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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES C. JAMES,

Plaintiff,

No. 2:11-cv-1527 GEB EFB P

vs.

FAGAN, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in an action brought under 42 U.S.C. § 1983. Plaintiff proceeds on an Eighth Amendment claim against defendant Fagan based on an alleged use of excessive force on October 27, 2010 at the California Medical Facility. Defendant moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b), on the ground that plaintiff failed to exhaust available administrative remedies prior to filing suit. Dckt. No. 18. For the following reasons, defendant’s motion must be denied.

I. Exhaustion under the PLRA

The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought with respect to prison conditions [under section 1983 of this title] until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “Prison conditions” subject to the exhaustion requirement have been defined broadly as “the effects of actions by government

1 officials on the lives of persons confined in prison” 18 U.S.C. § 3626(g)(2); *Smith v.*
2 *Zachary*, 255 F.3d 446, 449 (7th Cir. 2001); *see also Lawrence v. Goord*, 304 F.3d 198, 200 (2d
3 Cir. 2002). To satisfy the exhaustion requirement, a grievance must alert prison officials to the
4 claims the plaintiff has included in the complaint, but need only provide the level of detail
5 required by the grievance system itself. *Jones v. Bock*, 549 U.S. 199, 218-19 (2007); *Porter v.*
6 *Nussle*, 534 U.S. 516, 524-25 (2002) (purpose of exhaustion requirement is to give officials
7 “time and opportunity to address complaints internally before allowing the initiation of a federal
8 case”).

9 Prisoners who file grievances must use a form provided by the California Department of
10 Corrections and Rehabilitation, which instructs the inmate to describe the problem and outline
11 the action requested. The grievance process, as defined by California regulations, has three
12 levels of review to address an inmate’s claims, subject to certain exceptions. *See Cal. Code*
13 *Regs. tit. 15, § 3084.7*. Administrative procedures generally are exhausted once a plaintiff has
14 received a “Director’s Level Decision,” or third level review, with respect to his issues or claims.
15 *Id.* § 3084.1(b).

16 Proper exhaustion of available remedies is mandatory, *Booth v. Churner*, 532 U.S. 731,
17 741 (2001), and “[p]roper exhaustion demands compliance with an agency’s deadlines and other
18 critical procedural rules[.]” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). For a remedy to be
19 “available,” there must be the “possibility of some relief” *Booth*, 532 U.S. at 738. Relying
20 on *Booth*, the Ninth Circuit has held:

21 [A] prisoner need not press on to exhaust further levels of review once he has
22 received all “available” remedies at an intermediate level of review or has been
reliably informed by an administrator that no remedies are available.

23 *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

24 In the Ninth Circuit, motions to dismiss for failure to exhaust administrative remedies are
25 normally brought under Rule 12(b) of the Federal Rules of Civil Procedure. *See Albino v. Baca*,
26 ___ F.3d. ___, 2012 U.S. App LEXIS 19871 (9th Cir. Sept. 21, 2012). Nonetheless, it remains

1 well established that credibility of witnesses over material factual disputes cannot be resolved on
2 paper. Thus, when ruling on an exhaustion motion requires the court to look beyond the
3 pleadings in the context of disputed issues of fact, the court must do so under “a procedure
4 closely analogous to summary judgment.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119, n.14 (9th Cir.
5 2003). Doing so ensures that a process is followed to test whether disputes over facts pertaining
6 to whether plaintiff actually exhausted available remedies are truly genuine and material and
7 therefore warrant live testimony, or whether the dispute(s) may be disposed of by unrefuted
8 declarations and exhibits. Therefore, following the suggestion in *Wyatt*, and because care must
9 be taken not to resolve credibility on paper if it pertains to disputed issues of fact that are
10 material to the outcome, the undersigned applies the Rule 56 standards to exhaustion motions
11 that require consideration of materials extrinsic to the complaint.¹ *See Chatman v. Felker*, No.
12 Civ. S-06-2912 LKK EFB, 2010 WL 3431806, at *2-3 (E.D. Cal. Aug. 31, 2010).

13 Failure to exhaust is an affirmative defense in the sense that defendants bear the burden
14 of proving plaintiff did not exhaust available remedies. *Wyatt*, 315 F.3d at 1119. To bear this
15 burden:

16 a defendant must demonstrate that pertinent relief remained available, whether at
17 unexhausted levels of the grievance process or through awaiting the results of the
18 relief already granted as a result of that process. Relevant evidence in so
19 demonstrating would include statutes, regulations, and other official directives
20 that explain the scope of the administrative review process; documentary or
21 testimonial evidence from prison officials who administer the review process; and
information provided to the prisoner concerning the operation of the grievance
procedure in this case With regard to the latter category of evidence,
information provided [to] the prisoner is pertinent because it informs our
determination of whether relief was, as a practical matter, “available.”

22 *Brown*, 422 F.3d at 936-37 (citations omitted).

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25 ¹ Here, defendant relies on testimonial evidence in the form of declarations from prison
26 officials and a documentary record to establish the facts in support of his contention that plaintiff
failed to exhaust.

1 **II. Background**

2 Plaintiff commenced this action on June 6, 2011. Dckt. No. 1. On his form complaint,
3 plaintiff checked the box indicating that the administrative exhaustion process had been
4 completed, but also included a note that “CDCR refused to complete [the] process.” *Id.* § II.
5 Plaintiff explained that he had submitted an administrative appeal to the final level of review, but
6 that it was returned to him on the grounds that it was missing documentation. *Id.* (Pl.’s Decl.)
7 ¶ 11. Plaintiff claimed that he had done everything in his power to complete the exhaustion
8 process. *Id.* ¶ 12. Two months after commencing this action, plaintiff filed a document titled
9 “Notice Re Exhaustion of Administrative Remedy.” Dckt. No. 7. Plaintiff explained that after
10 protesting the rejection of his earlier filed appeal based on missing documentation, prison
11 officials took action at the final level of review on July 11, 2011. *Id.*

12 Because plaintiff essentially admitted that he had not exhausted available administrative
13 remedies prior to filing suit, the court recommended that this action be dismissed. Dckt. No. 8.
14 However, plaintiff objected to those recommendations, contending that he had exhausted his
15 administrative remedies prior to filing suit or alternatively, that he should be excused from
16 exhaustion because of errors in the processing of his appeal. Dckt. No. 11. In light of plaintiff’s
17 allegations, and because the defendant has the burden of pleading and proving the absence of
18 exhaustion, the court vacated the recommendation of dismissal, but made no finding regarding
19 the issue of exhaustion. Dckt. No. 12. Subsequently, the court directed the United States
20 Marshal to serve the complaint on defendant Faggan. Dckt. No. 14. On July 9, 2012, defendant
21 Faggan moved to dismiss the complaint as unexhausted. Dckt. No. 18.

22 Plaintiff filed an opposition to defendant’s motion to dismiss on August 8, 2012. Dckt.
23 No. 20. However, plaintiff indicated that he had been unaware of defendant’s motion until
24 receiving the court’s July 25, 2012 order.² *Id.* In light of plaintiff’s representation, the court

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26 ² On July 25, 2012, the court informed plaintiff of the requirements for opposing a motion
to dismiss for failure to exhaust available administrative remedies. *See Woods v. Carey*, 684

1 directed defendant to re-serve the motion on plaintiff and informed plaintiff that he could either
2 file an amended opposition within 30 days or rely on his previously filed opposition. Dckt. No.
3 21. Defendant re-served his motion on plaintiff the same day. Dckt. No. 22. The time for
4 plaintiff to file an amended opposition has passed and no amended opposition was submitted.
5 Therefore, on September 17, 2012, defendant filed a reply to plaintiff's August 8, 2012
6 opposition. Dckt. No. 24.

7 On October 11, 2012, plaintiff responded to defendant's reply brief by filing a document
8 he labels as "Reply to Defendant's Request for Dismissal," in which he summarized some of the
9 points made in his opposition and resubmitted copies of several exhibits. Dckt. No. 25.
10 Defendant moves to strike the filing as an unauthorized surreply. Dckt. No. 26. Neither the
11 Federal Rules of Civil Procedure nor the court's Local Rules contemplate the filing of a surreply.
12 Plaintiff's October 11, 2012 filing will therefore be disregarded.

13 **III. Discussion**

14 In his June 6, 2011 complaint, plaintiff alleges that defendant Faggan used excessive
15 force against him on October 27, 2010. Dckt. No. 1. Defendant argues that plaintiff failed to
16 exhaust administrative remedies as to this claim prior to filing suit. In support of the motion,
17 defendant submits: 1) the declaration of W. Sinkovich, Appeals Coordinator for the Institutional
18 Appeals Office at California Medical Facility, Vacaville ("Sinkovich Decl."); and 2) the
19 declaration of J.D. Lozano, Chief of the Office of Appeals for the California Department of
20 Corrections and Rehabilitation (CDCR) ("Lozano Decl.").

21 Defendant's evidence shows that inmate appeals alleging staff misconduct such as
22 excessive force are classified as "Staff Complaints." Lozano Decl. ¶ 6; Sinkovich Decl. ¶ 5.

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25 F.3d 934 (9th Cir. 2012); *Stratton v. Buck*, 2012 U.S. App. LEXIS 19647, at *7-8 (9th Cir. Sept.
26 19, 2012); *Wyatt v. Terhune*, 315 F.3d 1108, 1115, 1120 n.15 (9th Cir. 2003). The court also
informed plaintiff that his opposition to the motion was due within 30 days. Dckt. No. 19.

1 Lozano testifies that between October 27, 2010 and June 6, 2011, only two of plaintiff's inmate
2 appeals, classified as "Staff Complaints," were accepted for third level review. Lozano Decl.
3 ¶ 7, Exs. A, B. Of these two appeals, only one concerned defendant's alleged use of excessive
4 force on October 27, 2010. Lozano Decl., Ex. A ("Dckt. No. 18-4") (appeal log no. CMF-10-
5 02581). Exhibits attached to the Sinkovich and Lozano declarations show that the Inmate
6 Appeals Branch first received this appeal for third level review on December 3, 2010. Dckt. No.
7 18-4 at 5. On January 4, 2011, D. Foston, Chief of the Inmate Appeals Branch, rejected the
8 appeal for not including a CDCR Form 1858 Rights and Responsibilities Statement. *Id.* at 15.
9 The January 4, 2011 letter also informed plaintiff that he should make the requested correction
10 and resubmit the appeal. *Id.* On February 1, 2011, plaintiff wrote a letter to Foston requesting
11 an extension of time to resubmit his appeal, explaining that the appeals office had never returned
12 the CDCR Form 1858 to him. *Id.* at 18. Subsequently, plaintiff's appeal was submitted to the
13 Inmate Appeals Branch for a second time. *Id.* at 4 (showing appeal was received on February
14 15, 2011). On March 16, 2011, Foston again rejected plaintiff's appeal for not including the
15 required documentation and informed plaintiff to take the necessary corrective action and
16 resubmit the appeal. *Id.* at 16. On March 24, 2011, in response to a request by plaintiff,
17 Sinkovich informed plaintiff that he had "found the 1858 form for CMF appeal # 10-2581," and
18 directed plaintiff to return it to the appeals office. *Id.* at 19; *see also id.* at 11 (CDCR Form
19 1858, dated March 25, 2011, and signed by plaintiff and Sinkovich). On April 6, 2011, the
20 appeals office received plaintiff's appeal for the third time. *Id.* at 4.

21 On June 6, 2011, plaintiff commenced this action. Dckt. No. 1. On July 11, 2011,
22 plaintiff's appeal was denied at the third level of review. Dckt. No. 18-4 at 2-3. Thus, defendant
23 has shown that plaintiff's appeal had not been resolved at the third level of review prior to
24 commencing this action. The court finds that defendant has met his burden of showing that the
25 possibility of further administrative relief remained available to plaintiff prior to commencing
26 this action. The burden therefore shifts to plaintiff to produce evidence that demonstrates either

1 exhaustion or circumstances excusing exhaustion. *See Sapp v. Kimbrell*, 623 F.3d 813, 823-24
2 (9th Cir. 2010).

3 Defendant's motion includes a declaration from Lozano stating that plaintiff's appeal
4 was screened out on three separate occasions. Lozano Decl. ¶ 5. However, the exhibits
5 submitted with defendant's motion document only two occasions on which plaintiff's appeal was
6 screened out. *See* Dckt. No. 18-4. Through his opposition, plaintiff shows that on May 5, 2011,
7 his appeal was screened out for a third time. Dckt. No. 20 at 12. As set forth below, plaintiff
8 also demonstrates that the May 5, 2011 rejection of his appeal was improper, and rendered
9 further administrative relief unavailable to him. *See Sapp*, 623 F.3d at 823 (where prison official
10 improperly screens out inmate's appeal, inmate cannot pursue necessary sequence of appeals,
11 and administrative remedies become unavailable).

12 In the May 5 letter, Foston informed plaintiff that his appeal was again being rejected
13 because it was missing the CDCR Form 1858 and because plaintiff had not submitted the
14 original appeal. Dckt. No. 20 at 12. Foston also informed plaintiff that he could not appeal the
15 rejected appeal, but should take corrective action and resubmit the appeal. *Id.* In a declaration
16 signed under penalty of perjury, plaintiff states that the May 5 rejection of his appeal was
17 improper because he had in fact, submitted the original appeal. *Id.* at 4, ¶ 9. Plaintiff also claims
18 that he mailed the March 25, 2011 CDCR Form 1858 to the appeals office on March 26, 2011.
19 *Id.* at 8, 20 (copy of March 25, 2011 CDCR Form 1858). Plaintiff contends he could not take
20 corrective action, as instructed by Foston, because the original appeal and the CDCR Form 1858
21 were already in the possession of the Chief of Inmate Appeals as of April 6, 2011, when plaintiff
22 resubmitted his appeal for the third time. Dckt. No. 20 at 3, 8. Plaintiff declares that after
23 receiving the May 5 notice, he wrote letters to prison administrators but received no response.
24 *Id.* at 4, ¶ 10. Believing that no administrative remedy remained available to him, plaintiff
25 commenced this action on June 6, 2011. *Id.* at 4, ¶ 12; Dckt. No. 1. Plaintiff describes the July
26 11, 2011 denial of his appeal at the third level of review as a "surprise," pointing out that

1 defendant provides no explanation as to how his original appeal materialized at the Inmate
2 Appeals Branch and was thereafter answered after its rejection on May 5th. *Id.* at 4, ¶10; *id.* at 9,
3 41. Based on the foregoing, plaintiff has demonstrated circumstances excusing further
4 exhaustion of administrative remedies; he was improperly prevented from doing so. *See Sapp*,
5 623 F.3d at 823 (“[I]mproper screening of an inmate’s administrative grievances renders
6 administrative remedies ‘effectively unavailable’ such that exhaustion is not required under the
7 PLRA”).

8 In his reply, defendant argues that plaintiff failed to take all “reasonable and appropriate
9 steps” to exhaust his grievance because he “repeatedly failed to comply with CDCR’s
10 procedures, despite being given instructions.” Dckt. No. 24 at 6. To demonstrate plaintiff’s
11 purported failures in this regard, defendant states that plaintiff’s appeal was properly rejected on
12 January 4, 2011, March 16, 2011, and May 5, 2011. *Id.* at 4 (citing to defendant’s motion to
13 dismiss and to plaintiff’s opposition). Defendant then states that plaintiff resubmitted his appeal
14 on April 6, 2011, and that “once properly submitted,” it was accepted for third level review and
15 thereafter denied. *Id.* at 4, 6. However, defendant does not explain how or when plaintiff’s
16 appeal was resubmitted for third level review after it was rejected on May 5, 2011. Defendant
17 also fails to submit any evidence to refute plaintiff’s contentions that the May 5 rejection of
18 plaintiff’s appeal was improper, or that because of this improper rejection, plaintiff could not
19 take corrective action, and believed that no further administrative relief was available to him.

20 Accordingly, the court finds that plaintiff’s attempts to exhaust his administrative
21 remedies were reasonable and appropriate, and that defendant’s motion to dismiss must be
22 denied.

23 Accordingly, IT IS HEREBY ORDERED that the Clerk shall terminate Docket No. 26,
24 defendant’s motion to strike.

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1 Further, IT IS HEREBY RECOMMENDED that defendant's motion to dismiss this
2 action without prejudice for failure to exhaust administrative remedies (Dckt. No. 18) be denied.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: February 25, 2013.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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