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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ROGELIO MAY RUIZ,

12 Petitioner,

13 v.

14 R. OLIVEIRA, et al.,

15 Defendants.

Case No.: 17cv1914-DMS (NLS)

**REPORT AND
RECOMMENDATION GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

[ECF No. 39]

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18 Plaintiff Rogelio May Ruiz ("Plaintiff"), a prisoner proceeding *pro se* and *in forma*
19 *pauperis*, filed this civil rights action under 42 U.S.C. § 1983 claiming that Defendants
20 violated his Eighth Amendment right to be free from cruel and unusual punishment when
21 they failed to protect him from being attacked by another prison officer. ECF No. 17.

22 Defendants filed a motion for summary judgment seeking judgment in their favor on
23 all claims, contending that Plaintiff failed to exhaust his administrative remedies. ECF
24 No. 39. Defendants, and the Court, notified Plaintiff of the requirements for opposing
25 summary judgment pursuant to *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) and
26 *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc). ECF Nos. 39, 40. Plaintiff
27 filed several oppositions in Spanish (ECF Nos. 43, 46, 50, 55), and the Court ordered
28 Plaintiff to resubmit the opposition in English. ECF Nos. 44, 47. In addition, the Court

1 ordered Defendants to submit certified translations of several exhibits, which included
2 significant portions of text in Spanish, and Defendants complied. ECF Nos. 52, 53.

3 Upon due consideration and for the reasons outlined below, the Court
4 **RECOMMENDS** that the district judge **GRANT** the motion for summary judgment.

5 **I. FACTUAL BACKGROUND**

6 Plaintiff contends that Defendants R. Oliveira and B. Self violated his right to be
7 free from cruel and unusual punishment under the Eighth Amendment by failing to
8 protect him from a physical attack carried out by another corrections officer (“C/O”) L.
9 Romero. These facts, taken from Plaintiff’s Fourth Amended Complaint, are recited here
10 only to set the factual background for the allegations in Plaintiff’s complaint and are not
11 to be taken as true for the purposes of the summary judgment motion.

12 Plaintiff alleges that C/O Romero injured him in his face around August 15, 2015,
13 threatened him if he were to report the incident, and refused to let him see a nurse. ECF
14 No. 17 at 3. Plaintiff alleges that he nevertheless reported this incident in a CDCR 602
15 grievance. *Id.* Subsequently, on January 26, 2016, Plaintiff alleges that C/O Romero
16 followed him to the kitchen and threatened him for reporting the previous incident. *Id.*
17 Plaintiff alleges that he also reported this threat through another CDCR 602 grievance.
18 *Id.* Then, on February 19, 2016, while another officer arrested Plaintiff for a fight,
19 Plaintiff alleges that C/O Romero arrived on the scene, forced him into handcuffs and the
20 hit him 17 times in his face, breaking his nose, and caused other physical injury including
21 breaking his finger and dislocating his shoulder. *Id.* at 1-2.

22 Plaintiff alleges that Defendants Oliveira and Self did not protect him from the
23 attack by C/O Romero despite him filing CDCR 602 grievances about Romero prior to
24 the 2016 incident. *Id.* at 1-3.

25 **II. LEGAL STANDARDS**

26 **A. LEGAL STANDARD FOR SUMMARY JUDGMENT**

27 Summary judgment is appropriate “if the movant shows that there is no genuine
28 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

1 Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is
2 material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477
3 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if a reasonable jury
4 could return a verdict for the nonmoving party. *Id.*

5 The moving party bears the initial burden of establishing the absence of a genuine
6 issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this
7 burden in two ways: (1) by presenting evidence that negates an essential element of the
8 nonmoving party's case; or (2) by demonstrating the nonmoving party failed to establish
9 an essential element of the nonmoving party's case on which the nonmoving party bears
10 the burden of proving at trial. *Id.* at 322-23. If the moving party fails to bear the initial
11 burden, summary judgment must be denied and the court need not consider the
12 nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

13 Once the moving party establishes the absence of a genuine issue of material fact,
14 the burden shifts to the nonmoving party to set forth facts showing a genuine issue of a
15 disputed fact remains. *Celotex*, 477 U.S. at 330. “Where the record taken as a whole
16 could not lead a rational trier of fact to find for the non-moving party, there is no
17 ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
18 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253,
19 289 (1968)).

20 In making this determination, the Court must draw all inferences in the light most
21 favorable to the nonmoving party and determine whether a genuine issue of material fact
22 precludes entry of judgment. *Comite de Jornaleros de Redondo Beach v. City of*
23 *Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011). The Court determines only whether
24 there is a genuine issue for trial and, in doing so, it must liberally construe Plaintiff's
25 filings because he is a *pro se* prisoner. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir.
26 2010). The court should not engage in credibility determinations, weighing of evidence,
27 or drawing of legitimate inferences from the facts; these functions are for the trier of fact.
28 *Anderson*, 477 U.S. at 255.

1 When defendants seek summary judgment based on the plaintiff’s failure to
2 exhaust specifically, they must first prove that there was an available administrative
3 remedy and that plaintiff did not exhaust that available remedy. *Williams v. Paramo*, 775
4 F.3d 1182, 1191 (9th Cir. 2015) (citing *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir.
5 2014)) (quotation marks omitted). If they do, the burden of production then shifts to the
6 plaintiff “to show that there is something in his particular case that made the existing and
7 generally available administrative remedies effectively unavailable to him.” *Williams*,
8 775 F.3d at 1191; *see also Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016). Only “[i]f the
9 undisputed evidence viewed in the light most favorable to the prisoner shows a failure to
10 exhaust, [is] a defendant is entitled to summary judgment under Rule 56.” *Albino*, 747
11 F.3d at 1166.

12 **B. Legal Standard for Exhaustion**

13 The Prisoner Litigation Reform Act (“PLRA”) provides that “[n]o action shall be
14 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal
15 law, by a prisoner confined in any jail, prison, or other correctional facility until such
16 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e (a).
17 Therefore, exhaustion is “mandatory” before bringing a federal action. *Ross*, 136 S. Ct.
18 at 1856; *see Porter v. Nussle*, 534 U.S. 516, 524 (2002). A prisoner is not required to
19 plead exhaustion in his complaint; it is an affirmative defense that must be raised and
20 proven by a defendant. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

21 The Supreme Court has “held that to properly exhaust administrative remedies
22 prisoners must ‘complete the administrative review process in accordance with the
23 applicable procedural rules,’ []—rules that are defined not by the PLRA, but by the
24 prison grievance process itself.” *Id.* at 218 (quoting *Woodford v. Ngo*, 548 U.S. 81, 88
25 (2006) (internal citation omitted)). The exhaustion requirement offers the prison a
26 chance to resolve the issue on its own and “promotes efficiency” by allowing claims to be
27 resolved more quickly than litigation. *Woodford*, 548 U.S. at 90. Thus, a prison’s own

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1 grievance process, not the PLRA, determines how detailed a grievance must be to satisfy
2 the exhaustion requirement. *Jones*, 549 U.S. at 218.

3 Thus, under this legal framework, the Court must look to the prison’s grievance
4 procedure. The California Department of Corrections and Rehabilitation’s (“CDCR”)
5 administrative appeal system for inmates in the California prison system is described in
6 Title 15 of the California Code of Regulations: “Any inmate . . . under the [CDCR’s]
7 jurisdiction may appeal any policy, decision, action, condition, or omission by the
8 department or its staff that the inmate . . . can demonstrate as having a material adverse
9 effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a).
10 For appeals submitted after January 28, 2011, inmates must commence the appeals
11 process by submitting a CDCR Form 602 to the facility’s appeals coordinator describing
12 “the specific issue under appeal and the relief requested.” *Id.* at § 3084.2(a), (c). Among
13 other requirements, the appeal must be “limited to one issue or related set of issues” and
14 “list all staff member(s) involved and shall describe their involvement in the issue.” *Id.*
15 at § 3084.2(a)(1), (3). Administrative remedies

16 shall not be considered exhausted relative to any new issue, information, or
17 person later named by the appellant that was not included in the originally
18 submitted CDCR Form 602 . . . and addressed through all required levels of
19 administrative review up to and including the third level. In addition, a
20 cancellation or rejection decision does not exhaust administrative remedies.

21 *Id.* at § 3084.1(b).

22 If a prisoner is not satisfied with the first level response, he may submit a formal
23 appeal for a second level review, which is “conducted by the hiring authority or designee
24 at a level no lower than Chief Deputy Warden . . . or the equivalent.” *Id.* at §
25 3084.7(d)(2). If the prisoner is not satisfied with the second level review, he may appeal
26 to the third level of review by the chief of the Office of Appeals in Sacramento. *Id.* at §
27 3084.7(c), (d)(3). “The third level review constitutes the decision of the Secretary of the
28 California Department of Corrections and Rehabilitation on an appeal, and . . . exhausts
administrative remedies.” *Id.* at § 3084.7(d)(3).

1 **III. DISCUSSION**

2 Defendants’ sole argument in support of their motion for summary judgment is that
3 Plaintiff failed to exhaust his administrative remedies prior to bringing suit. In support of
4 this argument, Defendants attach the various CDCR 602s Plaintiff filed. *See* ECF No. 53.
5 The Court will review each of these under the exhaustion framework discussed above.

6 **A. Plaintiff’s 602 Grievances¹**

7 CDCR 602 Filed November 23, 2015

8 The first grievance Plaintiff filed related to this case was on November 23, 2015,
9 where he reported that C/O Romero struck him in the nose while he was handcuffed,
10 causing him to bleed.² ECF No. 53 at 5, 7. Plaintiff requested that Romero be
11 investigated. *Id.*

12 This grievance is shown as bypassing the first level of review. *Id.* On the response
13 for the second level of review, it states that an interview was conducted by Lt. A. Canedo
14 on February 6, 2016. *Id.* at 6. The second level review response dated the same day was
15 that the appeal was “partially granted” in that the investigation was completed and it was
16 concluded that no witnesses were identified and that the prison staff did not violate
17 CDCR policy. *Id.* at 9.

18 On February 28, 2016, Plaintiff appears to have attempted to take it up to the third
19 level of review. He wrote that he was dissatisfied with the processing of the grievance
20

21 ¹ In summarizing the CDCR grievances, the Court properly relies upon the certified
22 translation submitted by Defendants in support of their motion. *See, e.g., Santacruz v.*
23 *French Connection Bakery, Inc.*, C 07-1118 PVT, 2009 WL 10692044, at *2 (N.D. Cal.
24 July 27, 2009) (requiring submission of evidence on a motion for summary judgment to
25 include “proper Spanish language declarations that are supported by certified translations
26 which are shown to have been prepared by a competent translator”); *Jack v. Trans World*
27 *Airlines*, 854 F.Supp. 654, 659 (N.D. Cal. 1994) (“Witness testimony translated from a
28 foreign language must be properly authenticated and any interpretation must be shown to
be an accurate translation done by a competent translator.”).

² The Court notes that this is the date written on the 602 form but Plaintiff alleges in his
complaint that the incident took place on or about August 15, 2015. *See* ECF No. 17 at 3.

1 against C/O Romero, that he had failed to list the shift supervisor as a supervisor because
2 his name tag was covered by his jacket, and that he was requesting a staff investigator.
3 *Id.* at 6. In the grievance, he stated several times that his “complaint [] is only against L.
4 Romero.” *Id.* at 8. This appeal was rejected because it was “missing necessary
5 supporting documents,” in particular the CDCR Form 1858, Rights and Responsibilities
6 Statement. *Id.* at 4.

7 CDCR 602 Filed January 26, 2016

8 The second grievance Plaintiff filed followed the incident alleged in his complaint
9 where he accuses C/O Romero of threatening him for filing his first grievance. In this
10 grievance, Plaintiff stated that Romero followed him from the kitchen and told him that if
11 he reported him again, he will beat him up with another inmate and that “next time will
12 be worse.” ECF No. 53 at 14, 16. Plaintiff requested that he be transferred to another job
13 or that C/O Romero be removed from his job. ECF No. 53 at 14.

14 This grievance is again shown to bypass the first level of review, and on the
15 response for the second level of review, it states that an interview was conducted by Lt.
16 E. Ojeda on June 14, 2016. *Id.* at 18. The second level review response, dated the same
17 day, stated that the appeal was “partially granted.” The review response stated that an
18 investigation by interviewing C/O Romero and Plaintiff, and the conclusion was that the
19 staff did not violate CDCR policy. *Id.*

20 On July 17, 2016, Plaintiff attempted to file a third level appeal. *Id.* at 15. He
21 stated that since filing the grievance, he was hit in the face by C/O Romero on February
22 19, 2016, and was now requesting financial compensation and an administrative action
23 against him. *Id.* at 15, 17. This appeal was rejected on October 11, 2016 because “the
24 appeal issue or complaint emphasis has been changed at some point in the process to the
25 extent the process is entirely new, and the required lower levels of review and assessment
26 have thereby been circumvented.” *Id.* at 22. Plaintiff attempted to resubmit the appeal
27 through a letter, *id.* at 20, but the Appeals Office denied that request, finding that it was
28 submitted after the time limits for submitting an appeal passed, *id.* at 13.

2 After the alleged attack with C/O Romero where he punched Plaintiff in the face
3 several times and caused other injuries, Plaintiff filed another 602 grievance. ECF No.
4 53 at 41. He detailed what happened during the incident and his injuries in the grievance,
5 and requested a staff investigation and for protection against C/O Romero. *Id.* at 43. He
6 states that he filed his prior 602 three weeks ago, and was “still waiting for protection
7 assistance.” *Id.*

8 This grievance was shown to bypass the first level of review and on July 29, 2016,
9 the appeal was “partially granted” at the second level, with the conclusion was that the
10 staff did not violate CDCR policy. *Id.* at 31.

11 On October 4, 2016, it appears that Plaintiff attempted to file a third level appeal.
12 *Id.* at 42. He states that the only officer who hit him was C/O Romero and there was no
13 “need to identify more officers involved.” *Id.* He reiterated the injuries he sustained. *Id.*
14 at 44.

15 He also appears to have sent further forms to the appeals office, on a form for
16 “Inmate/Parolee Request for Interview, Item or Service,” dated November 3, 2016. On
17 these forms, he writes that he did not receive any communications regarding this
18 complaint until October 24, 2016,³ when he received a memorandum he claims had a
19 “false” date from July 28, 2016. *Id.* at 33, 37. The form included an attachment where
20 he wrote that he was interviewed by Oliveira and Self on August 2, 2016. *Id.* at 29.
21 Plaintiff stated that they told him they never sent him a memorandum as to his complaint
22 and blamed him for “their negligence.” *Id.*

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26 ³ The Court notes that he makes this claim despite the evidence including statements
27 signed by Plaintiff and dated October 4, 2016, in areas of the form responding to “if you
28 are dissatisfied with the Second Level response, explain reason below” and continuation
of this section. ECF No. 53 at 42, 44.

1 On January 11, 2017, the third level appeal was cancelled because it was found to
2 be untimely. *Id.* at 40. In another communication dated January 18, 2017, the appeal
3 was also rejected because it was missing a required form. *Id.* at 39.

4 Plaintiff responded on January 25, 2017, stating that he was in the hospital since
5 April 2016 until he was transferred in October 2016, and this may have caused the delay
6 in his filing his appeal. *Id.* at 30. On March 7, 2017, the appeals office responded,
7 stating that Plaintiff cannot reopen an appeal that had been previously cancelled. *Id.* at
8 28. This is the last communication submitted to the Court regarding the appeals process.

9 **B. Exhaustion**

10 **a. Defendants' Evidence**

11 Defendants argue that Plaintiff's claims here against Oliveira and Self are not
12 exhausted because they were not named in the complaints described above and none of
13 the complaints alleged that they failed to protect him. ECF No. 39-1 at 6. Alternatively,
14 Defendants argue that Plaintiff's appeals to the third level were all defective and, as such,
15 did not sufficiently exhaust. *Id.*

16 In *Jones v. Bock*, the Supreme Court explicitly declined to adopt a bright line rule
17 where "exhaustion is not *per se* inadequate simply because an individual later sued was
18 not named in the grievances." 549 U.S. at 219. "The level of detail necessary in a
19 grievance to comply with the grievance procedures will vary from system to system and
20 claim to claim, but it is the prison's requirements, and not the PLRA, that define the
21 boundaries of proper exhaustion." *Id.* at 218; *see also Morton v. Hall*, 599 F.3d 942, 946
22 (9th Cir. 2010).

23 Many older district court cases suggest there is no requirement under CDCR's
24 grievance procedures to name every defendant in order to properly exhaust. *See, e.g.,*
25 *Marella v. Terhune*, No. 03CV0660-BEN (AJB), 2005 WL 8160129, at *6 (S.D. Cal.
26 Feb. 7, 2005); *Ramos v. Monteiro*, No. CV060832GAFJTL, 2008 WL 4184644, at *11
27 (C.D. Cal. Sept. 8, 2008) (applying same to the CDCR Form 602).

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1 However, the California Code regulations governing the grievance process was
2 amended, effective January 28, 2011, to include the following provision:

3 ***The inmate or parolee shall list all staff member(s) involved and shall***
4 ***describe their involvement in the issue.*** To assist in the identification of
5 staff members, the inmate or parolee shall include the staff member's last
6 name, first initial, title or position, if known, and the dates of the staff
7 member's involvement in the issue under appeal. If the inmate or parolee
8 does not have the requested identifying information about the staff
9 member(s), he or she shall provide any other available information that
10 would assist the appeals coordinator in making a reasonable attempt to
11 identify the staff member(s) in question.

12 Cal. Code Regs. tit. 15, § 3084.2(a)(3). The code previously had no such explicit
13 requirement—the controlling statute prior to 2011 merely required inmates to complete a
14 CDCR Form 602 and “describe the problem and action requested.” *Morton*, 599 F.3d at
15 946; *Maldonado v. Yates*, No. 1:11-CV-01633 AWI, 2013 WL 3936732, at *4 (E.D. Cal.
16 July 30, 2013); *Godoy v. Wadsworth*, No. 05cv02913 NJV, 2010 WL 366640 at *4 (N.D.
17 Cal. Jan. 26, 2010). Here, because Plaintiff’s grievances were filed after the effective
18 date of the amendment, Plaintiff was explicitly told in his appeal responses that “[a]ll
19 issues related to the allegation of staff misconduct must be appealed separately” and that
20 he “does not exhaust administrative remedies on any unrelated issue not covered in this
21 response or concerning any staff member not identified by this complaint.” ECF No. 53
22 at 9, 18, 31.

23 Regardless, since this amendment, there does appear to be some disagreement
24 within district courts in the Ninth Circuit as to whether individual defendants must be
25 explicitly named. Some courts interpret this 2011 amendment to require prisoners to
26 explicitly name defendants in order to properly exhaust. *See, e.g., Rios v. Paramo*, No.
27 14CV01073WQHDHB, 2016 WL 8731085, at *12 (S.D. Cal. July 15, 2016), *report and*
28 *recommendation adopted*, No. 14CV1073 WQH (DHB), 2016 WL 4709063 (S.D. Cal.
Sept. 9, 2016) (finding no exhaustion where staff members were not named in grievance);
Parks v. Chappell, No. C-13-4048 EMC (PR), 2015 WL 3466280, at *5 (N.D. Cal. June

1 1, 2015) (same); *Stephen v. Alvarez*, No. 14-CV-01245-SI, 2016 WL 3162142, at *6
2 (N.D. Cal. June 7, 2016) (same). In *Randolph v. Nix*, the court analyzed this amendment
3 and found that because binding Supreme Court and Ninth Circuit caselaw required courts
4 to focus on the state regulations, the new amended regulations “clearly and
5 unambiguously required that Plaintiff list all staff members involved in the conduct/issue
6 of which he complained in order to properly exhaust administrative remedies with regard
7 to that conduct/issue.” No. 1:12-CV-00392-LJO, 2015 WL 5432622, at *5-6 (E.D. Cal.
8 Sept. 15, 2015).

9 Others take a more nuanced approach—not requiring defendants to be specifically
10 named but requiring such information that would be necessary to put the prison on notice
11 of the conduct complained about. *See, e.g., Rust v. Chino Prison Healthcare Providers*,
12 No. EDCV1700556JAKKES, 2018 WL 3325725, at *7 (C.D. Cal. Apr. 9, 2018), *report*
13 *and recommendation adopted*, No. 517CV00556JAKKES, 2018 WL 3303310 (C.D. Cal.
14 July 5, 2018) (finding sufficient exhaustion where defendants were not included by name,
15 but described as superiors and supervisors of other named staff members); *Catanzarite v.*
16 *Pierce*, No. 1:12-CV-01502-LJO, 2015 WL 3774285, at *9 (E.D. Cal. June 16, 2015),
17 *report and recommendation adopted*, No. 1:12-CV-01502-LJO, 2015 WL 4756094 (E.D.
18 Cal. Aug. 11, 2015) (finding sufficient exhaustion where a hearing committee was
19 identified by the group title and date of action without specific names); *Garcia v. Cate*,
20 No. EDCV131610JFWMAN, 2015 WL 5998607, at *7 (C.D. Cal. June 4, 2015), *report*
21 *and recommendation adopted*, No. EDCV1301610JFWDFM, 2015 WL 5971550 (C.D.
22 Cal. Oct. 13, 2015) (finding that grievance that failed to name defendant was sufficient
23 where grievance on the whole was sufficient to alert prison to issue complained about).

24 With this legal framework in mind, the Court concludes that Defendants have met
25 their burden to show that Plaintiff failed to exhaust his administrative remedies against
26 Oliveira and Self. As an initial matter, Plaintiff fails to name them in any of the actual
27 grievances he submitted. *See* ECF No. 53 at 5, 7, 14, 16, 41, 43. Each of these
28 grievances were solely focused on the conduct of C/O Romero. To the extent that

1 Plaintiff claims that these grievances covered Oliveira and Self's conduct, Plaintiff failed
2 to comply with CDCR regulations requiring that he name each involved staff member.
3 Cal. Code Regs. tit. 15, § 3084.2(a)(3).

4 Importantly, the grievances are not sufficient to put the prison on notice of the
5 alleged wrong conduct of Oliveira or Self, even if they were not named. Plaintiff's
6 allegations about these officers in this federal case centers on their alleged failure to
7 protect him from C/O Romero. The CDCR grievances center on C/O Romero's
8 conduct—first, as to the alleged physical attack in 2015; second, as to the alleged threats
9 in January 2016 for filing the first grievance; and third, as to alleged physical attack in
10 February 2016. *See* ECF No. 53 at 5, 7, 14, 16, 41, 43.

11 In the evidence submitted by Defendants, Oliveira and Self only appear in two
12 places. First, on a form titled "Inmate/Parolee Appeal Form Attachment" dated
13 November 3, 2016, Plaintiff stated:

14 In this ~~application~~ notice it's only an emergency notification of the appeals
15 coordinator. On 8-2-2016 I was interviewed by telephone from R.J.D. by
16 coordinators. R. Olivaria CCII J.B.self CCII, who explained to Re.
17 Dominguez as interpreter in D.S.H. in Salinas Valley Hospital that they
18 never sent me any memorandum to [illegible] remedies for my appeal. Log#
19 RJD-C-16-01158 which has a date that is delayed more than 9 months. They
20 even blamed me for their negligence which makes them criminal
accomplices to protect the officer who used abuse of unnecessary force.
Please correct this error. I'm sending this memo with delayed dates which I
received on 10-24-2016. Thank you very much.

21 ECF No. 53 at 29. Second, on a form titled "Inmate/Parolee Request for Interview, Item
22 or Service" dated November 3, 2016, Plaintiff stated:

23 "Notification for the Guidelines [Directors] of the 3rd Level Appeals Office,
24 Sacramento, CA. I notify you that R. Olivaria CCII x B. Self. CCII appeals
25 coordinator, since 2-19-16 I have never been sent by any means an order of
26 requirements for my appeal log R.J.D. 16-01158 until the date 10-24-2016,
27 when I was given a memorandum by CHCF staff. This memorandum has a
28 false send date from July 28, 2016. These coordinators did not correctly
guaranty [grant] my appeal."

1 *Id.* at 33, 37. Thus, viewing this evidence in the light most favorable to Plaintiff, Oliveira
2 and Self may have interviewed him as part of his third grievance process. Plaintiff
3 claimed that Oliveira and Self said they never sent any memorandum related to that
4 appeal and tried to blame Plaintiff for their negligence. Thus, his complaint against
5 Oliveira and Self during the grievance process relates to Plaintiff’s ability to timely
6 appeal his third grievance for the third level of review.⁴ Plaintiff appears to complain that
7 he was unable to timely appeal because Oliveira and Self failed to give him the
8 memorandum regarding the second level appeal, which was dated July 29, 2016, until it
9 was too late on November 24, 2016.

10 The complaint against Oliveira and Self during the grievance process unfortunately
11 has nothing to do with Plaintiff’s complaint against these officers now as to their failure
12 to protect him from C/O Romero. “An appeal generally ‘suffices to exhaust a claim if it
13 puts the prison on adequate notice of the problem for which the prisoner seeks
14 redress.’” *Sisneros v. Brown*, No. 14CV0891 GPC RBB, 2015 WL 4662056, at *13
15 (S.D. Cal. Aug. 6, 2015), *aff’d*, 689 F. App’x 514 (9th Cir. 2017), (quoting *Sapp v.*
16 *Kimbrell*, 623 F.3d 813, 822-23 (9th Cir. 2010)). In *Sisneros*, the Court found
17 insufficient exhaustion where the plaintiff alleged in his federal complaint that two
18 defendants failed to protect him from an attack by another guard, where the two
19 defendants were not named in the prison grievance, which instead focused on the
20 plaintiff’s medical issues and injuries he sustained during the alleged attack. *Id.*
21 (“Because the undisputed evidence in the record shows instead that Plaintiff’s CDCR 602
22 Log[s] lacked even a modicum of detail involving their purported roles in failing to
23 protect him, Defendants [] could not have reasonably been alerted to the nature of the
24 wrong for which Plaintiff now seeks redress against them.”). This is the issue Plaintiff
25 faces here—the grievances he filed were against C/O Romero and did not include any
26

27
28 ⁴ His appeal at the third level of review was ultimately rejected as untimely. *See* ECF
No. 53 at 40.

1 failure to protect claim against Defendants Oliveira or Self. *See also Ramos*, 2008 WL
2 4184644, at *11 (finding no exhaustion when claims that prison staff rejected his appeals
3 due to retaliatory motives were not part of the grievance); *York v. Stewart*, No.
4 115CV01828DADBAMPC, 2018 WL 1014456, at *9 (E.D. Cal. Feb. 21, 2018), *report*
5 *and recommendation adopted*, No. 115CV01828DADBAM, 2018 WL 1440626 (E.D.
6 Cal. Mar. 22, 2018) (finding no exhaustion where grievance did not include sufficient
7 information to put prison on notice about Defendant’s actions); *Young v. Balkind*, No. CV
8 12-7278 JGB (JC), 2016 WL 2620804, at *12 (C.D. Cal. Mar. 4, 2016), *report and*
9 *recommendation adopted*, No. CV 12-7278 JGB(JC), 2016 WL 2626745 (C.D. Cal. May
10 6, 2016) (“None of plaintiff’s grievances plausibly alerted the prison to a claim of any
11 other nature for which plaintiff sought redress from defendant.”).

12 Plaintiff’s grievances do include some general references to protection. In his third
13 grievance from February 2016 regarding the last alleged assault, he wrote that he was
14 “waiting for protection assistance” and was requesting “protection.” ECF No. 53 at 43.
15 In addition, in a letter to the appeals coordinator dated October 15, 2016, Plaintiff wrote
16 “I have reported this individual C/O L. Romero twice before and the CDCF system did
17 nothing to protect me.” *Id.* at 20. Even if these references would suffice to put the prison
18 on some notice as to a generalized failure to protect claim, they are not sufficient to
19 exhaust the claims against the individual defendants Oliveira and Self. In *Sunkett v. Ruiz*,
20 the prisoner’s grievance included allegations against a nonparty doctor and the “medical
21 staff as a whole.” No. 14CV2649-JLS(KSC), 2016 WL 8942966, at *12 (S.D. Cal. Feb.
22 12, 2016), *report and recommendation adopted*, No. 14-CV-2649-JLS (KSC), 2016 WL
23 8941158 (S.D. Cal. Mar. 14, 2016). The court found that this was not sufficient to
24 exhaust the claims against two individual doctors who were not named in the grievance.
25 *Id.* The Court agrees with this reasoning—such broad allegations referencing the entire
26 CDCR prison system is not sufficient to meet the requirement to describe “the specific
27 issue under appeal” Cal. Code Regs. tit. 15, § 3084.2(a).

28 ///

1 **b. Plaintiff’s Opposition**

2 Based on the foregoing discussion, the Court finds that Defendants have met their
3 initial burden on summary judgment to show that Plaintiff has not properly exhausted his
4 claims. *Williams*, 775 F.3d at 1191. Thus, now the burden of production shifts to
5 Plaintiff “to show that there is something in his particular case that made the existing and
6 generally available administrative remedies effectively unavailable to him.” *Id.*; *see also*
7 *Albino*, 747 F.3d at 1172.

8 Plaintiff submitted his original opposition to this motion in Spanish. ECF No. 43.
9 In response, the Court warned Plaintiff that it could not understand the opposition that
10 was submitted entirely in Spanish and gave Plaintiff more time to resubmit the
11 documents in English, suggesting ways that Plaintiff may be able to accomplish this.⁵
12 ECF No. 44 at 2-3. Despite the Court issuing a *Klinge/Rand* Notice, warning Plaintiff
13 about the consequences of a motion for summary judgment, Plaintiff did not comply with
14 these instructions and instead submitted three subsequent oppositions, each in Spanish.
15 ECF Nos. 46, 50, 55. At this juncture, the Court has given Plaintiff an abundance of time
16 to file an opposition in English and Plaintiff has demonstrated that he has the ability to
17 respond in English when required to do so.⁶

18 Thus, the Court is left unable to understand the oppositions that Plaintiff has
19 submitted. “It is clear, to the point of perfect transparency, that federal court proceedings
20

21
22 ⁵ This opposition, and each following opposition, included requests for appointment of
23 counsel. The Court has already repeatedly advised Plaintiff that his inability to
24 communicate in English does not constitute “exceptional circumstances,” warranting
25 appointment of counsel. *See* ECF Nos. 22, 33, 44 (each denying requests for counsel).
26 Regardless, these motions will not be addressed in this order.

27 ⁶ Plaintiff’s initial complaint was filed in English. ECF No. 1. Subsequently, when his
28 complaints were screened out under 28 U.S.C. § 1915 three times (ECF Nos. 7, 11, 13),
Plaintiff was able to understand those orders—all written by the Court in English—and
amend his complaint in response—also in English. ECF Nos. 8, 12, 17. His fourth
amended complaint, the operative complaint here, was determined to survive screening.
ECF No. 22.

1 must be conducted in English.” *United States v. Rivera-Rosario*, 300 F.3d 1, 5 (1st Cir.
2 2002); *see also United States v. Canales-Mendoza*, No. 3:14-CR-30016, 2017 WL
3 2988270, at *1 (W.D. Ark. July 13, 2017) (denying a motion made entirely in Spanish,
4 noting that “by longstanding tradition the vast majority of judicial business is conducted
5 in English,” that courts have “no obligation to appoint a Spanish-language translator for
6 motions” made under the Federal Rules of Civil Procedure, and that “it is not inconsistent
7 with any law [for the court to] order litigants to make filings in English”).

8 Significantly, even if the Court could understand what Plaintiff was stating in
9 Spanish, arguments made in motion practice is not evidence to be considered on a motion
10 for summary judgment. *See Flaherty v. Warehousemen, Garage & Serv. Station Emp.*
11 *Local Union No. 334*, 574 F.2d 484, 486 n.2 (9th Cir. 1978) (“Legal memoranda and oral
12 argument, in the summary judgment context, are not evidence, and do not create issues of
13 fact capable of defeating an otherwise valid motion for summary judgment.”); *Goehring*
14 *v. Wright*, 858 F. Supp. 989, 993 (N.D. Cal. 1994) (“It is axiomatic that the arguments of
15 counsel are not evidence .); *TV Interactive Data Corp. v. Sony Corp.*, No. C 10-0475
16 PJH, 2012 WL 6020113, at *17 (N.D. Cal. Dec. 3, 2012) (summary exhibits prepared by
17 counsel are “attorney argument, not evidence” on summary judgment).

18 The only exhibits and actual evidence Plaintiff submitted are attached to his
19 oppositions, totaling six pages. *See* ECF No. 43 at 7-12; ECF No. 46 at 7-12
20 (resubmitting identical pages). Thus, the Court will consider this evidence and evaluate
21 if it can defeat summary judgment by showing a factual dispute as to whether Plaintiff
22 sufficiently exhausted.

23 At the outset, the Court notes that each of these six pages is titled “Inmate/Parolee
24 Request for Interview, Item or Service.” ECF No. 43 at 7-12. This form, known as
25 CDCR Form 22, provides inmates with a forum to “request interviews with staff and/or
26 request items and services via a written request process.” Cal. Code Regs. tit. 15, §
27 3086(a). “The written request process may be used when the inmate or parolee seeks a
28 response to an issue or concern related to his or her confinement or parole.” *Id* at §

1 3086(b). However, the regulations explicitly state that “[a]n inmate or parolee's
2 documented use of a Request for Interview, Item or Service form does not constitute
3 exhaustion of administrative remedies as defined in subsection 3084.1(b).” *Id.* at §
4 3086(i). Consistent with the regulations, courts have routinely held that submitting this
5 “informal grievance” is not sufficient to meet the exhaustion requirement to bring the
6 claim to federal court. *See Pelayo v. Hernandez*, No. C 13-3618 RMW (PR), 2015 WL
7 4747831, at *7 (N.D. Cal. Aug. 11, 2015), *aff’d*, 671 F. App’x 1000 (9th Cir. 2016)
8 (“Plaintiff’s filing of a request for interview, i.e., CDCR Form 22, does not satisfy
9 the exhaustion requirement.”); *Woodson v. Ramirez*, No. 12CV1825-MMA BGS, 2013
10 WL 1315999, at *4 (S.D. Cal. Mar. 28, 2013) (holding same); *Jones v. R. Roque*, No. C
11 12-2946 LHK (PR), 2013 WL 4426515, at *3 (N.D. Cal. Aug. 15, 2013), *aff’d sub*
12 *nom. Jones v. Roque*, 616 F. App’x 307 (9th Cir. 2015) (holding same and collecting
13 other cases that hold the same); *Morris v. Bradford*, No. 2:11-CV-1171 KJM DAD, 2015
14 WL 135925, at *14 (E.D. Cal. Jan. 9, 2015), *report and recommendation adopted*, No.
15 2:11-CV-1171 KJM, 2015 WL 1014608 (E.D. Cal. Mar. 4, 2015) (holding same). Thus,
16 none of the evidence that Plaintiff submitted—in the form of the Form 22s—can suffice
17 to show exhaustion of this claims.

18 Furthermore, a review of the substance of these six pages reveals that most of them
19 have nothing to do with Defendants Oliveira and Self. The first page, dated September
20 20, 2017, appears to identify inmate Arello as a witness in his appeal against C/O
21 Romero and asks for assistance in locating him. ECF No. 43 at 7. The second page,
22 dated December 15, 2016, is in Spanish and to the Court’s best comprehension, appears
23 to request a copy of his previous CDCR 602 against C/O Romero and complains of the
24 delay in getting a response to the 602s.⁷ *Id.* at 8. The third page, dated January 22, 2015,

26 ⁷ While the Court attempts to take this evidence into account, viewing it in the light most
27 favorable to Plaintiff, the Court notes that it is under no obligation to consider it because
28 no certified translation was submitted. *See Fernandez v. Dexter*, No. CV 08-308-AB
PJW, 2015 WL 391621, at *4 (C.D. Cal. Jan. 27, 2015) (refusing to consider affidavits

1 is also entirely in Spanish and is unfortunately largely illegible. *Id.* at 9. As far as the
2 Court can tell, however, Defendants’ names do not appear on the form. The fourth page,
3 dated November 3, 2016, is a duplicate of Defendants’ evidence and has already been
4 addressed above. *Compare id.* at 10 with ECF No. 39-3 at 33 and ECF No. 53 at 33. The
5 sixth page, dated January 3, 2018, is again entirely in Spanish and appears to again ask
6 for a copy of his 602s and also medical report, to be used in his federal lawsuit. ECF No.
7 43 at 12.

8 The only page that mentions Oliveira and Self is page five, dated January 29, 2018.
9 ECF No. 43 at 11. In that form, Plaintiff appears to write that he “attach[es]” two Form
10 CDCR 602s, which he claims show that he requested protection from Defendants. *Id.*
11 He then states that the first 602 is the one against C/O Romero, where he injured
12 Plaintiff’s face in August or November 2015. Even if this Form 22 could be considered
13 in the exhaustion analysis, it appears the 602s referenced here are the ones against C/O
14 Romero, and already considered by the Court above. And as the Court found, nothing in
15 those 602s stated a failure to protection claim against Oliveira or Self sufficient to
16 exhaust his claims against them.⁸

17
18 submitted only in Spanish); *Heary Bros. Lightning Protection Co., Inc. v. Lightning*
19 *Protection Institute*, 287 F.Supp.2d 1038, 1074 (D. Ariz. 2003) (striking untranslated
20 exhibits as inadmissible); *United States v. Rivera-Rosario*, 300 F.3d 1, 7 n.4 (1st Cir.
21 2002) (noting “well-settled rule that parties are required to translate all foreign language
22 documents into English”); *Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 413-14 (1st
23 Cir. 2000) (declining to consider as part of summary judgment record a deposition
24 excerpt in Spanish, where party submitting excerpt failed to provide English translation);
25 *Krasnopivtsev v. Ashcroft*, 382 F.3d 832, 838 (8th Cir. 2004) (copy of passport was
26 properly excluded from evidence where no English translation or certification was
27 offered).

28 ⁸ If the Court were to take the liberal construction requirement to its most extreme and
give Plaintiff the utmost benefit of the doubt, one of the Plaintiff’s 602 forms does
include the word “protect” in a paragraph discussing Oliveira and Self. ECF No. 53 at
29. However, in that statement, Plaintiff appears to claim that they were protecting
Romero by causing a delay in Plaintiff receiving the appeals board response to his 602—a
very different protection claim to what he alleges here, that they failed to protect to *him*

1 Thus, on a whole, none of the evidence that Plaintiff submits in his oppositions
2 suffices to rebut the showing of failure to exhaust discussed above. Plaintiff has not put
3 forth any evidence to show that he was unable to or somehow prevented from filing the
4 602 grievance that was required to exhaust his claims against Defendants Oliveira and
5 Self. Accordingly, in summary, it is **RECOMMENDED** that the District Court **GRANT**
6 summary judgment in favor of Defendants Oliveira and Self for failure to exhaust
7 administrative remedies against them.

8 **VI. CONCLUSION AND RECOMMENDATION**

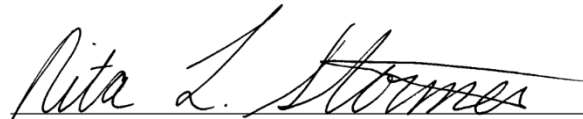
9 On Defendants' motion for summary judgment, the Court **RECOMMENDS** that
10 the motion be **GRANTED**. This report and recommendation is submitted to the United
11 States District Judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1).

12 **IT IS ORDERED** that no later than August 2, 2019, any party to this action may
13 file written objections and serve a copy on all parties. The document should be captioned
14 "Objections to Report and Recommendation."

15 **IT IS FURTHER ORDERED** that any Reply to the Objections shall be filed with
16 the Court and served on all parties no later than August 15, 2019. The parties are
17 advised that failure to file objections within the specified time may waive the right to
18 raise those objections on appeal of the Court's Order. *See Turner v. Duncan*, 158 F.3d
19 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

20 **IT IS SO ORDERED.**

21 Dated: July 15, 2019

22 

23 Hon. Nita L. Stormes
24 United States Magistrate Judge

25
26
27
28 _____
from Romero in the first place because his 602s would have put them on alert of the
danger.