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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SELVIN O. CARRANZA,
12 CDCR #T-67780,

13 Plaintiff,

14 vs.

15 EDMUND G. BROWN Jr., et al.,

16 Defendants.
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Case No.: 3:14-cv-00773-GPC-AGS

ORDER:

**1) DENYING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT FOR FAILURE
TO EXHAUST PURSUANT
TO 42 U.S.C. § 1997e(a)
[ECF No. 92]**

AND

**2) DISMISSING UNSERVED
DEFENDANTS PURSUANT
TO Fed. R. Civ. P. 4(m)**

23 Selvin O. Carranza (“Plaintiff”) is currently incarcerated at High Desert State
24 Prison, and is proceeding pro se and in forma pauperis in this civil action pursuant to 42
25 U.S.C. § 1983.

26 On January 24, 2017, the Court screened Plaintiff’s Second Amended Complaint
27 (“SAC”) pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A, and directed U.S. Marshal
28 service pursuant to 28 U.S.C. § 1915(d) and FED. R. CIV. P. 4(c)(3) as to 39 Defendants,

1 all of whom are alleged to have violated Plaintiff's First, Eighth, and Fourteenth
2 Amendment rights while Plaintiff was incarcerated at Richard J. Donovan Correctional
3 Facility ("RJD") in San Diego from June 2012 through April 2013. *See* ECF No. 42.¹

4 On May 3, 2017, twenty-seven Defendants² who had then been served filed a
5 motion seeking summary judgment as to most of Plaintiff's claims on grounds that he
6 failed to exhaust his administrative remedies before filing suit pursuant to 42 U.S.C.
7 § 1997e(a) (ECF No. 92). The Court has notified Plaintiff of the requirements for
8 opposing summary judgment pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)
9 (en banc), and *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc) (ECF No. 93), but
10 Plaintiff has filed no opposition. The Court set Defendants' Motion for hearing on July
11 21, 2017, but has since vacated that hearing, having found Defendants' Motion suitable
12 for disposition as submitted (ECF No. 114).

13 **I. Plaintiff's Allegations**

14 Plaintiff divides his SAC into five separate causes of action. *See* ECF No. 33 at 21-
15 25.

16 In Count One, Plaintiff claims that on June 22, 2012, RJD officials L. Tillman, S.
17 Rink, K. Thaxton, E. Pimentel, N. Scharr, J. Rodriguez, J. Reyes, E. Garcia, L. Brown,
18 and W. Suglich conspired and set him up to fight another inmate "gladiator style" and
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21 ¹ Page numbers for all documents filed in the Court's Case Management/Electronic Case File
22 ("CM/ECF") will refer to the pagination generated by CM/ECF as indicated on the top right-hand corner
23 of each chronologically-numbered docket entry.

24 ² On July 25, 2017, several additional Defendants, R. Lemon, R. Lopez, E. Ojeda (erroneously sued as
25 J. Ojeda), A. Demesa (erroneously sued as R. Demesas), A. Sanchez (erroneously sued as RN Sanchez),
26 J. Morales (sued as Unknown Morales), and L. Godinez (erroneously sued as N. Molina), filed a Notice
27 of Joinder (ECF No. 121). One Defendant, L. Brown, was personally served on June 14, 2017, *see* ECF
28 No. 112, but has yet to appear and/or join the remaining parties' Motion. Finally, the U.S. Marshal
attempted, but was unable to execute service upon the remaining Defendants, despite several attempts
and even after being provided confidential forwarding addresses in response to Judge Schopler's May
11, 2017 Order (ECF No. 94). The unserved parties are: M. Stout, C.P. Franco, K. Thaxton, and R.
Casper. *See* ECF Nos. 48, 50, 54, 83, 91-95, 101, 104, 109-110.

1 then used excessive force by shooting him in order to break up the fight in violation of
2 the Eighth Amendment. *Id.* at 21, 30-38, ¶¶ 1-72.

3 In Count Two, Plaintiff claims that on August 10, 2012, L. Tillman assaulted him
4 “in retaliation” for his having complained about the June 22, 2012 incident, and R.
5 Lemon failed to intervene. *Id.* at 21, 38-43, ¶¶ 73-127.

6 In Count Three, Plaintiff claims L. Tillman, S. Rink, A. Buenrostro, R. Lopez, R.
7 Davis, L. Vanderweide, W. Shimko, I. Marquez, R. La Costa, L. Romero, and other
8 “unknown defendants” conspired to “beat,” “mutilate,” and attempted to “murder him by
9 strangulation” while he was in handcuffs, and that others failed to intervene or provide
10 him medical attention on August 15, 2012—again in violation of the Eighth Amendment
11 and in retaliation for his previous complaints against staff. *Id.* at 23, 43-55 ¶¶ 128-245.
12 Plaintiff further claims Defendants R. Casper, N. Molina,³ and RN Sanchez laughed,
13 taunted him, and failed to intervene during the incident, *id.* at 51 ¶¶ 219-222; Defendants
14 L. Vanderweide, R. Davis, W. Shimko, S. Rink, A. Buenrostro, and C. Hernandez kept
15 him handcuffed for 10 hours afterward, refused to provide him medical attention, and
16 conducted a “biased” investigation and disciplinary proceeding before Defendants E.
17 Garcia, A. Hernandez, and Lt. R. Davis at which he was found guilty of battery on a
18 peace officer, referred for criminal prosecution, and sentenced to a SHU term in violation
19 of due process. *Id.* at 53-57 ¶¶ 235-266.

20 In Count Four, Plaintiff claims G. Savala, G. Stratton, J. Gomez, R. Davis, R.
21 Lopez, Ojeda, C. Franco, Morales, Q. Jackson, D. Arguilez, M. Stout, J. Brown, C. Meza,
22 and G. Hernandez falsely accused him of exposing himself to a female officer on
23 November 24, 2012, placed him in segregation, then charged and found him guilty of a
24 “sex offense” also in violation of due process. Plaintiff claims these Defendants did so in
25 order to damage his reputation, justify the cancellation of an internal “FBI investigation,”
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28 ³ L. Godinez was erroneously sued as N. Molina. *See* ECF No. 121.

1 and further retaliate against him for his “continuous” complaints and efforts to exhaust
2 his administrative remedies. *Id.* at 24, 61-68, ¶¶ 295-366.

3 In Count Five, Plaintiff claims D. Arguilez, R. Davis, A. Buenrostro, A. Silva, R.
4 Lopez, A. Demesa, “and other unknown C/Os,” used excessive force against him again
5 on April 18, 2013, while escorting him from his cell and in preparation for his transfer to
6 Kern Valley State Prison (“KVSP”). Plaintiff claims Defendants Lopez and Silva also
7 failed to properly decontaminate him after he had been pepper sprayed, and RN Sanchez
8 failed to attend to his injured wrist afterward—again in “retaliation for [him]
9 continuously complaining verbally and by filing 602[] staff complaints about
10 correctional officers.” *Id.* at 25, 68-71 ¶¶ 367-404.

11 Plaintiff seeks various forms of injunctive relief as well as nominal and
12 “unlimited” amounts of compensatory and punitive damages. *Id.* at 29, 73-75.

13 **II. Unserved Defendants**

14 Under Federal Rule of Civil Procedure 4(m), “[i]f a defendant is not served within
15 90 days after the complaint is filed, the court—on motion or on its own after notice to the
16 plaintiff—must dismiss the action without prejudice against that defendant or order that
17 service be made within a specified time.” *See Crowley v. Bannister*, 734 F.3d 967, 976
18 (9th Cir. 2013).

19 A review of the Court’s docket indicates that Plaintiff has failed to properly serve
20 Defendants M. Stout, C.P. Franco, K. Thaxton, and R. Casper. *See Walker v. Sumner*, 14
21 F.3d 1415, 1421-22 (9th Cir. 1994) (where a pro se plaintiff fails to provide the Marshal
22 with sufficient information to effect service, the court’s sua sponte dismissal of those
23 unserved defendants is appropriate under FED. R. CIV. P. 4(m)). Although an incarcerated
24 pro se plaintiff proceeding IFP is entitled to rely on the United States Marshal for service
25 of the summons and complaint, he must provide the Marshal with the information
26 necessary to effectuate that service. *See Puett v. Blandford*, 912 F.2d 270, 273 (9th Cir.
27 1990). Reliance on the U.S. Marshal does not mean that a plaintiff can “remain silent and
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1 do nothing to help effectuate service.” *Rochon v. Dawson*, 828 F.2d 1107, 1110 (5th Cir.
2 1987); *Puett*, 912 F.3d at 274-75.

3 In this case, Plaintiff has had notice of his failures to effectuate service upon
4 Defendants M. Stout, C.P. Franco, K. Thaxton, and R. Casper, has already been granted
5 extensions of time pursuant to FED. R. CIV. P. 4(m), and was also provided assistance
6 from the Deputy Attorney General in correcting his service insufficiencies to no avail.
7 *See* ECF Nos. 86, 94, 107. Therefore, the Court **DISMISSES** M. Stout, C.P. Franco, K.
8 Thaxton, and R. Casper as parties to this matter without prejudice pursuant to FED. R.
9 Civ. P. 4(m).

10 **III. Defendants’ Motion**

11 D. Arguilez, J. Brown, A. Buenrostro, Lt. R. Davis, R. Davis, E. Garcia, J. Gomez,
12 A. Hernandez, C. Hernandez, G. Hernandez, Q. Jackson, R. La Costa, I. Marquez, C.
13 Meza, E. Pimentel, J. Reyes, S. Rink, L. Romero, J. Rodriguez, G. Savala, N. Scharr, W.
14 Shimko, A. Silva, G. Stratton, W. Suglich, L. Tillman, and L. Vanderweide, later joined
15 by A. Demesa, L. Godinez, R. Lopez, J. Morales, E. Ojeda, R. Lemon, and A. Sanchez
16 (hereafter “Defendants”) seek summary judgment on grounds that Plaintiff failed to
17 exhaust his administrative remedies pursuant to 42 U.S.C. § 1997e(a) before filing suit as
18 to all claims alleged in his SAC *except* as to those alleged in Count 1 against Tillman,
19 Rink, Scharr, Pimentel, Suglich, Rodriguez and Garcia. *See* Defs.’ P&As in Supp. of
20 Summ. J. (ECF No. 92-1) at 7-11.

21 Plaintiff has not filed an opposition; however, his SAC is verified under penalty of
22 perjury. *See* ECF No. 33 at 28, 75. In his SAC, Plaintiff swears he *has* exhausted all his
23 claims. *Id.* at 26-28.

24 **A. Legal Standards for Exhausting Administrative Remedies**

25 “The Prison Litigation Reform Act of 1995 (PLRA) mandates that an inmate
26 exhaust ‘such administrative remedies as are available’ before bringing suit to challenge
27 prison conditions.” *Ross v. Blake*, 136 S. Ct. 1850, 1854-55 (2016) (quoting 42 U.S.C.
28 § 1997e(a)). “There is no question that exhaustion is mandatory under the PLRA[.]”

1 *Jones v. Bock*, 549 U.S. 199, 211 (2007) (citation omitted). The PLRA also requires that
2 prisoners, when grieving their appeal, adhere to CDCR’s “critical procedural rules.”
3 *Woodford v. Ngo*, 548 U.S. 81, 91 (2006). “[I]t is the prison’s requirements, and not the
4 PLRA, that define the boundaries of proper exhaustion.” *Jones*, 549 U.S. at 218.

5 The exhaustion requirement is based on the important policy concern that prison
6 officials should have “an opportunity to resolve disputes concerning the exercise of their
7 responsibilities before being haled into court.” *Jones*, 549 U.S. at 204. The “exhaustion
8 requirement does not allow a prisoner to file a complaint addressing non-exhausted
9 claims.” *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010).

10 Therefore, regardless of the relief sought, a prisoner must pursue an appeal through
11 all levels of a prison’s grievance process as long as that process remains available to him.
12 “The obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains
13 ‘available.’ Once that is no longer the case, then there are no ‘remedies ... available,’ and
14 the prisoner need not further pursue the grievance.” *Brown v. Valoff*, 422 F.3d 926, 935
15 (9th Cir. 2005) (original emphasis) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).
16 “The only limit to § 1997e(a)’s mandate is the one baked into its text: An inmate need
17 exhaust only such administrative remedies as are ‘available.’” *Ross*, 136 S. Ct. at 1862;
18 *see also Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010) (PLRA does not require
19 exhaustion when circumstances render administrative remedies “effectively
20 unavailable.”).

21 Grievance procedures are available if they are “‘capable of use’ to obtain ‘some
22 relief for the action complained of.’” *Ross*, 136 S. Ct. at 1859 (quoting *Booth*, 532 U.S. at
23 738); *see also Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (“To be
24 available, a remedy must be available ‘as a practical matter’; it must be ‘capable of use;
25 at hand.’”) (quoting *Albino*, 747 F.3d at 1171).

26 In *Ross*, the Supreme Court noted “three kinds of circumstances in which an
27 administrative remedy, although officially on the books, is *not* capable of use to obtain
28 relief.” 136 S. Ct. at 1859 (emphasis added). These circumstances arise when: (1) the

1 “administrative procedure ... operates as a simple dead end—with officers unable or
2 consistently unwilling to provide any relief to aggrieved inmates;” (2) the “administrative
3 scheme . . . [is] so opaque that it becomes, practically speaking, incapable of use ... so
4 that no ordinary prisoner can make sense of what it demands;” and (3) “prison
5 administrators thwart inmates from taking advantage of a grievance process through
6 machination, misrepresentation, or intimidation.” *Id.* at 1859-60 (citations omitted).

7 Applying these principles, the Ninth Circuit has specifically found that “[w]hen
8 prison officials fail to respond to a prisoner’s grievance within a reasonable time, the
9 prisoner is deemed to have exhausted available administrative remedies within the
10 meaning of the PLRA.” *See Andres v. Marshall*, 854 F.3d 1103, 1105 (9th Cir. 2017) (per
11 curiam) (finding RJD’s 6-month failure to respond to an inmate grievance rendered
12 prisoner’s administrative remedies unavailable); *accord Dole v. Chandler*, 438 F.3d 804,
13 809, 811 (7th Cir. 2006) (officials’ failure to respond to a “timely complaint that was
14 never received” rendered prisoner’s administrative remedies unavailable). The Ninth
15 Circuit has further found administrative remedies “plainly unavailable” where prison
16 officials “screen out an inmate’s appeals for improper reasons,” *Sapp v. Kimbrell*, 623
17 F.3d 813, 823 (9th Cir. 2010), and “effectively unavailable” where they provide the
18 inmate mistaken instructions as to the means of correcting a claimed deficiency, but upon
19 re-submission, reject it as untimely after compliance proved impossible. *See Nunez*, 591
20 F.3d at 1226. Administrative remedies may also prove unavailable if the prisoner shows
21 an “objectively reasonable” basis for his belief that “officials would retaliate against him
22 if he filed a grievance.” *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015).

23 Because the failure to exhaust is an affirmative defense, Defendants bear the
24 burden of raising it and proving its absence. *Jones*, 549 U.S. at 216; *Albino*, 747 F.3d at
25 1169 (noting that Defendants must “present probative evidence—in the words of *Jones*,
26 to ‘plead and prove’—that the prisoner has failed to exhaust available administrative
27 remedies under § 1997e(a)”). “In the rare event that a failure to exhaust is clear from the
28 face of the complaint, a defendant may move for dismissal under Rule 12(b)(6).” *Albino*,

1 747 F.3d at 1166. Otherwise, Defendants must produce evidence proving the Plaintiff's
2 failure to exhaust, and they are entitled to summary judgment under Rule 56 only if the
3 undisputed evidence, viewed in the light most favorable Plaintiff, shows he failed to
4 exhaust. *Id.*

5 **B. Legal Standards for Summary Judgment**

6 Summary judgment is generally proper if the movant shows there is no genuine
7 dispute as to any material fact and he or she is entitled to judgment as a matter of law.
8 FED. R. CIV. P. 56(a) (quotation marks omitted); *Albino*, 747 F.3d at 1166; *Washington*
9 *Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether a
10 fact is disputed or undisputed, must be supported by: (1) citing to particular parts of
11 materials in the record, including but not limited to depositions, documents, declarations,
12 or discovery; or (2) showing that the materials cited do not establish the presence or
13 absence of a genuine dispute or that the opposing party cannot produce admissible
14 evidence to support the fact. FED. R. CIV. P. 56(c)(1) (quotation marks omitted). The
15 Court may consider other materials in the record not cited to by the parties, although it is
16 not required to do so. FED. R. CIV. P. 56(c)(3); *Carmen v. San Francisco Unified Sch.*
17 *Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v. Navajo Cnty., Ariz.*, 609
18 F.3d 1011, 1017 (9th Cir. 2010).

19 When Defendants seek summary judgment based on the Plaintiff's failure to
20 exhaust specifically, they must first prove that there was an available administrative
21 remedy and that Plaintiff did not exhaust that available remedy. *Williams*, 775 F.3d at
22 1191 (citing *Albino*, 747 F.3d at 1172) (quotation marks omitted). If they do, the burden
23 of production then shifts to the Plaintiff "to show that there is something in his particular
24 case that made the existing and generally available administrative remedies effectively
25 unavailable to him." *Williams*, 775 F.3d at 1191; *see also Ross*, 136 S. Ct. at 1858-60;
26 *McBride*, 807 F.3d at 986 (citing "circumstances where the intervening actions or
27 conduct by prison officials [may] render the inmate grievance procedure unavailable.").

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1 Only “[i]f the undisputed evidence viewed in the light most favorable to the
2 prisoner shows a failure to exhaust, [is] a defendant is entitled to summary judgment
3 under Rule 56.” *Albino*, 747 F.3d at 1166.

4 Finally, “[a] [p]laintiff’s verified complaint may be considered as an affidavit in
5 opposition to summary judgment if it is based on personal knowledge and sets forth
6 specific facts admissible in evidence.” *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir.
7 2000) (en banc). District courts must also “construe liberally motion papers and pleadings
8 filed by pro se inmates and ... avoid applying summary judgment rules strictly.” *Thomas*
9 *v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

10 **C. CDCR’s Exhaustion Requirements**

11 With respect to their initial burden on summary judgment, the Court finds
12 Defendants have offered sufficient evidence, which Plaintiff does not contradict, to prove
13 that the California Department of Corrections and Rehabilitation (CDCR) has established
14 an “administrative remedy” for prisoners like Plaintiff to pursue before filing suit under
15 § 1983. *See Williams*, 775 F.3d at 1191 (citing *Albino*, 747 F.3d at 1172) (quotation
16 marks omitted).

17 Specifically, a California prisoner may appeal “any policy, decision, action,
18 condition, or omission by the department or its staff that [he] can demonstrate as having a
19 material adverse effect upon his ... health, safety, or welfare.” CAL CODE REGS., tit. 15
20 § 3084.1(a). Since January 28, 2011, and during the times alleged in Plaintiff’s SAC,
21 Title 15 of the California Code of Regulations requires three formal levels of appeal
22 review. *See Self Decl.* (ECF No. 92-3) ¶ 2. Thus, in order to properly exhaust, a
23 California prisoner must, within 30 calendar days of the decision or action being
24 appealed, or “upon first having knowledge of the action or decision being appealed,”
25 CAL. CODE REGS., tit. 15 § 3084.8(b), “use a CDCR Form 602 (Rev. 08/09),
26 Inmate/Parolee Appeal, to describe the specific issue under appeal and the relief
27 requested.” *Id.* § 3084.2(a). The CDCR Form 602 “shall be submitted to the appeals
28 coordinator at the institution.” *Id.* § 3084.2(c), § 3084.7(a). If the first level CDCR Form

1 602 appeal is “denied or not otherwise resolved to the appellant’s satisfaction at the first
2 level,” *id.* § 3084.7(b), the prisoner must “within 30 calendar days ... upon receiving [the]
3 unsatisfactory departmental response,” *id.* § 3084.8(b)(3), seek a second level of
4 administrative review, which is “conducted by the hiring authority or designee at a level
5 no lower than Chief Deputy Warden, Deputy Regional Parole Administrator, or the
6 equivalent.” *Id.* § 3084.7(b), (d)(2). “The third level is for review of appeals not resolved
7 at the second level.” *Id.* § 3084.7(c). “The third level review constitutes the decision of
8 the Secretary of the CDCR on an appeal, and shall be conducted by a designated
9 representative under the supervision of the third level Appeals Chief or equivalent. The
10 third level of review exhausts administrative remedies,” *id.* § 3084.7(d)(3), “unless
11 otherwise stated.”⁴ *Id.* § 3084.1(b); *see also* CDCR OPERATIONS MANUAL § 541100.13
12 (“Because the appeal process provides for a systematic review of inmate and parolee
13 grievances and is intended to afford a remedy at each level of review, administrative
14 remedies shall not be considered exhausted until each required level of review has been
15 completed.”).

16 **D. Discussion**

17 **a. Count 1**

18 First, Defendants concede Plaintiff has exhausted all available administrative
19 remedies as alleged in Count 1 against Tillman, Rink, Scharr, Pimentel, Suglich,
20 Rodriguez, and Garcia via CDCR 602 Inmate Appeal Log No. RJD-B-12-02812. *See*
21 Defs.’ P&As in Supp. of Summ. J. (ECF No. 92-1) at 7-11; Voong Decl. ¶ 8.

22 In Log No. RJD-B-12-02812, which is signed by Plaintiff as “submitted” on July
23 7, 2012, Plaintiff initially claimed Defendants Tillman and Rink “set [him] up,” and
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26 ⁴ For example, “[a] second level of review shall constitute the department’s final action on appeals of
27 disciplinary actions classified as ‘administrative’ as described in section 3314, or minor disciplinary
28 infractions documented on CDC[R] Form 128-A (rev. 4-74), Custodial Counseling Chrono, pursuant to
section 3312(a)(2), and shall exhaust administrative remedy on these matters.” CAL. CODE REGS., tit. 15
§ 3084.7(b)(1).

1 “stag[ed] ... a fight” that he “desperately tried to avoid,” by telling him to “handle [his]
2 business” and then shooting him 6 times as his “enemy attacked.” *See* Self Decl. Ex. A at
3 11-13. In the “Action Requested” section of this appeal, Plaintiff sought an investigation
4 by “Internal Affairs,” the preservation of video tapes “for all four cameras in B-6 group
5 yard,” and financial compensation from Defendants Tillman, Rink, as well as from
6 Defendants Thaxton, “who shot [him],” Scharr, Pimentel, and Rodriguez for “standing on
7 [the] sidelines to see the fight,” and from W. Suglich and E. Garcia “for ignoring [his]
8 safety concerns.” *Id.* at 13.

9 Because CDCR 602 Log No. RJD-B-12-02812 was classified as a “staff
10 complaint” pursuant to CAL. CODE REGS., tit. 15 § 3084.9(i), the first level of
11 administrative review was “bypassed,” *see* Self Decl. ¶ 6.a & Ex. A at 11, and Plaintiff’s
12 appeal was accepted at the second level of review by Defendant A. Hernandez on
13 December 1, 2012. *Id.*, Ex. A at 12. Plaintiff was interviewed by Defendant Savala, and a
14 second level response was issued on January 16, 2013, and reviewed by Defendant
15 Stratton. *Id.* at 9-10. Stratton “partially granted” the appeal insofar as Plaintiff’s request
16 for an “inquiry” was completed, and his mental health file was reviewed, but Stratton
17 determined that staff “did not violate CDCR policy with respect to one or more of the
18 issues appealed.” *Id.* at 10. Stratton’s response also informed that “all issues unrelated to
19 the allegation of staff misconduct must be appealed separately and w[ould] not be
20 addressed,” *id.* at 9,⁵ and that if Plaintiff wished to “appeal the decision and/or exhaust
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23 ⁵ Pursuant to CAL. CODE REGS., tit. 15 § 3084.9(i)(2), “[w]hen an appeal is accepted alleging staff
24 misconduct that also includes any other issue(s), the appeals coordinator at the time the appeal is
25 accepted as a staff complaint shall notify the inmate ... that any other appeal issue(s) may only be
26 appealed separately, and therefore resubmission of those issues is required of the intention is to seek
27 resolution of such matters. Upon receiving such a notice, the inmate ... has 30 calendar days to submit
28 separate appeal(s) regarding the other issues.” The Ninth Circuit, however, had held that “[w]hen prison
officials opt not to enforce a procedural rule but instead decide an inmate’s grievance on the merits,”
§ 1997e(a)’s exhaustion requirement is satisfied and “the purposes of the PLRA ... have been fully
served: prison officials have had a fair opportunity to correct any claimed deprivation and an
administrative record supporting the prison’s decision has been developed.” *Reyes v. Smith*, 810 F.3d
654, 658 (9th Cir. 2016).

1 administrative remedies, he must submit his staff complaint through all levels of appeal
2 review up to, and including, the Secretary's/Third Level of Review." *Id.* at 10.

3 On February 17, 2013, Plaintiff completed Section F of CDCR 602 Log No. RJD-
4 B-12-02812, indicating he was dissatisfied with the Second Level Response, and he
5 submitted it for a Third Level Review. *Id.* at 22. On the CDCR 602, Plaintiff continued to
6 request compensatory damages from Defendants Tillman, Rink, Thaxton, Reyes,
7 Rodriguez, Pimentel, and Scharr for "premeditating [his] shooting for job security," and
8 "creating an incident of violence by staging [his] fight," and "getting [him] shot 6 times."
9 *Id.*

10 On June 12, 2013, CDCR 602 Log No. RJD-B-12-02812 was denied at the Third
11 Level of Review. *Id.* at 19-20. Plaintiff was advised that an "inquiry was conducted and
12 [it was] concluded that staff did not violate policy." *Id.* The Third Level decision also
13 noted that Plaintiff "ha[d] added new issues and requests to his appeal," but they were not
14 addressed "as it is not appropriate to expand the appeal beyond the initial problem and
15 the initially requested action," and that the decision "exhaust[ed] the administrative
16 remedy available within CDCR." *Id.* at 20.

17 **b. Counts 2-5**

18 As to Plaintiff's remaining Counts, however, Defendants contend summary
19 judgment should be entered on their behalf because "the evidence shows" Plaintiff failed
20 to properly exhaust those claims pursuant to 42 U.S.C. § 1997e(a). *See* Defs.' Mem. of
21 P&As in Supp. of Summ. J. (ECF No. 92-1) at 4-7.

22 **i. Defendants' Evidence**

23 In support, Defendants proffer the sworn declarations of M. Voong, Chief of the
24 CDCR Office of Appeals, ECF No. 92-2, attached to which is a copy of all Third Level
25 Appeals received from Plaintiff and recorded by the CDCR's Inmate/Parolee Appeals
26 Tracking System ("IATS") in Sacramento. *Id.* at 6, Ex. 1.

27 Defendants also offer the sworn Declaration of B. Self, the Appeals Coordinator at
28 RJD. *See* ECF No. 92-3. Attached to Self's Declaration are copies of several, but not all,

1 of the CDCR 602 inmate appeals Plaintiff filed at RJD for the period beginning June 22,
2 2012 and ending May 18, 2013.⁶ *Id.*, Exs. A-G. With the exception of CDCR 602 Log
3 No. RJD-B-12-02812, *id.* at 9-24, Ex. A, Self attests that seven additional CDCR 602
4 appeals filed by Plaintiff were all “screened out” at the “institutional level” of
5 administrative review at RJD, and therefore never properly exhausted through the third or
6 “Director’s Level” of review in Sacramento. *Id.* at 2-7 ¶¶ 1-7.

7 Those appeals were designated as follows:

8 CDCR 602 Log No. RJD-B-13-01039: In this appeal, which appears related to
9 Plaintiff’s Count 4, on CDCR Form 602 Section A, where Plaintiff was asked to explain
10 the issue, he claimed Defendant M. Stout denied him witnesses, refused to present video
11 surveillance evidence, and declined to appoint him an investigative employee during a
12 disciplinary hearing held on December 25, 2012.⁷ *See* Self. Decl., Ex. B at 28-30. In
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15 ⁶ While Defendants have submitted photocopies of several CDCR 602 appeals filed by Plaintiff related
16 to the claims in his SAC, *see* Self Decl. ECF No. 92-3, Ex. A at 11-14 [Log No. RJD-B-12-02812]; Ex.
17 B at 28-31 [Log No. RJD-B-13-01039]; Ex. D at 68-75 [Log No. RJD-C-13-01131]; Ex. E at 78-82
18 [Log No. RJB-B-01132]; Ex. F at 85-89 [Log No. RJD-B-13-1223]; Ex. H at 95-98 [Log No. RJD-X-
19 13-01776], no copies of CDCR 602 Log Nos. RJD-B-13-01040 or RJD-B-13-01371 have been
20 provided. *Id.* Ex. C at 62-65; Ex. G at 91-92. Instead, Defendants offer what appear to be type-written
21 summaries of the claims Plaintiff raised in those appeals, transcribed by an unidentified correctional or
22 appeals official. *Id.* at 62, 91. Neither of these appeals include the date they were signed by Plaintiff, as
23 do the other CDCR 602s submitted by RJD Appeals Coordinator Self, and neither Self nor Defendants’
24 counsel explains why the original CDCR 602s as drafted, signed, and submitted by Plaintiff at RJD,
25 were not or could not be procured.

26 ⁷ The Exhibits attached to Self’s Declaration include a copy of the CDCR 115 RVR first issued on
27 November 24, 2012, and “Part C” of Log No. FB-12-163, which indicates Plaintiff’s disciplinary
28 hearing was held on December 25, 2012. *See* Self. Decl., Ex. B [ECF No. 92-3 at 54]. In his Declaration,
however, Self asserts Plaintiff’s “final RVR was issued on December 17, 2012.” *See* Self Decl. ¶ 6.b
[ECF No. 92-3 at 5]. The eight day difference does not matter if Plaintiff did not actually submit CDCR
602 Log No. RJD-B-13-01039 until March 15, 2013, however, since it would be outside the 30 days
permitted by CAL. CODE REGS., tit. 15 § 3084.8(b) in either case. If, on the other hand, Plaintiff
submitted this appeal on January 7, 2013—the date it is signed—or another CDCR 602 he claims to
have submitted on December 17, 2012, entitled “Retaliation False Accusation of Sex Crime on Female
C/O w/Serious Bodily Injury,” as he attests he did in his SAC, *see* ECF No. 33 at 27, both of those
would have been timely filed within 30 days of either December 17, 2012, or December 25, 2012,
pursuant to CAL. CODE REGS., tit. 15 § 3084.8(b).

1 Section B, where Plaintiff was asked to describe what “action [was] requested,” he
2 demanded Rules Violation Report (hereafter “RVR”), CDC 115 Log No. FB-12-163, in
3 which he was charged with “willful lewd exposure” on November 24, 2012, be “re-
4 heard,” because he was “falsely accused of a ‘sex crime’ in retaliation for previous 602
5 staff complaints.” *Id.* at 28. On the CDCR 602-A Form attached, Plaintiff further
6 requested damages from Defendants Savala, R. Davis, R. Lopez, C. Meza, J. Gomez,
7 Morales, Jackson, Stout, Franco, Hernandez, and Stratton for their “biased
8 investigations” and “refusing to discipline staff who retaliate for staff complaints.”⁸ *Id.* at
9 30.

10 Log No. RJD-B-13-01039 is *dated* as “submitted” by Plaintiff on January 7, 2013;
11 but Defendants attest it was not *received* until March 15, 2013, *see* Self Decl., ECF No.
12 92-3 at 4, ¶ 6.b, at which time it was “screened out” at the first level of review,⁹ rejected
13 on March 19, 2013, pursuant to CAL. CODE REGS., tit. 15 § 3084.6(b)(7), based on
14 Plaintiff’s failure to attach his “original 115/115-A”¹⁰ and the “Original 837,”¹¹ and
15 ultimately cancelled on March 26, 2013 as untimely pursuant to CAL. CODE REGS., tit. 15
16 § 3084.6(c)(4). *See* Self Decl., ¶ 6.b & Ex. B at 26-27.

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20 ⁸ Plaintiff also includes D. Paramo, J. Beard, D. Hoffman, J. Brown, and Mike Jimenez in the list of
21 persons from whom he demanded damages, but these Defendants were dismissed as parties to this action
on January 24, 2017. *See* ECF No. 42 at 15.

22 ⁹ Pursuant to CAL. CODE REGS., tit. 15 § 3084.5(a)(3) “[w]hen an appeal is not accepted, the inmate or
23 parolee shall be notified of the specific reasons for the rejection or cancellation of the appeal and the
correction(s) needed for the rejected appeal to be accepted.”

24 ¹⁰ Pursuant to CDCR OPERATIONS MANUAL § 52080.2, a “CDC[R] Form 115, Rules Violation Report”
25 is the document used to report “[i]nmate behavior which is a violation of law, CCR (15), and/or
26 approved procedure and not of a minor nature.”

27 ¹¹ Pursuant to CAL. CODE REGS., tit. 15 § 3268.1(a) “[e]very staff use of force is an incident that shall be
28 reported” and “documentation shall be on a CDCR Form 837-A (Rev. 10/15) Crime/Incident Report ...”
Id. at § 3268.1(a)(1). CAL. CODE REGS., tit. 15 § 3084(h) includes “incident reports” in the list of the
“supporting documents that are needed to substantiate allegations made in the [CDCR 602] appeal.”

1 CDCR 602 Log No. RJD-B-13-01040: Defendants do not provide a copy of the
2 actual CDCR 602 Appeal Form Plaintiff submitted, but instead attach what appears to be
3 a summary of the issues Plaintiff raised as transcribed by an unidentified appeals official.
4 The transcription does not indicate the date the CDCR 602 appeal was *signed* as
5 “submitted” by Plaintiff, but Defendants again claim it was not *received* until March 15,
6 2013. *See* Self Decl. at 5, ¶ 6.c. The subject of this grievance appears related to Count 3.
7 Defendants’ transcription reads:

8 Reqs. 115 Log FB-12-089 be reheard. On 9-19-12 Lt. R. Davis was the
9 SHO for his RVR. At his 115 hearing he was denied his right to view
10 the surveillance video of the incident dated 8-15-12. Reqs. to rehear his
11 115 as a violation of his right to view the surveillance video of the actual
12 incident. The video is evidence that would exonerate him, showing
C/O’s beat and strangled him near death. Reqs. compensatory, punitive,
and nominal damages.

13 *See* Self Decl. Ex. C [ECF No. 92-3] at 62. This appeal was classified as “Disciplinary”
14 and was rejected at the first level of administrative review via two CDCR Form 695s,
15 both dated March 19, 2013. *Id.*, Ex. C, at 64-65. Plaintiff was first advised this appeal
16 was rejected because he failed attach his “original 115/115A” as required by CAL. CODE
17 REGS., tit. 15 § 3084.6(b)(7), and because he had “exceeded the allowable number of
18 appeals filed in a 14 calendar day period” per CAL. CODE REGS., tit. 15 § 3084.6(b)(3). *Id.*
19 On April 12, 2013, however, Plaintiff was informed the appeal had been cancelled
20 pursuant to CAL. CODE REGS., tit. 15 § 3084.6(c)(4) because it was filed more than 30
21 days after the hearing date of the RVR it sought to challenge, “even though [he] had the
22 opportunity to submit within the time constraints.” *Id.* at 63.

23 CDCR 602 Log No. RJD-B-13-01131: In this appeal, which appears relevant to
24 both Plaintiff’s Counts 3 and 4, he again accuses Defendants Tillman and Rink of
25 “stag[ing] [his] fight ... [and] shooting” and thereafter retaliating against him “after [he]
26 fil[ed] several staff complaints,” by “beating and attempt[ing] to strangle [him] to death
27 on August 15, 2012,” together with Defendants R. Davis and Lopez. *See* Self Decl. at 5,
28 ¶ 6.c & Ex. C at 68, 70. Plaintiff claims he complained to the Warden during his

1 “committee on 9-20-12,” and requested an “investigation by an outside agency,” but
2 instead the Warden subjected him to an internal investigation, during which he was
3 interviewed by Defendant Savala. *Id.* at 70. “Suddenly, on 11/24/12,” Plaintiff claims he
4 was “falsely accused of a sex crime on [Defendant] Gomez,” and labeled as “a rap[i]st,
5 child molester, [and] ped[oph]ile” by Defendants R. Davis, Meza, Morales, and Jackson
6 who “escorted” him back from the “TTA medical” in a “retention lanyard,” “fracture[ed]
7 [his] right thumb,” and “cut[] [his] hand on a sharp tray slot.” *Id.*

8 In the “Action Requested” portion of this CDCR 602, Plaintiff asked that “this
9 incident” be referred to the San Diego District Attorney’s Office “for criminal
10 prosecution of Lt. Savala, C/O R. Davis, C/O R. Lopez & C/O J. Gomez & all C/Os
11 involved,” and that he be awarded “compensatory, punitive & nominal damages” from
12 Defendants Savala, R. Davis, R. Lopez, C. Meza, J. Gomez, Morales, Jackson, D.
13 Arguilez, Stout, and Hernandez¹² due to their “policies” of “retaliating against prisoners
14 for practicing freedom of speech filing staff complaints,” “labeling [him] as a sex
15 offender ... w/o any criminal conviction,” and “excessive/unnecessary force.” *Id.* at 68,
16 70.

17 Log No. RJD-B-13-01131 is *dated* as “submitted” by Plaintiff on December 17,
18 2012; but Defendant Self attests that it too was not *received* until March 15, 2013, *see*
19 Self Decl., ECF No. 92-3 at 5, ¶ 6.d, at which time it was “screened out” at the first level
20 of review, and cancelled on March 26, 2013, pursuant to CAL. CODE REGS., tit. 15
21 § 3084.6(c)(4) because it contained “three different staff complaints with incidents

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27 ¹² Plaintiff also requested damages from the Warden, D. Paramo, J. Beard, D. Hoffman, Mike Jimenez,
28 and the Governor, J. Brown, but all they have been dismissed as parties to this action. *See* ECF No. 42 at 15.

1 ranging from August 10, 2012 to November 14, 2012” and was untimely.¹³ *Id.*, ¶ 6.b &
2 Ex. B at 26-27.

3 CDCR 602 Log No. RJD-B-13-01132: In this appeal, again related to Plaintiff’s
4 Count 3, he claimed that on August 15, 2012, he returned to his cell after visiting “the
5 RN” to find his breakfast and lunch had been “dumped in the sink.” *See* Self Decl., Ex. E
6 at 78. “[W]hile cuffed in the front,” Plaintiff claimed he requested to “see the Lt. or
7 Captain to report staff’s misconduct & Sgt. Tillman’s assault w/deadly weapon a few
8 days earlier.” *Id.* Defendants Tillman and Shimko arrived and “against policy, opened
9 [his] door & physically hauled [him] to her office,” where Defendant Buenrostro said,
10 “Just throw that motherfucker on the floor so we can fuck him up.” *Id.* at 80. Plaintiff
11 then claimed after straddling a chair in the sergeant’s office, Buenrostro “yanked [him]
12 from behind [his] shirt,” and Defendants Vanderweide & Shimko “slammed [him] on the
13 floor” 10 feet in front of the office while “all 3 of them began beating [him].” *Id.* Plaintiff
14 alleges Vanderweide “began strangling [him] w/his massive strong hands,” and C/O R.
15 Lopez “yank[ed] [his] handcuffed wrists forward, clawing his fingers deep into [the]
16 fresh s[u]tures on [his] right wrist.” *Id.* Plaintiff claims he was unable to breathe and
17 suffered “positional asphyxia” as Buenrostro, Shimko, R. Davis, I. Marquez, R. La Costa
18 & “several unknown C/Os” continued to beat his “ribs, kidneys, lungs & legs.” *Id.*
19 Plaintiff claimed he struggled to “get Vanderweide to release [his] throat by pulling on
20 his forearm,” but when he released, Buenrostro “grabbed the left side of [Plaintiff’s]
21 face,” and “smashed the right side ... on the concrete floor.” *Id.* Plaintiff then claimed R.
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25 ¹³ The Court notes the dates noted on the CDCR Form 695 dated March 26, 2013 differ slightly than
26 those described by Plaintiff in CDCR 602 Log No. RJD-C-13-01131, *e.g.*, August 10, 2012 vs. August
27 15, 2012, and November 14, 2012 vs. November 24, 2012, but Plaintiff’s CDCR 602 would have been
28 untimely, *if it were not received until March 15, 2013*, regardless of these date discrepancies. If, on the
other hand, this Appeal was submitted on December 17, 2012, the date Plaintiff purported to have
signed it, only the allegations contained in it and related to the November 24, 2012 incident would have
been timely. *See* CAL. CODE REGS., tit. 15 § 3084.8(b) (“An inmate of parolee must submit the appeal
within 30 calendar days of: (1) The occurrence of the event or decision being appealed.”).

1 Lopez proceeded to “strangl[e] [him] near death again,” while “wrapping a spit-hood
2 mask around [his] neck.” Plaintiff claimed “through it all, [he] was in excessively tight
3 restraints, handcuffed, leg shackled” and was left “in waist chains for 10 hours chained to
4 [the] holding cages,” while unidentified “Supervisors and C/Os watched,” but “never
5 intervene[ed].” *Id.*

6 In the “Action Requested” portion of this CDCR 602, Plaintiff asked that “this
7 incident” be referred to the San Diego District Attorney’s Office “for criminal
8 prosecution of Sgt. L. Tillman, Lt. S. Rink & all C/Os named,” *id.* at 78, and that he be
9 awarded “compensatory, punitive & nominal damages” from Defendants Tillman, Rink,
10 Buenrostro, R. Lopez, R. Davis, J. Vanderweide, W. Shimko, I. Marquez, R. La Costa, L.
11 Romero, and A. Hernandez¹⁴ due to their “policies” of “biased investigations, [and]
12 refusing to discipline staff who used “excessive/unnecessary force” and retaliated against
13 him for “freedom of speech.” *Id.* at 80.

14 Log No. RJD-B-13-01132 is *dated* as “submitted” by Plaintiff on September 12,
15 2012; but Defendants attest that it too was not *received* until March 15, 2013, *see* Self
16 Decl., ECF No. 92-3 at 6, ¶ 6.e, at which time it was “screened out” at the first level of
17 review, and cancelled as untimely on March 26, 2013, pursuant to CAL. CODE REGS., tit.
18 15 § 3084.6(c)(4) because “the incident date is August 15, 2012.” *Id.* Ex. E at 77.¹⁵

19 CDCR 602 Log No. RJD-B-13-01223: In this appeal, which relates to Count 2,
20 Plaintiff claimed that “on August 10, 2012,” while he was “on walk alone yard cages
21 behind buildings 7 & 8,” Defendant R. Lemon “made a quick security check by the B
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24 ¹⁴ Plaintiff also requested damages from the Warden, D. Paramo, J. Beard, D. Hoffman, Mike Jimenez,
25 and the Governor, J. Brown, but all they have been dismissed as parties to this action. *See* ECF No. 42 at
26 15.

27 ¹⁵ Like CDCR Log Nos. RJD-C-13-01131, RJD-B-13-01040, and RJD-B-13-01039, Log No. RJD-B-13-
28 01132 *would* be timely if it were filed on the day Plaintiff ostensibly signed it since it relates to an
August 15, 2012, incident and was “submitted” on September 12, 2012. *See* Self Decl. Ex. E at 78, 80.

1 Yard fence, and found an “ice pick looking shank/knife.” *See* Self Decl., Ex. F at 85.
2 Plaintiff claimed Lemon came to his cage, cuffed him “in the front” and gave the ice
3 pick/shank to Tillman. After Plaintiff asked Tillman for permission to “go back to
4 Building 6 where [he] could have better mental health treatment,” as was recommended
5 by his psychologist, Plaintiff alleged Tillman replied, “I don’t care what your
6 psychologist says,” and then “charged at [him] swinging the ice pick,” and “rambl[ed]
7 mad[ly],” proclaiming “I should just stab you!” and “I might need to make a handle for
8 better gripping.” *Id.* at 87. Plaintiff claimed he “gripped [his] cane [under duress]” and
9 was “about to react with self-defense,” but Lemon held his right arm and “never
10 intervened.” *Id.* On August 14, 2012, Plaintiff claimed to have “finally vented,” and
11 because he was “traumatized w/PTSD,” he punched and broke a plexi-glass holding cage,
12 cut his right wrist, and required 8 sutures at Tri City Hospital. *Id.*

13 In the “Action Requested” portion of this CDCR 602, Plaintiff asked that “this
14 incident” be referred to the San Diego District Attorney’s Office “for criminal
15 prosecution of Sgt. L. Tillman for assaulting [him] w/deadly weapon w/traumatizing
16 great bodily injury.” *Id.* at 85. He also requested “compensatory, punitive & nominal
17 damages” from Defendants Tillman, and “superiors” Rink, E. Garcia, and A. Hernandez¹⁶
18 for their policies of “biased investigations,” and refusing to discipline staff who are “free
19 to commit crimes [assaults w/deadly weapon] against prisoners,” and cause them to
20 suffer “emotionally” from PTSD. *Id.* at 87.

21 Log No. RJD-B-13-01223 is *dated* as “submitted” by Plaintiff on August 27, 2012;
22 but Defendants attest again that it too was not *received* until March 15, 2013, *see* Self
23 Decl., ECF No. 92-3 at 6, ¶ 6.f, at which time it was “screened out” at the first level of

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27 ¹⁶ Plaintiff also requests damages from the Warden, D. Paramo, J. Beard, D. Hoffman, Mike Jimenez,
28 and the Governor, J. Brown, but all they have been dismissed as parties to this action. *See* ECF No. 42 at 15.

1 review, and cancelled as untimely on April 11, 2013, pursuant to CAL. CODE REGS., tit.
2 15 § 3084.6(c)(4) because “the date of the incident was 8/10/12.”¹⁷ *Id.*, Ex. F at 84.

3 CDCR 602 Log No. RJD-B-13-01371: Defendants again do not provide a copy of
4 the actual CDCR 602 Appeal Form Plaintiff submitted, but instead attach what appears to
5 be a summary of the issues Plaintiff raised as transcribed by an unidentified appeals
6 official. The transcription does not indicate the date the CDCR 602 Appeal Form was
7 signed by Plaintiff, but Defendants claim it was received on April 19, 2013. (*See Self*
8 *Decl.* at 6, ¶ 6.g.) In this grievance, Plaintiff attempts to appeal the rejection and/or
9 cancellations of his previous CDCR 602s appeals. Defendants’ transcription reads:

10 Appealing cancellation decision on 5 of his 602’s staff complaints-life
11 and death

12 RJD-B-13-01223 initially filed/mailed 8/27/12

13 RJD-B-13-01132 initially filed/mailed 9/12/12

14 RJD-C-13-01131 initially filed/mailed 12/17/12

15 RJD-B-13-01040 initially filed/mailed 10/29/12

16 RJD-B-13-01039 initially filed/mailed 1/07/13

17 He timely filed/mailed these 602’s to the appeals coord office, but the
18 C/Os were trashing them, shortstopping them, to never reach the AC
19 office. The AC office admitted it was extremely backlog over 6 months,
20 so how dare they deny him from untimeliness. Reqs his 602’s be
21 accepted as timely. An exception should be made as C/O’s obstructed
with his appeals process. Reqs. compensatory, punitive, and nominal
damages from R. Olson and J. Ramirez, G. Stratton, A. Hernandez, D.
Paramo.

22 *See Self Decl.* at 6-7 ¶ 6.g, Ex. G at 91.

23 This appeal was classified as “Legal: Processing of Appeals” and was rejected at
24 the first level of administrative review via a CDCR Form 695, dated April 19, 2013. *Id.*,

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27 ¹⁷ Like CDCR Log Nos. RJD-C-13-01131, RJD-B-13-01040, RJD-B-13-01039, and RJD-B-13-01132,
28 Log No. RJD-B-13-1223 would be timely if it were filed on the day Plaintiff ostensibly signed it since it
relates to an August 10, 2012 incident and he claims to have “submitted” it on August 27, 2012. *See Self*
Decl. Ex. F at 85, 87; SAC (ECF No. 33) at 27.

1 Ex. G, at 92. Plaintiff was advised this appeal was rejected pursuant to CAL. CODE REGS.,
2 tit. 15 § 3084.6(b)(7) because it was “missing necessary supporting documents” as
3 required by § 3084.3. *Id.* Specifically, Plaintiff was told: “You need to appeal your
4 cancelled appeals separately on a different appeal and attach the original copy of the
5 cancelled appeal.” *Id.*

6 CDCR 602 Log No. RJD-X-13-01776: Finally, in this appeal, which relates to
7 Count 5, Plaintiff claimed that on April 18, 2013, while he was “in the walk alone yard,”
8 Defendant Demesa informed him that “transportation was on the way to pick [him] up for
9 transfer.” *See* Self Decl., Ex. H at 95. “C/O R. Davis” and Defendant Silva “were already
10 in [his] cell,” and started “trashing [his] legal property.” *Id.* After Demesa placed him in a
11 holding cage, Defendant Davis “was about to open the cage to put [a] retention lanyard
12 on [Plaintiff’s] handcuffs for no reason,” therefore, Plaintiff “brought the handcuffs
13 forward,” and “began making noise hitting [his] cuffs on the tray slot,” and “request[ed]
14 to talk to Lt. Arguilez. *Id.* at 97. Plaintiff asked Arguilez if he could “pack [his] own
15 property,” but Arguilez replied, “Fuck that. We’re getting you the fuck out of here!” *Id.*
16 Plaintiff stated he would go “nowhere w/out [his] legal property,” and demanded to speak
17 to Captain Stout. When Arguilez refused, Plaintiff “began making noise,” then “kicked
18 open the tray slot.” *Id.* C/O R. Davis then “pepper sprayed [him] in the face,” and
19 continued to spray him with “3-4 pepper spray cans” as he turned his back. Plaintiff
20 further claims Defendants Davis “grabbed [his] leg through the tray slot,” and Arguilez
21 “slammed [him] on the concrete floor.” Defendants A. Silva, A. Buenrostro, R. Lopez,
22 and A. Demesa also responded by “beating [him] severely,” while Arguilez said, “I’m
23 going to break your fucken wrists,” and “ben[t] them backwards, engraving the handcuffs
24 tight to [his] wrist bones.” *Id.*

25 In the “Action Requested” portion of this CDCR 602 appeal, Plaintiff again asked
26 that the incident be referred to the District Attorney for “criminal prosecution of all
27 involved,” *id.* at 95, as well as for compensatory, punitive, and nominal damages from
28 Defendants Arguilez, R. Davis, A. Buenrostro, A. Silva, R. Lopez, A. Demesa, M. Stout,

1 S. Rink, A. Hernandez, and G. Stratton for “creating incidents of violence w/prisoners for
2 job security,” for “beating [him] severely,” and for “refusing to discipline staff.” *Id.* at 97.

3 Log No. RJD-X-13-01776 is *signed* by Plaintiff as “submitted” on May 12, 2013,
4 *id.* at 95, and Defendants admit they *received* this one on May 20, 2013. *See* Self Decl. at
5 ¶ 6.h, Ex. H at 95. However, it too was screened at the first level of review, and rejected
6 pursuant to CAL. CODE REGS., tit. 15 § 3084.6(b)(7) on June 3, 2013, because it was
7 “missing necessary supporting documents” as required by § 3084.3.¹⁸ *See id.*, Ex. H at
8 99. Specifically, Plaintiff was told his appeal was missing a “Complete 837 package.” *Id.*
9 After Plaintiff “re-submitted the appeal on July 19, 2013, however, [it] was cancelled
10 pursuant to CAL. CODE REGS., tit. 15 § 3084.6(c)(1) because [he] did not resubmit the
11 rejected appeal within thirty days of the rejection.” *See* Self Decl. at 7, ¶ 6.h; Ex. H at 94.

12 **ii. Plaintiff’s Rebuttal**

13 For his part, Plaintiff “declare[s] under penalty of perjury” that he exhausted Count
14 1 by “timely fil[ing] a 602” on July 7, 2012, CDCR 602 Log No. RJD-B-12-02812, and
15 pursuing it to the “highest level.” *See* SAC (ECF No. 33) at 26-28.

16 Plaintiff *also* swears to have filed “individual 602 appeals” regarding Counts 2, 3,
17 and 4 with “the Appeals Coordinator” at RJD on August 27, 2012 (Count 2—Log No.
18 RJD-B-13-01223), September 12, 2012 (Count 3—Log No. RJD-B-13-01132), and on
19 December 17, 2012 (Count 4—Log No. RJD-B-13-01131), but the Appeals Coordinators
20 “continuously replied that they had not received [them].” *Id.* at 27. Therefore, on March
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23 ¹⁸ The Court notes the CDCR Form 695 issued by RJD Appeals Coordinators R. Olson and J. Ramirez
24 rejecting Log No. RJD-X-13-01776 is dated June 3, 2013. *See* Self Decl., Ex. H at 99. However,
25 Plaintiff had been transferred to KVSP, and the June 3, 2013 CDCR Form 695 is also marked as
26 “Received 6-13-13” by a “C/O D. Hupp.” *Id.* Pursuant to Cal. Dept. of Corr. & Rehab. OPERATIONS
27 MANUAL § 54100.18, which governs the processing of CDCR 602 Appeals when inmates are transferred
28 from one prison to another before the process is complete, the “time limits on appeals forwarded to
sending institutions/parole regions for response *shall not commence until received by the responding
institution/parole region.*” Therefore, if Plaintiff did not receive RJD’s June 3, 2013 CDC Form 695
until June 13, 2013 at KVSP, the 30-day period for filing a response per CAL. CODE REGS., tit. 15
§ 3084.6(c)(1) would not expire until July 13, 2013. He swears he timely submitted it on the date it is
signed, July 8, 2013. *See* SAC (ECF No. 33) at 38.

1 14, 2013, Plaintiff attests to have “hand delivered five (5) 602 appeals to Warden Paramo
2 at RJD, and informed him the Appeals Coordinators continuously claimed they weren’t
3 receiving [his] 602 staff complaints.” *Id.* Plaintiff swears that the Warden “instructed
4 [him] to re-file them,” and he “delivered them to the Appeals Coordinator’s Office
5 himself,” but they were all dismissed as untimely. *Id.*

6 Finally, Plaintiff attests to have “timely filed another 602 staff complaint” on May
7 12, 2013, regarding Count 5 (Log No. RJD-X-13-01776). *Id.* This appeal was rejected on
8 June 3, 2013, because Plaintiff was told he failed to attach an “incident package 837.”
9 Plaintiff swears he was instructed to provide those “missing documents” and re-submit
10 his appeal, but his counselors at KVSP (to which he had since been transferred) informed
11 him he “had been sent on a goose chase for documents that didn’t exist.” *Id.* at 27-28.
12 Plaintiff therefore swears he “mailed [this] 602 appeal back to RJD” on July 8, 2013,
13 informing them that he “never received an 837 package,” but RJD then “cancelled [it] as
14 untimely.” *Id.* at 28.

15 **E. Analysis**

16 As noted above, “the [D]efendant[s]’ burden is to prove that there was an available
17 administrative remedy, and that the prisoner did not exhaust that available remedy.”
18 *Albino*, 747 F.3d at 1172. The burden then shifts to Plaintiff “who must show that there is
19 something particular in his case that made the existing and generally available
20 administrative remedies effectively unavailable to him.” *Williams*, 775 F.3d at 1191;
21 *Albino*, 747 F.3d at 1172; *Jones*, 549 U.S. at 218. He may do so by “showing the local
22 remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously
23 futile.” *Albino*, 747 F.3d at 1172 (citation omitted); *see also Ngo v. Woodford*, 539 F.3d
24 1108, 1110 (9th Cir. 2008) (noting potential “unavailability” of administrative remedies
25 if officials “obstruct[ed] [the prisoner’s] attempt to exhaust,” or “prevented [him] from
26 exhausting because procedures for processing grievances weren’t followed.”); *Nunez*,
27 591 F.3d at 1224 (finding prisoner’s lack of exhaustion “excused” where record showed
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1 he “took reasonable and appropriate steps to exhaust ... [but] was precluded from
2 exhausting, not through his own fault but by the Warden’s mistake.”)

3 “Under § 1997e(a), the exhaustion requirement hinges on the ‘availab[ility]’ of
4 administrative remedies: An inmate, that is, must exhaust available remedies, but need
5 not exhaust unavailable ones.” *Ross*, 136 S. Ct. at 1858; *Andres*, 854 F.3d at 1104.

6 In this case, the Court finds that M. Voong and B. Self’s Declarations, ECF Nos.
7 92-2; 92-3, like the evidence presented in *Williams*, “at most meets [Defendants’] burden
8 of demonstrating a system of available administrative remedies at the initial step of the
9 *Albino* burden-shifting inquiry.” *Williams*, 775 F.3d at 1192; Voong Decl. ¶¶ 3-4; Self
10 Decl. ¶¶ 2-4 (citing CAL. CODE REGS., tit. 15 § 3084, *et seq.*). Indeed, Plaintiff does not
11 dispute that CAL. CODE REGS., tit. 15 § 3084.1 “provide[s] a remedy for inmates and
12 parolees with identified grievances ... [with] an administrative mechanism for review of
13 departmental policies, decisions, actions, conditions, or omissions that have a material
14 adverse effect on the welfare of inmates and parolees.”

15 Plaintiff swears, however, that those mechanisms were not “available,” *i.e.*
16 “capable of use” to him as to Counts 2-4 because RJD appeals officials “continuously”
17 denied ever receiving the five individual, timely, and successive CDCR 602s “staff
18 complaints” he submitted between August 27, 2012 (Log No. RJD-B-13-01223) and
19 January 7, 2013 (Log No. RJD-B-13-01039), and then ultimately rejected them as
20 untimely—and only after the Warden personally delivered them to the appeals office for
21 him on March 14, 2013. *See* ECF No. 33 at 27; *Ross*, 136 S. Ct. at 1859 (citing *Booth*,
22 532 U.S. at 738).

23 Plaintiff further swears administrative remedies as to Count 5 were also
24 “unavailable” because while CDCR 602 Log No. RJD-X-13-01776 was timely, signed by
25 him on May 12, 2013, and received by RJD’s appeals office on May 20, 2013, *see* Self
26 Decl. at 7, ¶ 6.h & Ex. H at 95, RJD appeals coordinators “thwarted [him] from taking
27 advantage of [that] grievance process,” when they screened and rejected this CDCR 602
28 at the first level of review by “sending him on a wild goose chase” for documents his

1 counselors at KVSP told him “didn’t exist.” See ECF No. 33 at 27-28; *Ross*, 136 S. Ct. at
2 1860 (noting unavailability may be shown when “prison officials devise procedural
3 systems (including ... blind alleys and quagmires ...) in order to ‘trip[] up all but the
4 most skillful prisoners.’”) (quoting *Woodford*, 548 U.S. at 102); *Nunez*, 591 F.3d at 1226
5 (administrative remedies “effectively unavailable” where prisoner was precluded from
6 properly exhausting due to a mistaken instruction requiring an unavailable document that
7 was needed to pursue the appeal); *Sapp*, 623 F.3d at 823 (“[W]e hold that improper
8 screening of an inmate’s administrative grievances renders administrative remedies
9 ‘effectively unavailable’ such that exhaustion is not required under the PLRA.”).

10 Based on this precedent, and having carefully considered all the evidence
11 presented, the Court finds “genuine dispute[s] about material facts” exist related to the
12 exhaustion of Plaintiff’s administrative remedies, and those genuine disputes preclude
13 summary judgment in this case. *Albino*, 747 F. 3d at 1169. Defendants Declarations,
14 together with the Exhibits attached, including copies of Plaintiff’s multiple CDCR 602
15 Appeals, while sufficient to establish the existence of administrative remedies “in a
16 general sense,” are insufficient to carry Defendants’ “ultimate burden of proof,” *Albino*,
17 747 F.3d at 1172, in light of Plaintiff’s sworn counter-factual allegations¹⁹ as to having
18 “filed” and/or “submitted” multiple and *timely* CDCR 602 appeals related to Counts 2
19 through 5, which he attests were simply not addressed by RJD’s Appeals Coordinators
20 until he “hand-delivered [them] to Warden Paramo at RJD” on March 14, 2013, and
21 “informed him [they] continuously claimed they weren’t receiving [his] 602 staff
22 complaints.” See SAC at 27; *Williams*, 775 F.3d at 1192.

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25 ¹⁹ As noted above, Plaintiff’s SAC contains factual allegations related to the exhaustion of his claims,
26 are based on his personal knowledge, and are verified under penalty of perjury pursuant to 28 U.S.C.
27 § 1746. See ECF No. 33 at 26-28, 75. “A verified complaint may be used as an opposing affidavit under
28 Rule 56.” *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (citing *McElyea v. Babbitt*, 833
F.2d 196, 197-98 (9th Cir. 1987)). In *Williams*, the Ninth Circuit found summary judgment
inappropriate where allegations made in the prisoner’s sworn complaint suggested administrative
remedies at RJD were “not available” under the circumstances. 775 F.3d at 1192 & n.11.

1 This sworn testimony, when viewed in the light most favorable to Plaintiff,
2 satisfies Plaintiff’s burden of production under *Albino* and *Williams* insofar as it shows
3 that administrative remedies—at least with respect to Count 2-5—were not “available” to
4 him because RJD officials “thwarted the effective invocation of the administrative
5 process through threats, game-playing, or misrepresentations, ... in [his] individual case.”
6 *Ross*, 136 S. Ct. at 1862; *see also Williams*, 775 F.3d at 1191 (unavailability may be
7 shown if grievance process, as administered “through machination,” proved “ineffective,
8 unobtainable, unduly prolonged, inadequate, or obviously futile.” (quoting *Albino*, 747
9 F.3d at 1172) (internal citation omitted). In fact, the Ninth Circuit recently remanded a
10 district court’s grant of summary judgment on § 1997e(a) grounds where the record
11 showed “defendants improperly fail to process [a prisoner’s] timely filed grievance.”
12 *Andres*, 854 F.3d at 1104-05. In *Andres*, the plaintiff “filed a 602 grievance” two days
13 after an alleged incident involving excessive force, “but [he] never received a response”
14 from RJD appeals staff. *Id.* at 1104. The Court found administrative remedies were
15 “rendered effectively unavailable by defendants’ actions,” and therefore summary
16 judgment pursuant to § 1997e(a) was improper. *Id.* at 1105 (citing *Ross*, 136 S. Ct. at
17 1859-60); *see also Brown*, 422 F.3d at 943 n.18 (noting that an unjustified delay in
18 responding to a grievance “particularly a time-sensitive one, may demonstrate that no
19 administrative process was in fact available.”); *see also Watts v. Nguyen*, 2015 WL
20 4557522 at *9 (E.D. Cal. July 27, 2015) (citing the 30-day time limit set for the
21 submission of an inmate appeal by CAL. CODE REGS., tit. 15 § 3084.8(b), as well as the
22 time limits set for the “completion of appeals” by prison officials at all three levels of
23 review in § 3084.8(c), and noting that “[a]s a general principal, [the] procedural rules
24 [governing proper exhaustion per 42 U.S.C. § 1997e(a)] must be adhered to by both
25 inmates *and* prison officials.”) (italics added).

26 And while Defendants have submitted the Declaration of B. Self, RJD’s Appeals
27 Coordinator, whose “[o]ffice ... receives all inmate grievances,” and whose “[o]ffice did
28 not *receive and accept* for review any timely or properly filed appeals from Plaintiff”

1 related to Counts 2-5, *see* ECF No. 92-3 at 1, 7 ¶¶ 1, 7 (emphasis added), Defendants do
2 not further provide any sworn testimony from “Appeals Coordinators at RJD J. Ramirez
3 and R. Olson,” whom Plaintiff attests are the persons who “continuously replied they had
4 not received [his] 602 staff complaints,” *see* ECF No. 33 at 27, and who are also the same
5 two RJD appeals officials who later screened and rejected them as untimely. *See e.g.*, Self
6 Decl. Ex. B at 26-27 [Log No. RJD-B-13-01039]; Ex. D. at 67 [Log No. RJD-C-13-
7 01131]; Ex. E at 77 [Log No. RJD-B-13-01132]; Ex. F at 84 [Log No. RJD-B-01223];
8 Ex. H at 94, 99 [Log No. RJD-X-13-01776].²⁰

9 Because “the defendant[s] in a PLRA case must plead and prove non-exhaustion as
10 an affirmative defense,” and it is not clear as a matter of law whether Plaintiff failed to
11 exhaust the remedies made “available” to him at RJD, the Court finds that summary
12 judgment pursuant to 42 U.S.C. § 1997e(a) is not warranted, and “the case may proceed
13 to the merits.” *Albino*, 747 F.3d at 1171; *Williams*, 775 F.3d at 1192 (“[P]ermitting a
14 defendant to show that remedies existed in a general sense where a plaintiff has
15 specifically alleged that official action prevented [him] from filing a particular grievance
16 would force a plaintiff to bear the burden of proof, a burden which the plaintiff does not
17 bear.”) (quoting *Albino*, 747 F.3d at 1172).

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23 ²⁰ CAL. CODE REGS., tit. 15 § 3084.8 provides that the CDCR’s “[t]ime limits for reviewing appeals shall
24 commence upon the date of receipt of the appeal form by the appeals coordinator.” CAL. CODE REGS.,
25 tit. 15 § 3084.8(a). With some exceptions, “[a]ll appeals shall be responded to and returned to the inmate
26 or parolee by staff,” *id.* § 3084.8(c), and first and second level responses are due “within 30 working
27 days from date of receipt by the appeals coordinator.” *Id.* § 3084.8(c)(1), (2). Third level responses are
28 due “within 60 working days from the date of receipt by the third level Appeals Chief.” *Id.* § 3084.8(c)
(3). “Except for the third level, if an exceptional delay prevents completion of the review within
specified time limits, the appellant, within the time limits provided in subsection 3084.8(c), shall be
provided an explanation of the reasons for the delay and the estimated completion date.” CAL. CODE
REGS, tit. 15 § 3084.9(e).

1 **IV. Conclusion and Order**

2 Accordingly, the Court:

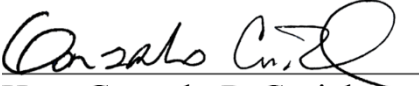
3 1) **DISMISSES** Defendants M. Stout, C.P. Franco, K. Thaxton, and R. Casper
4 without prejudice pursuant to FED. R. CIV. P. 4(m) and **DIRECTS** the Clerk to terminate
5 them as parties to this matter;

6 2) **DENIES** Defendants' Motion for Summary Judgment pursuant to 42 U.S.C.
7 § 1997e(a) (ECF No. 92); and

8 3) **ORDERS** Defendants W. Suglich, G. Stratton, A. Hernandez, E. Garcia, G.
9 Hernandez, R. Davis (Correctional Officer); R. Davis (Lieutenant), S. Rink, G. Savala, D.
10 Arguilez, L. Tillman, E. Ojeda (erroneously sued as J. Ojeda), L. Brown, J. Brown, A.
11 Buenrostro, A. Demesa (erroneously sued as R. Demesas), J. Gomez, C. Hernandez, Q.
12 Jackson, R. La Costa, R. Lemon, R. Lopez, I. Marquez, C. Meza, J. Morales (sued as
13 Unknown Morales), E. Pimentel, J. Reyes, J. Rodriguez, L. Romero, N. Scharr, W.
14 Shimko, A. Silva, J. L. Vanderweide, A. Sanchez (erroneously sued as RN Sanchez), and
15 L. Godinez (erroneously sued as N. Molina) to file a file an Answer to Plaintiff's Second
16 Amended Complaint (ECF No. 33) within 30 days of this Order.

17 **IT IS SO ORDERED.**

18 Dated: July 26, 2017

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20 Hon. Gonzalo P. Curiel
21 United States District Judge
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