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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAVANCE ROSS PAYNE,
Plaintiff,
v.
BASER, et al.,
Defendants.

No. 2: 20-cv-0553 TLN KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion for summary judgment on the grounds that plaintiff failed to exhaust administrative remedies. (ECF No. 36.) For the reasons stated herein, the undersigned recommends that defendants’ motion be granted.

II. Legal Standard for Summary Judgment

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

Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings,

1 depositions, answers to interrogatories, and admissions on file,
2 together with the affidavits, if any,” which it believes demonstrate
the absence of a genuine issue of material fact.

3 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
4 56(c)).

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

17 Consequently, if the moving party meets its initial responsibility, the burden then shifts to
18 the opposing party to establish that a genuine issue as to any material fact actually exists. See
19 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
20 establish the existence of such a factual dispute, the opposing party may not rely upon the
21 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the
22 form of affidavits, and/or admissible discovery material in support of its contention that such a
23 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
24 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
25 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
26 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
27 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return
28 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436

1 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d
2 1564, 1575 (9th Cir. 1990).

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

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

22 By notice provided on November 9, 2020 (ECF No. 32), and December 9, 2020 (ECF No.
23 36-1), plaintiff was advised of the requirements for opposing a motion brought pursuant to Rule
24 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir.
25 1998) (*en banc*); Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

26 Legal Standard for Exhaustion of Administrative Remedies

27 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA) provides that “[n]o
28 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other

1 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
2 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are
3 required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 549
4 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).

5 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the
6 relief offered by the process, unless “the relevant administrative procedure lacks authority to
7 provide any relief or to take any action whatsoever in response to a complaint.” Booth v.
8 Churner, 532 U.S. 731, 736, 741 (2001); Ross v. Blake, 136 S. Ct. 1850, 1857, 1859 (2016). The
9 exhaustion requirement applies to all prisoner suits relating to prison life. Porter v. Nussle, 534
10 U.S. 516, 532 (2002). An untimely or otherwise procedurally defective appeal will not satisfy the
11 exhaustion requirement. Woodford v. Ngo, 548 U.S. 81, 90-91 (2006).

12 As the U.S. Supreme Court recently explained in Ross, 136 S. Ct. at 1856, regarding the
13 PLRA’s exhaustion requirement:

14 [T]hat language is “mandatory”: An inmate “shall” bring “no action”
15 (or said more conversationally, may not bring any action) absent
16 exhaustion of available administrative remedies.... [T]hat edict
17 contains one significant qualifier: the remedies must indeed be
“available” to the prisoner. But aside from that exception, the
PLRA’s text suggests no limits on an inmate’s obligation to
exhaust—irrespective of any “special circumstances.”

18 Id. (internal citations omitted).

19 Exhaustion of administrative remedies may occur if, despite the inmate’s failure to comply
20 with a procedural rule, prison officials ignore the procedural problem and render a decision on the
21 merits of the grievance at each available step of the administrative process. Reyes v. Smith, 810
22 F.3d 654, 659 (9th Cir. 2016) (although inmate failed to identify the specific doctors, his grievance
23 plainly put prison on notice that he was complaining about the denial of pain medication by the
24 defendant doctors, and prison officials easily identified the role of pain management committee’s
25 involvement in the decision-making process).

26 III. Plaintiff’s Claims

27 This action proceeds on plaintiff’s original complaint, filed March 3, 2020, against
28 defendants Baser and Crisanto. (ECF No. 1.)

1 Plaintiff alleges that on December 29, 2017¹, defendants Baser and Crisanto escorted a
2 group of prisoners, including plaintiff, to the treatment center. (Id. at 12.) During the escort,
3 defendant Baser told plaintiff to “hurry up.” (Id.) As plaintiff and defendants approached the
4 treatment center, defendant Baser opened the door and told plaintiff to turn around and go back to
5 his housing unit because plaintiff took too long to get to the treatment center. (Id. at 13.) Plaintiff
6 responded, “I can’t help it. This is how I walk.” (Id.)

7 Defendant Baser slammed the treatment center door shut just before plaintiff stepped his
8 left foot inside, causing plaintiff’s left shoe to fall off. (Id. at 13-14.) Plaintiff asked defendant
9 Baser to apologize for slamming the door on his foot. (Id. at 14.) Defendant Baser yelled, “Get
10 the fuck in there,” while simultaneously pulling his metal baton out and striking plaintiff on the
11 right shoulder. (Id.) Defendant Baser then grabbed plaintiff by his jacket, pulling him out of the
12 doorway of the treatment center. (Id.)

13 Defendant Baser raised his baton a second time to strike plaintiff. (Id.) Before the baton
14 made contact, plaintiff grabbed the baton in mid-air. (Id.) At this time, defendant Crisanto failed
15 to intervene to help plaintiff. (Id. at 15.) Instead, defendant Crisanto yelled, “stop resisting.” (Id.)

16 IV. Discussion

17 A. Defendants’ Evidence

18 In support of the summary judgment motion, defendants submitted the declaration of S.
19 Boxall, Grievance Coordinator at California State Prison-Sacramento (“CSP-Sac”). (ECF No. 36-
20 5.) S. Boxall states that a search of the computer system was conducted under plaintiff’s name and
21 California Department of Corrections and Rehabilitation (“CDCR”) number for all non-health care
22 related grievances received by the CSP-Sac Grievance Office. (Id. at 2.) This search revealed that
23 from December 29, 2017, through March 3, 2020, the CSP-Sac Grievance Office received
24 grievance log numbers SAC-A-18-0533, SAC-T-18-00640, SAC-L-18-02455, SAC-S-18-5019,
25 SAC-A-19-1932 and SAC-A-19-2883 from plaintiff. (Id.)

26
27 ¹ In the complaint, plaintiff alleges that the incident occurred on December 29, 2018. However,
28 after reviewing the documents submitted regarding plaintiff’s relevant administrative grievances,
it is clear that the alleged incident occurred on December 29, 2017.

1 Grievances SAC-L-18-2455 and SAC-S-18-5019 are unrelated to the claims raised in the
2 instant action. (Id. at 2-4.)

3 *Grievance SAC-A-18-0533*

4 In grievance SAC-A-18-0533, signed by plaintiff on January 30, 2018, plaintiff raised
5 claims regarding the disciplinary hearing where he was found guilty of Battery on a Peace Officer
6 based on the December 29, 2017 incident. (Id. at 15.) In this grievance, plaintiff argued that during
7 the Rules Violation Report hearing he did not have his hearing aids. (Id. at 10.) Plaintiff argued
8 that without his hearing aids, he could not hear the Senior Hearing Officer conducting the hearing
9 and could not properly defend himself. (Id.) Plaintiff requested that the Rules Violation Report be
10 reissued and reheard. (Id.) This grievance did not raise the claims raised in the instant action.

11 On February 10, 2018, Warden Baughman granted grievance SAC-A-18-0533 at the second
12 level review. (Id. at 12.) Warden Baughman ordered the Rules Violation Report to be reissued and
13 reheard. (Id.)

14 *Grievance SAC-T-18-00640*

15 In grievance SAC-T-18-00640, signed by plaintiff on February 13, 2018, plaintiff alleged
16 that defendant Baser assaulted him on December 29, 2017. (Id. at 60.) On February 16, 2018, this
17 grievance was cancelled at the First Level of Review due to exceeding the 30 day time constraints
18 for filing grievances. (Id. at 59.) The response stated that the appeal issue occurred on December
19 29, 2017, and plaintiff had until no later than January 28, 2018 to submit the appeal. (Id.) This
20 appeal was not received into the Appeals Office until February 14, 2018. (Id.) The response also
21 stated,

22 It is noted that although you were in segregated housing from
23 12/29/17 until 2/3/18, you generated appeal SAC-A-18-00533 on
24 1/30/18, which was received in the Appeals Office on 1/31/18,
25 demonstrating your access to the appeals process while housed in
26 ASU. Therefore, this appeal is cancelled and is being returned to
27 you. You can submit a separate appeal on the disciplinary issue
28 related to this, as long as it is submitted within the 30 day time
constraints of receiving your final copy of the RVR.

27 (Id.)

28 ////

1 The First Level Review form also stated that, pursuant to California Code of Regulations
2 title 15, § 3084(6)(e), once an appeal has been cancelled, that appeal may not be resubmitted.
3 (Id.) The form further stated, “However, a separate appeal can be filed on the cancellation
4 decision. The original appeal may only be resubmitted if the appeal on the cancellation is
5 granted.” (Id.)

6 On the bottom of the form containing the First Level Response is a section stating, “Note:
7 If you are required to respond/explain to this CDCR Form 695 use only the lines provided
8 below.” (Id.) Although plaintiff was not required to respond to the form, plaintiff wrote the
9 following statements in the provided lines:

10 Due to the fact Sg. Fugioha has recommended appellant to receive
11 DDP is evidence the inmate has a learning disability and delay is due
12 to CDCR not providing DDP appellate assistance within due process,
protecting him from victimization violation...

13 (Id.)

14 Apparently in response to these comments, a second First Level response to grievance no.
15 SAC-T-18-00640 was issued on March 7, 2018. (Id. at 58.) This response states,

16 The enclosed documents are being returned to you for the following
17 reasons.

18 It has been determined that you are attempting to submit an appeal
19 that has been previously cancelled. Pursuant to CCR 3084.4 you are
20 advised that this is considered misuse or abuse of the appeals process.
Repeated violations may lead to your being placed on appeal
restriction as described in CCR 3084.4(g).

21 Your appeal was cancelled per CDC Form 695 dated February 16,
22 2018. You did not follow the directions on this form. Refer to the
23 last paragraph on the form which states, “Pursuant to CCR 3084.6(e),
24 once an appeal has been cancelled, that appeal may not be
25 resubmitted. However, a separate appeal can be filed on the
cancellation decision. You need to attach the original appeal with all
of its attachments to the cancellation appeal so that the documents
can be reviewed in order to make an informed decision on the
appropriateness of the cancellation. Please return the cancellation
appeal with the original appeal together for processing and review.

26 (Id.)

27 In support of the summary judgment motion, defendants submitted a form titled, “Inmate
28 Appeal Decision Effective Communication Confirmation,” issued in connection with the

1 February 16, 2018 First Level response to grievance SAC SAC-T-18-00640. (Id. at 88.) This
2 form states,

3 Pursuant to 10/22/03 memorandum titled EQUALLY EFFECTIVE
4 COMMUNICATION (REVISED), we must ensure and document
5 effective communication for appeals regarding due process contacts,
6 clinical encounters and liberty interests.

7 In these cases, the appeal decision (including appeal screening form
8 CDCR 695) is to be delivered and read to inmates on the TABE 4.0
9 and LD lists. Return completed Effective Communication
10 Confirmation Form to the Appeals Office.

11 (Id.)

12 The Effective Communication Confirmation Form contains plaintiff's name and appeal
13 no. SAC-T-18-00640. (Id.) The form states that it was assigned on February 16, 2018, and due
14 back on February 23, 2018. (Id.) The form indicates that plaintiff had a TABE score of 4.0 or
15 lower and hearing problems which could implicate potential effective communication triggers.
16 (Id.) The form states that on February 23, 2018, Sergeant Fujiwara communicated to plaintiff the
17 February 16, 2018 CDC Form 695, i.e., the February 16, 2018 First Level response to grievance
18 SAC-T-18-00640. (Id.)

19 The form states that Sergeant Fujiwara read the First Level response to plaintiff in simple
20 English, that was spoken slowly and clearly. (Id.) The form states that effective communication
21 with plaintiff was determined by 1) plaintiff reiterating in his own words, what was explained; 2)
22 plaintiff providing appropriate, substantive responses to questions asked; and 3) plaintiff asking
23 appropriate questions regarding the information provided. (Id.)

24 Defendants also provided an "Inmate Appeal Decision Effective Communication
25 Confirmation" form indicating that on March 11, 2018, Sergeant Reeds read to plaintiff the
26 March 7, 2018 response to grievance no. SAC-T-18-00640. (Id. at 90.) This form states that
27 Sergeant Reeds read the response to plaintiff while plaintiff wore his hearing aids. (Id.) The
28 form indicates that effective communication with plaintiff was determined on the same grounds
found by Sergeant Fujiwara, discussed above. (Id.)

Grievance SAC-A-19-1932

In grievance SAC-A-19-1932, plaintiff wrote that he did not receive a response to

1 grievance SAC-T-18-00640. (Id. at 84.) Plaintiff signed this grievance on May 5, 2019. (Id.)
2 On May 13, 2019, grievance SAC-A-19-1932 was cancelled for exceeding time limits to submit
3 grievances. (Id. at 82.) The response stated,

4 Per the attached EEC copies you received appeal log # SAC-T-18-
5 00640 twice, once on 2/23/18 and again on 3/11/18. You also wrote
6 back on the Form 695 dated 2/16/18, proving that you knew the
7 appeal had already been cancelled on 2/16/18. You are beyond the
8 30 day timeframes to appeal this issue and your appeal is being
9 cancelled as such.

10 (Id.)

11 This form stated that once an appeal has been cancelled, it may not be resubmitted. (Id.)
12 The form stated that a separate appeal could be filed on the cancellation decision. (Id.)

13 Rather than filing a separate appeal, on June 2, 2019, plaintiff appealed the cancellation of
14 grievance SAC-A-19-1932 to the next level of review. (Id. at 98.) On June 11, 2019, a First
15 Level response to this grievance was issued. (Id. at 95.) This response stated that plaintiff was
16 improperly attempting to submit an appeal that had been previously cancelled. (Id.)

17 This issue has already been cancelled. A cancellation is not
18 considered a response; therefore, it does not allow you to proceed to
19 the next level of review. If you disagree with the cancellation
20 decision, you may appeal the cancellation by submitting a new
21 appeal explaining why you feel the cancellation was in error. Be sure
22 to attach the cancelled appeal and all attachments speaking only to
23 the cancellation and not restating the previous appeal issue...

24 (Id.)

25 Defendants submitted an “Inmate Appeal Decision Effective Communication
26 Confirmation” form regarding grievance SAC-A-19-1932. (Id. at 111.) However, this form is
27 not completed by prison officials. (Id.)

28 *Grievance SAC-A-19-2883*

On July 1, 2019, plaintiff submitted grievance SAC-A-19-2883. (Id. at 116.) In this
grievance, plaintiff wrote that he was appealing the “cancellation of my 602 appeal.” (Id.)

Grievance SAC-A-19-2883 was bypassed at the First Level of review. (Id.)

On August 9, 2019, Warden Lynch issued a Second Level response denying grievance
SAC-A-19-2883. (Id. at 114-15.) The response stated that plaintiff was appealing the
cancellation of grievance SAC-A-19-1932. (Id. at 114.) In the response, Warden Lynch stated,

1 in relevant part,

2 A review of the Test of Adult Basic Education list reveals the
3 appellant has a Reading Grade Point Level below 4.0. The appellant
4 is a participant in the Mental Health Services Delivery System, at the
5 Correctional Clinical Case Management System (CCCMS) level of
6 care. Appellant's Development Disability Program code is NCF
7 indicating that he does not require adaptive functioning evaluation.
8 The appellant's Disability Placement Program code is DLT, DNH.
9 Therefore, he does require special accommodation to achieve
10 effective communication, Hearing Aids and Needs Staff to Speak
11 Loudly and Clearly.

12 Effective communication was achieved by speaking slowly, loudly
13 and clearly, using simple words and terms, and the appellant
14 displayed understanding of the issues related to this appeal by
15 discussing the merits of his appeal, using his own words to relate
16 those issues that were submitted on the Form 602/602a. The
17 appellant was advised if he could not hear, at any point in the
18 interview, to notify staff.

19 A telephone interview with the appellant was conducted by CCII(A)
20 O'Brian on August 7, 2019 at approximately 1400 hours, at High
21 Desert State Prison (HDSP), with the assistance of Correctional
22 Counselor I (CCI) B. Patterson. During the interview, appellant did
23 not have anything additional to add to the appeal.

24 The SLR reviewed the processing of appeal log SAC-A-19-01932.
25 The appeal was received by CSP-SAC Appeals Office on May 13,
26 2019. On May 13, 2019, the appeal was cancelled and screened back
27 to the appellant, advising the appellant he has exceeded the time
28 limits for resubmitting the appeal. The appellant was advised he
received his copy of appeal log SAC-T-18-00640 twice, on February
23, 2018 and March 11, 2018, per Inmate Appeal Decision Effective
Communication Confirmation Forms (EEC Form). The appellant
was advised he wrote back on the CDCR 695 Form dated February
16, 2018, which demonstrated that he was aware the appeal had
already been cancelled on February 16, 2018, therefore making him
beyond the 30 day timeframes to appeal the issue.

29 The appeals office received SAC-A-19-01932 back again on June 6,
30 2019. The appellant wrote in section D of the CDCR 602, noting he
was dissatisfied with the first level response. The appeal was
screened back to the appellant on June 11, 2019, advising the
appellant the appeal was already cancelled which is not considered a
first level response and he could not proceed to the next level of
review. The appellant was advised if he disagreed with the
cancellation decision, he may appeal the cancellation by submitting
a new appeal explaining why he felt the cancellation was in error and
to attach the cancelled appeal and all attachments speaking only to
the cancellation and not restating the previous appeal issue.

31 A review of appeal log SAC-A-19-01932, notes the appellant claims
32 CSP-SAC never investigated his claims on appeal log SAC-T-18-
33 00640 and he never received a response. Appeal log SAC-T-18-

1 00640 was screened back to the appellant stating the Hiring
2 Authority reviewed his appeal and it was cancelled due to time
3 constraints. Per EEC Form, dated February 16, 2018, the appellant
4 was issued the appeal and the CDCR Form 695 on February 23, 2018
5 by Sergeant (Sgt.) Fujiwara. The appellant resubmitted his appeal,
6 writing on the CDCR 695 Form and stating, "Due to the fact Sgt. Fuji
7 has recommended appellant to receive DDP ...delay is due to CDCR
8 not providing appellate assistance with due process." The appeal was
9 screened back to the appellant advising him the appeal was already
10 cancelled and a separate appeal can be filed on the cancellation
11 decision. Per EEC Form, dated March 7, 2018, the appellant was
12 again issued the appeal and CDCR 695 Forms on March 11, 2018 by
13 Sgt. Deeds. Appeal log SAC-A-19-01932 was received in the
14 Appeals Office on May 13, 2019, beyond the 30 day time constraints
15 to appeal a cancellation decision.

16 Based on the review of this matter, the SLR has determined appeal,
17 log SAC-A-19-01932 was appropriately cancelled as time
18 constraints were exceeded. The request to process appeal SAC-A-
19 19-01932 is Denied.

20 (Id. at 114-15.)

21 *Plaintiff's Third Level Grievances*

22 Defendants filed the declaration of Howard E. Mosely, the Associate Director of the
23 Office of Appeals ("OOA") for the CDCR. (ECF No. 36-4.) Mr. Mosely states that on May 13,
24 2020, he conducted a search of the OOA computer system for all non-health care related appeals
25 received by the OOA from plaintiff. (Id. at 3.) Mr. Mosely states that the OOA received two
26 appeals from plaintiff after December 29, 2017, i.e., appeal nos. SAC-S-18-05019 and SAC-A-
27 19-2883. (Id.)

28 Grievance SAC-S-18-5019 is unrelated to the claims raised in the instant action. (See id.
at 8-9.) The Third Level Appeal Decision in grievance SAC-A-19-2883 denied plaintiff's
grievance. (Id. at 56-57.)

29 B. Discussion

30 In the summary judgment motion, defendants argue that plaintiff's grievance for the
31 claims raised in this action is SAC-T-18-00640. Defendants argue that this grievance did not
32 exhaust plaintiff's administrative remedies because it was cancelled as untimely. Under prison
33 regulations applicable at the time of the events alleged in the complaint, inmates were required to
34 submit grievances within thirty days of the event or decision appealed. Cal. Code Regs., tit. 15,

1 former § 3084.8(b).² The regulations allowed an appeal to be cancelled if the time limits were
2 exceeded. Cal. Code Regs., tit. 15, former § 3084.6(c). An inmate may separately appeal the
3 cancellation of an appeal. Cal. Code Regs., tit. 15, former § 3084.6(e). At the discretion of the
4 appeals coordinator or the third level appeals chief, a cancelled appeal later could be accepted if it
5 were determined that the cancellation had been erroneous or if new information had been
6 received making the appeal eligible for review. Cal. Code Regs., tit. 15 former § 3084.6(a)(3).

7 In the summary judgment motion, defendants argue that plaintiff was advised of the
8 procedures for appealing the cancellation of grievance SAC-T-18-00640 in the February 16, 2018
9 screening notice for the cancellation of this grievance. Defendants contend that despite these
10 rules and instructions to him, plaintiff simply resubmitted the cancelled appeal. Because plaintiff
11 was attempting to resubmit the previously cancelled appeal, on March 7, 2018, the appeal was
12 screened out and returned to him.

13 Defendants observe that fourteen months after March 7, 2018, plaintiff submitted
14 grievance SAC-A-19-1932 claiming that he had not received a response to the original grievance
15 SAC-T-18-00640. This grievance was screened out as untimely.

16 Defendants observe that in grievance SAC A-19-2883, plaintiff contested the cancellation
17 of grievance SAC-A-19-1932. Defendants contend that the denial decisions in grievance SAC A-
18 19-2883 confirmed that appeal SAC-A-19-1932 was properly cancelled as untimely.

19 In summary, defendants argue that because plaintiff's original grievance, i.e., SAC-T-18-
20 00640, was cancelled as untimely, plaintiff failed to exhaust administrative remedies. See
21 Woodford v. Ngo, 548 U.S. at 90-91 (an untimely or otherwise procedurally defective appeal will
22 not satisfy the exhaustion requirement). In addition, in order to exhaust administrative remedies,
23 plaintiff was required to appeal the cancellation decision regarding grievance SAC-T-18-00640.
24 See Villery v. Beard, 2019 WL 250532, at *10 (E.D. Cal. Jan. 17, 2019) (citing Wilson v.
25 Zubiate, 718 F.App'x 479, 482 (9th Cir. 2017) (“[Plaintiff] had the possibility of appealing the

26
27 ² On March 25, 2020, CDCR issued an emergency appeal of these regulations and issued new
28 regulations which are effective June 1, 2020 through November 1, 2020. See Cal. Code Regs., tit.
15, § 3480, et. seq.

1 cancellation decision and therefore cannot show that he was ‘thwarted by improper screening’
2 under Sapp, 623 F.3d at 823.”), adopted at 2019 WL 4687079 (E.D. Cal. Sept. 26, 2019).

3 Defendants argue that plaintiff failed to file a timely grievance challenging the cancellation of
4 grievance SAC-T-18-00640. On these grounds, defendants argue that they are entitled to
5 summary judgment based on plaintiff’s failure to exhaust administrative remedies.

6 The undersigned finds that defendants met their initial summary judgment burden in
7 demonstrating that plaintiff failed to exhaust his administrative remedies. Defendants’ evidence
8 demonstrates that plaintiff failed to file a timely grievance challenging the alleged excessive force
9 incident. Defendants’ evidence demonstrates that plaintiff failed to file a timely and successful
10 grievance challenging the cancellation of his original grievance.

11 In opposition, plaintiff does not dispute defendants’ evidence regarding the four
12 grievances discussed above. Plaintiff argues that his failure to exhaust administrative remedies
13 should be excused on two grounds. First, plaintiff argues that he waited to submit grievance
14 SAC-T-18-00640 until fourteen days passed after submitting grievance SAC-A-18-0533. (ECF
15 No. 45 at 2-3.) Plaintiff argues that he was required to wait because California Code of
16 Regulations title 15, § 3084.4 states that the filing of more than one administrative grievance
17 within fourteen calendar days is considered an abuse of the appeals system. (Id.)

18 The undersigned is not persuaded by plaintiff’s argument that he was required to wait
19 fourteen days to submit grievance SAC-T-18-00640 until fourteen days after he submitted
20 grievance SAC-A-18-0533. The rules violation hearing challenged in SAC-A-18-0533 occurred
21 on January 23, 2018. (ECF No. 36-5 at 11.) The at-issue alleged excessive force incident
22 occurred on December 29, 2017. Plaintiff had thirty days from December 29, 2017, to file a
23 timely grievance. Plaintiff does not explain why he did not file a grievance raising his excessive
24 force claims before January 23, 2018.

25 In addition, as observed by defendants in the reply, plaintiff submitted grievance SAC-18-
26 A-0533 on January 30, 2018, which was more than thirty days after the at-issue December 29,
27 2017 incident. Therefore, plaintiff’s time to administratively appeal the at-issue December 29,
28 2017 incident had already expired.

1 For the reasons discussed above, the undersigned finds that plaintiff's argument that he
2 was required to wait fourteen days after submitting grievance SAC-A-18-0533 before submitting
3 his grievance regarding the December 29, 2017 incident is without merit.

4 In opposition, plaintiff also argues that due to learning, hearing and cognitive disabilities,
5 he required assistance in preparing his grievances which he did not receive. (ECF No. 45 at 5.)
6 Plaintiff argues that he could not read, hear or comprehend what was necessary for him to file a
7 timely grievance. (Id.) Plaintiff also argues that when he received the March 7, 2018 CDCR-695
8 form screening out grievance SAC-T-18-00640, he felt that he was "out of options" because
9 CDCR rules did not allow him to bypass a level of administrative review in order to seek relief.
10 (Id. at 6.) Plaintiff alleges that he filed another lawsuit raising the claims raised in the instant
11 action, i.e., 2: 18-cv-956 JAM CKD P, which was dismissed for failure to exhaust administrative
12 remedies. (Id.)

13 In the reply, defendants argue that plaintiff's opposition contains no admissible evidence
14 to support his claim that a lack of assistance by prison staff at any time prevented him from
15 submitting an appeal. Defendants observe that plaintiff attaches no evidence to his opposition in
16 support of this claim and that the opposition is not verified.

17 In Ross, the Supreme Court found "three kinds of circumstances in which an
18 administrative remedy, although officially on the books, is not capable of use to obtain relief."
19 136 S. Ct. at 1858-59. These circumstances include: "(1) when the administrative procedure
20 'operates as a simple dead end' because officers are 'unable or consistently unwilling to provide
21 any relief to aggrieved inmates'; (2) when the administrative scheme is 'so opaque that it
22 becomes, practically speaking, incapable of use' because 'no ordinary prisoner can discern or
23 navigate it'; and (3) when prison administrators 'thwart inmates from taking advantage of a
24 grievance process through machination, misrepresentation, or intimidation.'" Andres v. Marshall,
25 867 F.3d 1076, 1078 (9th Cir. 2017) (quoting Ross, 136 S. Ct. at 1858-59). However, "we expect
26 that these circumstances will not often arise." Ross, 136 S. Ct. at 1859 (citation omitted). The
27 Ninth Circuit characterized the list in Ross as "non-exhaustive." Andres, 867 F.3d at 1078.
28 Various other circumstances render administrative remedies unavailable, including the failure of

1 prison officials to properly process a prisoner’s grievance. Id. at 1079.³

2 While plaintiff may not have submitted evidence in support of his claim that his alleged
3 learning, hearing and cognitive disabilities prevented him from exhausting his administrative
4 remedies, defendants presented evidence of plaintiff’s reading and hearing disabilities. The
5 Inmate Appeal Decision Effective Communication Confirmation forms, submitted by defendants,
6 reflect that plaintiff’s TABE score was 4.0 or lower and that plaintiff had a hearing disability.

7 The undersigned is sympathetic to plaintiff’s reading and hearing disability. However,
8 plaintiff cites no legal authority demonstrating that these conditions, standing alone, render
9 administrative remedies unavailable, and this court has not found any. Based on Ross, the
10 undersigned cannot find that these conditions are special circumstances rendering administrative
11 remedies unavailable. See Ramirez v. Rose, 2020 WL 1907445, at *7 (E.D. Cal. March 5, 2020),
12 adopted at 2020 WL 1905286 (April 17, 2020) (same) (citing Ross, 136 S. Ct. at 1858 (there is no
13 “special circumstances” exception to PLRA’s exhaustion rule)).⁴

14 For the reasons discussed above, the undersigned recommends that defendants’ summary
15 judgment motion be granted on the grounds that plaintiff failed to exhaust administrative
16 remedies. The evidence demonstrates that plaintiff’s grievance addressing the excessive force
17 incident, i.e., SAC-T-18-00640, was properly cancelled as untimely. The evidence demonstrates

19 ³ See also, e.g., Reyes v. Smith, 810 F.3d 654, 658, 659 (9th Cir. 2016) (despite failure to identify
20 the specific doctors, grievance plainly put prison on notice that inmate complained about the
21 denial of pain medication by the defendant doctors, and prison officials easily identified the role
22 of pain management committee's involvement in the decision-making process, and rendered a
23 decision on the merits of the grievance at each step of the process); McBride v. Lopez, 807 F.3d
24 982, 987 (9th Cir. 2015) (“the threat of retaliation for reporting an incident can render the prison
25 grievance process effectively unavailable.”); Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010)
(if inmate’s administrative grievance is improperly rejected on procedural grounds, exhaustion
26 may be excused as unavailable); Nunez v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010)
(warden’s mistake rendered prisoner’s administrative remedies “effectively unavailable”); Brown
27 v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (prisoner not required to proceed to third level where
28 appeal granted at second level and no further relief was available).

⁴ The undersigned also observes that both of the Inmate Appeal Decision Effective
Communication Confirmation forms submitted regarding grievance SAC-T-18-00640 reflect that
the decision to cancel the grievance was explained to plaintiff on two separate occasions and that
plaintiff understood the decision.

1 that plaintiff failed to submit a timely (and successful) grievance challenging the cancellation of
2 grievance SAC-T-18-00640.

3 Defendants also move for summary judgment as to defendant Crisanto on the grounds that
4 plaintiff's grievance did not name defendant Crisanto. Defendants are correct that in the relevant
5 grievance, SAC-T-18-00640, plaintiff did not name defendant Crisanto. (See ECF No. 36-5 at
6 60-63.) In this grievance, plaintiff alleged only that defendant Baser committed "assault and
7 battery." (Id. at 60.)

8 Under the PLRA, a grievance "suffices if it alerts the prison to the nature of the wrong
9 for which redress is sought." Reyes v. Smith, 810 F.3d 654, 659 (9th Cir. 2016) (quoting Sapp
10 v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010)). "A grievance...need not contain every fact
11 necessary to prove each element of an eventual legal claim." Griffin v. Arpaio, 557 F.3d 1117,
12 1120 (9th Cir. 2009). "The primary purpose of a grievance is to alert the prison to a problem and
13 facilitate its resolution, not to lay groundwork for litigation." Id.

14 In grievance SAC-T-18-00640, plaintiff did not put prison officials on notice that
15 defendant Crisanto participated in the alleged excessive force incident. Accordingly, the
16 undersigned recommends that defendant Crisanto be granted summary judgment on these
17 additional grounds.

18 Accordingly, IT IS HEREBY RECOMMENDED that defendants' summary judgment
19 motion (ECF No. 36) be granted.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, plaintiff may file written objections
23 with the court and serve a copy on all parties. Such a document should be captioned
24 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that

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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: April 2, 2021

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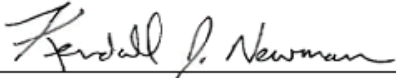
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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE