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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JASON LATRELL THOMAS,

Plaintiff,

v.

D. SHEPPARD-BROOKS, et al.,

Defendants.

CASE NO. 1:06-cv-01332-LJO-YNP PC

FINDINGS AND RECOMMENDATIONS

(Doc. 48)

Plaintiff Jason Latrell Thomas (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Before the Court is Defendants’ motion to dismiss based on Plaintiff’s failure to properly exhaust all of his administrative remedies prior to filing suit and failure to state a claim. (Doc. #48.) This action is proceeding on Plaintiff’s Third Amended Complaint filed on March 28, 2008 against Defendants M. Castro, D. D. Sheppard-Brooks, K. Frescura, I. Garza, I. Hernandez, James, M. L. Gonzalez, Price, Vikjord, and Wilber (“Defendants”). Plaintiff alleges that Defendants violated Plaintiff’s rights under the First and Eighth Amendments. Defendants filed their motion to dismiss on June 17, 2009. (Doc. #48.) Plaintiff filed an opposition on July 6, 2009. (Doc. #49.) Defendants filed a reply to Plaintiff’s opposition on July 8, 2009. (Doc. #50.) For the reasons set forth below, the Court recommends that Defendants’ motion to dismiss be partially granted and that this action proceed on Plaintiff’s Eighth Amendment failure to protect claims against Defendants D. D. Sheppard-Brooks, I. Garza, M. L. Gonzales, Wilber, and James. The Court recommends that all other claims be dismissed due to Plaintiff’s failure to exhaust his administrative remedies.

1 **I. Defendants' Motion to Dismiss**

2 Plaintiff alleges that Defendants violated his constitutional rights while he was incarcerated
3 at the California State Prison in Corcoran, California ("CSP-Corcoran"). Plaintiff claims that
4 Defendants Wilber, Vikjord, Frescura, Price, Castro, and Hernandez censored his outgoing mail in
5 violation of his rights under the First Amendment. Plaintiff claims that Defendants Vikjord, Wilber,
6 Castro, Frescura, Price, and Hernandez violated Plaintiff's rights under the Eighth Amendment by
7 attacking Plaintiff while he was shackled and not resisting, and by tainting Plaintiff's meals with
8 liquid detergent. Plaintiff claims that the actions by Defendants Wilber, Vikjord, Price, Frescura,
9 Hernandez, and Castro were out of retaliation against Plaintiff's exercise of his protected right to file
10 grievances against the government and that they engaged in other retaliatory actions against Plaintiff.
11 Finally, Plaintiff claims that Defendants D. D. Sheppard-Brooks, I. Garza, M. L. Gonzales, Wilber,
12 and James violated Plaintiff's Eighth Amendment rights through their deliberate indifference to a
13 serious threat to Plaintiff's safety. Plaintiff alleges that he was given an R-suffix and that Defendants
14 did not respond to his complaints that the R-suffix placed his life in danger from attack by other
15 inmates.

16 Defendants filed their motion to dismiss on June 17, 2009. Defendants argue that they are
17 entitled to dismissal because Plaintiff failed to properly exhaust his administrative remedies prior
18 to filing this action and because Plaintiff's allegations fail to state a claim. Defendants allege that
19 Plaintiff filed seven administrative grievances concerning his incarceration at CSP-Corcoran before
20 he initiated this action. (Mem. of P. & A. in Supp. of Mot. to Dismiss Pl.'s Compl. 5:24-25.)
21 Defendants further allege that five of those seven grievances had not yet been completed when
22 Plaintiff initiated this lawsuit on September 25, 2006. (Mem. of P. & A. in Mot. to Dismiss 5:25-
23 6:1.) Defendants allege that the remaining grievances were factually insufficient to put the
24 institution on notice of Plaintiff's present claims. (Mem. of P. & A. in Mot. to Dismiss 6:1-2.)

25 Defendants also argue that Plaintiff's allegations fail to state a claim against Sheppard-
26 Brooks or Garza. (Mem. of P. & A. in Mot. to Dismiss 9:17-18.) Defendants argue that Plaintiff
27 has failed to allege that Sheppard-Brooks or Garza were aware that Plaintiff had been double-celled
28 after he received his R-suffix and did not act with deliberate indifference. (Mem. of P. & A. in Mot.

1 to Dismiss 9:18-11:17.) Defendants also argue that Plaintiff fails to state a claim for retaliation
2 based on his tainted meals because Plaintiff does not allege it was motivated by protected conduct.
3 (Mem. of P. & A. in Mot. to Dismiss 11:18-12:2.) Finally, Defendants argue that Defendant
4 Gonzales is entitled to dismissal because her actions (denying Plaintiff's administrative grievance
5 requesting that his R-suffix be removed) were not sufficient to state a claim. (Mem. of P. & A. in
6 Mot. to Dismiss 12:3-13:13.)

7 In his opposition, Plaintiff argues that his administrative grievance complaining about his R-
8 suffix, grievance Log No. 06-2480, was partially granted on August 8, 2006. (Pl.'s Opp'n to Defs.'
9 Mot. to Dismiss His Compl. 1.) Plaintiff claims that at that point, the appeal was completed because
10 there was no further relief available, though Plaintiff concedes that he continued to pursue his
11 grievance to the Director's Level. (Pl.'s Opp'n 1.) However, Plaintiff also alleges that his R-suffix
12 was not removed until October 5, 2006. (Pl.'s Opp'n 9.)

13 Plaintiff alleges that his grievance complaining about his dangerous cell-mate, grievance Log
14 No. 06-3161, was exhausted before filing suit because it was an emergency appeal that was not
15 processed within the five day time limit for emergency grievances because prison staff re-classified
16 it as a normal prison grievance. (Pl.'s Opp'n 2.) Plaintiff also makes vague allegations that
17 Defendants impeded Plaintiff's ability to exhaust by refusing or throwing away his grievances. (Pl.'s
18 Opp'n 3.) Plaintiff also argues that his amended complaint was filed on March 28, 2008, long after
19 his administrative grievances were fully exhausted. (Pl.'s Opp'n 1.)

20 In their reply to Plaintiff's opposition, Defendants argue that Plaintiff did not exhaust. First,
21 Defendants argue that Plaintiff's vague allegations that he submitted an unidentified grievance that
22 was rejected as untimely does not excuse him from exhausting. (Reply in Supp. of Mot. to Dismiss
23 Pl.'s Compl. 2:20-25.) Defendants further concede that some responses to Plaintiff's grievances
24 were untimely, however, the delays do not excuse Plaintiff from the exhaustion requirement because
25 Plaintiff could have filed a timely appeal to the next level of review. (Reply 2:26-3:8.) In their
26 reply, Defendants also withdraw their argument that Plaintiff has failed to link Sheppard-Brooks to
27 any constitutional violation. (Reply 6 n.4.) Defendants continue to argue that Garza has not been
28 linked to any constitutional violations and that both Sheppard-Brooks and Garza have not been

1 shown to have acted with deliberate indifference. (Reply 6:9-8:6.) Defendants also continue to
2 argue that Plaintiff failed to allege that Defendants' tainting his meals was motivated by protected
3 conduct and that Gonzales' actions are not sufficient to hold him/her liable. (Reply 8:7-9:20.)

4 Plaintiff thereafter filed a motion "to Supplement his Opposition to the Defendants' Motion
5 to Dismiss Points & Authorities." (Doc. #51.) Plaintiff alleges that the prison official who
6 responded to grievance Log No. COR-6-06-02480 told Plaintiff that the appeal was completed.
7 (Pl.'s First Req. Asking to Allow Him to Supplement His Opp'n to the Defs.' Mot. to Dismiss P. &
8 A. 1.) Plaintiff also reiterates that he has effectively exhausted his administrative remedies because
9 his attempts to appeal were sufficient to put Defendants on notice of his claims, and that his remedies
10 were exhausted by the time Plaintiff filed his Third Amended Complaint. (Pl.'s Supplement 2.)

11 **II. Discussion**

12 **A. Failure to Exhaust**

13 Defendants argue that Plaintiff failed to properly exhaust his administrative remedies.
14 Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to
15 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any
16 jail, prison, or other correctional facility until such administrative remedies as are available are
17 exhausted." 42 U.S.C. § 1997e(a). The section 1997e(a) exhaustion requirement applies to all
18 prisoner suits relating to prison life. Porter v. Nussle, 435 U.S. 516, 532 (2002). "All 'available'
19 remedies must now be exhausted; those remedies need not meet federal standards, nor must they be
20 'plain, speedy, and effective.'" Porter, 534 U.S. at 524 (citing Booth v. Churner, 532 U.S. 731, 739
21 n.5 (2001)). Prisoners must complete the prison's administrative process, regardless of the relief
22 sought by the prisoner and regardless of the relief offered by the process, as long as the
23 administrative process can provide some sort of relief on the complaint stated. Booth, 532 U.S. at
24 741.

25 The California Department of Corrections has an administrative grievance system for
26 prisoner complaints. Cal. Code Regs., tit. 15 § 3084, et seq. "Any inmate or parolee under the
27 department's jurisdiction may appeal any departmental decision, action, condition, or policy which
28 they can reasonably demonstrate as having an adverse effect upon their welfare." Cal. Code Regs.

1 tit 15, § 3084.1(a). Four levels of appeal are involved, including the informal level, first formal
2 level, second formal level, and third formal level, also known as the “Director’s Level.” Cal. Code
3 Regs. tit 15, § 3084.5.

4 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
5 defense which Defendants have the burden of raising and proving the absence of exhaustion. Wyatt
6 v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust nonjudicial administrative
7 remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a
8 summary judgment motion. Id. at 1119 (citing Ritza v. Int’l Longshoremen’s & Warehousemen’s
9 Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)). In deciding a motion to dismiss for failure
10 to exhaust administrative remedies, the court may look beyond the pleadings and decide disputed
11 issues of fact. Id. at 1119-20. If the court concludes that the prisoner has failed to exhaust
12 administrative remedies, the proper remedy is dismissal without prejudice. Id.

13 The Ninth Circuit has not yet decided whether exceptions to the PLRA’s exhaustion
14 requirement exist. Ngo v. Woodford, 539 F.3d 1108, 1110 (9th Cir. 2008). However, other circuits
15 have held that the exhaustion requirement is satisfied when prison officials prevent exhaustion from
16 occurring through misconduct, or fail to respond to a grievance within the policy time limits. See,
17 e.g. Moore v. Bennette, 517 F.3d 717, 725 (4th Cir.2008) (“[A]n administrative remedy is not
18 considered to have been available if a prisoner, through no fault of his own, was prevented from
19 availing himself of it.”); Aquilar-Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir.2007) (Courts
20 are “obligated to ensure any defects in exhaustion were not procured from the action of inaction of
21 prison officials.”); Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir.2006) (administrative remedy not
22 available if prison employees do not respond to a properly filed grievance or use affirmative
23 misconduct to prevent a prisoner from exhausting); Boyd v. Corrections Corp. of America, 380 F.3d
24 989, 996 (6th Cir.2004) (“administrative remedies are exhausted when prison officials fail to timely
25 respond to properly filed grievance”); Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004)
26 (inability to utilize inmate appeals process due to prison officials’ conduct or the failure of prison
27 officials to timely advance appeal may justify failure to exhaust); Jernigan v. Stuchell, 304 F.3d
28 1030, 1032 (10th Cir.2002) (the failure to respond to a grievance within the policy time limits

1 renders remedy unavailable); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir.2002) (when prison
2 officials fail to respond, the remedy becomes unavailable, and exhaustion occurs); Foulk v. Charrier,
3 262 F.3d 687, 698 (8th Cir.2001) (district court did not err when it declined to dismiss claim for
4 failure to exhaust where prison failed to respond to grievance); Powe v. Ennis, 177 F.3d 393, 394
5 (5th Cir.1999) (when a valid grievance has been filed and the state’s time for responding has expired,
6 the remedies are deemed exhausted); Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir.1998) (when
7 time limit for prison’s response has expired, the remedies are exhausted); see also Mitchell v. Horn,
8 318 F.3d 523, 529 (3d Cir.2003) (recognizing that a remedy prison officials prevent a prisoner from
9 utilizing is not an available remedy); Brown v. Croak, 312 F.3d 109, 113 (3d Cir.2002) (formal
10 grievance procedure not available where prison officials told prisoner to wait for termination of
11 investigation before filing formal grievance and then never informed prisoner of termination of
12 investigation); Miller v. Norris, 247 F.3d 736, 740 (8th Cir.2001) (a remedy prison officials prevent
13 a prisoner from utilizing is not an available remedy).

14 **1. Plaintiff’s Grievances**

15 Defendants identify seven grievances that Plaintiff filed before Plaintiff initiated this lawsuit.
16 Two of the grievances concern issues that do not address the claims in this lawsuit (Log No. COR-6-
17 06-03507 regarding delays in medical treatment, Log No. COR 6-06-03242 regarding Plaintiff’s
18 attempts to obtain copies of documents in his central file). (Mem. of P. & A. in Mot. to Dismiss 6:3-
19 16.) Thus, these grievances do not exhaust the administrative remedies for any claims that are the
20 subject of this lawsuit.

21 Defendants allege that grievance Log No. COR-6-06-2480 appealed Plaintiff’s R-suffix, but
22 was not exhausted before Plaintiff filed suit because the Director’s Level decision was not issued
23 until January 2007. (Mem. of P. & A. in Mot. to Dismiss 6:17-20.) In response, Plaintiff alleges that
24 Log No. COR-6-06-2480 was “partially granted” on August 8, 2006. (Pl.’s Opp’n to Def.’s Mot.
25 to Dismiss His Compl. Mem. of P. & A. 4:6-8.) Plaintiff argues that his administrative remedies
26 were exhausted at this point because he sought money damages and there was no other relief
27 available beyond what was “partially granted.” (Plaintiff’s Opp’n 1.) However, two allegations in
28 Plaintiff’s opposition contradict that argument. First, the fact that Plaintiff continued to appeal the

1 grievance after it was “partially granted” suggests that further relief was available. Secondly, and
2 more definitely, Plaintiff concedes that “[b]ased on that appeal (Log No. COR-6-06-2480) the “R”
3 suffix was removed on October 5, 2006.” (Pl.’s Opp’n Mem. of P. & A. 4:9-10.) Thus, further relief
4 was available in the form of removal of the R-suffix, which occurred after Plaintiff appealed the
5 “partially granted” lower level appeal and after Plaintiff initiated this action. Thus, remedies were
6 still available when Plaintiff filed suit and the administrative grievance process involving grievance
7 Log No. COR-6-06-2480 was not completed when this action was initiated.

8 Grievance Log No. COR-06-4077 alleged retaliation by Gonzales because she did not want
9 to do her job and sent confidential information about Plaintiff’s R-suffix to Plaintiff via institutional
10 mail. (Mem. of P. & A. in Mot. to Dismiss 6:21-23.) Defendants allege that this grievance was filed
11 September 24, 2006 (one day before this action was initiated) and the Director’s Level response was
12 issued in April 2007. (Mem. of P. & A. in Mot. to Dismiss 6:24-26.) Plaintiff does not dispute any
13 of these facts. Thus, grievance Log No. COR-06-4077 did not exhaust the administrative remedies
14 for any of the claims that are the subject of this lawsuit.

15 Grievance Log No. COR-6-06-03778 alleged that Defendants Frescura, Wilber, Carter, and
16 Price starved black inmates in retaliation for filing administrative grievances and housed Plaintiff
17 in a broken cell. (Mem. of P. & A. in Mot. to Dismiss 7:1-3.) Defendants allege that the grievance
18 was not exhausted before Plaintiff filed suit because the Director’s Level response was issued in
19 February 2007. Mem. of P. & A. in Mot. to Dismiss 7:4-5.) Plaintiff does not dispute any of these
20 facts. Thus, grievance Log No. COR-6-06-03778 did not exhaust the administrative remedies for
21 any of the claims that are the subject of this lawsuit.

22 Grievance Log No. COR-06-3190 alleged that Plaintiff was housed in a cell without lights
23 and that Plaintiff previously appealed the issue but did not receive a response. (Mem. of P. & A. in
24 Mot. to Dismiss 7:15-17.) Defendants allege that Plaintiff was moved to a cell with adequate
25 lighting before a first level response granted the grievance. (Mem. of P. & A. in Mot. to Dismiss
26 7:17-19.) Defendants argue that this grievance did not put prison officials on notice because nothing
27 in the grievance indicated that Plaintiff was intentionally housed in a cell without lights out of
28 retaliation for Plaintiff’s protected conduct. (Mem. of P. & A. in Mot. to Dismiss 7:22-26.) Plaintiff

1 does not dispute any of these facts. The Court finds that Plaintiff did not provide enough
2 information in his grievance to allow prison officials to take appropriate responsive measures. See
3 Griffin v. Arpaio, 557 F.3d 1117, 1121 (9th Cir. 2009) (quoting Johnson v. Testman, 380 F.3d 691,
4 697 (2d Cir. 2004)). Plaintiff's legal claims are not that he was placed in a cell without light, but that
5 Defendants had placed him in that cell out of retaliation for Plaintiff's exercise of protected conduct.
6 Plaintiff was moved to a cell with a working light, and thus prison officials likely concluded that the
7 grieved of problem was solved. Because Plaintiff failed to notify prison officials that the cell
8 housing was retaliatory, Plaintiff's grievance did not provide them with adequate notice to address
9 the problem. Thus, grievance Log No. COR-06-3190 did not exhaust the administrative remedies
10 for any of the claims that are the subject of this lawsuit.

11 Grievance Log No. COR-6-06-03161 alleged that Defendants Gonzales, Garza, and Wilber
12 failed to protect Plaintiff from harm caused by the R-suffix. (Mem. of P. & A. in Mot. to Dismiss
13 7:6-8.) Defendants allege that the grievance was responded to on October 3, 2006—after Plaintiff
14 initiated suit. (Mem. of P. & A. in Mot. to Dismiss 7:8-9.) Defendants further allege that the
15 informal and first levels of review were initially bypassed, but the grievance was later reclassified
16 and remanded back to the first level of review where it was partially granted. (Mem. of P. & A. in
17 Mot. to Dismiss 7:9-11.) Defendants allege that Plaintiff never appealed the grievance to the second
18 or Director's levels of review. (Mem. of P. & A. in Mot. to Dismiss 7:11-12.) Plaintiff alleges that
19 he filed grievance Log No. COR-6-06-03161 on August 6, 2006. (Pl.'s Opp'n Mem. of P. & A.
20 4:25-26.) Plaintiff alleges that Defendants did not respond within the 30 days given for first level
21 review, or the 20 working days given for second level review. (Pl.'s Opp'n Mem. of P. & A. 4:26-
22 5:8.) Plaintiff then filed a third level grievance but it was rejected. (Pl.'s Opp'n Mem. of P. & A.
23 5:6-8.) Defendants respond by conceding that the response was untimely, but that remedies
24 remained available and that Plaintiff's lawsuit was still premature because it takes sixty working
25 days to receive a Director's Level response after Plaintiff completes all the lower levels of review.
26 (Reply 3:17-24.)

27 The Court begins its analysis by adopting the position held by other circuits that the
28 exhaustion requirement is satisfied when prison officials ignore a grievance by failing to respond

1 within the policy time limits. Both Plaintiffs and Defendants agree that Plaintiff's grievance Log No.
2 COR-6-06-03161 was filed on August 6, 2006. Plaintiff had not received any response when he filed
3 suit on September 25, 2006. Plaintiff's grievance was treated as a first level grievance, and thus
4 Plaintiff should be able to rely on prison officials responding to the grievance within the policy time
5 limits for first level grievance. That prison officials could have theoretically given themselves more
6 time by classifying the grievance as a Director's Level grievance does not excuse prison officials
7 from meeting their own policy time limits. Thus, the Court finds that when Plaintiff filed suit on
8 September 25, 2006, his administrative remedies for the claims brought in grievance Log No. COR-
9 6-06-03161 were exhausted because prison officials failed to respond to the grievance within policy
10 time limits. The Court further finds that Plaintiff's actions in pursuing higher levels of appeal when
11 he finally received a response after he initiated this lawsuit did not "un-exhaust" his claims. Thus,
12 Plaintiff's administrative remedies related to his claims that Defendants' failed to protect Plaintiff
13 from the risk of harm caused by his R-suffix are exhausted.

14 **2. Other Claims**

15 Plaintiff alleges that he filed a number of grievances after he initiated this lawsuit.
16 Grievances that Plaintiff filed after initiating this lawsuit do not properly exhaust his administrative
17 remedies. Plaintiff must fully exhaust his administrative remedies before filing suit, not before filing
18 any amended complaint. A prisoner does not comply with the exhaustion requirement by exhausting
19 available remedies during the course of litigation. McKinney v. Carey, 311 F.3d 1198, 1199 (9th
20 Cir. 2002). By extension, any claims premised on events that occurred after Plaintiff filed suit
21 cannot be added to this action because Plaintiff's administrative remedies concerning those claims
22 could not have been exhausted prior to initiating this action. Plaintiff's argument that those claims
23 were exhausted by the time he filed his Third Amended Complaint is unavailing. Those claims
24 cannot be added to this lawsuit because the relevant deadline is the date that this action was
25 initiated—September 25, 2006. Any claims exhausted after that date must be brought in a separate
26 action.

27 Plaintiff sets forth other arguments that either his administrative remedies should be deemed
28 exhausted, or that he is excused from exhausting. Plaintiff alleges that he put prison officials on

1 notice via letters and complaints addressed directly to the warden, or other prison officials. Plaintiff
2 also alleges that his mother filed a complaint on his behalf. (Pl.'s Opp'n Mem. of P. & A. 4:20-23.)
3 Defendants are correct in pointing out that the exhaustion requirement requires proper exhaustion,
4 which means complying with the prison's procedural rules for filing administrative grievances. The
5 touchstone inquiry of the exhaustion requirement is whether Plaintiff properly exhausted his
6 administrative remedies, not whether Plaintiff put Defendants on notice of his claims. There is no
7 indication that informal letters and letters from Plaintiff's mother are acceptable methods for
8 pursuing administrative remedies in CSP-Corcoran's grievance system.

9 Plaintiff also alleges that many of his grievances were ignored, not responded to, stolen,
10 and/or destroyed. Plaintiff's allegations of ignored, lost, stolen, and destroyed grievances are too
11 vague to effectively rebut Defendants' claims that Plaintiff has failed to exhaust his administrative
12 remedies. Plaintiff provides no details regarding the contents of any of these grievances or when he
13 attempted to file them. Thus, Plaintiff has not provided the Court with any allegations or evidence
14 that suggest his administrative remedies for the claims that are the subject of these lawsuits were
15 obstructed. Had Plaintiff identified the contents of the ignored, lost, stolen, or destroyed grievances,
16 the Court may be able to determine that Plaintiff's administrative remedies for those claims were
17 obstructed. However, the vague allegation that some grievances were ignored is not sufficient to
18 support the inference that Plaintiff's administrative remedies were wrongfully obstructed for all of
19 his claims, particularly when there is ample evidence that many of Plaintiff's grievances were
20 recorded and responded to. Plaintiff fails to rebut Defendant's showing that Plaintiff failed to
21 exhaust his administrative remedies for all his claims except Plaintiff's claims regarding the danger
22 to his safety posed by the R-suffix.

23 **B. Failure to State a Claim**

24 **1. Claims Against Defendants Sheppard-Brooks and Garza**

25 Defendants argue that Plaintiff has failed to state a claim against Defendants Sheppard-
26 Brooks and Garza because (1) Plaintiff fails to allege a link between Garza and the alleged
27 constitutional violations; and (2) Plaintiff fails to allege that Sheppard-Brooks and Garza acted with
28 deliberate indifference.

1 Plaintiff was transferred to CSP-Corcoran on April 14, 2006. (Compl. ¶ 19.) Defendant
2 Garza was assigned as his correctional counselor. (Compl. ¶ 19.) Plaintiff informed members of
3 the ICC that his life was in danger because of the R-suffix on multiple occasions “prior to and on”
4 April 27, 2006. (Compl. ¶ 19.) Sheppard-Brooks and Garza did not remove the R-suffix. (Compl.
5 ¶ 22.) Plaintiff was double-celled at the end of June 2006. (Compl. ¶ 22.) Defendants argue that
6 “[a]t most, [Plaintiff’s] allegations show that [Sheppard-Brooks and Garza] knew that [Plaintiff]
7 believed his R-suffix was unjustified and created safety concerns.” (Mem. of P. & A. in Mot. to
8 Dismiss 10:24-26.) Defendants argue that Garza has not been linked to any constitutional violation
9 because Plaintiff was not double-celled at any point in time when he was Plaintiff’s correctional
10 counselor, and thus, Plaintiff was never in danger at any point in time when Garza was Plaintiff’s
11 correctional counselor. Defendants further argue that Plaintiff has not alleged that Sheppard-Brooks
12 or Garza acted with deliberate indifference because Plaintiff has not alleged that they knew the R-
13 suffix was improper, or knowingly disregarded any substantial, serious risk to his safety. Defendants
14 conclude that at most, Sheppard-Brooks and Garza were aware of the hypothetical risk that Plaintiff
15 could have faced if he were double-celled with another inmate in the future.

16 Defendants argue that there is no established constitutional right not to be assigned an R-
17 suffix. However, the relevant inquiry is not whether Plaintiff has a right not to be assigned an R-
18 suffix. Even if an R-suffix is properly assigned, if a prisoner notifies prison authorities that his R-
19 suffix placed him in substantial risk of serious harm, prison authorities are required by the
20 constitution to take steps to protect him. Plaintiff alleges that Sheppard-Brooks and Garza both had
21 the power either to remove the R-suffix or to place Plaintiff on single cell status pending
22 investigation of his safety concerns. (Pl.’s Opp’n Mem. of P. & A. 11.) Whether there existed a
23 substantial risk of serious harm at any point in time when Garza was assigned as Plaintiff’s
24 correctional counselor is a factual question that is more appropriately addressed on a motion for
25 summary judgment or at trial. Defendants believe that the risk to Plaintiff had not yet crystallized
26 to the point of an Eighth Amendment violation because Plaintiff was not yet double celled and the
27 risk of his R-suffix being discovered by other inmates was too speculative. Plaintiff contends that
28 both the risk of getting double-celled and the risk of disclosure of the R-suffix were sufficient to

1 warrant preventative action by Sheppard-Brooks and Garza. The Court finds that Plaintiff has
2 alleged enough to overcome a 12(b)(6) motion.

3 **2. Retaliation Claims for Tainted Meals**

4 Defendants argue that Plaintiff fails to state a claim for retaliation based on his allegations
5 that his meals were tainted with pain inducing substances because Plaintiff does not allege that the
6 actions were motivated by protected conduct. (Mem. of P. & A. in Mot. to Dismiss 11:18-12:2.)
7 Because the Court finds that Plaintiff has failed to exhaust his administrative remedies regarding
8 these claims and that the claims should therefore be dismissed, the Court need not address the merits
9 of Defendants' arguments.

10 **3. Claims Against Defendant Gonzales**

11 Defendants argue that Defendant Gonzales is entitled to dismissal because Plaintiff has failed
12 to allege sufficient facts to establish liability. (Mem. of P. & A. in Mot. to Dismiss 12:3-13.)
13 Plaintiff alleges that M. L. Gonzales was a correctional counselor in charge of ensuring the accuracy
14 of Plaintiff's departmental records. (Compl. ¶ 6.) Plaintiff filed an emergency appeal on May 11,
15 2006 to have his R-suffix removed and Gonzales was assigned to process the appeal. (Compl. ¶ 20.)
16 Plaintiff's emergency appeal was treated as a non-emergency appeal and Gonzales denied the appeal
17 with "reckless disregard to the serious risk posed to Plaintiff's health by the R-suffixation." (Compl.
18 ¶ 21.) Gonzales would later concede that the R-suffix was inappropriate and had "actual knowledge
19 of the serious risk posed to Plaintiff's health by the R-suffix," yet "failed to take any or remedial
20 action to remove the R or protect Plaintiff from attack based on the R suffix." (Compl. ¶ 23.)
21 Plaintiff was later attacked twice by his cellmate because of his R-suffix. (Compl. ¶ 25.)

22 Plaintiff's allegations against Defendant Gonzales are sufficient to state a claim. Although
23 Plaintiff's appeal was filed before Plaintiff was actually double-celled, it is possible that a substantial
24 risk it existed even before Plaintiff was double-celled. See discussion supra Part II.B.1. If the
25 probability of Plaintiff being double-celled was sufficiently high, and the probability of his cell-mate
26 discovering his R-suffix was sufficiently high, it may rise to the level of an Eighth Amendment
27 violation for a prison official to ignore the risk when he/she a reasonable opportunity to preemptively
28 eliminate the risk by either removing the R-suffix or by putting Plaintiff on single-cell status.

1 Plaintiff alleges that Gonzales did nothing, which ultimately led to Plaintiff being double-celled,
2 Plaintiff's cell-mate learning about the R-suffix, and Plaintiff being attacked by his cell-mate.

3 Defendants contend that the failure to respond appropriately to an administrative grievance
4 is not actionable in the Ninth Circuit. Defendants' proposition is only partially true. The failure to
5 respond to an administrative grievance is not in itself a violation of the constitution because
6 prisoners do not have a constitutional right to access a prison grievance system. See Ramirez v.
7 Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.3d 639, 640 (9th Cir. 1988).
8 However, if a prisoner alleges that an administrative grievance gave prison authorities actual
9 knowledge of a substantial risk of serious harm to the prisoner and the same prison authorities fail
10 to take any action to protect the prisoner, that prisoner may be able to state a cognizable claim for
11 the violation of his rights under the Eighth Amendment. The cases cited by Defendants are
12 unavailing here. The 9th Circuit in Ramirez and Mann, only held that prisoners have no legitimate
13 claim of entitlement to a grievance procedure, which is not at issue here. In Curtis v. Buckely, 2006
14 U.S. Dist. LEXIS 76201 (E.D. Cal October 10, 2006), the plaintiff claimed that he was denied due
15 process when his inmate appeals were ignored. Here, Plaintiff is not alleging that he has a liberty
16 interest in the processing of his appeals. Plaintiff is alleging that Gonzales knew that Plaintiff's
17 faced a substantial risk of serious harm and acted with deliberate indifference by failing to take steps
18 to protect Plaintiff. Plaintiff is not complaining about the inmate grievance system, Plaintiff is
19 alleging that the inmate grievance system is the means by which Gonzales learned about the
20 substantial risk of serious harm. The second case cited by Defendants, Hooker v. Simon, 2007 U.S.
21 Dist. LEXIS 56824 (E.D. Cal. July 24, 2007), is equally unavailing. In that case, the plaintiff's
22 complaint was dismissed because the plaintiff failed to support his conclusory allegations with
23 adequate factual support to make his claims plausible—a requirement under Federal Rule of Civil
24 Procedure 8. Here, Plaintiff has provided specific factual allegations demonstrating Gonzales' actual
25 knowledge of the risk to Plaintiff's safety and Gonzales' failure to act to protect Plaintiff. Similarly,
26 Hightower v. Schwarzenegger, 2007 U.S. Dist. LEXIS 20520 (E.D. Cal. March 8, 2007), was also
27 based on the non-cognizability of due process claims premised on the denial of inmate grievances
28 and the plaintiff's failure to meet the pleading requirements of Federal Rule of Civil Procedure 8.

1 As such, the Court finds that Plaintiff states a cognizable claim against Gonzales for the violation
2 of Plaintiff's Eighth Amendment rights.

3 **III. Conclusion and Recommendation**

4 Defendants identify seven grievances regarding the conditions at CSP-Corcoran that Plaintiff
5 had filed before initiating this lawsuit. Five of the seven grievances either did not address the events
6 in this complaint or were not fully completed by the time Plaintiff initiated this lawsuit. Grievance
7 Log. No. COR-06-3190 failed to put prison officials on notice about the retaliatory nature of his
8 placement in a cell without working lights, and thus did not fulfill the exhaustion requirement for
9 his retaliation claim.

10 Grievance Log No. COR-6-06-03161 concerned the threat to safety caused by Plaintiff's R-
11 suffix and was completed for purposes of the exhaustion requirement when Plaintiff initiated this
12 lawsuit. All other grievances filed and/or completed after this lawsuit was initiated do not fulfill the
13 exhaustion requirement. Thus, Defendants have adequately met their burden of demonstrating that
14 Plaintiff has failed to exhaust his administrative remedies for his First Amendment freedom of
15 expression claims, First Amendment retaliation claims, and Eighth Amendment use of excessive
16 force claims against Defendants Wilber, Vikjord, Frescura, Price, Castro, and Hernandez.

17 Having determined that Plaintiff's Eighth Amendment failure to protect claims were properly
18 exhausted, the Court rejects Defendants' arguments that Plaintiff's factual allegations fail to establish
19 a claim against Defendants Sheppard-Brooks, Garza, and Gonzales. Plaintiff has sufficiently alleged
20 that Sheppard-Brooks, Garza, and Gonzales were aware of a substantial threat to Plaintiff's safety
21 and failed to take adequate remedial efforts to address that threat. This action should proceed on
22 Plaintiff's Eighth Amendment failure to protect claim against Defendants D. D. Sheppard-Brooks,
23 I. Garza, M. L. Gonzales, Wilber, and James.

24 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 25 1. Defendants' motion to dismiss, filed June 17, 2009, be GRANTED with respect to
26 Plaintiff's First Amendment freedom of expression claims, First Amendment
27 retaliation claims, and Eighth Amendment use of excessive force claims against
28 Defendants Wilber, Vikjord, Frescura, Price, Castro, and Hernandez; and

1 2. Defendants’ motion to dismiss be DENIED with respect to Plaintiff’s Eighth
2 Amendment failure to protect claims against Defendants D. D. Sheppard-Brooks, I.
3 Garza, M. L. Gonzales, Wilber, and James.

4 These Findings and Recommendations will be submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
6 **days** after being served with these Findings and Recommendations, the parties may file written
7 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
8 Findings and Recommendations.” The parties are advised that failure to file objections within the
9 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
10 1153 (9th Cir. 1991).

11 IT IS SO ORDERED.

12 **Dated:** October 16, 2009

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE