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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VENCIL GREEN,

CASE NO. 1:09-cv-01747-AWI-GBC (PC)

Plaintiff,

ORDER DENYING MOTION REQUESTING
THE COURT PRESERVE PLAINTIFF'S
EXHAUSTION OF ADMINISTRATIVE
REMEDIES ON THE RECORD

v.

B. S. DAVIS. et al,

Defendants.

(ECF No. 37)

ORDER

Plaintiff Vencil Green ("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 the Court is Plaintiff's Motion Requesting that the Court Preserve Plaintiff's Exhaustion of Administrative Remedies on the Record. (ECF No. 37.) In his Motion, Plaintiff requests that the Court preserve on the record his exhaustion of administrative remedies. Plaintiff states that exhaustion documents were included as attachments to his original complaint, but not to his Amended Complaint. (ECF Nos. 1 & 35.) Plaintiff then alleges that Defendants "falsified" their Answer (ECF No. 36) by including as an affirmative defense

1 that Plaintiff failed to exhaust his administrative remedies.

2 The Court notes that, at this time in the proceedings, Defendants have not filed any
3 dispositive motion arguing failure to exhaust. Failure to exhaust was referred to in their
4 Answer as an affirmative defense. Federal Rule of Civil Procedure 8(c) requires that when
5 Defendants respond to a pleading, they must affirmatively state any affirmative defense.
6 Failure to exhaust, under the Prison Litigation Reform Act, is an affirmative defense as to
7 which Defendants have the burden of proof. Wyatt v. Terhune, 315 F.3d 1108, 1119, (9th
8 Cir. 2003). Until a pleading is filed contending that Plaintiff has failed to exhaust, Plaintiff
9 need not argue to the contrary.
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11 It appears that Plaintiff is requesting that the Court take judicial notice of the fact that
12 he has exhausted his administrative remedies. The Court will take judicial notice of its own
13 record in this case, United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); however,
14 the Court will not preserve Plaintiff's exhaustion of administrative remedies on the record.
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16 Therefore, Plaintiff's Motion is DENIED.
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21 IT IS SO ORDERED.

22 Dated: June 6, 2011


23 UNITED STATES MAGISTRATE JUDGE
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