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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 EARL WARNER,

10 Plaintiff,

11 v.

12 MATTHEW L. CATE, et al.,

13 Defendants.
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CASE NO. 1:12-cv-01146-LJO-MJS (PC)

**ORDER SETTING EVIDENTIARY
HEARING**

Date: August 14, 2015

Time: 10:00 a.m., Courtroom 6 (MJS)

15 Plaintiff is a state prisoner proceeding pro se in this civil rights action brought
16 pursuant to 42 U.S.C. § 1983. The action proceeds against Defendants Walker, Davis,¹
17 Prokop, Spralding, and Fellows on Plaintiff's Eighth Amendment failure to protect claim.

18 Defendants filed a motion for summary judgment based on Plaintiff's failure to
19 exhaust administrative remedies. (ECF No. 41.) On June 9, 2015, the District Court
20 adopted the Magistrate Judge's Findings and Recommendations to deny the motion.
21 (ECF No. 65.) The matter was referred back to the Magistrate Judge for further
22 proceedings on the issue of exhaustion.

23 Accordingly, the Court HEREBY SETS an evidentiary hearing before the
24 Honorable Michael J. Seng, United States Magistrate Judge, to decide the disputed
25 issues of fact relating to the exhaustion of Plaintiff's claims. The hearing will be held on
26 August 14, 2015, at 10:00 a.m., in Courtroom 6, Seventh Floor of the United States
27 District Court in Fresno, California. The hearing will commence and be completed that

28 ¹ Formerly Defendant D. McGaha.

1 day, and will be limited to the issue of whether Plaintiff is excused from the Prison
2 Litigation Reform Act's exhaustion requirement because administrative remedies were
3 "effectively unavailable."

4 More specifically, the parties should be prepared to present evidence as to the
5 following:

- 6 • Whether Plaintiff's Appeal No. PVSP-O-12-00872 was improperly rejected
7 based on Plaintiff's failure to allege a material adverse effect on his
8 welfare;
- 9 • Whether Plaintiff's Appeal Nos. RJD-B-12-00796 and RJD-B-12-01098
10 were improperly cancelled as untimely; and
- 11 • Whether Plaintiff had a reasonable, good faith belief that the administrative
12 appeals process was effectively unavailable to him.

13 In preparation for the hearing, it is HEREBY ORDERED that, no later than July
14 17, 2015, the parties shall confer regarding the witnesses to be called and evidence to
15 be presented at the hearing. No later than July 31, 2015, defense counsel shall file a
16 statement setting forth the witnesses to be called and documents to be presented at the
17 hearing. Defense counsel shall provide a courtesy copy of all exhibits to be used at the
18 hearing to Judge Seng's chambers no later than July 31, 2015.

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20 IT IS SO ORDERED.

21 Dated: June 9, 2015

22 /s/ Michael J. Seng
23 UNITED STATES MAGISTRATE JUDGE
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