not comply with CDCR’s appeal procedures and therefore was
13 sufficient to properly exhaust any additional claims. ECF No. 80 at 4 (citing Cal. Code Regs. tit.
14 15, § 3084.1(b)). Defendants also submit that plaintiff is not entitled to additional discovery
15 pursuant to Rule 56 of the Federal Rules of Civil Procedure because the parties agree that Appeal
16 Log No. CMF-M-19-00128 is the only issue in dispute. ECF No. 80 at 5.

17 Before addressing the merits of the pending summary judgment motions, the court
18 addresses plaintiff’s request for additional discovery to support his opposition. Local Rule 260(b)
19 requires the party opposing summary judgment to “provide a specification of the particular facts
20 on which discovery is to be had or the issues on which discovery is necessary.” The only specific
21 facts that plaintiff identifies in his request for discovery relate to whether the Office of Appeals
22 forwarded information to the Office of Internal Affairs. However, the exhaustion of
23 administrative remedies does not require prisoners to report staff misconduct to the Office of
24 Internal Affairs. See Cal. Code regs. tit. 15 §§ 3084.1(b), 3084.7(d)(3) (2018) (repealed June 1,
25 2020) (describing three levels of administrative review necessary to properly exhaust a prisoner’s
26 grievance). Therefore, this information would not be relevant to, or assist plaintiff in, opposing
27 the pending summary judgment motions. Accordingly, plaintiff’s request for additional discovery
28 is denied.

1 **III. Legal Standards**

2 **A. Summary Judgment**

3 Summary judgment is appropriate when it is demonstrated that there “is no genuine
4 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
5 Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by
6 “citing to particular parts of materials in the record, including depositions, documents,
7 electronically stored information, affidavits or declarations, stipulations (including those made for
8 purposes of the motion only), admissions, interrogatory answers, or other materials....” Fed. R.
9 Civ. P. 56(c)(1)(A).

10 Summary judgment should be entered, after adequate time for discovery and upon motion,
11 against a party who fails to make a showing sufficient to establish the existence of an element
12 essential to that party's case, and on which that party will bear the burden of proof at trial. See
13 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an
14 essential element of the nonmoving party's case necessarily renders all other facts immaterial.”
15 Id. If the moving party meets its initial responsibility, the burden then shifts to the opposing party
16 to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec.
17 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
18 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
19 of their pleadings but is required to tender evidence of specific facts in the form of affidavits,
20 and/or admissible discovery material, in support of its contention that the dispute exists or show
21 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed.
22 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the
23 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the
24 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,
25 Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is
26 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving
27 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987). In the
28 endeavor to establish the existence of a factual dispute, the opposing party need not establish a

1 material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be
2 shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.”
3 T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce the
4 pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
5 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963
6 amendments).

7 In resolving the summary judgment motion, the evidence of the opposing party is to be
8 believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the
9 facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475
10 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's
11 obligation to produce a factual predicate from which the inference may be drawn. See Richards
12 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902
13 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than
14 simply show that there is some metaphysical doubt as to the material facts.... Where the record
15 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
16 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

17 **B. Exhaustion of Administrative Remedies**

18 The Prison Litigation Reform Act of 1995 (“PLRA”) provides that “[n]o action shall be
19 brought with respect to prison conditions under section 1983 of this title, ... until such
20 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). A prisoner must
21 exhaust his administrative remedies before he commences suit. McKinney v. Carey, 311 F.3d
22 1198, 1199–1201 (9th Cir. 2002). Failure to comply with the PLRA’s exhaustion requirement is
23 an affirmative defense that must be raised and proved by the defendant. Jones v. Bock, 549 U.S.
24 199, 216 (2007). In the Ninth Circuit, a defendant may raise the issue of administrative
25 exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event the failure
26 to exhaust is clear on the face of the complaint, or (2) a motion for summary judgment. Albino v.
27 Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc). An untimely or otherwise procedurally
28 defective appeal will not satisfy the exhaustion requirement. Woodford v. Ngo, 548 U.S. 81, 84

1 (2006).

2 In order to defeat a properly supported motion for summary judgment based on a
3 prisoner's failure to exhaust pursuant to 42 U.S.C. § 1997e(a), plaintiff must "come forward with
4 some evidence showing" that he has either (1) properly exhausted his administrative remedies
5 before filing suit or (2) "there is something in his particular case that made the existing and
6 generally available remedies unavailable to him by 'showing that the local remedies were
7 ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" Williams v.
8 Paramo, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting Hilao v. Estate of Marcos, 103 F.3d 767,
9 778 n.5) (9th Cir. 1996)); Jones, 549 U.S. at 218. "Accordingly, an inmate is required to exhaust
10 those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the
11 action complained of.'" Ross v. Blake, 136 S. Ct. 1850, 1859 (2016) (quoting Booth v. Churner,
12 532 U.S. 731, 738 (2001)). If undisputed evidence viewed in the light most favorable to the
13 prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56 of
14 the Federal Rules of Civil Procedure. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). If
15 there is at least a genuine issue of material fact as to whether the administrative remedies were
16 properly exhausted, the motion for summary judgment must be denied. See Fed. R. Civ P. 56(a).

17 When the district court concludes that the prisoner has not exhausted administrative
18 remedies on a claim, "the proper remedy is dismissal of the claim without prejudice." Wyatt v.
19 Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled on other grounds by
20 Albino, 747 F.3d at 1168-69. "If a motion for summary judgment is denied, disputed factual
21 questions relevant to exhaustion should be decided by the judge." Albino, 747 F.3d at 1170. If
22 the court finds that remedies were not available, the prisoner exhausted available remedies, or the
23 failure to exhaust available remedies should be excused, the case proceeds to the merits. Id. at
24 1171.

25 **IV. Allegations in the First Amended Complaint**

26 At all times relevant to the allegations in the amended complaint, plaintiff was an inmate
27 at the California Medical Facility where defendant Lozano was the warden. In his verified
28 amended complaint, plaintiff alleges that on November 29, 2018, defendant Bowen, who was a

1 correctional officer, opened his cell door and asked him to undress “without giving any
2 reasonable justification related to legitimate penological interest.” ECF No. 14 at 3. Plaintiff
3 further alleges that defendant Bowen made the request “for his own sexual gratification, or for the
4 purpose of humiliating, degrading and demeaning the Plaintiff.” ECF No. 14 at 3. Plaintiff
5 verbally reported this misconduct to defendant Footman on January 1, 2019 and filed an inmate
6 grievance about it on January 3, 2019. Id. After reporting the misconduct, defendant Bowen
7 blocked plaintiff’s path on several occasions. Id. at 4. He also sexually fondled plaintiff “by
8 rubbing and pressing” his private parts against plaintiff when he was entering or exiting his cell.
9 Id. Plaintiff also alleged that defendant Bowen made “inciteful statements” to him and looked at
10 him in a “lecherious” [sic] manner. Id. at 3. Defendants Lozano and Footman “failed to protect
11 Plaintiff from Defendant C. Bowen’s sexual fondling by allowing him unfettered access and
12 undue influence over Plaintiff... after filing [his] grievance....” Id. at 4.

13 **V. Undisputed Material Facts¹**

14 Plaintiff does not dispute the existence of an administrative remedy at the California
15 Medical Facility. The California Department of Corrections and Rehabilitation has an
16 administrative grievance system for prisoners to appeal “any policy, decision, action, condition,
17 or omission by the department or its staff” that has a material adverse effect on the health, safety,
18 or welfare of inmates. Cal. Code Regs. tit. 15, § 3084.1(a) (2018) (repealed June 1, 2020). A
19 prisoner initiates an inmate appeal by submitting a CDCR 602 Form. Defendants’ Separate
20 Statement of Undisputed Facts (“DSUF”) at No. 6.² Inmates must follow the procedures
21 outlined in California Code of Regulations, Title 15, sections 3084.1 through 3085, by describing
22 the problem and the action requested in the appeal form. DSUF at No. 7. The level of specificity
23 required in the appeal is described by regulation:

24 The inmate or parolee shall list all staff member(s) involved and shall
25 describe their involvement in the issue. To assist in the identification

26 ¹ All facts are undisputed by the parties unless otherwise indicated.

27 ² All references to “DSUF” refers to the Statement of Undisputed Facts submitted by defendants
28 Lozano and Footman. ECF No. 57-2. The court also notes that defendant Bowen filed a Notice
of Joinder to the motion for summary judgment filed by defendants Lozano and Footman. See
ECF No. 59.

1 of staff members, the inmate or parolee shall include the staff
2 member's last name, first initial, title or position, if known, and the
3 dates of the staff member's involvement in the issue under appeal. If
4 the inmate or parolee does not have the requested identifying
5 information about the staff member(s), he or she shall provide any
6 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.

7 Cal. Code Regs. tit. 15, § 3084.2(a)(3)–(4) (2018) (repealed June 1, 2020). According to CDCR
8 regulations, inmates are only permitted to grieve one issue per appeal. DSUF at No. 11, Cal.
9 Code Regs. tit. 15, § 3084.6(b)(8).

10 In 2018 and 2019, the relevant time period for exhaustion purposes, California regulations
11 required that inmates pursue administrative grievances through three levels of review to exhaust
12 their administrative remedies. Cal. Code Regs. tit. 15, §§ 3084.1(b), 3084.7(d)(3) (2018)
13 (repealed June 1, 2020). At the first level of administrative review, the CDCR 602 form is
14 submitted to the appeals coordinator at the prison. DSUF at No. 8, Cal. Code Regs. tit. 15, §
15 3084.1, 3084.7 (2018). The appeals coordinator may bypass the first level of review under
16 certain circumstances. DSUF at No. 8, Cal. Code Regs. tit. 15 § 3084.1, 3084.7 (2018). If the
17 inmate is not satisfied with the decision at the first level, he may appeal to the second level. Id.
18 The second level of administrative review must be completed before appealing to the Appeals
19 Chief who conducts the third level of review. Id. A decision at the third level of review
20 constitutes the decision of the Secretary of the California Departments of Corrections and
21 Rehabilitations and is necessary to properly exhaust administrative grievances. Id.

22 When an inmate submits an appeal that does not comply with the regulations governing
23 the appeal process, an appeals coordinator will reject the return the appeal with the reason for the
24 rejections and provide instructions on how to correct the defect, if possible. DSUF at No. 10, Cal.
25 Code Regs. tit. 15, §§ 3084.6(b), (c), and (e) (2018).

26 The administrative appeals process at CDCR and CMF was available to plaintiff and
27 plaintiff utilized the administrative appeals process between November 29, 2018, when the
28 incidents in plaintiff's first amended complaint occurred, and October 24, 2019, when plaintiff

1 filed suit. DSUF at No. 14; but see Saddozai v. Davis, ___ F.4th ___, 2022 WL 1613616 (9th
2 Cir. May 23, 2022) (concluding that the filing date of plaintiff’s amended complaint was the only
3 relevant pleading for determining exhaustion of administrative remedies). During this time
4 period, plaintiff submitted multiple non-medical appeals to CMF’s appeals office and the Office
5 of Appeals that were accepted for review. DSUF at No. 15.

6 The administrative appeal that relates to the allegations in plaintiff’s amended complaint
7 was assigned **Appeal Log Number CMF-M-19-00128**. DSUF at Nos. 15-16. Plaintiff
8 submitted this appeal on January 3, 2019 indicating that on November 29, 2018, at or about 6:10
9 a.m., officer Bowen opened his cell door and asked plaintiff to disrobe. ECF No. 57-4 at 59
10 (CDCR 602 Form), DSUF at No. 17, Bowen’s Statement of Undisputed Facts (“BSUF”), at No.
11 10. Plaintiff indicated that the request was not related to Bowen’s official duties but was solely
12 sexual in nature. ECF No. 57-4 at 61 (CDCR 602 Form), DSUF at No. 17. Plaintiff refused to
13 undress for defendant Bowen who then closed plaintiff’s cell door and left. Id. In order to
14 discourage plaintiff from reporting his sexual misconduct, defendant Bowen manufactured a false
15 Rules Violation Report (log number 06120552) against plaintiff. Id. As part of plaintiff’s
16 grievance, he indicated that he reported Bowen’s behavior to Lieutenant Footman on January 1,
17 2019. Id. No other officers were mentioned in plaintiff’s grievance. Id.

18 Appeal Log Number CMF-M-19-00128 was received by the inmate appeals office at
19 CMF on or about January 4, 2019 where it bypassed the first level of administrative review.
20 DSUF at No. 17.

21 On March 19, 2019, the second level appeal response informed plaintiff that his grievance
22 was referred for an appeal inquiry and the matter would be referred to the Office of Internal
23 Affairs (“OIA”) for follow-up and a possible investigation. DSUF at No. 18. If OIA investigated
24 the matter, plaintiff would be notified as to whether the allegations were sustained, not sustained,
25 unfounded, exonerated, or no finding was possible. DSUF at No. 18. If OIA declined to
26 investigate, the matter would be returned to the institution for completion of an inquiry as to
27 whether staff violated policy. Id. Appeal Log Number CMF-M-19-00128 was partially granted
28 at the second level of review in that the matter was referred to the OIA for review and possible

1 investigation. Id. Plaintiff was further notified that he could appeal this decision to the third level
2 of review which would be necessary to exhaust his administrative remedies. Id.

3 On April 6, 2019, plaintiff appealed this grievance to the third level of administrative
4 review. ECF No. 57-4 at 62 (CDCR 602 Form), BSUF at No. 12. In describing his
5 dissatisfaction with the second level appeal response, plaintiff indicated that since November 29,
6 2018 defendant Bowen subjected him to ongoing “lecherous and wanton” looks and incidental
7 physical contact when opening and closing plaintiff’s cell door and “has consistently initiated
8 [this] sight and sound contact” with plaintiff “in furtherance of his sexual misconduct.” ECF No.
9 57-4 at 62 (CDCR 602 Form). The Office of Appeals (“OOA”) received this appeal on April 22,
10 2019 and denied it on July 30, 2019. DSUF at No. 19, BSUF at No. 13. The third level appeal
11 response did not specifically address any of the ongoing misconduct by defendant Bowen that
12 occurred after November 30, 2018. DSUF at No. 19, BSUF at No. 13.

13 Plaintiff did not submit any other appeals relevant to the allegations in the first amended
14 complaint during the relevant time period. DSUF at No. 20.

15 **VI. Analysis**

16 The court finds that defendants have carried their initial burden of proving the availability
17 of an administrative remedy. Therefore, the burden shifts to plaintiff to come forward with
18 evidence that there was something in his particular case that made the existing administrative
19 remedies effectively unavailable to him or that he has otherwise properly exhausted his claims.
20 Williams v. Paramo, 775 F.3d at 1191. In this case, the parties agree that the only relevant
21 administrative grievance that plaintiff filed was Appeal Log Number CMF-M-19-00128.

22 The court finds that the undisputed material evidence shows that plaintiff did not describe
23 the actions of defendants Lozano and Footman in Appeal Log Number CMF-M-19-00128 which
24 form the basis of the allegations against them in his first amended complaint. Although plaintiff’s
25 602 form mentions defendant Lozano by name, it does not reference any wrongdoing by this
26 defendant. Therefore, plaintiff did not provide the appeal coordinator at the prison with sufficient
27 information to respond to the allegations that defendants Lozano and Footman failed to protect
28 him from the sexual abuse by defendant Bowen. See Cal. Code Regs. tit. 15, § 3084.2(a) (2018)

1 (requiring inmate to identify all staff involved and to describe their involvement in the issue);
2 Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010) (concluding that a grievance that complained
3 of visitation restrictions, and did not mention an assault or that the visitation restriction was
4 related to the assault, was insufficient to put prison officials on notice that staff conduct
5 contributed to the assault). For all these reasons, the court recommends granting the motion for
6 summary judgment filed by defendants Lozano and Footman.

7 Defendant Bowen’s motion for summary judgment focuses on the allegations of ongoing
8 sexual misconduct that were added to plaintiff’s administrative appeal at the third level of review.
9 The undisputed material facts demonstrate that these allegations of ongoing misconduct were not
10 addressed by the third level of administrative review or any other level of review because plaintiff
11 did not include them in his initial 602 form. By raising a new issue at the third level of review,
12 the court finds that plaintiff did not comply with CDCR regulations and therefore did not properly
13 exhaust his claim pertaining to ongoing sexual misconduct by defendant Bowen that occurred
14 after November 29, 2018. See Cal. Code Regs. tit. 15, § 3084.2(a)(4) (2018) (requiring inmate to
15 “state all facts known and available to him/her regarding the issue being appealed at the time of
16 submitting the Inmate/Parolee Appeal form”); Cal. Code Regs. tit. 15, § 3084.1(b) (2018)
17 (administrative remedies not exhausted as to “any new issue, information, or person later named
18 by the appellant that was not included in the originally submitted CDCR Form 602”). Even
19 though plaintiff submitted his original 602 appeal form over one month after the initial events of
20 November 29, 2018, he did not include any allegations of ongoing misconduct by defendant
21 Bowen. Plaintiff’s administrative appeal did not comply with CDCR regulations requiring all
22 known and available facts to be presented in the original 602 form. See Tate v. Andres, No. 2:18-
23 cv-0822-KJM-AC-P, 2022 WL 1104016 (E.D. Cal. 2022). Therefore, defendant Bowen is
24 entitled to summary judgment for plaintiff’s failure to exhaust the claim of ongoing sexual
25 misconduct.

26 As to defendant Bowen’s motion for summary judgment on the merits of the Eighth
27 Amendment sexual abuse claim based on events of November 29, 2018, the court finds that it is
28 premature because all merits-based discovery has been stayed. See ECF No. 65. As a result, the

1 undersigned recommends denying defendant Bowen’s summary judgment motion on the merits
2 of the remaining Eighth Amendment claim without prejudice to renewal at a later stage of the
3 proceedings.

4 **VII. Plain Language Summary for Pro Se Party**

5 The following information is meant to explain this order in plain English and is not
6 intended as legal advice.

7 The court is recommending that the motion for summary judgment be granted as to
8 defendants Lozano and Footman. It is also recommending that defendant Bowen’s motion for
9 summary judgment be granted as to the events occurring after November 29, 2018. The court
10 recommends denying defendant Bowen’s motion for summary judgment on the merits of the
11 Eighth Amendment claim without prejudice to renewal at a later date because discovery about the
12 underlying facts you allege has been stayed. These recommendations, if adopted by the district
13 court judge, will end your case against defendants Lozano and Footman. It will narrow
14 the Eighth Amendment claim against defendant Bowen to the facts that occurred on November
15 29, 2018 as alleged in your first amended complaint.

16 If you disagree with these recommendations in your case, you may explain why they are
17 not the correct result. Label your explanation as “Objections to Magistrate Judge’s Findings and
18 Recommendations” and file it with the court within 14 days from the date of this order. The
19 district court judge assigned to your case will review your objections and make the final decision
20 in a written order.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. Plaintiff’s request for issuance of subpoenas (ECF No. 56) is denied as premature.
- 23 2. Plaintiff’s request for judicial notice (ECF No. 55) is denied.
- 24 3. Defendants’ joint motion to strike (ECF No. 64) is granted.
- 25 4. The Clerk of Court is directed to strike plaintiff’s replies to defendants’ answers (ECF
26 Nos. 52, 54) from the docket since they were filed in violation of the court’s
27 November 2, 2021 order.
- 28 5. Plaintiff’s request for additional discovery and to defer resolution of the pending

1 motions for summary judgment (ECF No. 75-1) is denied for the reasons explained
2 herein.

3 IT IS FURTHER RECOMMENDED that:

- 4 1. The motion for summary judgment filed by defendants Lozano and Footman (ECF
5 No. 57) be granted.
- 6 2. Plaintiff's claims against defendants Lozano and Footman be dismissed without
7 prejudice for failing to exhaust administrative remedies.
- 8 3. Defendant Bowen's motion for summary judgment (ECF No. 60) be granted, in part,
9 and denied, in part.
- 10 4. Plaintiff's claim involving ongoing sexual misconduct by defendant Bowen be
11 dismissed without prejudice for failing to exhaust administrative remedies.
- 12 5. This case be allowed to proceed on the remaining Eighth Amendment sexual abuse
13 claim against defendant Bowen.
- 14 6. Defendant Bowen's motion for summary judgment on the merits be denied without
15 prejudice to renewal at a later stage of the proceedings.

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

24 Dated: June 2, 2022

25 
26 CAROLYN K. DELANEY
27 UNITED STATES MAGISTRATE JUDGE

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