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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROBERT LEWIS SMITH,

Plaintiff,

v.

S. PINA, et al.,

Defendants.

CASE NO. 1:11-cv-01651-LJO-MJS (PC)

FINDINGS AND RECOMMENDATIONS TO  
DENY DEFENDANT PINA'S MOTION TO  
DISMISS

(ECF No. 29)

OBJECTIONS DUE WITHIN FOURTEEN  
DAYS

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Plaintiff Robert Lewis Smith ("Plaintiff") is a state prisoner proceeding in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff began this action by filing a Complaint on September 29, 2011. (Compl., ECF No. 1.) On March 20, 2102, the Court screened Plaintiff's Complaint and dismissed it, with leave to amend, for failure to state a claim. (ECF No. 14.) Plaintiff filed a First Amended Complaint. (Am. Compl., ECF No. 17.) The Court issued Findings and Recommendations finding that Plaintiff stated a cognizable claim and recommending that certain claims and defendants be dismissed from this action. (ECF No. 18.) The Findings and Recommendations were adopted. (ECF No. 19.) Plaintiff is currently proceeding on an Eighth Amendment claim against Defendant Pina for his alleged failure to protect Plaintiff.

On December 18, 2012, Defendant Pina filed a motion to dismiss this action on the ground that Plaintiff failed to exhaust his administrative remedies prior to commencing this

1 action. (Def.'s Mot., ECF No. 29.) Plaintiff filed an opposition on January 3, 2013. (Pl.'s  
2 Opp'n, ECF No. 30.) Defendant Pina filed a reply on January 9, 2013. (Def.'s Reply, ECF  
3 No. 31.)

4 Defendant Pina's motion to dismiss is now ready for ruling pursuant to Local Rule  
5 230(I).

6 **I. LEGAL STANDARD**

7 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought  
8 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
9 prisoner confined in any jail, prison, or other correctional facility until such administrative  
10 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Therefore, prisoners are  
11 required to exhaust all available administrative remedies prior to filing suit. Jones v. Bock,  
12 549 U.S. 199, 211 (2007). The Supreme Court held that "the PLRA's exhaustion  
13 requirement applies to all inmate suits about prison life, whether they involve general  
14 circumstances or particular episodes, and whether they allege excessive force or some  
15 other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Further, the exhaustion of  
16 remedies is required, regardless of the relief sought by the prisoner, as long as the  
17 administrative process can provide some sort of relief on the prisoner's complaint. Booth  
18 v. Churner, 532 U.S. 731, 741 (2001).

19 The California Department of Corrections and Rehabilitation ("CDCR") has an  
20 administrative grievance system for prisoner complaints; the process is initiated by  
21 submitting a CDCR Form 602. Cal. Code Regs., tit. 15, §§ 3084.1, 3084.2(a) (2009).  
22 During the time relevant to this case, four levels of appeal existed: an informal level, a first  
23 formal level, a second formal level, and a third formal level, also known as the "Director's  
24 Level"; each successive appeal had to be submitted within fifteen working days of the  
25 event being appealed. Id. at §§ 3084.5, 3084.6(c).<sup>1</sup> To properly exhaust administrative  
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27 <sup>1</sup> Emergency changes to the regulations became effective on January 28, 2011. The changes  
28 occurred after the events at issue here and are therefore irrelevant to the resolution of Defendant's motion  
to dismiss.

1 remedies, a prisoner must comply with the deadlines and other applicable procedural rules.  
2 Woodford v. Ngo, 548 U.S. 81, 93 (2006).

3 The exhaustion requirement of § 1997e(a) is not a pleading requirement, but rather  
4 an affirmative defense. Defendants have the burden of proving plaintiff failed to exhaust  
5 the available administrative remedies before filing a complaint in the District Court. Jones  
6 v. Bock, 549 U.S. 199, 216 (2007). A motion raising a prisoner's failure to exhaust the  
7 administrative remedies is properly asserted by way of an unenumerated motion under  
8 Fed. R. Civ. P 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003); Ritza v. Int'l  
9 Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1998) (per  
10 curium). In determining whether a case should be dismissed for failure to exhaust  
11 administrative remedies, “the court may look beyond the pleadings and decide disputed  
12 issues of fact” in a procedure that is “closely analogous to summary judgment.” Id. at  
13 1119–20. When the court concludes the prisoner has not exhausted all of his available  
14 administrative remedies, “the proper remedy is dismissal without prejudice.” Id.

## 15 **II. PLAINTIFF’S CLAIMS**

16 The essential allegations of Plaintiff’s First Amended Complaint are summarized as  
17 follows:

18 Plaintiff was previously incarcerated at California State Prison, Corcoran (“CSP-  
19 COR”), where the events alleged in the First Amended Complaint occurred.

20 Plaintiff alleges that in 2007 he was diagnosed with a heart condition that caused  
21 fainting. (Am. Compl. at 7.) As a result, he needed to be housed in a bottom bunk on a  
22 downstairs tier, so that if he fainted he would not injure himself in a fall. (Id.) Plaintiff  
23 informed Defendant Pina, the supervising officer, about his medical chrono. (Id. at 4-6.)  
24 Defendant Pina did not accommodate Plaintiff’s medical needs. (Am. Compl. at 5.) On  
25 October 2, 2010, while being escorted up a set of stairs to his upstairs bunk, Plaintiff  
26 suffered a fainting spell, fell down the stairs, and injured his right knee, back, and neck.  
27 (Id.)

1 **III. ARGUMENTS - MOTION TO DISMISS**

2 **A. Defendant Pina's Motion**

3 Defendant Pina moves for dismissal pursuant to 42 U.S.C. § 1997e(a). He argues  
4 that Plaintiff failed to exhaust his administrative remedies prior to filing this action.

5 Plaintiff initiated this action on September 29, 2011. (Compl. at 1.) To have  
6 properly exhausted his claims, Plaintiff must have submitted an inmate appeal regarding  
7 the claims which give rise to this action and obtained a third level decision prior to  
8 September 29, 2011. Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); McKinney v. Carey,  
9 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam).

10 The incident at issue in Plaintiff's action occurred on October 2, 2010. (Am. Compl.  
11 at 5.) After this date, Plaintiff filed one relevant appeal, "Corcoran 10-02894", regarding  
12 the event at issue and requesting that prison staff be ordered to adhere to his  
13 accommodation chronos. (Campbell Decl., ECF No. 29-3 at Ex B.) This appeal was  
14 partially granted at the first and second levels. (Id.) At the third level, Plaintiff's appeal was  
15 returned to Plaintiff and not processed because Plaintiff failed to complete Section H of the  
16 appeal. (Lozano Decl., ECF No. 29-4 at ¶ 9.) No appeal related to the incident at issue  
17 in this action was exhausted to the third level. (Id. at ¶ 8.)

18 Defendant Pina argues that since Plaintiff failed to exhaust his administrative  
19 remedies, his First Amended Complaint should be dismissed.

20 **B. Plaintiff's Opposition**

21 Plaintiff responds that he filed another appeal, not mentioned in Defendant Pina's  
22 motion, that exhausted his administrative remedies. (Pl.'s Opp'n at 5, Ex. C.) The appeal  
23 to which he refers was filed on October 28, 2010, and, mentioning the October 2, 2010  
24 fainting incident, requests a lower bunk assignment. (Id. at Ex. C.) This appeal was  
25 granted at the informal level without being given a file number. (Id.) Plaintiff was given a  
26 lower tier bunk. (Id.)

27 Plaintiff argues that because this appeal was granted and he received his requested  
28 relief, he was not required to appeal it further, and so he exhausted his administrative

1 remedies.

2 **C. Defendant Pina's Reply**

3 Defendant Pina alleges that the appeal that was granted on the informal level was  
4 not sufficient for exhaustion purposes because it was untimely submitted and did not deal  
5 with the issues in Plaintiff's First Amended Complaint. (Def.'s Reply at 3.)

6 **IV. ANALYSIS**

7 **A. Corcoran 10-02894 Appeal**

8 Defendant Pina is correct in arguing that Plaintiff's Corcoran 10-02894 appeal did  
9 not exhaust remedies prerequisite to this case under 42 U.S.C. § 1997e(a). Although the  
10 appeal was partially granted at the first level, Plaintiff was not satisfied with the relief and  
11 appealed it to the second level (Campbell Decl. at Ex B) and then to the third level (id.).  
12 Plaintiff's appeal was denied on the third level because it was incomplete; he was given  
13 an opportunity to correct the omission, re-file and exhaust the appeal. (Lozano Decl., ECF  
14 No. 29-4 at ¶ 9.) He did not do so. (Id.) Plaintiff's failure to obtain a decision on this  
15 appeal at the third level was a failure to exhaust available remedies. Woodford v. Ngo, 548  
16 U.S. at 83-84.

17 **B. October 18, 2010 Appeal**

18 Defendant Pina is incorrect in arguing that Plaintiff's October 18, 2010 appeal did  
19 not serve to exhaust under 42 U.S.C. § 1997e(a). This appeal was granted at the informal  
20 level and so no further action was required of Plaintiff to exhaust. Nevertheless,  
21 Defendant Pina argues that it was untimely and contains insufficient information for  
22 exhaustion purposes.

23 1. Untimeliness

24 Prison officials accepted and processed Plaintiff's late prison appeal and provided  
25 him with a full grant of relief at the informal level. (Pl.'s Opp'n at 5, Ex. C.) Such action  
26 estops Defendant from asserting an untimeliness defense.

27 a. Equitable Exception to Exhaustion

28 The exhaustion requirement of Woodford may be avoided where the facts of the

1 case demonstrate a defense of waiver, estoppel, or equitable tolling. Johnson v. Ford,  
2 261 F. Appx. 752, 753 (5th Cir. 2008).

3 The United States Supreme Court and the Ninth Circuit Court of Appeals have not  
4 decided whether the PLRA's exhaustion requirement is subject to exception. Woodford,  
5 548 U.S. at 104 (Breyer, J., concurring) (assuming exceptions apply); Ngo v. Woodford,  
6 539 F.3d 1108, 1110 (9th Cir. 2008) ("It is unclear whether we can read exceptions into the  
7 PLRA's exhaustion requirement.").

8 However, many other circuits have concluded that an exception exists, or  
9 exhaustion has been completed, where the petitioner could not properly exhaust due to  
10 the conduct or inaction of prison officials. See e.g. Moore v. Bennette, 517 F.3d 717, 725  
11 (4th Cir. 2008) ("[A]n administrative remedy is not considered to have been available if a  
12 prisoner, through no fault of his own, was prevented from availing himself of it.");  
13 Aquilar-Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (stating that courts  
14 must "ensure any defects in exhaustion were not procured from the action or inaction of  
15 prison officials"); Kaba v. Stepp, 458 F.3d 678, 684 (7th Cir. 2006) (holding an  
16 administrative remedy unavailable under the PLRA where prison staff fail to respond to a  
17 properly-filed grievance or commit misconduct that prevents exhaustion); Abney v.  
18 McGinnis, 380 F.3d 663, 667 (2d Cir. 2004) (administrative remedies not available under  
19 the PLRA, and defendants estopped from raising non-exhaustion where the petitioner  
20 could not use the administrative appeals process due to prison officials' conduct or failure  
21 to timely process the appeal).

22 Estoppel may be found where actions taken by defendant prevent a plaintiff from  
23 filing suit. Lukovsky v. City and County of San Francisco, 535 F.3d 1044, 1051-52 (9th  
24 Cir. 2008), citing Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990).  
25 Under California law, equitable estoppel requires that: (1) the party to be estopped must  
26 be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or  
27 must so act that the party asserting the estoppel had a right to believe it was so intended;  
28 (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the

1 party asserting the estoppel must reasonably rely on the conduct to his or her injury.  
2 Lukovsky, 535 F.3d at 1051, citing Honig v. San Francisco Planning Dep't, 127 Cal.App.4th  
3 520, 529 (Cal. Ct. App. 2005).

4 b. Defendant is Estopped to Assert Untimeliness

5 Defendant Pina asserts an untimeliness defense to Plaintiff's appeal even though  
6 the appeal was never rejected or cancelled for untimeliness. Plaintiff was given no notice  
7 of, or opportunity to administratively appeal, untimeliness; his appeal was accepted.<sup>2</sup>  
8 Plaintiff was unable to exhaust his administrative remedies as to any untimeliness defense  
9 due to prison officials' failure to reject or cancel his appeal on that basis. No other or  
10 further administrative review process was made available. See Hill v. Curcione, 657 F.3d  
11 116, 125 (2d Cir. 2011) (a late filing that is accepted and decided on the merits fulfills the  
12 exhaustion requirement of the PLRA); cf. Payne v. Pitkins, 447 F. Appx. 291, 292 (3d Cir.  
13 2011) (failure to exhaust found where inmate's claim was filed well past the fifteen day  
14 time-frame for filing grievance, was rejected as untimely, and inmate then failed to appeal  
15 the rejection).

16 Plaintiff can not be said to have procedurally defaulted in his appeal recourse as to  
17 such an "untimely" claim. See Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004) (inmate  
18 does not procedurally default, so as to fail to exhaust where not on notice of need to grieve  
19 a particular form of relief). Moreover, Plaintiff's appeal was processed by prison officials  
20 and complete relief was granted at the informal level, exhausting all available  
21 administrative remedies. Woodford, 548 U.S. at 87.

22 The actions of prison officials prevented Plaintiff from timely pursuing administrative  
23 remedies on Defendant's proffered untimeliness defense. The Woodford Court suggests  
24 that acceptance of a late appeal would not place an inmate in procedural default of  
25 administrative remedies absent some other procedural violation. See Woodford, 548 U.S.  
26 at 95 ("[A]cceptance of [a] late grievance would not thwart the prisoner's wish to bypass

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28 <sup>2</sup> Untimeliness as grounds for rejecting an appeal may be separately appealed. See Cal. Code  
Regs. tit. 15 § 3084.6(e).

1 the administrative process; the prisoner could easily achieve this by violating other  
2 procedural rules until the prison administration has no alternative but to dismiss the  
3 grievance on procedural grounds.”). Acceptance of Plaintiff’s late appeal was  
4 unaccompanied by any further procedural infirmity. The appeal was not dismissed on  
5 procedural grounds.

6 Defendant Pina argues that refusal to recognize the untimeliness defense will make  
7 prison officials disinclined to investigate and voluntarily remedy untimely claims of  
8 mistreatment for fear of forfeiting a valid untimeliness defense. The policy argument is  
9 unavailing here because prison officials granted the appeal on the merits at the informal  
10 level without ever raising untimeliness. The Court denies the instant motion based not  
11 upon waiver of untimeliness, but rather estoppel to assert untimeliness.

12 c. Estoppel Furthers Justice and Policy

13 Exhaustion requirements may be excused where dismissal would not further the  
14 interests of justice or the purposes of the exhaustion requirement. Johnson, 261 F. Appx.  
15 at 755. The doctrine of exhaustion of administrative remedies serves the main purposes  
16 of affording an agency “an opportunity to correct its own mistakes with respect to the  
17 programs it administers before it is haled into federal court,” discouraging “disregard of [the  
18 agency’s] procedures”, and “promot[ing] efficiency” by resolving claims outside of litigation.  
19 Woodford, 548 U.S. at 88.

20 Prison officials had the benefit of reviewing and granting Plaintiff’s appeal. Plaintiff  
21 apparently received all the relief he sought under the appeal. Plaintiff was required to  
22 appeal beyond the informal level only if he disagreed with the informal level response.  
23 (Pl.’s Opp’n at Ex. C.) Since he did not so disagree, no other or further administrative  
24 review process remained available to Plaintiff.

25 To now find Plaintiff’s appeal untimely would not further the principles underlying the  
26 exhaustion doctrine because complete review on the merits by full grant of relief at the  
27 second level was accomplished. See Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir.  
28 2010) (inmate’s failure to exhaust under PLRA excused where he took reasonable and

1 appropriate steps to exhaust and was precluded not through his own fault but by the  
2 mistake of prison staff); see also Jones v. Plessas, 2011 WL 5593038 at \*1 (E.D. Cal.  
3 November 16, 2011), citing Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005) (a  
4 prisoner need not exhaust further levels of review once he has been reliably informed by  
5 an administrator that no more remedies are available).

6 The primary purpose of a grievance is to alert the prison to a problem and facilitate  
7 its resolution.” Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). This Plaintiff  
8 accomplished.

## 9 2. Notification

10 The Court previously found that Plaintiff’s pleading raised a cognizable Eighth  
11 Amendment claim arising from Defendant Pina’s alleged failure to protect Plaintiff. The  
12 appeal submitted by Plaintiff reflect his concerns regarding his bunk placement, and in the  
13 appeal he asks for protection by being provided a lower tier bunk. (Pl.’s Opp’n at Ex. C.)  
14 Considering Plaintiff’s appeal as a whole and as broadly as reasonable, it appears it  
15 adequately described his concerns and the remedy he sought in the same way as is now  
16 asserted in his First Amended Complaint.. Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir.  
17 2009) (a grievance is only sufficient if “it alerts the prison to the nature of the wrong for  
18 which redress is sought”). Plaintiff’s appeal mentioned his October 2010 fainting episode  
19 and explained why he felt a lower tier bunk was necessary. (Pl.’s Opp’n at Ex. C.)  
20 Although Plaintiff does not mention Defendant Pina by name, he was not required to do  
21 so in his appeal for exhaustion purposes. Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir.  
22 2010) (prisoners are not required to identify responsible parties or otherwise signal who  
23 may be sued). This appeal alerted the prison to the nature of the wrong and gave it an  
24 opportunity to correct or respond to that wrong. Plaintiff’s grievance was sufficient to  
25 exhaust his claim against Defendant Pina for failing to protect Plaintiff.

## 26 **III. CONCLUSION AND RECOMMENDATION**

27 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendant Pina’s  
28 motion to dismiss (ECF No. 29) be denied.

1 These Findings and Recommendations are submitted to the United States District  
2 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
3 fourteen (14) days after being served with these Findings and Recommendations, any party  
4 may file written objections with the Court and serve a copy on all parties. Such a document  
5 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
6 Any reply to the objections shall be served and filed within ten days after service of the  
7 objections. The parties are advised that failure to file objections within the specified time  
8 may waive the right to appeal the District Court's order. Martinez v. Y1 st, 951 F.2d 1153  
9 (9th Cir. 1991).

10 IT IS SO ORDERED.

11 Dated: August 15, 2013

12 *Isl. Michael J. Seng*  
13 UNITED STATES MAGISTRATE JUDGE  
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