

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 13 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JERRY KENT DILLINGHAM, a.k.a. Jerry
Dillingham,

Plaintiff-Appellant,

v.

EVA SCRUGGS; et al.,

Defendants-Appellees.

No. 18-16300

D.C. No. 4:16-cv-03267-YGR

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Jerry Kent Dillingham, a California state prisoner, appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The district court properly granted summary judgment for defendants because Dillingham failed to exhaust his remedies and failed raise a genuine issue of material fact as to whether administrative remedies were effectively unavailable to him. *See id.* at 1172 (explaining that once the defendant has carried the burden to prove that there was an available administrative remedy, the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him).

The district court did not abuse its discretion in denying Dillingham's motions for appointment of counsel because Dillingham was able to articulate his claims and was unlikely to succeed on the merits. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and discussing factors to consider in ruling on a motion to appoint counsel).

The district court did not abuse its discretion in denying Dillingham's motion for reconsideration because Dillingham set forth no valid grounds for reconsideration. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration under Federal Rules of Civil Procedure 59 and 60).

Dillingham's unopposed motion to supplement the record is granted.

AFFIRMED.

Date Mailed March TwentyFirst, 2019

Jerry Dillingham, COC# C95149
Kern Valley State Prison
3000 West Cecil Ave.,
P.O. Box 5104
Delano, CA 93216

Armstrong V. Newsom, American With Disabilities Mental Impairment
Qualified Slowness Comprehension, Learning Illiterate Below 4.0. Reading
TABE class Member Unrepresented Dependent Person Plaintiff. Attn: The
Below Signee Drafter Articulator of this Document(s) Content For Mr.
Dillingham. Your signature is optional if out of fear for your safety to
prevent COCR/KVSP Retaliation. Signature Name of Professional
Attorney License # , Professional Paralegal
or other person(s) who Drafted this Document, I, the below signee
declare under penalty of perjury:

Date Executed _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY DILLINGHAM,
Appellant,

VS.

E. SCRUGGS, J. BRUNSCHER, R. MOJICA,
Appellee(s)

9th Cir. Case No. 18-16300

Originating Court Case No. Y:16-03267-YER
N.D.

SUPPLEMENTAL EVIDENCE IN
SUPPORT OF OPENING BRIEF
BEFORE: LEAVY & HURWITZ
Circuit Judges.

Mr. Dillingham request the panel judges not hold this motion to the
high professional standards of a license's Attorney.

Plaintiff ask's the Court to accept for review the attached
labeled Exhibit's declaration(s) D, E, G, H, N. evidence & their
referred to attachment's evidence, originally filed with the lower Court.

These Declaration's are the exacte declarations the opening brief
makes reference to.

These Declarations will enable the Appeals judge's to hopefully
get a clear understanding of plaintiff's arguments, authorities relied

an pleaded circumstance's claims overlooked or mishandled by the lower court.

Plaintiff additionally files with the appeals court if permissible to aid the court's analysis of the opening brief's and other moving paper's frequently referred to [CDCR FORM 22] Inmate Request For Service Labeled as Exhibit's evidence and or referred to as a attachment to Labeled Exhibit grievance appeal's regarding subject matter Court declared Cognizable Claims,

This additional attachment evidence Labeled Exhibit # 2B, is a true authentic copy business archived public record of Calif., Dept., of Corrections and Rehabilitation, Regarding Departmental employees' instruction's and Inmate's for how the CDCR FORM 22 can be utilized Procedurally.

I declare under penalty of perjury the foregoing is true and correct.
And the attached EX. 2B. is I verify is a authentic COPY of a Public business record
Date March 21, 2019

J. Dillingham

Jerry Dillingham
Plaintiff

J. Dillingham
✓ Appellant

Eva Scruggs, et al.,
Appellees

9th Cir. Case No. 18-16300
Originating Court Case No.
4:16-03267-YER
U.D.

EXHIBIT COVER PAGE

2 B
EXHIBIT

Description of this exhibit: CDCR Memorandum Business
Archived Record Directive Secure 602 Grievance
Filing/Submission Mail Box Collection Designated
Sites Artical Evidence Of Exhaustion

Number of Pages to this exhibit: 2 Pages.

JURISDICTION: (Check One Only)

- ☐ MUNICIPAL COURT
- ☐ SUPERIOR COURT
- ☒ APPELATE COURT 9th Cir.
- ☐ STATE SUPREME COURT
- ☐ UNITED STATES DISTRICT COURT
- ☐ STATE CIRCUIT COURT
- ☒ UNITED STATES SUPREME COURT
- ☐ GRAND JURY

Memorandum

Date December 30, 2011

To: Associate Directors, Division of Adult Institutions
Wardens

Subject: **SECURE APPEAL COLLECTION SITES AND RELATED MATTERS**

The Office of Inspector General (OIG) conducted a review of the revised inmate appeal process which became effective January 28, 2011. The OIG identified the concerns that led the Department to changes its Inmate appeal process and assessed whether the revised inmate appeal process addressed those concerns. Pursuant to Inspector General recommendations, no later than April 30, 2012 each housing unit and every program office will ensure that a secure appeal collection site (lock box) is provided on every yard and in each building for use by inmates for submission of appeals directly to the Appeals Office. ←

- Retrievals from these collection sites will be performed by Appeals Office staff and/or staff designated by the Warden.
- By April 30, 2012 each institution/facility shall formulate an Operational Procedure identifying the collection sites, staff responsibilities in collection and the manner in which deposited appeals will be transmitted to the Appeals office.

→ In addition, inmates who desire a receipt for a submitted appeal are permitted the option of placing the appeal in an unsealed envelope addressed to the Appeals Office accompanied by a CDCR Form 22.

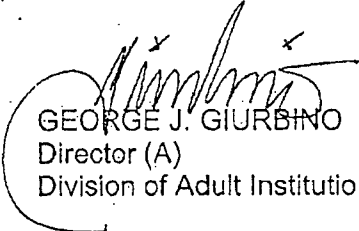
- Staff accepting the appeal will first confirm the presence of an appeal in the envelope and then on the CDCR Form 22, note the date and time they were given the appeal and provide the inmate with his/her receipt (Goldenrod copy) noting that the appeal is being forwarded to the Appeals Office.
- Reading or inspecting the contents of the appeal will be conducted only by the Appeals Office; therefore other staff shall not attempt to do this at the time of receipt. They will, however, date, initial and seal the envelope and deposit it at a secure collection site. ←
- No further response to the inmate shall be required on the CDCR Form 22 as their Inmate Appeals Tracking System (IATS) printout will serve to verify the acceptance of the appeal by the Appeals Office. If the appeal is rejected appellants receive a CDC Form 695 from the Appeals Office along with their returned appeal detailing each and every reason why it was rejected and what action(s) need to be taken for it to be accepted.

Appeals Coordinators shall, effective January 2012, meet at least quarterly with their local Inmate Advisory Councils (IAC) either independently or in conjunction with scheduled Warden Meetings in order to receive input on appeal and written request processing matters. Information developed during such meetings shall be shared with the Chief, Office of Appeals.

Associate Directors, Division of Adult Institutions
Wardens
Page 2

Each institution is hereby directed to conduct a self-certification audit to ensure revised appeal regulations are available in the prison law library with proof a practice being forwarded to their respective Associate Director as well as the Office of Appeals by January 23, 2012.

If you have any question regarding this matter, please contact Dean Foston, Office of Appeals at [redacted] or Captain Tom Emigh at [redacted]



GEORGE J. GIURBINO
Director (A)
Division of Adult Institutions

Attachment

cc: Dean Foston
Tom Emigh

DEF000038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

JERRY KENT DILLINGHAM, a.k.a. Jerry
Dillingham,

Plaintiff-Appellant,

v.

EVA SCRUGGS; et al.,

Defendants-Appellees.

No. 18-16300

D.C. No. 4:16-cv-03267-YGR
Northern District of California,
Oakland

ORDER

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Dillingham's motions for an extension of time to file a petition for rehearing and for administrative relief (Docket Entry Nos. 36 and 37) are denied.

The mandate shall reissue forthwith.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,
Plaintiff,

v.

EVA SCRUGGS, et al.,
Defendants.

Case No. 16-cv-03267-YGR (PR)

**ORDER GRANTING DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT; AND DENYING OTHER
PENDING MOTIONS AS MOOT**

I. INTRODUCTION

Plaintiff Jerry Dillingham, currently incarcerated at California State Prison - Los Angeles County, brings the instant *pro se* action, pursuant to 42 U.S.C. § 1983, stemming from alleged constitutional violations that took place while he was incarcerated at Salinas Valley State Prison ("SVSP") from 2011 through 2013. Plaintiff seeks monetary damages based on alleged injuries caused by the following Defendants: SVSP Bakery Supervisors Eva Scruggs and J. Brunscher; SVSP Lieutenant R. Mojica, SVSP Warden A. Hedgpeth; California Department of Corrections and Rehabilitation ("CDCR") Secretary J. Beard; and CDCR Director M. Cate.

The Court notes that Plaintiff originally filed the same claims against most of the same Defendants in another civil rights action, Case No. C 12-6537 YGR (PR) (hereinafter "*Dillingham I*"), in which the Second Amended Complaint ("SAC") was the operative complaint. *Compare* Dkt. 1 *with* Dkt. 16 in Case No. C 12-6537 YGR (PR). However, in *Dillingham I*, the Court granted the Defendants' motion for summary judgment based on the failure to exhaust administrative remedies under the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), as to most of the claims in the SAC (i.e., all claims except for the retaliation claim against Defendants Brunscher and Scruggs, and SVSP Officer S. Lawson). *See* Dkt. 97 in Case No. C 12-6537 YGR (PR) at 3-14. The aforementioned claims were dismissed without prejudice to refile after exhausting California's prison administrative process. *See id.* (citing *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002)). The Court granted the Defendants' motion for

summary judgment as to Plaintiff's remaining retaliation claim and issued judgment. *Id.* at 14-24; *see also* Dkt. 98 in Case No. C 12-6537 YGR (PR). Plaintiff appealed the judgment (entered on September 8, 2015), but he voluntarily dismissed his appeal. Dkt. 101 in Case No. C 12-6537 YGR (PR).

In the instant action, Plaintiff has submitted a new complaint, in which he has refiled most of the claims from his previous action, *Dillingham I*, and indicated that he has since exhausted his claims to the "highest level of appeal available to [him]." *See* Dkt. 1 at 1-2.¹

Both Plaintiff and Defendants move for summary judgment (and partial summary judgment) or cross-summary judgment under Federal Rule of Civil Procedure 56. Dkts. 20, 45. In Plaintiff's motion, he moves for "partial" summary judgment on the ground that there are no material facts in dispute and that he is entitled to judgment as a matter of law. Dkt. 20. Meanwhile, in Defendants' cross-motion for summary judgment, Defendants argue that they are entitled to summary judgment for the following reasons: (1) Plaintiff did not comply with the requirement to exhaust available administrative remedies before bringing *Dillingham I* and he still has not complied with this requirement because he never exhausted a grievance related to his claims through all three levels of administrative review, Dkt. 45 at 6; and (2) Plaintiff is collaterally estopped from re-litigating his claim that administrative remedies were unavailable before the Court's September 8, 2015 ruling in *Dillingham I* that such a claim that "administrative remedies were unavailable was 'conclusory at best' and 'the evidence produced by Defendants is sufficient to carry their ultimate burden of proof to show that [Dillingham's deliberate indifference, access-to-court, and conspiracy claims] are unexhausted, even in light of [Dillingham's] verified factual allegations,'" *id.* (quoting Dkt 97 in Case No. C 12-6537 YGR (PR) at 13). Plaintiff has filed an opposition to the motion, and Defendants have filed their reply. Dkts. 54, 55, 59.

Also before the Court are the following motions: (1) Plaintiff's Motion to Stay Case

¹ Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by the parties.

Pending Court Ruling on Emergency Request of Appointment of Counsel (dkt. 28); (2) Defendants' Motion for Protective Order Staying Discovery (dkt. 69); (3) Plaintiff's Motion for Appointment of an Expert Witness (dkt. 70); and (4) Plaintiff's Motion to Compel Discovery Disclosure of Records of Prior Complaints (dkt. 72).

For the reasons outlined below, the Court GRANTS Defendants' cross-motion for summary judgment based on Plaintiff's failure to exhaust administrative remedies as to all the claims in his new complaint, DENIES Plaintiff's motion for partial summary judgment, and DENIES as moot all remaining pending motions.

II. MOTIONS FOR SUMMARY JUDGMENT

A. Background

1. Summary of Claims

The following summary of Plaintiff's claims is taken from the Court's June 2, 2017 Order of Partial Dismissal and Service, which states as follows:

In the instant complaint, Plaintiff alleges multiple incidents involving various SVSP prison officials. Specifically, the Court finds that Plaintiff has alleged the following cognizable claims against the following named Defendants:

(1) an Eighth Amendment claim that Defendants Scruggs and Brunscher acted with deliberate indifference to the threat of serious harm or injury to Plaintiff by other prisoners resulting from these Defendants spreading certain rumors that Plaintiff was a "snitch, informant, rat, cop" (Claim 1);

(2) claim for emotional distress and mental torture against Defendants Scruggs, Brunscher and Mojica for their acts of "maliciously [sic] caus[ing] the spread of identifying [Plaintiff] as a 'snitch,' 'informant' amongst dangerous convicts" prior to the January 18, 2013 incident involving an assault and battery with a weapon by his cell mate inmate Lozano, who stated to Plaintiff, "This ass beating you[re] getting is for being a snitch rat." (Claims 3 and 8);

(3) a claim of conspiracy in violation of 42 U.S.C. § 1995(3), against Defendants Scruggs and Brunscher (Claim 4); and

(4) a claim of a denial of Plaintiff's right to access to the courts against Defendant Mojica (Claims 5, 6 and 7).

Dkt. 1 at 22-25.

Dkt. 13 at 2-3. The Court dismissed without prejudice Plaintiff's supervisory liability claims against Defendants Hedgpeth, Cate and Beard. *Id.* at 3. The Court also pointed out that the complaint included allegations against Defendants Scruggs and Brunscher for acting in retaliation for Plaintiff filing grievances (Claim 2). *Id.* (citing Dkt. 1 at 23). However, the Court noted that those allegations "repeat the claim Plaintiff made in his previous action, Case No. C 12-6537 YGR (PR) [*Dillingham I*], in which summary judgment was granted in favor of Defendants (as to this retaliation claim) and against Plaintiff." *Id.* Therefore, the Court dismissed as frivolous the retaliation claim against Defendants Scruggs and Brunscher it was duplicative of the claim Plaintiff already litigated and lost. *Id.* (citing *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995); *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988) (duplicative or repetitious litigation of virtually identical causes of action is subject to dismissal under 28 U.S.C. § 1915 as malicious)).

2. Background Relating to Exhaustion

As exhibits to Defendants' attorney Deputy Attorney General Elliot T. Seals's declaration, Defendants have once again submitted as supporting evidence the same prison records the presented in *Dillingham I*, which they argue prove that he never submitted grievances through the CDCR's administrative grievance process concerning the aforementioned cognizable claims, i.e., all claims except for Claim 2 (the retaliation claim against Defendants Scruggs and Brunscher). Dkt. 45 at 7-10. Defendants also claims that "[a]fter September 8, 2015, when the court dismissed [Plaintiff's] previous lawsuit for failure to exhaust, [he] still failed to exhaust available remedies. [Plaintiff] did not submit any new grievances to the third level related to his claims against Brunscher, Scruggs, or Mojica. *Id.* at 13 (citing Voong Decl., Exs. A-C).

Defendants seem to again argue that no fair reading of Plaintiff's grievances could conclude that he complained that any Defendants put him in harm's way by labeling him a snitch, caused him to be threatened or attacked by other inmates, conspired to violate his constitutional rights, violated his right to court access, or mentally tortured him in violation of the Eighth Amendment. *See id.*; *see also* Seals Decl., Ex. 7 (Medina Decl., Exs. B, D, E.)

Thus, Defendants raise the same argument as in *Dillingham I*—that Plaintiff failed to

1 exhaust administrative remedies for his deliberate-indifference claim, court access claim,
 2 conspiracy claim, and Eighth Amendment claim for mental torture. Accordingly, they argue that
 3 the Court should grant summary judgment in Defendants' favor on each of those claims.

4 Before turning to the facts relating to exhaustion in the present case, the Court briefly
 5 reviews the requirements of the PLRA and administrative review process applicable to California
 6 prisoners.

7 **a. Legal Framework Relating to Exhaustion**

8 The PLRA requires a prisoner to exhaust "available administrative remedies" before
 9 bringing an action with respect to prison conditions. 42 U.S.C. § 1997e(a). "[T]he PLRA's
 10 exhaustion requirement applies to all inmate suits about prison life, whether they involve general
 11 circumstances or particular episodes, and whether they allege excessive force or some other
 12 wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

13 Exhaustion of all "available" remedies is mandatory; those remedies need not meet federal
 14 standards, nor must they be "plain, speedy, and effective." *Booth v. Churner*, 532 U.S. 731, 739-
 15 40 (2001). The PLRA requires *proper* exhaustion of administrative remedies. *Woodford v. Ngo*,
 16 548 U.S. 81, 83 (2006). "Proper exhaustion demands compliance with an agency's deadlines and
 17 other critical procedural rules because no adjudicative system can function effectively without
 18 imposing some orderly structure on the course of its proceedings." *Id.* at 90-91. Thus, the PLRA
 19 requires compliance with prison grievance procedures to exhaust properly. *Id.* The PLRA's
 20 exhaustion requirement cannot be satisfied "by filing an untimely or otherwise procedurally
 21 defective administrative grievance or appeal." *Id.* at 84.

22 The CDCR provides its inmates and parolees the right to appeal administratively "any
 23 policy, decision, action, condition, or omission by the department or its staff that the inmate or
 24 parolee can demonstrate as having a material adverse effect upon his or her health, safety, or
 25 welfare." Cal. Code Regs. tit. 15, § 3084.1(a).²

26
 27 ² The regulations pertaining to the inmate appeal process were amended effective January
 28 28, 2011. As explained below, Plaintiff's grievances were submitted *after* January 28, 2011;
 therefore, the amended regulations were in effect and govern his grievances.

To initiate an appeal, the inmate or parolee must submit a CDCR Form 602 (“appeal” or “grievance”) describing the issue to be appealed to the Appeals Coordinator’s office at the institution or parole region for receipt and processing. *Id.* § 3084.2(a)-(c). The level of detail in an administrative grievance necessary to exhaust a claim properly is determined by the prison’s applicable grievance procedures. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The level of specificity required in the appeal is described in the California Code of Regulations as follows:

The inmate or parolee shall list all staff member(s) involved and shall describe their involvement in the issue. To assist in the identification of staff members, the inmate or parolee shall include the staff member’s last name, first initial, title or position, if known, and the dates of the staff member’s involvement in the issue under appeal.

Cal. Code Regs. tit. 15, § 3084.2(a)(3). Inmates have “30 calendar days” to submit a grievance (using the prescribed CDCR Form 602) from the “occurrence of the event or the decision being appealed.” *Id.* § 3084.8(b)(1).

The CDCR’s appeal process consists of three formal levels of appeals: (1) first formal level appeal filed with one of the institution’s appeal coordinators, (2) second formal level appeal filed with the institution head or designee, and (3) third formal level appeal filed with the CDCR director or designee (“Director’s Level”). *Id.* §§ 3084.7.³ A prisoner exhausts the appeal process when he completes the third level of review. *Id.* § 3084.1(b); *Harvey v. Jordan*, 605 F.3d 681, 683 (9th Cir. 2010). A “cancellation or rejection” of an appeal “does not exhaust administrative remedies.” Cal. Code Regs. tit. 15, § 3084.1(b).

b. Plaintiff’s Relevant Appeal History

The following summary relating to Plaintiff’s relevant appeal history is taken from the Court’s September 8, 2015 Order Granting Defendants’ Motion for Summary Judgment in *Dillingham I*:

From 2000 to the present, Plaintiff has administratively exhausted “more than 30 inmate grievances” to the Director’s Level. Briggs Decl. ¶ 7, Ex. A. Among those grievances exhausted through the

³ Under the regulations, as amended effective January 28, 2011, the informal grievance level has been omitted and there are now only three levels: first level appeal, second level appeal, and third level appeal. *See* Cal. Code Regs. tit. 15, § 3084.7.

Director's level, two were submitted during the relevant period of 2011 through 2012—SVSP-12-02488 and SVSP-11-01435. Briggs Decl. ¶ 8, Ex. A; Medina Decl. ¶ 15, Exs. B, C. The record shows that SVSP-12-02488 concerned Plaintiff's complaint about the outcome of the hearing on an unrelated May 26, 2012 RVR. Medina Decl., Ex. C. However, the other exhausted grievance, SVSP-11- 01435, concerned some of the claims in the present action, as further explained below. Medina Decl. ¶¶ 17, 21, Ex. B.

In addition, Plaintiff submitted, albeit only to the lower levels of review, two other grievances concerning the issues in the present action and related to his job in the bakery in 2011 and 2012—SVSP-L-11-379 and SVSP-L-11-669. Medina Decl. ¶¶ 17-20, Exs. D, E.

Defendants have supplied copies of the relevant grievances, to which the Court will cite. Plaintiff does not dispute that these grievances are relevant to the present case. Therefore, the Court will limit its analysis to the three relevant grievances, which are summarized below:

1) SVSP-L-11-379⁴

On February 9, 2011, Plaintiff submitted SVSP-L-11-379 to the first level of review. Medina Decl. ¶ 18, Ex. D. In SVSP-L-11-379, Plaintiff complained about a chrono that Defendant Scruggs prepared on February 4, 2011, and in which she was critical of Plaintiff's job performance on January 27, 2011, i.e., that he was "working at an extremely slow pace in the Central Kitchen Bakery, which was impeding bakery production." *Id.* SVSP-L-11-379 asserted that another inmate manipulated Defendant Scruggs into writing the chrono. *Id.* Plaintiff claimed the chrono was false and requested that Defendant Scruggs withdraw it. *Id.* SVSP-L-11-379 did not complain about the actions of anyone other than Defendant Scruggs. *Id.*

The record shows Plaintiff pursued SVSP-L-11-379 through the first level of review, where it was denied. *Id.* The prison does not have any record indicating that Plaintiff pursued SVSP-L-11-379 to the higher levels of review.

2) SVSP-L-11-669

On March 17, 2011, Plaintiff submitted SVSP-L-11-669 to the first level of review. Medina Decl. ¶ 19, Ex. E. SVSP-L-11-669 only concerned Defendant Scruggs and a February 4, 2011 chrono she issued to Plaintiff for theft of food. Medina Decl., Ex. E, Dkt. 70-5 at 2-8. Specifically, Plaintiff complained that Defendant Scruggs attended a meeting with Supervising Correctional Cook A. Fagan

⁴ The Court notes that the only copy of SVSP-L-11-379 in the record is missing the page containing the "extra space for [Plaintiff] to continue describing the issue that he was grieving and the relief he was requesting." Medina Decl. ¶ 18. However, there is a summary of the issue he was grieving and relief requested outlined in the first-level response to SVSP-L-11-379, *id.*, and Plaintiff does not dispute that the summary is a correct interpretation of this information from SVSP-L-11-379.

and Plaintiff, during which Defendant Scruggs allegedly stated as follows: “The 2-4-2011 CDCR 128-A Chrono Information is a[n] error on my part & I recant.” Medina Decl., Ex. E, Dkt. 70-5 at 2. Plaintiff further claimed that Defendant Scruggs added: “I will write up a new chrono which will clear [Plaintiff]’s name regarding the 128-A.” *Id.* at 4. However, Plaintiff complained that despite the aforementioned statements by Defendant Scruggs at that meeting, she later refused to retract the previous chrono or prepare a new laudatory chrono for Plaintiff (as a compensation). *Id.*

Plaintiff pursued SVSP-L-11-669 through the first two levels of review. It was partially granted at the second level of review on May 9, 2011. However, the “inquiry [was] not yet complete.” *Id.* at 8. The record shows that the second-level response indicates that a “confidential inquiry was conducted,” although the summary of the appeal inquiry was incomplete because it seems to end mid-sentence. *Id.* Nevertheless, Plaintiff appealed it to the Director’s level review on June 7, 2011. Medina Decl. ¶ 19, Ex. E; Mojica Decl. ¶ 10, Ex. D; Decl. Briggs ¶ 9, Ex. B; Dkt. 16 ¶ 14. On September 7, 2011, the third level reviewer informed Plaintiff that it had returned the grievance to the SVSP appeal coordinators because aforementioned second-level response was inadequate. Medina Decl., Ex. E, Dkt. 70-5 at 9-11. Directions from the third level required the creation of an amended second-level response and that Plaintiff be provided the opportunity to review the amended response and appeal the decision to the third level again should he so choose. *Id.*; Decl. Briggs ¶ 9, Ex. B. On October 25, 2011, an amended second-level response was completed. Medina Decl. ¶ 20, Ex. E, Dkt. 70-5 at 12-13; Mojica Decl. ¶ 11. The reviewer explained that the appeal was partially granted to the extent that an “inquiry” was conducted, and the “inquiry” was complete upon finding that “[s]taff did not violate CDCR policy.” Medina Decl., Ex. E, Dkt. 70-5 at 12. The amended second-level response explicitly advised Plaintiff that to exhaust all remedies, he would need to submit the grievance to the third-level review. *Id.* However, the record shows that Plaintiff did not pursue SVSP-L-11-669 to the final level of review.

3) SVSP-L-11-1435

On June 16, 2011, Plaintiff submitted SVSP-L-11-1435 to the first level of review. Medina Decl. ¶ 21, Ex. B. Plaintiff pursued this grievance through all three levels of review and completely exhausted available administrative remedies for it. *Id.* SVSP-L-11-1435 asserted that Defendant Hedgpeth ordered Defendants Lawson, Scruggs, and Brunscher to “stop illegally preventing [Plaintiff] from working in the bakery,” and complained that Defendants Lawson, Scruggs, and Brunscher had continued to prevent Plaintiff from working despite the Defendant Hedgpeth’s order. *Id.*, Ex. 70-2 at 2. The grievance further asserted that his bakery supervisors, Defendants Brunscher and Scruggs, filed false documents about Plaintiff causing him to lose his job and that they did this in retaliation for grievances he filed against them. *Id.* at 4. Although this grievance referenced Defendant Hedgpeth, it did not alert the prison to any problem with his conduct. *Id.* To the contrary, as mentioned above, it asserted that Defendant Hedgpeth attempted to

1 help Plaintiff by ordering others to allow him to work. *Id.*

2 On June 24, 2011, SVSP-L-11-1435 was initially screened out at the
3 first level of review because it was not submitted on the
4 “departmentally approved appeal forms” and did not include the
5 required attachments to support his grievance. *Id.* at 12. On July
6 22, 2011, Plaintiff re-submitted SVSP-L-11-1435 on the correct
7 form along with the required attachments. *Id.* at 2-11.

8 On August 23, 2011, SVSP-L-11-1435 was partially granted at the
9 second level of review in that an “inquiry into [his] allegation ha[d]
10 been conducted.” *Id.* at 13. The summary for appeal inquiry stated:

11 You were interviewed on August 17, 2011 by R.
12 Rodriguez you stated you worked in the bakery for
13 about 4 years and [you were] the senior baker with a
14 pay rate of .32 per hour. You claim staff singled
15 you out and were issuing unjustified 128s and
16 128B1s. You said the write ups were for Staff
17 Manipulation, Over Familiarity and slowing down
18 production. You added by not providing you with
19 the 101s from the request date July 2010-March
20 2011, you were deprived of your Due Process. You
21 admitted that you failed to follow a baking
22 procedure by not placing a sheet pan on the top rack
23 when baking the cakes causing metal shaving[s] to
24 fall in the cakes. You felt that this write up was
25 unjust because your supervisors were watching you
26 and they should have corrected you at the time.
27 There were no witnesses interviewed. The
28 following information was reviewed as a result of
your allegations of staff misconduct. On October
21, 2010, January 27, 2011 and February 3, 2011
you received 128-As for poor job performance. On
February 22, 2011 you received a 128-B for
attempting to manipulate staff then on April 26,
2011 you received a 128-B for program failure at
which time you were placed on S time. This
reviewer found no violation of CDCR policies by
staff.

21 *Id.* at 13. Plaintiff then appeal SVSP-L-11-1435 to the Director’s
22 level, where it was initially rejected on October 4, 2011 and January
23 27, 2012 for being incomplete and for having “excessive
24 attachments,” respectively. *Id.* at 15-16.

25 On May 18, 2012, SVSP-L-11-1435 was denied at the
26 Director’s level and “no relief” was provided at this final level of
27 review. *Id.* at 17. The third-level reviewer “determined that
28 [Plaintiff’s] allegations have been reviewed and evaluated by
administrative staff and an inquiry has been completed” at the
second level of review. *Id.* The third-level response also indicated
that “[n]o changes or modifications are required by the Institution,”
and that “[t]his decision exhausts the administrative remedies
available to [Plaintiff] within CDCR.” *Id.* at 18.

1 Dkt. 97 at 5-9 (footnote renumbered).

2 In addition to the 602 appeals above, Plaintiff filed two other 602 appeals in 2013 that
3 relate to the assault by his former cellmate, inmate Lozano: log numbers SVSP-L-13-05800 and
4 SVSP-L-13-05799. Voong Decl., Exs. B, C. As exhibits attached to the instant motion,
5 Defendants have supplied copies of the aforementioned grievances, to which the Court will cite.
6 Plaintiff does not dispute that these grievances are relevant to the present case. Therefore, the
7 Court also includes in its analysis these two other relevant grievances, which are summarized
8 below:

9 **4) SVSP-L-13-05800⁵**

10 On January 16, 2013, Plaintiff submitted SVSP-L-13-05800 to the first level of review.
11 Voong Decl. ¶ 10, Ex. B, Dkt. 48-1 at 8-11. In SVSP-L-13-05800, Plaintiff complained that
12 Correctional Officers T. Johnson and D. Moon ignored his request in early January 2018 to be
13 moved to another cell and this caused him to be attacked by inmate Lozano on January 18, 2013.
14 *See id.* Plaintiff asserted that inmate Lozano attacked him because of the following reasons:
15 (1) inmate Lozano is a “gangster, that has shown his malicious, violent, and general ill
16 temperedness, rambunctious demeanor at every turn”; (2) Plaintiff is old and has “mental health”
17 issues; (3) Plaintiff is a “colored man” and inmate Lozano is a “Mexican”; and (4) Plaintiff told
18 inmate Lozano and that he “did not want [inmate Lozano] making w[i]ne, doing drug[s] while in
19 the cell.” *Id.* SVSP-L-13-05800 did not complain about the actions of anyone other than
20 Correctional Officers Moon and Johnson.⁶ *Id.*

21 The record shows Plaintiff pursued SVSP-L-13-05800 through the first and second levels
22 of review, where it was bypassed at the first level and granted in part in the second level. *Id.*
23 According to the second level response, his appeal was “PARTIALLY GRANTED in that the
24 Appeal inquiry is complete [and] has been reviewed and all issues were adequately addressed.”

25
26 ⁵ The Court has chosen to continue the numbering of the relevant appeals based on the fact
that this is the fourth after the three 602 appeals listed above (from *Dillingham I*).

27 ⁶ The Court notes that Plaintiff filed a separate section 1983 case against Correctional
28 Officers Moon and Johnson, in which summary judgment has been granted in favor of all
Defendants in that action. *See* Dkts. 92 and 98 in Case No. C 13-5777 YGR (PR).

Id. at 12. Furthermore, the response concluded that prison staff did not violate CDCR policy with respect to one or more issues appealed. *Id.* Plaintiff then pursued SVSP-L-13-05800 to the final level of review. *Id.* On February 5, 2014, the Office of Appeals (“OOA”) initially rejected the appeal because he “ha[d] not submit[ted] [his] appeal printed legibly in ink or typed on the lines provided on the appeal forms in no smaller than a 12-point font or failed to submit an original.” *Id.* at 23. Plaintiff was instructed that if he wished to resubmit it after taking “corrective action” that he would need to “resubmit the appeal within the timeframes specified in [the California Code of Regulations, Title 15, Section] CCR 3084.6(a) and 3084.8(b).” *Id.* at 23. Plaintiff returned the appeal to the OOA, but the record shows that it did not arrive in the OOA until March 12, 2014, which exceed[ed] time constraints allowed by 5 days.” *Id.* at 7. Thus, the appeal was cancelled on July 25, 2014. *Id.*

On August 24, 2014, Plaintiff appealed the cancellation of SVSP-L-13-05800, and his appeal was given log number OOA-13-08881. Voong Decl. ¶ 10, Ex. C, Dkt. 48-1 at 34-35. On November 24, 2014, OOA-13-08881 was denied. *Id.* at 32-33. The denial indicates that the “decision exhausts the administrative remedy available to the appellant within CDCR.” *Id.* at 33.

5) SVSP-L-13-05799

On January 23, 2013, Plaintiff filed a 602 appeal alleging that Sergeant E. Howard made Plaintiff sign a false compatibility chrono, stating that he was involved in a fight after he claimed he was assaulted. Voong Decl. ¶ 10, Ex. D, Dkt. 48-1 at 71-78. SVSP-L-13-05799 did not complain about the actions of anyone other than Sergeant Howard.⁷ *Id.*

The record shows Plaintiff pursued SVSP-L-13-05799 through the first and second levels of review, where it was bypassed at the first level and granted in part in the second level. *Id.* According to the second level response, his appeal was “PARTIALLY GRANTED in that the Appeal inquiry is complete [and] has been reviewed and all issues were adequately addressed.” *Id.* at 79. Furthermore, the response concluded that prison staff did not violate CDCR policy with

⁷ The Court notes that Plaintiff had also named Sergeant Howard as a defendant when he filed the separate section 1983 case, in which summary judgment has been granted in favor of all Defendants in that action. See Dkts. 92 and 98 in Case No. C 13-5777 YGR (PR).

1 respect to one or more issues appealed. *Id.* Plaintiff then pursued SVSP-L-13-05799 to the final
2 level of review. *Id.* On February 10, 2014, the OOA initially rejected the appeal because he
3 “ha[d]not submit[ted] [his] appeal printed legibly in ink or typed on the lines provided on the
4 appeal forms in no smaller than a 12-point font or failed to submit an original.” *Id.* at 86. Plaintiff
5 was instructed that if he wished to resubmit it after taking “corrective action” that he would need
6 to “resubmit the appeal within the timeframes specified in [the California Code of Regulations,
7 Title 15, Section] CCR 3084.6(a) and 3084.8(b).” *Id.* Thereafter, Plaintiff returned the appeal to
8 the OOA, but the record shows that Plaintiff was directed to submit a second version due to a
9 back-log from a “building catastrophe at the [OOA].” *Id.* at 87. However, after Plaintiff
10 submitted the second version of the returned appeal, it was rejected on September 17, 2014 and he
11 was instructed to “remove the white photocopy version of SVSP-L-13-05799” *Id.* Plaintiff
12 did so and resubmitted it, but the record shows that it did not arrive in the OOA until “November
13 6, 2014, more than 30 days from the [September 17, 2014] rejection letter.” *Id.* at 65, 69. Thus,
14 the appeal was cancelled on March 3, 2015. *Id.* at 69.

15 On March 26, 2015, Plaintiff appealed the cancellation of SVSP-L-13-05799, and his
16 appeal was given log number OOA-13-09012. Voong Decl. ¶ 10, Ex. D, Dkt. 48-1 at 65-66. On
17 June 15, 2015, OOA-13-09012 was denied. *Id.* The denial indicates that the “decision exhausts
18 the administrative remedy available to the appellant within CDCR.” *Id.* at 66.

19 Finally, Defendants have also provided evidence that Plaintiff submitted two other 602
20 appeals after the Court’s September 8, 2015 Order Granting Defendants’ Motion for Summary
21 Judgment was issued in *Dillingham I.* See Voong Decl. ¶ 11, Exs. C, D. Specifically, the record
22 shows that Plaintiff submitted 602 appeal log numbers SATF-16-02515 and SATF-17-00107 to
23 the third level. See *id.* SATF-16-02515 received a final decision and was exhausted but SATF-
24 17-00107 was screened-out for failing to comply with procedural requirements. *Id.* However, the
25 record shows that these two aforementioned 602 appeals do not relate to the claims in this present
26 action. *Id.* Instead, they relate to complaints about Plaintiff’s housing conditions at the California
27 Substance Abuse and Treatment Facility in 2016 and 2017. *Id.*

B. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56 provides that a party may move for summary judgment on some or all of the claims or defenses presented in an action. Fed. R. Civ. P. 56(a)(1). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c)(1)(A) (requiring citation to “particular parts of materials in the record”). If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. See *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

When the parties file cross-motions for summary judgment, the court must consider all the evidence submitted in support of the motions to evaluate whether a genuine dispute of material fact exists precluding summary judgment for either party. *The Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135 (9th Cir. 2001).

The failure to exhaust administrative remedies is an affirmative defense that must be raised in a motion for summary judgment. See *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc). The defendants have the initial burden to prove “that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy.” *Id.* at 1172; *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). If the defendants carry that burden, “the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him.” *Albino*, 747 F.3d at 1172. The ultimate burden of proof remains with defendants, however. *Id.* “If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.” *Id.* at 1166.

A district court may only consider admissible evidence in ruling on a motion for summary judgment. See Fed. R. Civ. P. 56(e); *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

1 In support of the motion for summary judgment, Defendants have presented declarations from
 2 OOA Chief M. Voong as well as their attorney, Deputy Attorney General Seals, who has attached
 3 previously-filed declarations (filed in support of the motion for summary judgment in *Dillingham*
 4 *I*) from OOA Acting Chief R. Briggs and Defendants Medina and Mojica. Dkts. 48, 49. As
 5 noted, Plaintiff has filed oppositions to Defendants' cross-motion for summary judgment (dkts. 54,
 6 55); however, the oppositions are not verified and will not be considered because they were not
 7 signed under "penalty of perjury." Dkt. 54 at 4; Dkt. 55 at 7. In essence, Plaintiff's oppositions
 8 raise similar arguments and issues to those in his complaint. *Compare* Dkts. 54, 55 *with* Dkt. 1.
 9 Because the complaint is verified, dkt. 1 at 26, the Court will construe it as an opposing affidavit
 10 under Federal Rule of Civil Procedure 56, insofar as it is based on personal knowledge and sets
 11 forth specific facts admissible in evidence. *See Schroeder v. McDonald*, 55 F.3d 454, 460 &
 12 nn.10-11 (9th Cir. 1995).

13 C. Analysis of Defendants' Cross-Motion for Summary Judgment

14 1. Defendants' Initial Burden of Proving Unexhaustion

15 As explained above, Defendants contend that Plaintiff did not exhaust his administrative
 16 remedies as to all claims in the complaint in the present action. Dkt. 45 at 5, 11-14. In its
 17 previous order in *Dillingham I*, the Court determined that Defendants had met their initial burden
 18 as the moving party by setting forth evidence to demonstrate Plaintiff's non-exhaustion as to all
 19 claims in this action (which are similar to the claims in *Dillingham I* except the retaliation claim),
 20 specifically by conducting a search of the CDCR's records and finding no grievances submitted to
 21 the Director's level by Plaintiff concerning the claims at issue, stating as follows:

22 . . . Defendants acknowledge that Plaintiff filed one relevant
 23 grievance to the retaliation claim against Defendants Brunscher,
 24 Scruggs and Lawson, but contend that Plaintiff did not exhaust his
 25 administrative remedies as to all other claims in the SAC. Dkt. 56 at
 26 29. The undisputed evidence shows that SVSP-L-11-1435 involved
 27 the aforementioned retaliation claim and that Plaintiff pursued this
 28 grievance to the highest level of appeal. The undisputed evidence
 also reveals that Plaintiff filed two other grievances, also dealing
 with the retaliation claim (but mostly against Defendant Scuggs);
 however, SVSP-L-11-379 and SVSP-L-11-669 were not pursued to
 the highest level of appeal. Therefore, Defendants argue that they
 are entitled to summary judgment based on Plaintiff's failure to
 exhaust his administrative remedies as to all claims except for the

1 aforementioned retaliation claim. *Id.*

2 Defendants have met their initial burden as the moving party by
3 setting forth evidence to demonstrate Plaintiff's non-exhaustion as
4 to all claims except for the aforementioned retaliation claim,
5 specifically by conducting a search of the CDCR's records and
6 finding no grievances submitted to the Director's level by Plaintiff
7 concerning the claims at issue. *See Paramo*, 775 F.3d at 1191.
8 Defendants cite the declarations of Acting Chief Briggs of the
9 Office of Appeals and Appeals Coordinator Medina who have
10 reviewed Plaintiff's grievances and concluded that: (1) Plaintiff only
11 submitted two grievances during the 2011-2012 time period at issue
12 that were pursued to the Director's level, only one of which related
13 to the aforementioned retaliation claim; and (2) he did not submit
14 any grievances concerning his deliberate indifference claim, court
15 access claim, conspiracy claim, and Eighth Amendment claim for
16 mental torture against Defendants that were accepted at any level of
17 review. Briggs Decl. ¶ 8; Medina Decl. ¶¶ 17-24. Specifically,
18 Appeals Coordinator Medina, who is responsible for "receiving,
19 logging, routing, and monitoring the disposition of inmate
20 grievances" at SVSP, attests that a search of the database containing
21 records of all inmate appeals filed by Plaintiff at SVSP was
22 conducted and that the search produced a grievance activity report
23 showing proof that Plaintiff submitted a total of eight inmate appeals
24 during the 2011-2012 time period. Medina Decl. ¶ 14. Appeals
25 Coordinator Medina reviewed the grievance activity report and
26 reviewed the grievances Plaintiff submitted from 2011 through 2012
27 states as follows relating to eight inmate appeals that were accepted
28 for review:

 I am informed by the Attorney General's Office that
 Dillingham's lawsuit concern work related incidents
 that occurred in 2011 and 2012 between Dillingham
 and his bakery supervisors. Based on my review of
 the IATS printout and my review of the grievances
 Dillingham submitted in 2011 and 2012, I have
 confirmed that Dillingham submitted only three
 grievances concerning those alleged events, and he
 pursued one of them through the final level of
 review.

Id. ¶ 17. The three relevant grievances, which have been described
 in detail above as only pertaining to the aforementioned retaliation
 claim, are: SVSP-L-11-379, SVSP-L-11-669, and SVSP-11-01435.
 Id. ¶¶ 18-21.

Dkt. 97 in Case No. C 12-6537 YGR (PR) at 10-11.

 Furthermore, the record shows that in 2013, Plaintiff submitted two grievances, SVSP-L-13-05800 and SVSP-L-13-05799, related to his claim that he was assaulted by inmate Lozano on January 18, 2013. *See Voong Decl.*, Exs. B, C. However, neither of these grievances alleged any wrongdoing by the Defendants in the present action—Defendants Brunscher, Mojica, or Scruggs.

1 To the contrary, as mentioned above, they alleged that non-Defendant correctional officers were
2 deliberately indifferent to him being assaulted and that a non-Defendant sergeant required Plaintiff
3 to sign a chrono related to the altercation with inmate Lozano. *See id.*

4 Finally, after the Court's September 8, 2015 Order granting summary judgment for failure
5 to exhaust in *Dillingham I*, the record shows that Plaintiff did not make any further efforts to
6 exhaust available administrative remedies by submitting any new grievances related to his claims
7 against Defendants Brunscher, Scruggs, or Mojica. *See Voong Decl.*, Exs. A-C. Instead, the
8 record shows that the 602 appeals Plaintiff submitted, SATF-16-02515 and SATF-17-00107,
9 involved unrelated complaints about his housing conditions at the California Substance Abuse and
10 Treatment Facility in 2016 and 2017. *Id.*

11 In sum, Defendants have adequately shown that there were available administrative
12 remedies that Plaintiff did not fully exhaust as to all claims in the instant complaint.

13 **2. Plaintiff's Burden of Proving Unavailability of Administrative Remedies**

14 As such, the burden shifts to Plaintiff "to come forward with evidence showing that there
15 is something in his particular case that made the existing and generally available administrative
16 remedies effectively unavailable to him." *Albino*, 747 F.3d at 1166. Improper screening of a
17 prisoner's administrative grievances may excuse a failure to exhaust. *See Sapp v. Kimbrell*, 623
18 F.3d 813, 822-23 (9th Cir. 2010). The prisoner must demonstrate "(1) that he actually filed a
19 grievance or grievances that, if pursued through all levels of administrative appeals, would have
20 sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials
21 screened his grievance or grievances for reasons inconsistent with or unsupported by applicable
22 regulations." *Id.* at 823-24.

23 In its previous order in *Dillingham I*, the Court determined the conclusory evidence
24 presented by Plaintiff was insufficient to defeat the Defendants' motion for summary judgment as
25 to the unexhausted claims, stating as follows:

26 As explained above, Defendants have presented evidence that
27 Plaintiff's prison records prove that he did not submit grievances
28 through CDCR's administrative grievance process concerning the
claims in his complaint. In response, Plaintiff has filed a verified
opposition to Defendants' motion, Plaintiff has filed a verified

1 opposition as well as various verified declaration in opposition to
 2 Defendants' declarations, which are excessively lengthy (with
 3 multiple attachments) and difficult to decipher, but they seem to
 4 indicate that he concedes that the three aforementioned grievances
 5 are the ones relevant to the present case. Dkts. 91 at 5-6, 13-15; 93
 6 at 3. The Court notes that in his verified SAC, Plaintiff claims that
 7 he filed one other grievance against Defendants Brunscher and
 8 Scruggs on March 27, 2011, which is a different filing date than the
 9 three aforementioned grievances. Dkt. 16 at 12, ¶ 24. Attached to
 10 the SAC is Plaintiff's March 27, 2011 grievance on the original
 11 appeal form, in which he complains that Defendants Brunscher and
 12 Scruggs filed "false[,] erroneous[,] prejudicial" chronos and RVRs
 13 in retaliation for his filing grievances against them. *Id.* at 71-74.
 14 However, there are no markings on that form indicating that this
 15 grievance was received or processed through the highest level of
 16 appeal. *See id.* Plaintiff claims that he submitted this grievance for
 17 review; however, Defendant Mojica (an appeals coordinator)
 18 "ma[d]e unavailable administrative redress of this grievance with
 19 [Defendant] Mojica's staff" *Id.* ¶ 24. He adds that the
 20 unanswered grievance was not returned to him. *Id.* Thus, Plaintiff
 21 claims that he was "unable to complete final exhaustion" of this
 22 grievance. *Id.* Even though it seems that Plaintiff's March 27, 2011
 23 was unanswered, the Court finds that the previously-mentioned three
 24 grievances, which *were* accepted for review—i.e., SVSP-L-11-1435
 25 was exhausted through the *Director's* level—are sufficient evidence
 26 showing that Plaintiff has exhausted administrative remedies as to
 27 his retaliation claim against Defendants Brunscher, Scruggs and
 28 Lawson. Accordingly, Defendants have not met their ultimate
 burden to show that Plaintiff did not exhaust his available
 administrative remedies as to the aforementioned retaliation claim.

However, as to the other claims in his SAC, it seems that Plaintiff
 generally argues that the administrative remedies were made
 "unavailable" to him; however, his arguments in support of such a
 claim are not clearly outlined in his opposition. Instead, they are
 separately argued in a conclusory fashion in his declarations in
 opposition to Defendants' declarations. *See generally* Dkts. 91, 93.
 Although Plaintiff is not required to allege that he resorted to
 extraordinary measures in order to exhaust his administrative
 remedies, conclusory allegations that the administrative remedies
 process is inadequate are insufficient to defeat dismissal for failure
 to exhaust. *See White v. McGinnis*, 131 F.3d 593, 595 (6th Cir.
 1997). Furthermore, the record contradicts Plaintiff's arguments
 because, as mentioned above, it shows that Plaintiff was able to
 pursue *two grievances* to the Director's level at the time period
 during which his administrative remedies were allegedly not made
 available to him—SVSP-12-02488 and SVSP-11-01435. Briggs
 Decl. ¶ 8, Ex. A; Medina Decl. ¶ 15, Exs. A-C. Plaintiff does not
 support his allegation that the administrative remedies were made
 unavailable to him; therefore, they are conclusory at best. Further,
 the Court is not required to scour the record to determine which
 particular argument and/or exhibit pertains to Plaintiff's conclusory
 claim that his administrative remedies were made unavailable to
 him. Thus, the aforementioned conclusory evidence presented by
 Plaintiff is insufficient to defeat Defendants' motion for summary
 judgment as to the other claims in his SAC. Furthermore, the fact

1 that Plaintiff was able to file eight inmate appeals between 2011 and
2 2012 and pursue two grievances to the Director's level suggests that
3 he had adequate access to the administrative appeals process. *See*
4 Medina Decl. ¶ 14; Briggs Decl. ¶ 8. Meanwhile, the evidence
5 produced by Defendants *is sufficient* to carry their ultimate burden
6 of proof to show that the other claims are unexhausted, even in light
7 of Plaintiff's verified factual allegations.

8 Dkt. 97 at 12-13 (emphasis in original).

9 In the present case, Plaintiff seems to make a conclusory claim that after the Court's
10 September 8, 2015 Order in *Dillingham I*, he exhausted all available administrative remedies as to
11 the claims in his complaint. *See* Dkt. 1 at 2. As explained above, such claim is not supported by
12 the evidence. Plaintiff also appears to argue that he was excused from exhausting his claims
13 through the third level of review because he was not allowed to re-submit his March 27, 2011 602
14 appeal. *See* Dkt. 1, Exs. O-S. However, the evidence attached to Plaintiff's complaint does not
15 show that he ever actually re-submitted this appeal. *Id.* Instead, his exhibits appear to show that
16 Plaintiff submitted multiple requests inquiring about the status of his March 27, 2011 602 appeal
17 using a CDCR Form 22 or "Inmate/Parolee Request for Interview, Item of Service," which is not
18 the same as re-submitting the actual 602 appeal form. *See id.* As explained above, there is no
19 evidence that Plaintiff submitted or re-submitted the March 27, 2011 602 appeal. Defendants have
20 provided Defendant Mojica's previous declaration (from *Dillingham I*) showing that no such 602
21 appeal was received. *See* Dkt. 1, Ex. D, Seals Decl., Ex. 7 (Mojica Decl.) at Ex. A. Plaintiff has
22 not presented evidence that he was prevented from re-submitting the March 27, 2011 602 appeal.
23 Instead, the evidence shows that Plaintiff was well-versed on how to submit grievances because he
24 submitted multiple grievances during this period, some of which were exhausted through all three
25 levels of review. *See* Seals Decl., Ex. 5 (Briggs Decl.) at Ex. A; Voong Decl., Ex. A. Moreover,
26 the record also shows that Plaintiff never submitted any grievances complaining that Defendant
27 Mojica failed to respond to the March 27, 2011 602 appeal or claiming that Defendant Mojica
28 intentionally prevented this grievance's submission. Plaintiff has failed to present evidence that
he actually submitted the March 27, 2011 602 appeal and thus, it follows that this grievance was
not exhausted through the third level.

Furthermore, Defendants argue that Plaintiff's claim that administrative remedies were

unavailable (purportedly because Defendant Mojica failed to respond to the March 27, 2011 602 appeal) is not credible, and they add that because it was previously addressed by this Court such an argument is now collaterally estopped. This Court agrees. Re-litigation of an issue decided in a prior proceeding is prohibited by the doctrine of collateral estoppel. *Allen v. McCurry*, 449 U.S. 90, 96, 105 (1980) (collateral estoppel applies to section 1983 suits). Collateral estoppel, also known as issue preclusion, prohibits the re-litigation of issues decided in a prior proceeding when “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was [a] full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.” *Grieve v. Tamerin*, 269 F.3d 149, 153 (2d Cir. 2001) (citation and quotation marks omitted). All elements of collateral estoppel are present here, as Defendants have shown. The present issue—involving Plaintiff’s position that exhaustion was unavailable—is identical to the one decided in the prior proceeding⁸; exhaustion was actually litigated and actually decided in the prior action (it was the central issue); there was a full and fair opportunity to litigate the issue in the prior proceeding (both parties fully briefed the issue); and the litigation of the exhaustion issue was necessary to support a valid and final judgment on the merits (the decision in the prior proceeding was the reason summary judgment was granted and the claims at issue were dismissed). The Court also notes that the party against whom preclusion is sought (Plaintiff) is the same in both actions. This Court’s prior determination of the issue of exhaustion applies here and bars re-litigation.

Accordingly, Defendants are entitled to summary judgment based on the failure to exhaust administrative remedies, and their motion is GRANTED as to all the claims in his complaint. Dkt. 45.

D. Analysis of Plaintiff’s Motion for Partial Summary Judgment

In resolving Defendants’ cross-motion for summary judgment above, the Court has also

⁸ In *Dillingham I*, this Court noted that Plaintiff’s had initial filed an appeal, but he voluntarily dismissed it. Dkt. 101 in Case No. C 12-6537 YGR (PR). As such, the Court’s previous rulings in *Dillingham I* still stand.

1 reviewed the evidence and arguments in Plaintiff's pending motion for partial summary judgment.
2 The evidence and argument in Plaintiff's motion do not defeat Defendants' cross-motion. Having
3 determined that Defendants are entitled to judgment as a matter of law due to Plaintiff's failure to
4 exhaust administrative remedies, Plaintiff's motion for partial summary judgment is necessarily
5 DENIED. Dkt. 20.

6 **III. CONCLUSION**

7 For the reasons outlined above, the Court orders as follows:

8 1. The Court GRANTS Defendants' cross-motion for summary judgment based on
9 the failure to exhaust administrative remedies as to all claims in the complaint. Dkt. 45. The
10 aforementioned claims are DISMISSED without prejudice to refile after exhausting California's
11 prison administrative process. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).

12 2. The Court DENIES Plaintiff's motion for partial summary judgment. Dkt. 20.

13 3. All remaining motions are DENIED as moot, including: (1) Plaintiff's Motion to
14 Stay Case Pending Court Ruling on Emergency Request of Appointment of Counsel (dkt. 28);
15 (2) Defendants' Motion for Protective Order Staying Discovery (dkt. 69); (3) Plaintiff's Motion
16 for Appointment of an Expert Witness (dkt. 70); and (4) Plaintiff's Motion to Compel Discovery
17 Disclosure of Records of Prior Complaints (dkt. 72).

18 4. The Clerk of the Court shall enter judgment, terminate all pending motions, and
19 close the file.

20 5. This Order terminates Docket Nos. 20, 28, 45, 69, 70, and 72.

21 IT IS SO ORDERED.

22 Dated: June 12, 2018

23 
24 YVONNE GONZALEZ ROGERS
25 United States District Judge
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,
Plaintiff,

v.

EVA SCRUGGS, et al.,
Defendants.

Case No. 16-cv-03267-YGR (PJH)

CERTIFICATE OF SERVICE


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6/12/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jerry Dillingham ID: C-95149
California State Prison - Los Angeles County
Facility D - Bldg. D4 -Bed 227
P.O. Box 4670
Lancaster, CA 93539

Dated: 6/12/2018

Susan Y. Soong
Clerk, United States District Court

By: 
Kelly Collins, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,
Plaintiff,

v.

EVA SCRUGGS, et al.,
Defendants.

Case No. 16-cv-03267-YGR (PR)

JUDGMENT

For the reasons set forth in this Court's Order Granting Defendants' Cross-Motion for Summary Judgment; Denying Plaintiff's Motion for Partial Summary Judgment; and Denying Other Pending Motions as Moot,

IT IS ORDERED AND ADJUDGED

That Plaintiff take nothing, that the action be dismissed in accordance with the Court's Order, and that each party bear its own costs of action.

Dated: June 12, 2018



YVONNE GONZALEZ ROGERS
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,

Plaintiff,

v.

EVA SCRUGGS, et al.,

Defendants.

Case No. 16-cv-03267-YGR (PJH)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6/12/2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jerry Dillingham ID: C-95149
California State Prison - Los Angeles County
Facility D - Bldg. D4 -Bed 227
P.O. Box 4670
Lancaster, CA 93539

Dated: 6/12/2018

Susan Y. Soong
Clerk, United States District Court

By: Kelly Collins
Kelly Collins, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON

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