

1 Plaintiff's "Response to Defendants' Reply" (ECF No. 82) was not authorized.
2 Local Rule 230 (l) permits only the filing of a response by the party opposing a motion
3 and a reply by the moving party. However, inasmuch as Defendants have not objected
4 to Plaintiff's reply motion and Plaintiff is a *pro se* litigant, the Court will consider Plaintiff's
5 surreply.

6 **II. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT**

7 Any party may move for summary judgment, and "[t]he [C]ourt shall grant
8 summary judgment if the movant shows that there is no genuine dispute as to any
9 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
10 56(a). Each party's position, whether it be that a fact is disputed or undisputed, must be
11 supported by (1) citing to particular parts of materials in the record, including but not
12 limited to depositions, documents, declarations, or discovery; or (2) "showing that the
13 materials cited do not establish the absence or presence of a genuine dispute, or that an
14 adverse party cannot produce admissible evidence to support the fact." Fed R. Civ. P.
15 56(c)(1).

16 "Where the moving party will have the burden of proof on an issue at trial, the
17 movant must affirmatively demonstrate that no reasonable trier of fact could find other
18 than for the moving party." Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th
19 Cir. 2007). If the burden of proof at trial rests with the nonmoving party, then the moving
20 party need only point to "an absence of evidence to support the nonmoving party's
21 case." *Id.* Once the moving party has met its burden, the nonmoving party must point to
22 "specific facts showing that there is a genuine issue for trial." *Id.* (quoting Anderson v.
23 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

24 In evaluating the evidence, "the [C]ourt does not make credibility determinations
25 or weigh conflicting evidence," and "it draws all inferences in the light most favorable to
26 the nonmoving party." *Id.*

1 **III. FACTUAL SUMMARY**

2 The court finds the following facts to be undisputed:

3 Following the discovery of contraband in Plaintiff's cell, Plaintiff was removed from
4 the cell and handcuffed for six hours while that alleged infraction was being
5 investigated. Plaintiff, uncomfortable from being handcuffed for so long, requested a
6 grievance form from Defendant Tordsen. Tordsen denied his request and moved Plaintiff
7 to a cell that had recently been occupied by an incontinent inmate and had yet to be
8 cleaned.¹ Plaintiff thought he was being placed in the dirty cell in retaliation for his earlier
9 request for a grievance form, and again requested a grievance form from Tordsen.
10 Tordsen again failed to provide one.

11 Plaintiff threatened suicide in order to be removed from the dirty cell; and
12 Defendants Day, Coker, and Leach came to Plaintiff's cell in response. Plaintiff
13 complained about the dirty cell and requested a grievance form. Defendants did not
14 provide one. Plaintiff was put on suicide watch overnight, but in the morning was
15 returned to the still dirty cell. Plaintiff did not make further requests for grievances. He
16 ended up cleaning the cell himself with Windex and paper towels.

17 **III. PARTIES' ARGUMENTS**

18 Defendants argue that Plaintiff failed to exhaust his administrative remedies
19 because he did not file a grievance on the issue of being placed in a dirty cell. They cite
20 the "Kings County Jail Policy and Procedure Manual" to argue that the first step of the
21 grievance process is to make a verbal complaint to a deputy on shift. Once the deputy
22 hears the complaint, he or she has 24 hours to resolve the complaint. If the complaint is
23 not or cannot be resolved in that time, the inmate must then proceed to the second step
24 of the grievance process, which is to submit a grievance form to the shift supervisor.
25 (ECF Nos. 77-1, at 6-7; 77-5, at 2.)

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28 ¹ Plaintiff characterizes the cell as "feces-covered." Defendants assert it was merely "speckled with feces."
Either way, there does not seem to be any dispute that the cell was soiled with human fecal matter.

1 Here, Defendants argue that once Plaintiff complained about the dirty cell, they
2 had 24 hours to remedy the condition. Fewer than 24 hours elapsed between the time
3 Tordsen placed Plaintiff in the feces-covered cell and the time that Plaintiff cleaned the
4 cell himself. Defendants argue this means Plaintiff's "complaints were resolved within 24
5 hours." (ECF No. 81, at 6, 7.) In any event, Defendants argue they were not obligated to
6 provide Plaintiff with a written grievance form in response to his request (ECF No. 81, at
7 7), and that if, after 24 hours had elapsed, Plaintiff "did not feel that [his complaints] were
8 adequately addressed, a discussion should have been had with the deputy and a formal
9 grievance submitted." (Id., at 6.)

10 Plaintiff, for his part, argues that Defendants have misstated the first step of the
11 grievance procedure, and that a first-level grievance must be made in writing, not orally.
12 In support of his argument, he cites two documents: (1) the "Kings County Jail Inmate
13 Orientation Jail Rules," which outlines the grievance procedure somewhat differently
14 than the "Manual," and (2) the "Kings County Jail Inmate Grievance Form" itself.

15 The "Jail Rules" provide, in relevant part, that:

16 "The first step of the grievance procedure is to file a grievance with
17 Floor Deputy. The deputy has 24 hours to solve the problem. If the deputy
18 cannot solve the grievance, the grievance can be submitted to the next
19 level."

20 Plaintiff argues that the words "file" and "submitted" indicate that the first-level
21 grievance must be made in writing. He writes, "the word 'file'... denotes the submission
22 of documents. For instance, a person can file for a divorce, or file a petition, or file a tax
23 return. One cannot verbally 'file' a complaint." (ECF No. 79, at 4.) According to
24 Plaintiff's view of the grievance process, the 24-hour period cannot even begin until an
25 inmate is provided with a grievance form.

26 The "Inmate Grievance Form" does not use the word "file." Instead, it states that
27 the first step of the grievance procedure is to "advise a Deputy of the problem, and allow
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1 the Deputy up to 24 hours to resolve.” (ECF No. 80, at 16.) However, the form has three
2 sections, respectively entitled “First,” “Second,” and “Third Step Grievance,” with blank
3 spaces following each to be filled in by either the inmate or the person to whom the
4 grievance is submitted. Plaintiff contends that “the blank spaces designated for the
5 ‘documentation’ of names, dates and times on the actual grievance form” indicate that
6 “Step One of the grievance process is a procedure of written documentation, and not
7 merely a verbal complaint.” (ECF No. 80, at 6.)

8 Therefore, Plaintiff argues, he could not proceed any further in the administrative
9 appeal process than making repeated requests for a grievance form. He argues that “by
10 simply asking the defendants for a grievance form, [he] has indeed exhausted all
11 administrative remedies that were ‘available’ to him at the time.” (*Id.*) Plaintiff also
12 argues that by denying his three grievance requests, placing him twice in a feces-
13 covered cell, and making him clean his cell himself, Defendants chilled his First
14 Amendment rights and that his “will to assert his Constitutional rights diminished as a
15 result of the defendants’ reprisals.” (ECF No. 79, at 8.)

16 In reply, Defendants reiterate their interpretation of the proper grievance
17 procedure and point out procedural flaws in Plaintiff’s declaration.

18 **IV. DISCUSSION**

19 **A. Legal Standard -- Exhaustion**

20 The Prison Litigation Reform Act (“PLRA”) stipulates, “No action shall be brought
21 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
22 a prisoner confined in any jail, prison, or other correctional facility until such
23 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
24 Therefore, prisoners are required to exhaust all available administrative remedies prior to
25 filing suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

26 “The primary purpose of a [prisoner’s administrative] grievance is to alert the
27 prison to a problem and facilitate its resolution, not to lay groundwork for litigation.”

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1 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). “A grievance need not include
2 legal terminology or legal theories unless they are in some way needed to provide notice
3 of the harm being grieved. A grievance also need not contain every fact necessary to
4 prove each element of an eventual legal claim.” *Id.* Instead, the grievance must alert
5 “the prison to the nature of the wrong for which redress is sought,” *id.* at 1120 (quoting
6 Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)), and must give the prison an
7 opportunity “to reach the merits of the issue.” *Id.* at 1119.

8 A motion for summary judgment is the proper means to raise a prisoner's failure
9 to exhaust administrative remedies. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir.
10 2014). Defendants have the burden of proving Plaintiff failed to exhaust available
11 administrative remedies. *Id.* A defendant's burden of establishing an inmate's failure to
12 exhaust administrative remedies has been characterized by the Ninth Circuit as “very
13 low.” Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The “defendant need only
14 show the existence of . . . [a grievance procedure] that the plaintiff did not use.” *Id.*
15 (citing Hilao v. Estate of Marcos, 103 F.3d 767, 778, n.5 (9th Cir. 1996)).

16 An inmate may be excused from the exhaustion requirement where administrative
17 remedies were “effectively unavailable.” Albino, 747 F.3d at 1173 (citing Nunez v.
18 Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010)). An administrative remedy may be
19 “effectively unavailable” where prison officials fail to respond to a properly filed
20 grievance, Sapp v. Kimbrell, 623 F.3d 813, 822-823 (9th Cir. 2010); erroneously inform
21 inmates that additional paperwork is necessary, causing the inmate to miss filing
22 deadlines, Nunez, 591 F.3d at 1226; or fail to provide an inmate with either grievance
23 forms or information about the grievance procedure, despite his complaints or requests.
24 Albino, 747 F.3d at 1177; see also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir.
25 2009) (inmate would not fail to timely file where he did not have access to the necessary
26 forms within the filing time period).

1 **B. Analysis**

2 Viewing the evidence in the light most favorable to Defendants, the Court finds
3 that Defendants have failed to show the absence of a genuine dispute as to whether
4 Plaintiff failed to exhaust. Indeed, the Court finds that there is no genuine dispute of
5 material fact that Defendants rendered the administrative remedy “effectively
6 unavailable,” excusing Plaintiff from the exhaustion requirement.

7 Defendants do not dispute that: they did not accede to any of Plaintiff’s multiple
8 requests for a grievance form; they placed Plaintiff twice in a cell soiled with human
9 excrement from another prisoner, the second time after he had complained about
10 conditions in the cell; no effort was made to clean the cell between Plaintiff’s two stays in
11 it; or that Plaintiff ultimately had to clean the cell himself.

12 The Court finds, first, that the procedure Plaintiff was to follow to exhaust the first-
13 level administrative remedy was not clear. Indeed, the information provided tends to
14 confirm ambiguity in the requirements. From the conflicting information provided, a
15 finder of fact might determine that a written grievance was required at the first level, that
16 Plaintiff justifiably believed he had complied with the first step, or that Plaintiff justifiably
17 believed that further attempts to exhaust would be futile because of Defendants’
18 obstructive tactics.

19 The “Policy and Procedure Manual” to which Defendants cite does indicate that
20 first-level grievances may be made verbally; however, it also indicates that grievances
21 may be made in writing, providing: “depending on the nature of the problem, the deputy
22 may immediately advise the inmate the problem cannot be resolved at his/her level, and
23 therefore shall provide the inmate with a grievance form.” (ECF No. 77-1.) Defendants
24 provided no such form. Does this mean they were confused as to whether one was
25 required? Did their inaction tell Plaintiff that they were not going to let him file a written
26 grievance or that he did not need to file one? Under most any interpretation, one could
27 find Plaintiff was prevented from complying or excused from complying.

1 In any event, the information in the Manual was not, apparently, provided to the
2 inmates; Defendants indicate that inmates are only provided with the Jail Rules. (ECF
3 No. 77-5, at 4.) The information in the manual suggesting a verbal complaint may suffice
4 at the first level may not be imputed to Plaintiff because there is no indication that he had
5 access to it. See Albino, 747 F.3d at 1175.

6 Moreover, as Plaintiff points out, the Jail Rules are worded differently from the
7 Manual, and as such are confusing, if not wholly inconsistent with one another, to the
8 extent that the Rules require an inmate to “file” a first-level grievance and the Manual
9 requires the inmate to “advise” a deputy of his problem.

10 The grievance form, meanwhile, could reasonably support either the Defendants’
11 argument that the first-level grievance should be verbal or Plaintiff’s argument that it
12 should be written. Although the “First Step Grievance” section of the form has blanks to
13 be filled in with writing, the form also indicates that step one is to “advise a Deputy of the
14 problem and allow the Deputy up to 24 hours to resolve.” The form does not indicate
15 whether the inmate or the Deputy is to fill out the first section or when in the grievance
16 process the inmate is to be given the form. (ECF No. 79, at 14.)

17 Apart from the semantic confusion in the above documents, the Court finds that
18 Defendants’ repeated denials of Plaintiff’s requests for a grievance form, combined with
19 their placement of Plaintiff in the same feces-stained cell about which he had originally
20 complained, rendered the administrative remedy “effectively unavailable,” regardless of
21 whether the first step was to be verbal or in writing. Defendants fall well short of meeting
22 their burden to show that a person in Plaintiff’s situation would think that additional
23 attempts to redress his wrong – whether in writing or verbally – would be likely to meet
24 with success. See Albino, 747 F.3d at 1177 (defendants did not establish that jail had
25 “an available administrative remedy” where they failed to provide inmate with grievance
26 forms despite his repeated complaints and told him instead to address his concerns to
27 his criminal defense attorney).

1 Defendants' argument that Plaintiff's concerns were "resolved" within 24 hours is
2 difficult to dignify with analysis. Plaintiff's decision to clean despicably unsanitary
3 conditions before a day had elapsed does not obviate the wrong suffered by being
4 placed in (and returned to) such conditions, especially if this was done, as Plaintiff
5 claims, in retaliation for his complaints.

6 Accordingly, the Court will recommend that Defendants' motion for summary
7 judgment be denied and that summary judgment be entered for Plaintiff on the issue of
8 exhaustion.

9 **V. CONCLUSION AND ORDER**

10 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendants'
11 motion for summary judgment (ECF No. 77) be denied and that summary judgment be
12 entered for Plaintiff.

13 These Findings and Recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
15 **fourteen** (14) days after being served with these Findings and Recommendations, any
16 party may file written objections with the Court and serve a copy on all parties. Such a
17 document should be captioned "Objections to Magistrate Judge's Findings and
18 Recommendations." Any reply to the objections shall be served and filed within ten days
19 after service of the objections. The parties are advised that failure to file objections within
20 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
21 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).
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24 IT IS SO ORDERED.

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26 Dated: April 13, 2015

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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