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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EMELITO EXMUNDO,

Plaintiff,

v.

A. K. SCRIBNER, et al.,

Defendants.

CASE NO. 1:06-cv-00205-AWI-GBC (PC)

FINDINGS AND RECOMMENDATION
RECOMMENDING DEFENDANT'S MOTION
TO DISMISS BE DENIED

(ECF No. 45)

OBJECTIONS DUE WITHIN THIRTY DAYS

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I. PROCEDURAL HISTORY

Plaintiff Emelito Exmundo ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Pending before this Court is a Motion to Dismiss filed by Defendants Bell and Johnson. (ECF No. 45.) Plaintiff filed an Opposition on May 12, 2011, and Defendants replied on June 6, 2011. (ECF Nos. 48 & 52.)

This action proceeds on Plaintiff's Second Amended Complaint filed June 19, 2009 (ECF No. 32.) On October 8, 2010, this Court screened Plaintiff's Complaint finding that

1 it stated a cognizable claim for relief against Defendant Bell for retaliation and against
2 Defendants Bell and Johnson for use of excessive force. (ECF No. 35.)

3 **II. ARGUMENT**

4 In the instant Motion, Defendants argue that Plaintiff failed to exhaust his
5 administrative remedies before filing this action. Defendants state that Plaintiff filed this
6 action within three weeks of filing his inmate grievance concerning Defendants Bell and
7 Johnson. The alleged incident occurred on October 5, 2005. Plaintiff filed the related
8 inmate grievance on February 2, 2006. (ECF No. 32, 2nd Am. Compl. Ex. C1(a).) Plaintiff
9 filed this action on February 23, 2006. (ECF No. 1.) Plaintiff received the First-Level
10 Response on March 22, 2006 and then withdrew his appeal. (ECF No. 32, 2nd Am.
11 Compl. Exs. C1(b) & (e).) Thus, Plaintiff did not exhaust his administrative remedies
12 before filing this action with the Court.
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15 In his Opposition, Plaintiff states that he filed a grievance on October 25, 2005
16 related to Defendants Bell and Johnson and that Defendants failed to respond. Plaintiff
17 then refiled the grievance on December 12, 2005 to which he never received a response.
18 When Defendants failed to respond to his grievances twice, Plaintiff filed this action on
19 February 23, 2006. Plaintiff claims that the administrative remedies were not “available”
20 to him. Plaintiff goes on to state that the grievance filed on February 2, 2006 was against
21 Renteria and Defendant Johnson for retaliation and harassment, but the primary reason
22 for the grievance was Defendants failure to respond to Plaintiff’s previously filed
23 grievances. Plaintiff argues that Defendants failure/delay in responding to his grievances
24 made the administrative remedies unavailable to him, excusing him from exhausting.
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27 In their Reply, Defendants merely repeat the dates of Plaintiff’s grievance,

1 complaint, and prison appeal reviews. They fail to address Plaintiff's contention that he
2 previously attempted to file the same grievance twice prior to the February 2, 2006
3 grievance which was accepted and processed.

4 **III. LEGAL STANDARD**

5 "The Prison Litigation Reform Act ["PLRA"] requires that a prisoner exhaust
6 available administrative remedies before bringing a federal action concerning prison
7 conditions." Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. §
8 1997e(a)); Brown v. Valoff, 422 F.3d 926, 934 (9th Cir. 2005) (quoting Porter v. Nussle,
9 534 U.S. 516, 525 n.4 (2002)) (The PLRA "creates 'a general rule of exhaustion' for
10 prisoner civil rights cases."). "[T]he PLRA's exhaustion requirement applies to all inmate
11 suits about prison life, whether they involve general circumstances or particular episodes,
12 and whether they allege excessive force or some other wrong." Bennett v. King, 293 F.3d
13 1096, 1098 (9th Cir. 2002) (quoting Porter, 534 U.S. at 532); accord Roles v. Maddox, 439
14 F.3d 1016, 1018 (9th Cir.), cert. denied, 549 U.S. 905 (2006). The PLRA's "exhaustion
15 requirement is mandatory." McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per
16 curiam); accord Jones v. Bock, 549 U.S. 199, 211 (2007) ("There is no question that
17 exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought
18 in court."); see also Panaro v. City of North Las Vegas, 432 F.3d 949, 954 (9th Cir. 2005)
19 (The PLRA "represents a Congressional judgment that the federal courts may not consider
20 a prisoner's civil rights claim when a remedy was not sought first in an available
21 administrative grievance procedure."). Even if the prisoner seeks monetary or other relief
22 that is unavailable through the grievance system in question, the prisoner must still first
23 exhaust all available administrative remedies. See Booth v. Churner, 532 U.S. 731, 741
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1 (2001) (“[W]e think that Congress has mandated exhaustion clearly enough, regardless of
2 the relief offered through administrative procedures.”).

3 While the PLRA requires “proper” exhaustion of available administrative remedies,
4 Woodford v. Ngo, 548 U.S. 81, 93 (2006), it does not define the boundaries of proper
5 exhaustion. See Jones, 549 U.S. at 218. Rather, “[p]roper exhaustion demands
6 compliance with an agency’s deadlines and other critical procedural rules[.]” Woodford,
7 548 U.S. at 90. “The level of detail necessary in a grievance to comply with the grievance
8 procedures will vary from system to system and claim to claim, but it is the prison’s
9 requirements, and not the PLRA, that define the boundaries of proper exhaustion.” Jones,
10 549 U.S. at 218; see, e.g., Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009, as
11 amended June 5, 2009) (per curiam) (“The California prison system’s requirements define
12 the boundaries of proper exhaustion.”) (internal quotation marks and citation omitted).
13 Absent a prison grievance procedure mandating the naming of each individual involved,
14 a prisoner need not identify all of the defendants later named in a lawsuit during the
15 administrative grievance process. Jones, 549 U.S. at 218.

16 The PLRA’s exhaustion requirement is not jurisdictional; rather, it creates an
17 affirmative defense that a defendant may raise in an unenumerated Rule 12(b) motion.
18 See Jones, 549 U.S. at 213-14; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), cert.
19 denied, 540 U.S. 810 (2003). The defendant bears the burden of raising and proving the
20 absence of exhaustion. Wyatt, 315 F.3d at 1119. Specifically, the defendant must show
21 that some administrative relief remains available to the plaintiff “whether at unexhausted
22 levels of the grievance process or through awaiting the results of the relief already granted
23 as a result of that process.” Brown, 422 F.3d at 936-37. In deciding a motion to dismiss
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1 for failure to exhaust, a court may “look beyond the pleadings and decide disputed issues
2 of fact.” Wyatt, 315 F.3d at 1119-20. When a prisoner has not exhausted administrative
3 remedies on a claim, “the proper remedy is dismissal of the claim without prejudice.” Id.
4 at 1120. However, dismissal of the entire complaint is not required when a prisoner has
5 exhausted some, but not all, of the claims included in the complaint. See Jones, 549 U.S.
6 at 223-24.
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8 California provides its inmates and parolees the right to appeal administratively the
9 alleged misconduct of correctional officers and “any departmental decision, action,
10 condition or policy perceived by those individuals as adversely affecting their welfare.” Cal.
11 Code Regs. tit. 15, § 3084.1(a), (e). In order to exhaust administrative remedies within this
12 system, a prisoner normally must proceed through four levels: (1) initiation of informal
13 resolution through submission of a CDC form describing the problem and the action
14 requested; (2) first level formal written appeal to the prison’s appeals coordinator; (3)
15 second level formal appeal to the institution’s warden or designee; and (4) third level formal
16 appeal to the CDCR Director (“Director’s Level”). Id. § 3084.5; see Woodford, 548 U.S.
17 at 90-91 (California prisoners are required to use the process established by Cal. Code
18 Regs., tit. 15 §§ 3084.1, 3084.2-3084.6 in order to satisfy 42 U.S.C. § 1997e(a)); Porter,
19 534 U.S. at 532 (the exhaustion requirement is mandatory and applies to all prisoner suits
20 relating to prison life that do not implicate the duration of the prisoner’s sentence).
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23 **IV. ANALYSIS**

24 After reviewing the attachments to Plaintiff’s Second Amended Complaint, it
25 appears that Plaintiff did file several grievances prior to the grievance filed in February
26 2006. In the February 2006 grievance, Plaintiff states, much like he does here, that he
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1 filed two grievances about the incident in October 2005, but did not receive any responses
2 from them.

3 It is undisputed that there is no record in the Inmate Appeal Tracking System of
4 Plaintiff's October grievance or his resubmitted December grievance. Plaintiff claims that
5 he placed both grievances on his door for mail pickup. Defendants merely repeat that
6 Plaintiff failed to exhaust before filing this action.

7 While the absence of evidence that a grievance was officially filed may indicate that
8 a plaintiff never submitted the grievance, it may also indicate that the grievance was
9 discarded or ignored by staff. See Spence v. Director of Corr., 2007 WL 61006, *3
10 (E.D.Cal. Jan. 8, 2007) (If prison officials "are interfering with inmates' ability to properly
11 file their 602s, then there will be no official record of the 602s having been 'accepted.'"),
12 findings and recommendations adopted in full, 2007 WL 738528 (E.D.Cal. Mar. 6, 2007).

13 The PLRA requires that an inmate exhaust such administrative remedies "as are
14 available." 42 U.S.C. § 1997e(a). As the Ninth Circuit has repeatedly reiterated, the PLRA
15 does not require exhaustion when circumstances render administrative remedies
16 "effectively unavailable." Sapp v. Kimbrell, 623 F.3d 813 (9th Cir. 2010). If employees of
17 a facility prevent or interfere with the filing of a grievance or the inmate's ability to exhaust
18 administrative remedies, the exhaustion requirement may be "unavailable" and defendants
19 estopped from raising non-exhaustion as an affirmative defense. See Jernigan v. Stuchell,
20 304 F.3d 1030, 1032 (10th Cir. 2002). Courts have repeatedly held that an administrative
21 remedy becomes "unavailable" for purposes of the exhaustion requirement if prison
22 officials do not respond to a properly filed grievance or if they otherwise use affirmative
23 misconduct to thwart a prisoner's attempts to exhaust. See e.g., Brown v. Valoff, 422 F.3d
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1 926 n. 18 (9th Cir. 2005); Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010); Lewis
2 v. Washington, 300 F.3d 829, 833 (7th Cir. 2002) (“we refuse to interpret the PLRA ‘so
3 narrowly as to permit prison officials to exploit the exhaustion requirement through
4 indefinite delay in responding to grievances.’”); Abney v. McGinnis, 380 F.3d 663, 667 (2nd
5 Cir. 2004); Ziemba v. Wezner, 366 F.3d 161, 163-64 (2nd Cir. 2004); Miller v. Norris, 247
6 F.3d 736, 740 (8th Cir. 2001) (finding allegations that prison officials failed to respond to
7 his written requests for grievance forms were sufficient to raise an inference that the
8 prisoner had exhausted his “available” administrative remedies); Mitchell v. Horn, 318 F.3d
9 523, 529 (3rd Cir. 2003) (holding that prisoner lacked available administrative remedy for
10 exhaustion purposes where the prisoner was unable to file a grievance because prison
11 officials refused to provide him with the necessary grievance forms).
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14 Plaintiff has submitted a sworn statement that he filed a timely grievance form and
15 also resubmitted the grievance form when he did not receive a response. The Court
16 cannot ignore Plaintiff’s sworn statements. “In a situation such as this in which the parties
17 offer differing versions of events based on competing declarations, the issue is one of
18 witness credibility and the Court cannot make that requisite assessment on a motion to
19 dismiss.” Buchanan v. Santos, 2010 WL 1267353, *5 (E.D.Cal. Mar. 31, 2010). Thus,
20 given the limited record before it, the Court is essentially compelled at this stage of the
21 proceedings to accept Plaintiff’s allegations that he attempted to exhaust his administrative
22 remedies but was thwarted in doing so by Defendants.
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24 **V. CONCLUSION AND RECOMMENDATION**

25 Therefore, the Court HEREBY RECOMMENDS that Defendants’ Motion to Dismiss
26 for failure to exhaust be DENIED.
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1 These Findings and Recommendations will be submitted to the United States
2 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
3 Within thirty (30) days after being served with these Findings and Recommendation, the
4 parties may file written objections with the Court. The document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendation.” The parties are
6 advised that failure to file objections within the specified time may waive the right to appeal
7 the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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11 IT IS SO ORDERED.

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13 Dated: June 14, 2011


14 UNITED STATES MAGISTRATE JUDGE