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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERNARDOS GRAY, JR.,
Plaintiff,
v.
T. VIRGA, et al.,
Defendants.

No. 2:12-cv-3006 KJM AC P

ORDER AND
FINDINGS & RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, filed this action pursuant to 42 U.S. § 1983 on December 9, 2012.¹ ECF No. 1. The court granted plaintiff’s request to proceed in forma pauperis on February 27, 2013. ECF No. 6. The complaint was found appropriate for service upon the following defendants employed at California State Prison – Sacramento (CSP-Sac): Warden T. Virga; Correctional Lieutenant M. Nielson; Correctional Sergeant S. Phelps; Correctional Officers M. Starnes and N. Gam; and, Registered Nurse G. Wangombe. Id.

I. Complaint

Plaintiff raises two separate Eighth Amendment claims based on (1) prison officials’ failure to protect him from an inmate assault when he was housed in the Administrative Segregation Unit (ASU) at CSP-Sacramento, and (2) their deliberate indifference to his medical

¹ The filing date of the complaint was determined using the prison mailbox rule. See Houston v. Lack, 487 U.S. 266 (1988).

1 needs following the inmate attack. ECF No. 1 at 1. According to the allegations of the
2 complaint, defendant Nielson approved plaintiff's housing assignment with Inmate Williams in
3 the ASU even though Inmate Williams had been removed from general population due to
4 possessing two hand-made weapons. Id. at 4. On May 19, 2011, plaintiff alleges that defendants
5 Gam and Starnes failed to conduct the required search procedure before placing him into the same
6 cell as Inmate Williams. Id. at 3. Upon their entry into the same cell, both plaintiff and Inmate
7 Williams were handcuffed behind their backs. Id. Upon having his handcuffs removed by
8 defendant Gam, Inmate Williams immediately began stabbing plaintiff who was still handcuffed.
9 Id. at 4. Defendant Gam then blinded plaintiff and not the aggressor with pepper spray while the
10 stabbing continued. Id. Defendant Starnes released a second stream of pepper spray into the cell.
11 Id.

12 Following this attack, plaintiff alleges that he was not provided any medical attention for
13 his wounds until he had been photographed and interrogated by correctional officers. Id. at 5.
14 Once taken to the medical section, plaintiff alleges that Nurse Wangombe provided inadequate
15 medical care in that she failed to refer him to a doctor and failed to remove pepper spray from his
16 hair, body and lungs. Id. at 5-6. Defendant Phelps interrogated plaintiff while he was still having
17 a hard time breathing, was still bleeding, and was complaining that his handcuffs were too tight.
18 Id. at 7. Without ever being examined by a doctor, plaintiff was dragged to a holding cell in the
19 medical center where he was left lying on the floor in shackles. Id. at 8. Plaintiff seeks
20 compensatory and punitive damages as well as declaratory and injunctive relief. Id. at 9.

21 II. Motion to Dismiss

22 Pending before the court is defendants' motion to dismiss under non-enumerated Rule
23 12(b) of the Federal Rules of Civil Procedure for failure to exhaust. ECF Nos. 14, 17 (joinder by
24 defendant Starnes). While the motion to dismiss also references Rule 12(b)(6) of the Federal
25 Rules of Civil Procedure for plaintiff's failure to state a claim upon which relief may be granted,
26 no separate argument on that ground is provided in the Memorandum of Points and Authorities.
27 Compare ECF No. 14 at 1 with ECF No. 14-2. For that reason, the court's discussion will be
28 limited to the defendant's assertion that plaintiff failed to exhaust his administrative remedies

1 with respect to his Eighth Amendment claims. The motion has been fully briefed. ECF Nos. 23
2 (opposition), 26 (reply), 30 (sur-reply), 35 (motion to strike sur-reply).

3 In the motion, defendants assert that the complaint should be dismissed in its entirety
4 because plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation
5 Reform Act (PLRA). Defendants contend that plaintiff's only properly submitted administrative
6 grievance was limited to the medical care issue, and was not reviewed at the Director's Level as
7 required for exhaustion. Defendants contend that plaintiff did not properly file any administrative
8 grievance regarding the actions of defendants Virga, Gam, Nielson, and Phelps, rendering his
9 claims against those defendants also unexhausted.

10 A. The Exhaustion Requirement

11 Pursuant to the Prison Litigation Reform Act ("PLRA"):

12 No action shall be brought with respect to prison conditions under
13 section 1983 of this title, or any other Federal law, by a prisoner
14 confined in a jail, prison, or other correctional facility until such
administrative remedies as are available are exhausted.

15 42 U.S.C. § 1997e (a); see also Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009); Brown v.
16 Valoff, 422 F.3d 926, 934 (9th Cir. 2005) (quoting Porter v. Nussle, 534 U.S. 516, 525 n.4 (2002)
17 (The PLRA "creates 'a general rule of exhaustion' for prisoner civil rights cases.")).

18 Compliance with the exhaustion requirement is mandatory for any type of relief sought.
19 Booth v. Churner, 532 U.S. 731, 739, 741 (2001) (holding that prisoners must exhaust their
20 administrative remedies regardless of the relief they seek, i.e., whether injunctive relief or money
21 damages, even though the latter is unavailable pursuant to the administrative grievance process);
22 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam); accord Jones v. Bock, 549
23 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and
24 that unexhausted claims cannot be brought in court."); see also Panaro v. City of North Las
25 Vegas, 432 F.3d 949, 954 (9th Cir. 2005) (The PLRA "represents a Congressional judgment that
26 the federal courts may not consider a prisoner's civil rights claim when a remedy was not sought
27 first in an available administrative grievance procedure.")).

28 An untimely or otherwise procedurally defective appeal will not satisfy the exhaustion

1 requirement. Woodford v. Ngo, 548 U.S. 81, 84 (2006). When an inmate’s administrative
2 grievance is improperly rejected on procedural grounds, however, exhaustion may be excused as
3 “effectively unavailable.” Sapp v. Kimbrell, 623 F. 3d 813, 823 (9th Cir. 2010); see also Nunez
4 v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (warden’s mistake rendered prisoner’s
5 administrative remedies “effectively unavailable”); Ward v. Chavez, 678 F.3d 1042, 1045 (9th
6 Cir. 2012) (exhaustion excused where futile); Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005)
7 (plaintiff not required to proceed to third level where appeal granted at second level and no
8 further relief was available).

9 Administrative remedies must be exhausted before the complaint is filed. McKinney v.
10 Carey, 311 F.3d 1198 (9th Cir. 2002), but see Rhodes v. Robinson, 621 F.3d 1002 (9th Cir. 2010)
11 (PLRA exhaustion requirement satisfied with respect to new claims within an amended or
12 supplemental complaint so long as administrative remedies are exhausted prior to the filing of the
13 amended or supplemental complaint).

14 The PLRA’s exhaustion requirement is not jurisdictional; rather, it creates an affirmative
15 defense that a defendant may raise in an unenumerated Rule 12(b) motion. See Jones, 549 U.S. at
16 213–14; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), cert. denied, 540 U.S. 810 (2003).
17 The defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
18 F.3d at 1119.

19 B. Standards Governing the Motion

20 In deciding a motion to dismiss for failure to exhaust, a court may “look beyond the
21 pleadings and decide disputed issues of fact.” Id., 315 F.3d at 1119–20. Thus, the parties may go
22 outside the pleadings, submitting affidavits or declarations under penalty of perjury, but plaintiff
23 must be provided with notice of his opportunity to develop a record. Id. at 1120 n.14. In this
24 case, plaintiff was provided with such notice on April 2, 2013 and concurrently with the filing of
25 the motion to dismiss on June 24, 2013. See ECF Nos. 10 at 3-4,14-1. See Woods v. Carey, 684
26 F.3d 934 (9th Cir. 2012). If the court determines that plaintiff has failed to exhaust, dismissal
27 without prejudice is the appropriate remedy. Id. at 1120.

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1 C. The CDCR’s Administrative Remedies

2 The State of California provides its prisoners and parolees the right to appeal
3 administratively “any policy, decision, action, condition, or omission by the department or its
4 staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or
5 her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). Following amendments that
6 took effect January 28, 2011, California prisoners are required to proceed through three levels of
7 appeal to exhaust the administrative appeal process: (1) formal written appeal on a CDC 602
8 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level
9 appeal to the Director of the CDCR. See 15 Cal. Code Regs. § 3084.1- 3084.9.² A final decision
10 from the Director’s level of review satisfies the exhaustion requirement under 42 U.S.C. §
11 1997e(a). See Lira v. Herrera, 427 F.3d 1164, 1166–67 (9th Cir. 2005); see also Cal. Code Regs.
12 tit. 15, § 3084.7(d)(3) (as amended Dec. 13, 2010). Specific time limits apply to the processing of
13 each administrative appeal. See Cal. Code Regs. tit. 15, § 3084.8. Absent any specific
14 exceptions, the first and second level administrative responses are required to be completed
15 “within 30 working days from [the] date of receipt by the appeals coordinator.” Id. Likewise, a
16 third level response is due within 60 working days from the date the appeal is received by the
17 appeals chief. Id.

18 However, appeals concerning staff complaints are processed differently. California Code
19 of Regulations Title 15, § 3084.5(b)(4) states:

20 When an appeal is received that describes staff behavior or activity
21 in violation of a law, regulation, policy, or procedure or appears
22 contrary to an ethical or professional standard that could be
23 considered misconduct as defined in subsection 3084(g), whether
such misconduct is specifically alleged or not, the matter shall be
referred pursuant to subsection 3084.9(i) ..., to determine whether it
shall be:

- 24 (A) Processed as a routine appeal but not as a staff complaint.
25 (B) Processed as a staff complaint appeal inquiry.

26
27 ² The informal resolution level was eliminated. See Cal. Code Regs. tit. 15, § 3084.7 (as
28 amended Dec. 13, 2010).

1 (C) Referred to Internal Affairs for an investigation/inquiry.
2 An inmate appeal alleging staff misconduct must be accompanied by a Rights and Responsibility
3 Statement. Id. § 3084.9(i). “All appeals alleging staff misconduct will be presented by the
4 appeals coordinator to the hiring authority or designee within five working days.” Id. §
5 3084.9(i)(3). “Only after the appeal has been reviewed and categorized as a staff complaint by
6 the hiring authority or designee shall it be processed as a staff complaint.” Id. § 3084.9(i)(1).
7 When an appeal that is classified and accepted as a staff complaint includes other non-related
8 issues, “the appeals coordinator shall notify the inmate that any other appeal issue(s) may only be
9 appealed separately and therefore resubmission of those issues is required if the intention is to
10 seek resolution of such matters.” Id. § 3084.9(i)(2); see also id. § 3084.5(b)(5). Processing an
11 appeal as a staff complaint does not preclude a prisoner from exhausting administrative appeals to
12 the Director’s Level. Cal. Code Regs. tit. 15, § 3084.1(b).

13 D. Defendants’ Evidence

14 Defendants produced the affidavits of J.D. Lozano, the Chief of the Office of Appeals of
15 the CDCR, as well as that of A. Briones, the health care appeals coordinator at CSP-Sacramento.
16 See ECF Nos. 14-3, 14-4. The Lozano affidavit describes the various levels of non-health care
17 related administrative appeals available for California inmates, with the last level being that of the
18 Office of Appeals (“OOA”). ECF No. 14-3. According to Lozano, the “OOA’s records disclose
19 that inmate Bernardos Gray (P-46538) did not file any appeals that were accepted by the OOA
20 claiming prison officials were deliberately indifferent to the risk of him being attacked by his
21 cellmate on May 19, 2011....” ECF No. 14-3 at 2. The affidavit provided by A. Briones
22 describes the processing of misconduct complaints against health care staff by prisoners. See
23 ECF No. 14-4. “When a health care appeal is treated as a staff complaint it is sent to the Chief
24 Executive Officer to review, investigate, and issue a response to the inmate. Treating an appeal
25 as a staff complaint does not limit the ability of an inmate to appeal his grievance to the
26 Director’s Level of Review.” ECF No. 14-4 at 1-2. Attached to Briones’ affidavit is the CDCR
27 602 appeal form logged as appeal no. SAC HC 11014641/SAC SC 11000479, submitted by
28 plaintiff pertaining to the medical care he received after his May 19, 2011 assault by a fellow

1 inmate. ECF No. 14-4 at 4-7. This inmate appeal was partially granted at the second formal
2 level, and was not appealed thereafter. Id.

3 E. Plaintiff's Opposition

4 In his opposition to the motion to dismiss, plaintiff alleges that his efforts to
5 administratively exhaust his claims were thwarted by the improper screening of his appeals by
6 prison officials. See ECF No. 23. In support, plaintiff submitted copies of a CDCR 602 appeal
7 form alleging that he was the "victim of violence and officer negligence" in relation to double-
8 celling on May 19, 2011. See ECF No. 23 at 14. This appeal specifically named defendants
9 Starnes and Gam as being the officers whose negligence led to plaintiff's assault by another
10 inmate. Id. In the section pertaining to the "action requested," plaintiff asked for "pain
11 management regimen of methadone; dismissal of RVR # A-S-11-05-040; release from
12 administrative segregation; transfer to CSP-Lancaster; commutation/suspension of remaining
13 sentence; and[,] all qualifying forms of compensatory relief for actual injury/damages and
14 prospective medical complications; [as well as] compensatory relief for deliberate negligence and
15 indifferent negligence." ECF No. 23 at 15-16. Plaintiff originally submitted this appeal on June
16 7, 2011. Id. However it was screened as a complaint pertaining to "living conditions" and
17 rejected on June 8, 2011 because "it involves multiple issues that do not derive from a single
18 event..." and because the "appeal issue is obscured by pointless verbiage or voluminous unrelated
19 documentation...." ECF No. 23 at 28.

20 On June 29, 2011, plaintiff re-submitted this appeal form explaining that his complaint "is
21 expressing all one event, from the beginning to the end, which resulted in my injuries by the
22 cause of staff misconduct to follow safety precaution procedure of inspecting inmates in ad-seg
23 housing...." ECF No. 23 at 18. In response, this appeal was returned to plaintiff without any
24 explanation so he submitted it directly to the third level of administrative appeal. ECF No. 23 at
25 8, 29. On July 18, 2011 the Office of Appeals rejected plaintiff's appeal because it bypassed
26 required lower level(s) of review. ECF No. 23 at 30.

27 Following this rejection, plaintiff re-submitted his appeal to first formal level of
28 administrative review on July 26, 2011. ECF No. 23 at 8, 30. This appeal was rejected on

1 August 3, 2011 because it involved “multiple issues that do not derive from a single event,” it
2 concerned “an anticipated action or decision,” and because it was “missing necessary supporting
3 documents.” ECF No. 23 at 30-31. On this occasion, plaintiff was advised that his appeal
4 involved a total of four separate issues that “will need to be handled by various areas. Separate
5 appeals will need to be submitted.” Id. at 31. Specifically, plaintiff was instructed that he needed
6 to provide more detailed information as well as a CDCR 1858 form as to his first issue involving
7 a staff complaint. Id. His second issue related to pain management needed to be addressed on a
8 Health Care 602 form. Id. His third issue related to the requested dismissal of a rules violation
9 report (“RVR”) required him to provide the final copy of the RVR itself. Id. And, plaintiff’s
10 request to be released from administrative segregation and transferred to a different prison
11 required a CDC 128-G and 114-D forms to be submitted. Id.

12 On August 11, 2011, plaintiff re-submitted his appeal form to the first formal level of
13 administrative review along with the requested CDCR 1858, 128-G and 114-D forms. ECF No.
14 23 at 32. Plaintiff additionally submitted a hand-written note indicating that his pain management
15 and RVR issues were contained within the “actions requested” section of the appeal form and
16 were thus not separate issues. Id. This appeal was once again rejected on August 18, 2011 for
17 the same reasons as the previous appeal. ECF No. 23 at 33-35. While this time plaintiff was
18 “thanked” for providing the requested documents, his appeal was nonetheless rejected once more
19 with an instruction to attach his four issues on separate 602 forms. Id. Four separate 602 forms
20 were provided to plaintiff at this juncture with each one labeled with what appears to be a post-it
21 note identifying each issue to be raised on the form. ECF No. 23 at 10, 36-42.

22 Plaintiff once again complied with the instructions provided by the appeals coordinator
23 and re-submitted four separate 602 forms on August 20, 2011 “in a big yellow envelope via
24 institutional mail.” ECF No. 23 at 10-11, 36-42. After thirty days passed without any response to
25 this latest submission, plaintiff submitted a CDCR-22 form to the first administrative level of
26 review requesting the status of his appeal. ECF No. 23 at 11. Plaintiff received a response on
27 October 10, 2011 from the Appeals Coordinator at CSP-Sac indicating that the review of his
28 appeal had been delayed and that the estimated completion date was October 25, 2011. ECF No.

1 23 at 50. After submitting another CDCR-22 form requesting the status of his August 11, 2011
2 appeal without receiving any response, plaintiff filed the instant civil rights action on December
3 9, 2012. ECF No. 23 at 11.³

4 Plaintiff also addresses his separate health care appeals regarding defendant Wangombe.
5 On July 25, 2011 plaintiff filed a health care 602 appeal form alleging that Registered Nurse
6 Wangombe provided inadequate medical care and refused to let a doctor examine him following
7 his May 19, 2011 assault by another inmate. ECF No. 23 at 57-58. The health care appeal form
8 indicates that this appeal was logged as No. SAC HC 11014641 and the informal as well as first
9 formal levels of review were bypassed.⁴ ECF No. 23 at 57-58. Plaintiff's health care appeal was
10 partially granted on September 30, 2011 at the second formal level of review following an inquiry
11 in which it was determined that staff did not violate CDCR policy. ECF No. 23 at 60-61. The
12 memorandum detailing this response to plaintiff's staff complaint against Registered Nurse
13 Wangombe informed him that:

14 " [a]llegations of staff misconduct do not limit or restrict the
15 availability of further relief via the inmate appeals process. If you
16 wish to appeal the decision, you must submit your staff complaint
17 appeal through all levels of appeal review up to, and including, the
Director's Level of Review. Once a decision has been rendered at
the Director's Level of Review, your administrative remedies will
be considered exhausted."

18 ECF No. 23 at 61.

19 Also attached to plaintiff's opposition to the motion to dismiss are two separate inquiries
20 that plaintiff submitted to CDCR staff concerning his health care 602 appeal. ECF No. 23 at 63,
21 65. On March 17, 2013 plaintiff completed a CDCR 22 form requesting a copy of his second
22 level staff complaint appeal. ECF No. 23 at 63. After being informed that the wrong form was
23 used to make the inquiry, plaintiff submitted a GA 22 form requesting the same thing on March

24 ³ Plaintiff details additional efforts he took to exhaust his administrative remedies after filing the
25 complaint in this case. See ECF No. 23 at 11-12. The court disregards this information because
26 exhaustion is required prior to the time of filing. See McKinney v. Carey, 311 F.3d 1198 (9th
27 Cir. 2002).

28 ⁴ As of January 28, 2011 the informal resolution level was eliminated so this appears to be an
error in processing the appeal form.

1 21, 2013. ECF No. 23 at 65. Plaintiff received a response on March 22, 2013 indicating that
2 based on a search of the appeals database, his appeal form No. HC 11014641 “never went to the
3 2nd level so there is no copy to send you.” Id.

4 F. Defendants’ Reply

5 In their reply, defendants assert that the multiple screenings of plaintiff’s non-health care
6 related appeals were consistent with applicable regulations. ECF No. 26 at 3-6. Defendants
7 further contend that the October 20, 2011 response, which indicated that there was a delay in
8 processing appeal log No. SAC-S-11-00533, did not relate to the events of May 19, 2011. ECF
9 No. 26 at 3 (citing ECF No. 26-1 at ¶ 6 (Lynch Affidavit)). Defendants argue that “[t]here is
10 simply no evidence to support Gray’s claim that he submitted four separate appeals on August 20,
11 2011, that did not receive a response.” ECF No. 26 at 6.

12 Defendants additionally submit the declaration of J. Lynch, the Appeals Coordinator at
13 CSP-Sacramento, who details the plaintiff’s appeal history at that institution. ECF No. 26-1.
14 According to Lynch, appeals that are screened-out are not assigned a log number “and the
15 physical records from screened-out appeals are not maintained.” Id. at 2. However, later in this
16 same affidavit, Lynch states that “[h]ad these [August 20, 2011] appeals been received, they
17 would have been stamped by the appeals office or he would have received a screen-out letter in
18 response.” ECF No. 26-1 at 3. Plaintiff only filed two administrative appeals which were
19 accepted for review between May 19, 2011 and May 19, 2012. Id. “Neither of these appeals
20 alleged that any officers acted with deliberate indifference that caused him to be injured by his
21 cellmate on May 19, 2011.” ECF No. 26-1 at 2. In his affidavit J. Lynch states that he “reviewed
22 the documents attached to inmate Gray’s Opposition to Defendants’ Motion to Dismiss (ECF No.
23 23), and none of them indicate his appeals were improperly screened.” Id.

24 Along with the Lynch affidavit, defendants submit the second level appeal decision in
25 Appeal Log No. SAC-S-11-00533 dated September 13, 2011 that concerns plaintiff’s continued
26 placement in administrative segregation. ECF No. 26-1 at 5-6. The original CDCR 602 appeal
27 form dated May 5, 2011 is also included as an exhibit. ECF No. 26-1 at 7-9. In the appeal form
28 plaintiff states that he is appealing the Institution Classification Committee’s decision of April 20,

1 2011 to retain him in administrative segregation. Id. Interestingly, this appeal form also
2 demonstrates that it was screened-out on four separate occasions between May 16, 2011 and
3 August 19, 2011. Id. at 11.

4 The second CDCR 602 appeal form included with the Lynch affidavit concerns a June 27,
5 2011 complaint concerning damage caused to plaintiff's personal property. ECF No. 26-1 at 27-
6 28. After being screened out on two separate occasions, this appeal was ultimately withdrawn by
7 plaintiff at the first formal level of review on August 18, 2011 because the property was replaced.
8 ECF No. 26-1 at 28.

9 To the extent that the Lynch affidavit contains legal conclusions rather than factual
10 averments, e.g. ECF No. 26-1 at ¶ 7, the court will disregard them and reach its own conclusions
11 based on the evidence submitted by the parties.

12 G. Plaintiff's Unauthorized Response to Defendants' Reply

13 In this unauthorized submission, plaintiff details the above-noted history concerning the
14 screening of his inmate appeals. ECF No. 30. He argues that his appeals did not contain multiple
15 issues he wanted to address, but only multiple forms of relief that he wanted "granted for the staff
16 misconduct claim of deliberate indifference that caused his injuries." ECF No. 30 at 6. With
17 respect to his health care appeal against defendant Wangombe, plaintiff states that he "thought his
18 appeal was being held [un]til the investigation was completed before he could continue to the
19 next level." Id. at 7.

20 Defendants have moved to strike this unauthorized response since neither the Federal
21 Rules of Civil Procedure nor the Local Rules provide for such a pleading and because defendants
22 did not raise any new arguments in their reply brief which would warrant a response. ECF No.
23 35.

24 The court will deny the motion to strike as defendants did submit an additional thirty-nine
25 pages of documentary evidence attached to their reply. This evidence was available to defendants
26 at the time they filed their motion to dismiss, yet they chose to wait to file it until their reply, thus
27 foreclosing plaintiff's ability to respond to the evidence. The sand-bagging of a pro se plaintiff
28 will not be condoned by this court.

1 III. Analysis

2 It is undisputed in this case that plaintiff did not pursue his inmate appeals through the
3 third level of review. However, plaintiff contends that the appeals coordinators three times
4 improperly screened out and rejected his inmate appeals at the first level of review, thereby
5 rendering administrative remedies effectively unavailable to him and excusing his failure to
6 exhaust. Defendants take the position that the screening out of plaintiff's three first level appeals
7 was proper and authorized by the governing regulations.

8 The Ninth Circuit has held that "improper screening of an inmate's administrative
9 grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not
10 required under the PLRA." Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). As the Ninth
11 Circuit noted, if prison officials screen out an inmate's appeals for improper reasons, the inmate
12 cannot pursue the necessary sequence of appeals, and, as a result, his administrative remedies
13 become unavailable. Id. In order to fall within this exception, the inmate must establish: (1) that
14 he actually filed a grievance or grievances that, if pursued through all levels of administrative
15 appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court; and (2)
16 that prison officials screened his grievance or grievances for reasons inconsistent with or
17 unsupported by applicable regulations. Id. at 823–24.

18 A. Staff Complaint re Failure to Protect

19 Plaintiff's initial grievance of the May 19, 2011 attack plainly alleged that plaintiff was
20 assaulted by inmate Williams as the result of Officers Gam's and Starnes' failure to protect him.
21 See ECF No. 23 at 15-16 (602 dated June 7, 2011). Moreover, this 602 made clear that the
22 assault occurred in the process of housing plaintiff with a new cell mate. Id. The complaint
23 attributes the decision to double-cell plaintiff with inmate Williams to defendant Nielson. ECF
24 No. 1 at 4. The 602 specified that Officers Gam and Starnes failed to search Williams or the cell
25 before putting the inmates together. ECF No. 23 at 16. The complaint alleges that defendant
26 Virga, the warden, is responsible for failing to adequately train correctional staff regarding the
27 search procedures that apply when double-celling inmates in a high risk security unit, and that
28 this failure to train resulted in plaintiff's injuries. ECF No. 1 at 3. Because the June 7, 2011

1 inmate appeal notified prison authorities of the nature of the problem for which plaintiff sought
2 redress – an inmate assault which resulted from double-celling and staff failure to take necessary
3 safety precautions – the 602 would have sufficed to exhaust Claim One as to these four
4 defendants had it been pursued through all levels of administrative appeal. See Sapp, 623 F.3d at
5 824 (“A grievance suffices to exhaust a claim if it puts the prison on adequate notice of the
6 problem for which the prisoner seeks redress.”); Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir.
7 2009) (grievance satisfies the administrative exhaustion requirement if it “alerts the prison to the
8 nature of the wrong for which redress is sought.”).⁵

9 The question then becomes whether plaintiff’s failure to pursue the complaint through all
10 levels of administrative appeal is attributable to plaintiff or to prison officials. The June 7, 2011
11 inmate appeal was rejected because it purportedly addressed “multiple issues that do not derive
12 from a single event” and because it was “obscured by pointless verbiage or voluminous unrelated
13 documentation.” ECF No. 23 at 28. While the applicable regulations do provide for dismissal of
14 appeals on these grounds, they do not apply to plaintiff’s 602. The sole subject of the appeal,
15 described in response to the prompt “Explain your issue,” is the May 19, 2011 assault and its
16 immediate aftermath. No other incident is complained of. Plaintiff’s statement of the issue
17 consists of approximately 250 words, and is relatively concise and clearly presented. No
18 pointless verbiage is apparent. ECF No. 23 at 15-16. The attachments all pertain to the May 19,
19 2011 altercation between plaintiff and inmate Williams or to plaintiff’s security classification and
20 attendant housing requirements, which are relevant to the dangers of double-celling. This
21 documentation is neither unduly voluminous nor unrelated. Id. at 19-27. The relief sought by the
22 602 does indeed range widely, from pain medication for plaintiff’s injuries to dismissal of a rules
23 violation report that plaintiff received in relation to the altercation, but these matters are all

24
25 ⁵ Although Virga and Nielson were not named in the 602, that fact does not defeat exhaustion.
26 Sapp, 623 F.3d at 824 (prisoner was not required to identify responsible parties in prison
27 grievance to exhaust claims against specific defendants). The complaint states facts linking these
28 defendants to the events of May 19, 2011, which were adequately grieved for exhaustion
purposes.

1 mentioned solely in the context of “actions requested.”⁶ All the requested relief relates to the
2 May 19 incident. Id. at 15. For all these reasons, the screen-out appears to have been
3 inappropriate. For the reasons that follow, however, plaintiff is entitled to relief from the non-
4 exhaustion rule even if the initial screening order was proper.

5 After his initial appeal was rejected, plaintiff made diligent and persistent efforts to obtain
6 review. He promptly resubmitted his 602 with an explanation that he was seeking to appeal a
7 single incident of staff misconduct. ECF No. 23 at 17-18 (June 29, 2011 appeal). When he
8 received no response, plaintiff sought advice from a prisoner’s rights organization and then,
9 pursuant to that advice, submitted his appeal directly to the Office of Appeals for discretionary
10 third level review. Id. at 8, 29. Although this appeal was rejected on July 18, 2011 for bypassing
11 lower levels of review, id. at 29, plaintiff is correct that Cal. Code Regs. tit. 15, § 3084.6(a)(3)
12 and (4)⁷ give the third level appeals chief discretion to accept and consider a previously rejected
13 appeal. Accordingly, plaintiff’s request for review was permissible (or, at least, based on a
14 reasonable reading of the rules). When this effort failed, plaintiff started over at the first formal
15 level of review on July 26, 2011. Id. at 29.

16 The appeal submitted on July 26 was screened out on August 3 on the same grounds
17 stated in first screen-out order: that too many separate issues were being appealed in a single 602.
18 Id. at 30-31. This time the institution appeals coordinator provided specific advice about what
19

20 ⁶ Defendants characterize the various actions requested by plaintiff as distinct “issues” within the
21 meaning of the rule that limits a single 602 to a single matter. See ECF No. 26 at 5. However,
22 Cal. Code Regs. tit. 15, § 3084.6(b)(8) bars appeals “involv[ing] multiple issues that do not derive
23 from a single event. . .” All actions requested by plaintiff “derive from” the May 19, 2011
24 assault. The 602 plainly identifies the “issue” appealed as the conduct of prison staff in relation
25 to the assault. Concerns regarding pain relief and subsequent disciplinary proceedings are
26 presented only in the context of requested remedies, and not in plaintiff’s statement of his issue.
27 The undersigned is cognizant of the fact that the various remedies requested by plaintiff were not
28 all available via the single 602 addressing the May 19 assault, and the subsequent history of
plaintiff’s attempt to exhaust (which is discussed below) makes clear that this was the reasoning
behind the screen-out. Accordingly, the court does not rely on a finding that the first screen-out
was improper, but proceeds to plaintiff’s continuing attempts to comply with the rules.

⁷ Subsequent unlabeled statutory references are to Title 15 of the California Code of Regulations.

1 forms needed to be submitted in order to seek the various kinds of relief that had been requested.
2 Id. at 31. On August 11 plaintiff resubmitted his appeal, supported by several of the forms that
3 had been specified by the appeals coordinator. Id. at 30-31 (directing plaintiff to submit, inter
4 alia, CDC Forms 1858, 128-G and 114-D); id. at 32 (cover letter documenting submission of
5 same). Plaintiff did not, however, submit the forms that he had been told were necessary to
6 separately appeal his pain management and RVR issues, because – as he explained yet again – *he*
7 *was not attempting to appeal those matters.* Id. at 32 (distinguishing 602 “A section” issues from
8 “B section” remedial actions requested). Once more plaintiff was told that his appeal could not
9 be processed because he was raising too many unrelated issues together. Id. at 33 (screen-out
10 letter dated August 18, 2011). Once again, the institution’s refusal to process the appeal on these
11 grounds obstructed plaintiff’s ability to exhaust.

12 Importantly to the present analysis, plaintiff’s July 26 and August 11 submissions were
13 not cancelled as outside the applicable time limits or for any other reason.⁸ Despite the time that
14 had elapsed since the May 19 assault, and plaintiff’s history of what prison officials considered
15 persistent noncompliance with the appeals regulations, he was specifically advised in the August
16 18 screen-out letter that he could resubmit his appeal yet again and have it considered if he used
17 separate forms for each “issue.” Id. Indeed, at no point during the convoluted history of his
18 attempted staff complaint was plaintiff told that he had lost the opportunity to perfect his appeal.
19 On the contrary, he was repeatedly instructed to resubmit his paperwork.⁹ Accordingly, as of
20 August 18, 2011 plaintiff had not forfeited the opportunity for administrative exhaustion and had
21 thirty days in which to submit corrected documents. § 3084.6(a)(2).

22
23 ⁸ See § 3084.6(c)(4). Inmate appeals may be “cancelled” for untimeliness and other reasons
24 specified in § 3084.6(c), and are not thereafter renewable except under limited circumstances
25 specified in § 3084.6(a)(3) & (4). Appeals are “rejected” for procedural mistakes that can be
26 cured. § 3084.6(b) (listing bases for rejection), § 3084.6(a)(2) (providing for resubmission of
27 corrected appeal within 30 days of rejection).

28 ⁹ As previously noted, § 3084.6(a)(2) provides that an appeal rejected for procedural reasons may
later be accepted if the procedural problem is corrected and the appeal returned within 30 days of
rejection. Plaintiff responded within thirty days, usually within a very few days, every time his
appeal was rejected.

1 Plaintiff contends that on August 20, 2011 he submitted all the requested documentation,
2 including separate appeals of the pain management issue and RVR, on forms provided to him by
3 the appeals coordinator. Defendants contend that no such appeals packet was ever received, and
4 that plaintiff therefore failed to exhaust. ECF No. 26 at 6. Petitioner counters that he never
5 received a response to his August 20 staff complaint, and that exhaustion should therefore be
6 excused. In the final analysis, then, disposition of the motion to dismiss turns on whether plaintiff
7 did in fact comply with the August 18 screen out by re-submitting four separate appeal forms on
8 August 20, 2011.

9 Plaintiff has stated under oath that he submitted four separate appeal forms via
10 institutional mail on August 20, 2011. ECF No. 23 at 11. He has also submitted a copy of his
11 response to the August 18 screen-out that is dated August 20 and states that it is accompanied by
12 “form numbers one through four.” Id. at 33. Plaintiff avers that the entire set of appeal
13 documents comprising Exhibit A to his opposition, id. at 13-42, was submitted to the appeals
14 coordinator’s office on August 20. Id. at 11. This set of documents does include copies of four
15 separate 602 forms addressing (1) the RVR, (2) staff responsibility for the assault, (3) pain
16 management needs resulting from injuries sustained in the assault, and (4) requested release from
17 ad seg and transfer. Id. at 36-42. These documents appear to bear post-it note labels consistent
18 with plaintiff’s declaration that the appeals coordinator gave him, together with the August 18
19 screen-out letter, blank 602 forms with “note tags. . . stating or titling what each blank appeal is
20 for.” Id. at 10. The four completed 602s were apparently back-dated by plaintiff to the date of
21 the initial 602 (June 7, 2011). Id. at 36-42. Plaintiff states under oath that he never received a
22 response to his August 20 submission, and that his inquiries went unanswered. Id. at 11.

23 Defendants argue that plaintiff has failed to prove he resubmitted his appeal after August
24 18, but the court rejects this argument. Plaintiff’s sworn statements, supported by copies of the
25 documents that he swears he submitted, are sufficient to establish that plaintiff complied with the
26 August 18 screen-out order. The fact that the institution’s appeals logs do not reflect receipt of
27 the August 20 submission, as defendants’ declarant states, does not mean that plaintiff did not
28 deposit it in the institutional mail as he claims. Defendants also argue that an October 2011 letter

1 from the appeals coordinator to plaintiff, acknowledging a delay in the processing of an appeal,¹⁰
2 involved an appeal of a different issue and does not demonstrate that a properly submitted appeal
3 of the May 19 incident had been received and was being processed. That letter is immaterial to
4 the court's conclusion.

5 Defendants bear the burden of proving non-exhaustion, Wyatt, 315 F.3d at 1119, and their
6 reliance on plaintiff's appeal log does not satisfy that burden. The appeals log documents the
7 appeals' coordinator's receipt of documents and not whether plaintiff placed the documents into
8 the institutional mail. There is no factual basis for any inference that the contents of an appeals
9 log from CSP-Sacramento accurately reflects whether documents were placed into the
10 institutional mail system.¹¹ Plaintiff has produced evidence to show that he submitted the
11 documents. Defendants have not rebutted that showing with evidence going to plaintiff's use of
12 the institutional mail. Based on the absence of any documentation countering plaintiff's affidavit,
13 the undersigned finds that plaintiff has demonstrated that he re-filed four separate inmate appeals
14 at the first level of review concerning his assault by another inmate on May 19, 201, and received
15 no response from the appeals coordinator. After filing two separate inquiries concerning these
16 administrative appeals, plaintiff abandoned further efforts to exhaust his administrative remedies.

17 Based on this record, the undersigned finds that plaintiff's abandonment of the second and
18 third levels of administrative review was excused pursuant to Nunez v. Duncan, 591 F.3d 1217,
19 1224 (9th Cir. 2010), and that these administrative remedies were effectively unavailable. In
20 Nunez, the Ninth Circuit found that an inmate was excused from exhausting his administrative
21 remedies because he "took reasonable steps to exhaust his Fourth Amendment claim and was
22 precluded from exhausting, not through his own fault but by the Warden's mistake." Id. at 1224.

23 Similarly, in Rupe v. Beard, 2013 WL 2458398 (E.D. Cal. 2013), a district judge of this
24 court reasoned that "after an inmate has waited a reasonable period of time and has received no
25 response or notice of delay, the failure by prison officials to abide by inmate-grievance

26 ¹⁰ See ECF No. 23 at 50.

27 ¹¹ Problems with the processing of inmate mail at CSP-Sacramento during the period of plaintiff's
28 attempts to exhaust have been the subject of other lawsuits in this district. See, e.g., Manning v.
Bunnell, No. 2:12-cv-2440 MCE AC, ECF No. 63 at 14-15.

1 regulations must excuse the inmate's failure to exhaust; otherwise, prison officials could
2 indefinitely delay inmates from pursuing legal remedies simply by ignoring all inmate appeals.”
3 Id. at *16. That reasoning is sound. While the Ninth Circuit has not specifically found that an
4 untimely or delayed response by prison officials automatically excuses a prisoner's failure to
5 exhaust, it has left open that exact possibility. See Brown v. Valoff, 422 F.3d 926, 943 n. 18 (9th
6 Cir. 2005); see also Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002) (stating that the
7 “failure to respond to a grievance within the time limits contained in the grievance policy renders
8 an administrative remedy unavailable....”); Foulk v. Charrier, 262 F.3d 687, 698 (8th Cir. 2001)
9 (affirming district court decision not to dismiss for failure to exhaust when a Department of
10 Corrections' failure to respond to a preliminary grievance precluded the plaintiff from pursuing a
11 formal grievance).

12 In the instant case, plaintiff took all reasonable steps to comply with the three prior screen
13 outs of his first level administrative appeal by submitting the requested documentation as well as
14 by completing separate appeal forms for each separate issue. However, after he had complied and
15 re-submitted the appeals in proper form on August 20, 2011, prison officials did not respond.
16 Under these circumstances, the undersigned finds that the second and third levels of
17 administrative review were effectively unavailable to plaintiff. Accordingly, the motion to
18 dismiss defendants Virga, Nielson, Starnes, and Gam should be denied.

19 B. Health Care Appeal

20 The court now turns to the exhaustion status of plaintiff's health care appeal. The parties
21 agree that plaintiff did not file a Director's Level appeal with respect to his complaint of
22 inadequate medical care by defendant Wangombe. Plaintiff's explanation for this failure – that he
23 believed his appeal “was being held till the investigation was completed before he could continue
24 to the next level,” ECF No. 23 at 7 -- is simply not persuasive in light of the evidence he himself
25 submitted, which demonstrates that he was informed he could appeal the decision to the
26 Director's Level of Review. See id. at 61. Plaintiff was specifically informed on September 28,
27 2011 that the internal inquiry had been completed and that it was determined that staff did not
28 violate CDCR policy. Id. at 60-61. As plaintiff was advised at that time, he was required to

1 pursue his appeal through the Director's level in order to exhaust. Id.

2 The instant case is distinguishable from Brown v. Valoff, 422 F.3d 926, 938 (9th Cir.
3 2005), in which the Ninth Circuit concluded that an inmate had sufficiently exhausted his
4 administrative remedies concerning a staff complaint by pursuing it only through the second level
5 of administrative review. "[N]o further relief was in fact 'available' through the appeals process,
6 although the staff complaint process to which the grievance was directed... had not yet run its
7 course" because the staff investigation by the Office of Internal Affairs had already been opened.
8 Id. at 939. Brown, however, does not establish a per se rule that the pendency of an internal
9 investigation renders further administrative appeal unavailable. The result in Brown turned on
10 the fact that the prisoner -- unlike plaintiff here --was not informed that any further review was
11 available to him following the second level response. Id. at 937. Indeed, the Brown court found
12 that another prisoner, Hall, had not satisfied the exhaustion requirement because he -- like plaintiff
13 here -- had been informed that if he was dissatisfied with the second level appeal response, further
14 administrative review was available. Id. at 941. The second level appeal response in plaintiff's
15 case specifically advised him that he could submit his staff complaint appeal up to, and including,
16 the Director's Level of Review. ECF No. 23 at 61. Under Brown, plaintiff's failure to do so
17 renders his claim unexhausted. For this reason, it is recommended that defendants' motion to
18 dismiss defendant Wangombe be granted.

19 The only factual allegations of the complaint regarding defendant Phelps are contained in
20 the medical care claim. Plaintiff alleges that Phelps was present when nurse Wangombe
21 examined plaintiff, asked the nurse whether plaintiff needed to see a doctor, and questioned
22 plaintiff about the assault while he was in medical distress. ECF No. 1 at 6-7. A very liberal
23 construction of the complaint could support an inference that Phelps participated in the failure to
24 obtain adequate medical care. Because Phelps is implicated only in the unexhausted medical care
25 claim, it will be recommended that the motion to dismiss be granted as to him.

26 IV. Ancillary Motion

27 Also pending before the court is plaintiff's motion for a court order to compel the return
28 of his personal legal property. ECF No. 28. The court notes that this motion was filed on

1 December 19, 2013,¹² almost one month after briefing had closed on defendants' motion to
2 dismiss, and, on the same day that plaintiff filed an unauthorized sur-reply to the pending motion
3 to dismiss. See ECF No. 30.

4 In the motion, plaintiff indicates that he was transferred from Pelican Bay State Prison to
5 Salinas Valley State Prison on December 5, 2013 without any of his legal property. ECF No. 28
6 at 1. Plaintiff requests a court order compelling Pelican Bay State Prison to forward all of his
7 legal property to him "in a reasonable amount of time...." ECF No. 28 at 1.

8 Since there is no motion presently pending to which plaintiff must respond, this request
9 will be denied. Plaintiff has not shown a sufficient reason for this Court to interfere in the day-to-
10 day operations of the prison. See Turner v. Safley, 482 U.S. 78, 84–86 (1987); Wright v. Rushen,
11 642 F.2d 1129, 1132 (9th Cir.1981) (courts should avoid enmeshing themselves in minutiae of
12 prison operations).

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's motion to compel the return of his legal property (ECF No. 28) is denied;
15 and
16 2. Defendants' motion to strike plaintiff's unauthorized sur-reply (ECF No. 35) is denied.

17 IT IS HEREBY RECOMMENDED that:

18 1. The motion to dismiss for failure to exhaust administrative remedies (ECF No. 14) be
19 granted as to defendant Wangombe and Phelps, and denied with respect to defendants Virga,
20 Nielson, Starnes, and Gam;

21 2. Defendants Virga, Nielson, Starnes, and Gam be directed to file an answer to the
22 complaint within thirty days of the adoption of these findings and recommendations.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
25 after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned

27 _____
28 ¹² The filing date is based on the use of the prison mailbox rule. See Houston v. Lack, 487 U.S.
266 (1988) (establishing prison mailbox rule).

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
2 objections shall be served and filed within fourteen days after service of the objections. The
3 parties are advised that failure to file objections within the specified time may waive the right to
4 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: January 27, 2014

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7 ALLISON CLAIRE
8 UNITED STATES MAGISTRATE JUDGE
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