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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EMILITO EXMUNDO,

Plaintiff,

v.

R. KANE, et al.,

Defendants.

CASE NO. 1:08-cv-00822-DLB PC

ORDER GRANTING DEFENDANTS’
MOTION TO STRIKE SURREPLY

(Docs. 29, 30)

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION TO DISMISS FOR FAILURE TO
EXHAUST AND DISMISSING CERTAIN
CLAIMS WITHOUT PREJUDICE

/ (Docs. 15)

Order

I. Background

Plaintiff Emilito Exmundo (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This action was removed from state court on June 12, 2008. This action is proceeding on Plaintiff’s complaint against Defendants R. Kane and Ross for retaliation in violation of the First Amendment and interference with medical care, in violation of the Eighth Amendment, and for violation of the California Constitution. On October 7, 2009, Defendants filed a motion to dismiss certain claims for Plaintiff’s failure to exhaust administrative remedies, pursuant to the unenumerated portion of Rule 12(b) of the Federal Rules of Civil Procedure. (Doc. 15.) On January 4, 2010, after receiving an extension of

1 time, Plaintiff filed his opposition. (Doc. 21.) On January 15, 2010, Defendants filed their reply.
2 (Doc. 26, 27.) The matter is deemed submitted pursuant to Local Rule 230(l).¹

3 **II. Plaintiff's Surreply**

4 On February 1, 2010, Plaintiff filed his reply to Defendants' reply, also known as a
5 surreply. (Doc. 28.) On February 8, 2010, Defendants filed a motion to strike the surreply.
6 (Doc. 29.) On March 1, 2010, Plaintiff filed his opposition to Defendants' motion. (Doc. 30.)

7 Surreplies are generally not permitted in this Court. *See* Local Rule 230(l). The Court
8 neither requested nor granted leave for Plaintiff to file a surreply. Accordingly, Defendants'
9 motion to strike Plaintiff's surreply is GRANTED and the surreply is HEREBY ORDERED
10 stricken.²

11 **III. Summary of Complaint**

12 Plaintiff is currently incarcerated at Pleasant Valley State Prison ("PVSP") in Coalinga,
13 California, where the events giving rise to this action occurred. Plaintiff contends that on March
14 21, 2007, Defendant Kane wrote a false report alleging that Plaintiff was "cheeking"³ his
15 medication. Plaintiff contends this was done in retaliation for Plaintiff filing grievances against
16 Kane for making him stand in line for a long time before receiving his medication, and for not
17 referring him to a pain specialist and ophthalmologist. Plaintiff contends that on May 24, 2007,
18 Defendant Kane refused to give him his medication. On January 26, 2008, Defendant Kane
19 again refused to give Plaintiff his medication.

20 Plaintiff contends that on December 2 to December 19, 2007, Plaintiff was not given his
21 pain medications or seizure medication. Plaintiff contends that he suffered a seizure as a result
22 of the deprivation. Plaintiff contends that Defendant Ross wrote a false report alleging that on
23

24 ¹ Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion
25 on October 14, 2009. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 17.)

26 ² Out of an abundance of caution, the Court reviewed Plaintiff's surreply and finds that it would not change
the analysis herein.

27 ³ As described by Defendants, cheeking is pretending to take medication but instead holding the medication
28 under the tongue or in the cheek. It is used by inmates to avoid medication compliance or to later sell the pills to
other inmates.

1 November 20, 2007, Plaintiff was checking his medications. Plaintiff contends this was done as
2 retaliation for Plaintiff writing a grievance against a correctional officer, and for threatening to
3 sue her for falsely accusing him of disrespect, which resulted in his confinement to quarters for
4 96 hours.

5 **IV. Failure to Exhaust Administrative Remedies**

6 **A. Legal Standard**

7 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
8 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
9 confined in any jail, prison, or other correctional facility until such administrative remedies as are
10 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
11 administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211, 127 S. Ct. 910,
12 918-19 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is
13 required regardless of the relief sought by the prisoner and regardless of the relief offered by the
14 process, *Booth v. Churner*, 532 U.S. 731, 741, 121 S. Ct. 1819 (2001), and the exhaustion
15 requirement applies to all prisoner suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516,
16 532, 122 S. Ct. 983 (2002).

17 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
18 defense under which Defendants have the burden of raising and proving the absence of
19 exhaustion. *Jones*, 127 S. Ct. at 921; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).
20 The failure to exhaust nonjudicial administrative remedies that are not jurisdictional is subject to
21 an unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Wyatt*, 315 F.3d
22 at 1119 (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365, 368 (9th
23 Cir. 1998) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative
24 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*,
25 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative
26 remedies, the proper remedy is dismissal without prejudice. *Id.*

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28 ///

1 **B. Discussion**

2 The California Department of Corrections and Rehabilitation has an administrative
3 grievance system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (2010). The process
4 is initiated by submitting a CDC Form 602. *Id.* § 3084.2(a). Four levels of appeal are involved,
5 including the informal level, first formal level, second formal level, and third formal level, also
6 known as the “Director’s Level.” *Id.* § 3084.5. Appeals must be submitted within fifteen
7 working days of the event being appealed, and the process is initiated by submission of the
8 appeal to the informal level, or in some circumstances, the first formal level. *Id.* §§ 3084.5,
9 3084.6(c). In order to satisfy section 1997e(a), California state prisoners are required to use this
10 process to exhaust their claims prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 85-86, 126 S.
11 Ct. 2378 (2006); *McKinney*, 311 F.3d at 1199-1201. Exhaustion does not *always* require pursuit
12 of an appeal through the Director’s Level of review. What is required to satisfy exhaustion is a
13 fact specific inquiry, and may be dependent upon prison officials’ response to the appeal. *See*
14 *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (listing examples of exceptions to
15 exhaustion requirement from other circuits); *Brown v. Valoff*, 422 F.3d 926, 935-36 (9th Cir.
16 2005) (“[E]ntirely pointless exhaustion” not required).

17 Plaintiff filed this action on April 11, 2008. (Doc. 1, Exh. A.) Defendants contend that
18 Plaintiff exhausted only two inmate appeals related to this action: PVSP-07-01171, submitted
19 April 17, 2007, and PVSP-07-02179, submitted May 27, 2007. (Doc. 15, Mem. Of P. & A. In
20 Support of Mot. To Dismiss 6:12-21; Exh. E, grievance No. PVSP-07-01171; Exh. F, grievance
21 No. PVSP-07-02179.) Defendants contend that PVSP-07-02179 fails to exhaust any claims in
22 this action. (Doc. 15, Mem. Of P. & A. 6:19-21.) Defendants contend that Plaintiff only
23 exhausted one claim, that Defendant Kane retaliated against him on March 21, 2007 by filing a
24 false report against him. (Mem. Of P. & A. 8:21-23.) Plaintiff in opposition contends that he
25 exhausted all his claims in this action. (Doc. 21, Opp’n 3:17.)⁴

26
27 ⁴ Defendants object to Plaintiff’s exhibits A4, B6, C4, E2-4, F6, F11, F14, G6, G7, H4, and I4 as
28 irrelevant, hearsay, and lacking foundation and authentication, pursuant to Federal Rules of Evidence 402, 802, 601-
602, 1002-1005. (Doc. 26, Defs.’ Objections.) For the purposes of this order, the Court will consider this evidence,
and will therefore overrule Defendants’ objections. Such a ruling is not on the merits of the objections.

1 **1. Claims Against Defendant Kane**

2 A. May 24, 2007 Incident

3 Defendants contend that PVSP-07-2179, while exhausted, mentions Defendant Kane only
4 in reiterating his allegations against Defendant Kane regarding the March 21, 2007 RVR. (Mem.
5 Of P. & A. 6:22-23.) Defendants contend that Plaintiff does not allege in that appeal or any
6 other that Kane denied him medication on May 24, 2007, or that his medication was discontinued
7 as a result of the March 2007 RVR. (Mem. Of P. & A. 6:24-25.) Plaintiff contends that PVSP-
8 07-2179 mentions Kane’s retaliation specifically in his requested relief. (Opp’n, Exh. C1.)

9 Defendants appear to rely on the fact that Plaintiff did not specifically name Defendant
10 Kane as the person who denied or discontinued his medication in May 2007 as support for their
11 contention that Plaintiff failed to exhaust his retaliation claim regarding this incident. However,
12 all that is required by the PLRA is compliance with a prison’s grievance procedure. *See Jones v.*
13 *Bock*, 549 U.S. 199, 218-19 (2007) (“The level of detail necessary in a grievance to comply with
14 the grievances procedures will vary from system to system and claim to claim, but it is the
15 prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion
16 [E]xhaustion is not *per se* inadequate simply because an individual later sued was not named in
17 the grievances.”). The inmate appeal form CDC-602 does not require identification of specific
18 individuals. *See Cal. Code Regs.*, tit. 15 § 3084.2(a). Rather, it merely requires that the inmate
19 “describe the problem and action requested.” *Id.* “A grievance [] need not contain every fact
20 necessary to prove each element of an eventual legal claim. The primary purpose of a grievance
21 is to alert the prison to a problem and facilitate its solution, not to lay groundwork for litigation.”
22 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (quotations and citations omitted).

23 Plaintiff notified prison officials that his medication had been discontinued arbitrarily on
24 May 24, 2007. (Doc. 15, Exh. E, grievance PVSP-07-2179.) Plaintiff requested that Defendant
25 Kane stop retaliating against Plaintiff. (*Id.*) This constitutes sufficient notice pursuant to the
26 California Code of Regulations and federal law. Plaintiff has satisfied the exhaustion
27 requirement pursuant to the PLRA regarding his claim against Defendant Kane for the denial and
28 discontinuation of his medication on May 24, 2007. Accordingly, the Court denies Defendants’

1 motion to dismiss Plaintiff's retaliation claims against Defendant Kane pertaining to the May 24,
2 2007 incident.⁵

3 B. January 2008 Incident

4 Defendants contend that Plaintiff's January 2008 claim, that Defendant Kane denied him
5 his medication on that date, was never exhausted. Defendants contend that none of Plaintiff's
6 exhausted appeals mention this denial of medication. (Doc. 15, Mem. Of P. & A. 7:1-2.)

7 Defendants contend that the January 2008 claim is not intertwined with the exhausted claim
8 against Defendant Kane for filing a false March 2007 RVR. (Mem. Of P. & A. 8:1-3.)

9 Plaintiff contends that the January 2008 claim is intertwined with the March 2007 RVR,
10 because it is part of a continual retaliation by Defendant Kane against Plaintiff. (Opp'n 11:5-10.)
11 Plaintiff contends that he notified Kane of his intent to sue in state court within ninety days for
12 the false March 2007 RVR. (*Id.*) Plaintiff contends that Defendant Kane's deprivation of
13 medication on January 2008 is retaliation for the same incident. (*Id.*) Plaintiff also contends that
14 he appealed the denial of medication several times, but was screened out by the appeals
15 coordinator. (Opp'n 2:18-3:1.)

16 Plaintiff mentions the January 2008 denial of medication in an inmate grievance. (Opp'n
17 Exh. H5.) However, it appears that Plaintiff appealed this grievance only to the informal level.
18 (*Id.*) An inmate must comply with the inmate grievance procedure in order to exhaust
19 administrative remedies pursuant to the PLRA. *See Jones*, 549 U.S. at 218. Plaintiff appears to
20 have submitted his grievance to the first level on March 31, 2008. (Exh. H5.) The inmate
21 grievance process requires a first level response to be completed within thirty working days. Cal.

23 ⁵ To the extent that Defendants make a distinction between the denial of medication on May 24, 2007 and
24 discontinuation of medication, the Court does not find such a distinction in PVSP-07-2179. Plaintiff complained of
25 the discontinuation of his medication on May 24, 2007, which necessarily includes denial of medication. A review
26 of the second and third level responses indicates that the responding prison official considered Plaintiff's grievance
27 to include a claim of retaliatory conduct by Defendant Kane. (Opp'n, Exh. C5, C6.)

28 Plaintiff had also argued that PVSP-07-0990 was exhausted and included Plaintiff's claims against
Defendant Kane. Defendants contend that it was submitted more than 4 months before the May 24, 2007 incident,
and thus cannot be used to exhaust administrative remedies for that claim. The Court agrees. Appeals must be
submitted within fifteen working days of the event being appealed. Cal. Code. Regs., tit 15 3084.6(c). Plaintiff did
not do so with PVSP-07-0990 as it pertained to his May 24, 2007 claims, and thus it cannot be used to demonstrate
exhaustion of those claims.

1 Code Regs., tit. 15 § 3084.6(a)(2). Thus, the first level response was not due until thirty working
2 days after March 31, 2008. Assuming Plaintiff did submit this grievance to the first level of
3 review, Plaintiff would not be able to complete exhaustion of this grievance before he initiated
4 this action on April 11, 2008. Thus, Plaintiff has not demonstrated that he exhausted all
5 available administrative remedies with this grievance.

6 Plaintiff's contention that the January 2008 denial is retaliation for the same March 2007
7 RVR does not cure Plaintiff's lack of exhaustion. As stated previously, the purpose of the inmate
8 grievance procedure is to notify prison officials of a problem and what redress is requested.
9 *Griffin*, 557 F.3d at 1120. Plaintiff did not sufficiently notify prison officials of his issues with
10 the January 2008 denial of medication, as this incident occurred several months after either the
11 March 2007 or May 2007 incidents. Plaintiff raising this issue at the informal level and then not
12 appealing it further does not comply with the inmate grievance process of the CDCR for
13 purposes of exhaustion, and is thus non-compliance with the PLRA. Accordingly, Plaintiff failed
14 to exhaust administrative remedies regarding his January 2008 retaliation claim against
15 Defendant Kane.

16 **2. Claims Against Defendant Ross**

17 Defendants contend that Plaintiff did not exhaust any of his claims pertaining to
18 Defendant Ross prior to the initiation of this action. Plaintiff's claims against Defendant Ross
19 arose from an incident in November 2007 when Defendant Ross wrote a report that Plaintiff was
20 cheeking his medication, in retaliation for a grievance against correctional officer Mendoza and
21 for Plaintiff giving notice of intent to pursue legal action against Defendant Ross. (Mem. Of P.
22 & A. 7:17-22.) Defendants contend that Plaintiff failed to exhaust this claim because he did not
23 exhaust a claim in any appeal that Defendant Ross wrote a false report to retaliate against him.
24 (Mem. Of P. & A. 7:4-5.) Defendants contend that the exhausted claim against Defendant Kane
25 is separated by eight months and concerns different incidents, persons, and retaliatory motives
26 than the unexhausted claim against Defendant Ross. (Mem. Of P. & A. 7:26-27.)

27 Plaintiff in opposition contends that he attempted to file an inmate grievance against
28 Defendant Ross as a staff complaint, but that appeals coordinators refused to process it. (Opp'n

1 6:22-7:18.) In support Plaintiff submits Exhibits E1 to E8. Defendants reply that Plaintiff
2 attempted to bypass the inmate grievance procedure by submitting his grievance directly to the
3 third level of review, rather than go through the process of submitting it to an appeals coordinator
4 first. (Doc. 27, Reply 5:10-23.)⁶

5 A review of Plaintiff's exhibits indicate that on December 14, 2007, he submitted a
6 grievance regarding a false report by Defendant Ross that Plaintiff was cheating his medication.
7 (Opp'n, Exh. E6.) It was received by the Inmate Appeals Branch at the Director's level on
8 December 24, 2007. (*Id.*) The Inmate Appeals Branch screened out the grievance on February 1,
9 2008 because the appeal should have been submitted directly to an appeals coordinator at the
10 prison. (Opp'n, Exh. E5.)

11 It appears that Plaintiff also submitted his grievance to the appeals coordinator office for
12 review. (Opp'n, Exh. E1.) Plaintiff contends that he intended to file the grievance against
13 Defendant Ross as a staff complaint, which would bypass filing at the informal level. (Opp'n
14 6:22-7:18.) The appeals coordinator apparently responded on March 21, 2008, and April 4,
15 2008. (*Id.*) The appeals coordinator who reviewed the grievance did not construe Plaintiff's
16 grievance to be a staff complaint, and returned the grievance to Plaintiff for re-submission
17 because Plaintiff's request for the removal of the 128 "needs to be forwarded to staff who
18 initiated the chrono." (Opp'n Exh. E1.) A review of the grievance itself indicates that Plaintiff
19 sought expungement of the 128 chrono from his file "and any other appropriate action, dispose of
20 the matter as the law and justice require." (Opp'n, Exh. E6.) Plaintiff contends that he sent the
21 grievance to Defendant Ross and Sgt. Huckabay, the author of the 128 chrono, who failed to
22 respond to the grievance. (Opp'n 7:9-11.)

23
24 ⁶ Plaintiff submitted another grievance, PVSP-08-0418, concerning the November RVR. (Opp'n, Exh. D1-
25 D8.) Plaintiff sought the expungement of the RVR from his prison file. (*Id.*) Defendants contend that PVSP-08-
26 0418 concerned a denial of due process, not for retaliatory conduct. (Mem. Of P. & A. 7:2-5.) A review of PVSP-
08-418 indicates that it was for the purposes of due process, and provides no mention of retaliatory conduct. It thus
cannot be used to demonstrate exhaustion of Plaintiff's retaliation claim against Defendant Ross.

27 Plaintiff contends that PVSP-08-0344, which is exhausted, concerned Defendant Ross's retaliatory conduct.
28 (Opp'n Exh. F1-F8.) This grievance concerns Plaintiff's issues with correctional officer Cano, who allegedly
threatened Plaintiff when Plaintiff stated to Defendant Ross that he was going to file a staff complaint against her.
The grievance was appealed to the third level on December 30, 2008, after Plaintiff initiated this action. (Opp'n
Exh. F1.) Thus, it cannot be used to demonstrate exhaustion of Plaintiff's retaliation claim against Defendant Ross.

1 Though not explicitly found by the Ninth Circuit, other circuits have found exceptions to
2 the exhaustion requirement when prison officials' obstruction of an inmate's ability to exhaust
3 would render administrative remedies unavailable. *See, e.g., Turner v. Brownside*, 541 F.3d
4 1077, 1085 (11th Cir. 2008) (finding administrative remedies unavailable when prisoner
5 threatened with retaliation by prison officials); *Macias v. Zenk*, 495 F.3d 37, 45(2d Cir. 2007)
6 (same); *Kaba v. Stepp*, 458 F.3d 678, 684-86 (7th Cir. 2006) (same); *Brown v. Croak*, 312 F.3d
7 109, 111-12 (3d Cir. 2002) (finding administrative remedies unavailable when prison officials
8 erroneously told prisoner to wait until investigation was complete before filing grievance); *see*
9 *also Nunez*, 591 F.3d at 1224 (finding plaintiff's failure to timely exhaust administrative
10 remedies excused because plaintiff took reasonable and appropriate steps to exhaust claim and
11 was precluded from exhausting by warden's mistake); *Moore v. Bennette*, 517 F.3d 717, 725 (4th
12 Cir. 2008) ("[A]n administrative remedy is not considered to have been available if a prisoner,
13 through no fault of his own, was prevented from availing himself of it."); *Aquilar-Avellaveda v.*
14 *Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007) (Courts are "obligated to ensure any defects in
15 exhaustion were not procured from the action or inaction of prison officials."). Defendants bear
16 the burden of proof in raising the affirmative defense of failure to exhaust administrative
17 remedies. *Jones*, 549 U.S. at 216.

18 The Court finds that Defendants have not met their burden of demonstrating Plaintiff's
19 failure to exhaust for this claim. Plaintiff's opposition is a sworn affidavit in this instance. *See*
20 Fed. R. Civ. P. 43(c); 28 U.S.C. § 1746. Plaintiff attests in his opposition that he attempted to
21 comply with the appeals coordinator's order and submitted his inmate grievance with Defendant
22 Ross and Sgt. Huckabay, but they failed to respond to Plaintiff's grievance. (Opp'n 6:22-7:18.)
23 Prison officials' failure to comply with their own inmate grievance process would render
24 Plaintiff's administrative remedies unavailable.

25 In reaching this conclusion, the Court does not find that Plaintiff has definitively
26 demonstrated he has exhausted administrative remedies. However, the burden lies with the
27 Defendants to show that Plaintiff has not exhausted. Based on all the submissions, Defendants
28 have not met their burden of proof, and the Court must deny Defendants' motion to dismiss

1 Plaintiff's claims against Defendant Ross for failure to exhaust administrative remedies.

2 **V. Conclusion and Order**

3 Based on the foregoing, it is HEREBY ORDERED that:

- 4 1) Defendants' motion to dismiss for failure to exhaust administrative remedies, filed
5 October 7, 2009, is GRANTED as to Plaintiff's retaliation claim against
6 Defendant Kane for denial of medication in January 2008;
- 7 2) Defendants' motion to dismiss is DENIED as to (a) Plaintiff's retaliation claim
8 against Defendant Kane for denial of medication in May 2007 and (b) Plaintiff's
9 retaliation claim against Defendant Ross for false report of checking medication in
10 November 2007; and
- 11 3) This action proceed against Defendant Kane for filing of a retaliatory false report
12 in March 2007 and retaliatory denial of medication in May 2007, and against
13 Defendant Ross for filing a retaliatory false report of checking medication in
14 November 2007.

15
16 IT IS SO ORDERED.

17 **Dated: May 6, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE