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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EMELITO EXMUNDO,

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

Plaintiff,

ORDER ADOPTING FINDINGS AND  
RECOMMENDATION AND DENYING  
DEFENDANTS' MOTION TO DISMISS

v.

A. K. SCRIBNER, et al.,

(ECF No. 45 & No. 53)

Defendants.

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**ORDER**

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. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 15, 2011, the Magistrate Judge filed a Findings and Recommendation recommending that Defendants' Motion to Dismiss (ECF No. 45) for failure to exhaust be denied. (ECF No. 53.) On July 13, 2011, Defendants filed objections to the Magistrate Judge's Findings and Recommendation disagreeing with the Court's conclusion that

1 Plaintiff attempted to exhaust his administrative remedies but was thwarted by Defendants  
2 who failed to respond to Plaintiff's two prior attempts at exhaustion. Defendants rely on  
3 Hendon v. Baroya, 2007 WL 3034263, \*3 (E.D.Cal. Oct. 16, 2007) for their argument that  
4 Plaintiff's attempts did not exhaust his available administrative remedies and that, once the  
5 third grievance was accepted, Plaintiff should have exhausted then.  
6

7 The Court notes that one major difference between Hendon and the instant action  
8 is that in Hendon the inmate did not submit a sworn statement, but only supplied argument  
9 that he attempted exhaustion, which the Court did not rely on as evidence. Here, Plaintiff  
10 submitted a sworn statement that he attempted to file two grievances which were not  
11 responded to and, thus, the Court will consider it as evidence.  
12

13 Although the Ninth Circuit has not yet ruled on the issue, Ngo v. Woodford, 539 F.3d  
14 1108,1110 (9th Cir. 2008), there is authority for the proposition that if a prisoner submitted  
15 a timely inmate appeal in compliance with the governing regulations and his appeal  
16 received no response, or received a response only after an extraordinary delay, the  
17 prisoner has satisfied the exhaustion requirement. See e.g., Moore v. Bennette, 517 F.3d  
18 717, 725 (4th Cir. 2008); Aquilar-Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir.  
19 2007); Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006); Boyd v. Corrections Corp. of  
20 America, 380 F.3d 989, 996 (6th Cir. 2004); Abney v. McGinnis, 380 F.3d 663, 667 (2d.  
21 2004); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002); Mitchell v. Horn, 318  
22 F.3d 523, 529 (3d Cir. 2003). In addition, in Brown v. Valoff, 422 F.3d 926 (9th Cir. 2005),  
23 the Ninth Circuit Court of Appeals refused to interpret the exhaustion requirements of the  
24 Prison Litigation Reform Act "so narrowly as to permit prison officials to exploit the  
25 exhaustion requirement through indefinite delay in responding to grievances." Brown, 422  
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1 F.3d at 943 n. 18 (internal alterations and marks omitted) (citations omitted).

2 Therefore, even though Plaintiff's third attempt was accepted and processed, the  
3 first two attempts and Defendants failure to respond them effectively exhaustion Plaintiff's  
4 available administrative remedies.

5  
6 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(c) and Local Rule 305,  
7 this Court has conducted a de novo review of this case. Having carefully reviewed the  
8 entire file, the Court finds the Findings and Recommendation to be supported by the record  
9 and by proper analysis. Thus, the Motion to Dismiss is HEREBY DENIED.

10 IT IS SO ORDERED.

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12 Dated: August 1, 2011

  
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CHIEF UNITED STATES DISTRICT JUDGE