

1 exhaust administrative remedies prior to filing suit.¹ Plaintiff has opposed the motion and
2 defendants have filed a reply.²

3 **BACKGROUND**³

4 In the TAC, plaintiff alleges the following:

5 On August 29, 2003, when plaintiff was incarcerated at the CCCJ, she was assaulted
6 without cause by Sheriff's Deputy James Cavin. (TAC at 16:¶¶ 18-20.) In February 2007,
7 plaintiff was transferred to the Valley State Prison for Women ("VSPW") (TAC at 38:¶ 14),
8 and in June 2007 she was transferred to administrative segregation at CCWF (TAC at 40:¶
9 18). In August 2007, plaintiff filed emergency administrative appeals, complaining that
10 CCWF defendants Sgt. Gibson and Sgt. Robertson were denying her access to the law library
11 and legal materials adequate to enable her to file a complaint concerning the above-noted
12 assault and to comply with other court deadlines. (TAC 44:¶ 6.) On August 19, 2007,
13 plaintiff was returned to CCCJ for court hearings (TAC 41:¶ 22), and she remained there
14 until she was returned to CCWF on November 5, 2007 (TAC 42:¶ 27).

15 Plaintiff believed the statutory deadline for filing the instant complaint was August 29,
16 2007. (TAC 41:¶ 22.) Because of the denial of access to the law library and legal materials
17 at CCWF, however, plaintiff was not able to file her original complaint in this matter until
18 March 2008. (TAC 43:¶ 3-45:¶ 7.)

19 Based on the above allegations, plaintiff claims CCWF Sgts. Gibson and Roberts, as
20 well as Warden Gail Patrick, have violated her constitutional right of access to the courts.

21 **DISCUSSION**

22 _____
23 ¹Plaintiff has also named CCWF Warden Gail Patrick as a defendant to her claim.
24 Warden Patrick, however, has not been served; consequently, no appearance has been made
25 on her behalf.

26 ²The Contra Costa County defendants have filed a separate motion to dismiss with
27 respect to the claims asserted against them in the TAC. (Docket No. 25.) The motion has
28 been fully briefed and is addressed in a separate order filed concurrently herewith.

³As the instant motion pertains solely to the claims asserted against the CCWF
defendants, only the facts alleged by plaintiff in the TAC with respect to those claims are set
forth herein.

1 Defendants Gibson and Roberts move to dismiss plaintiff’s claims on the ground
2 plaintiff has failed to exhaust her administrative remedies as required under 42 U.S.C.
3 § 1997(e).

4 A. Standard of Review

5 Non-exhaustion under § 1997e(a) is an affirmative defense; defendants have the
6 burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108,
7 1119 (9th Cir. 2003). A nonexhaustion defense should be raised in an unenumerated Rule
8 12(b) motion. Id. In deciding such a motion, the district court may look beyond the
9 pleadings and decide disputed issues of fact. Id. at 1119-20. If the court concludes the
10 prisoner has not exhausted nonjudicial remedies, the complaint is subject to dismissal without
11 prejudice. Id. at 1120; see also Lira v. Herrera, 427 F.3d 1164, 1175 (9th Cir. 2005) (holding
12 when complaint includes both exhausted and unexhausted claims court should dismiss
13 unexhausted claims).

14 B. The Exhaustion Requirement

15 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
16 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
17 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison,
18 or other correctional facility until such administrative remedies as are available are
19 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the discretion of
20 the district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006). Exhaustion is a prerequisite to
21 all prisoner lawsuits concerning prison life, whether such actions involve general conditions
22 or particular episodes, whether they allege excessive force or some other wrong, and even if
23 they seek relief not available in grievance proceedings, such as money damages. Porter v.
24 Nussle, 534 U.S. 516, 524 (2002).

25 The State of California provides its prisoners and parolees the right to appeal
26 administratively “any departmental decision, action, condition or policy perceived by those
27 individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, (“CCR”),
28

1 § 3084.1(a).⁴ In order to exhaust available administrative remedies within this system, a
2 prisoner must proceed through several levels of appeal: (1) informal review, (2) first formal
3 level appeal on a CDC 602 inmate appeal form, (3) second formal level appeal to the
4 institution head or designee, and (4) third formal level appeal to the Director of the California
5 Department of Corrections and Rehabilitation (“CDCR”). See CCR § 3084.5; Barry v.
6 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). A final decision from the Director’s level
7 of review satisfies the exhaustion requirement under § 1997e(a). Id. at 1237-38. At each
8 level of appeal, the inmate “must submit the appeal within 15 working days of the event or
9 decision being appealed, or of receiving an unacceptable lower level appeal decision.” CCR
10 § 3084.6(c).

11 The exhaustion requirement cannot be satisfied by the filing of an untimely or
12 otherwise procedurally defective administrative grievance or appeal. See Woodford, 548
13 U.S. at 84. Rather, “proper exhaustion” of available administrative remedies is required. Id.
14 at 92. The requirements of the prison’s grievance process, not the PLRA, define the
15 boundaries of proper exhaustion. Jones v. Bock, 549 U.S. 199, 218 (2007).

16 An action must be dismissed unless the prisoner first exhausted available
17 administrative remedies before filing suit. McKinney v. Carey, 311 F.3d 1198, 1199 (9th
18 Cir. 2002).

19 C. Analysis

20 Defendants argue plaintiff did not exhaust her administrative remedies because she
21 did not receive, before filing the instant action, a decision on the merits from the Director’s
22 level of review with respect to the claims plaintiff raises herein.

23 In support of their argument, defendants submit a declaration by N. Grannis
24 (“Grannis”), Chief of the Inmate Appeals Branch (“IAB”) at the California Department of
25 Corrections and Rehabilitation. According to Grannis, the IAB keeps an electronic record of
26 each inmate administrative appeal that has proceeded through the final level of review, the

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28 ⁴Unless otherwise noted, all further references to code sections are to title 15 of the
California Code of Regulations.

1 Director's level. (Decl. N. Grannis Supp. Mot. Dismiss ("Grannis Decl.") ¶ 3.) Grannis has
2 attached to his declaration the IAB computer printout of a report showing each inmate appeal
3 filed by plaintiff at the Director's level of review since the time the computer system was
4 commenced in 1993. (Id. ¶ 4 & Ex. A.) The report lists which of plaintiff's appeals were
5 addressed at the Director's level of review and which appeals were "screened out," i.e.,
6 rejected for procedural reasons, at the Director's level of review. (Id. ¶ 3.)

7 As relevant to the instant action, the report of plaintiff's Director's-level appeals
8 shows that the Director's level did not accept or review any inmate appeals from plaintiff
9 before she mailed her original complaint in the instant action to the court on March 12, 2008.
10 Specifically, the only inmate appeals received from plaintiff at the Director's level before
11 March 12, 2008 were screened out for various reasons. Further, the report shows that a final
12 decision on plaintiff's appeal number CCWF-08-0004, which appeal concerns plaintiff's
13 access to the law library and legal supplies in order to meet court deadlines, was not issued
14 by the Director's level until November 5, 2008, nearly eight months after plaintiff filed the
15 instant action. (Id. ¶ 7 & Ex. A.)

16 Based on the above evidence, defendants argue the administrative appeals process was
17 available to plaintiff to exhaust her claims before filing suit, and plaintiff failed to properly
18 exhaust her administrative appeals.

19 In opposition to the motion to dismiss, plaintiff does not dispute that her appeal
20 concerning her access-to-the-courts claim was not addressed on the merits at the Director's
21 level of review before she filed the instant action. Rather, she argues the Court should allow
22 her claim to proceed because her administrative appeal was "granted" at the first level of
23 review, thereby exhausting the claim. In particular, the evidence shows that Correctional
24 Lieutenant V. Cambridge, on February 4, 2008, issued a First Level Appeal Response to
25 plaintiff's grievance that she was not being allowed access to the law library and legal
26 supplies necessary for her to litigate her civil actions. The appeal described the action
27 requested by plaintiff as follows: "You are requesting access to the Law Library as well as
28 the necessary indigent station[e]ry supplies needed for you to complete your legal work."

1 (Decl. of J. Nygaard (“Nygaard Decl.”) in Supp. of Defs.’ Reply Ex. 2 at 7.) Lt. Cambridge
2 then provided the following response to plaintiff’s request:

3 **APPEAL RESPONSE:**

4 I interviewed you on February 4, 2008 at the First Level of review to afford
5 you the opportunity to explain your appeal issues in detail. During the
6 interview, you indicated that you were getting access to the Law Library as
7 well as the necessary indigent station[e]ry supplies needed for you to complete
8 your legal work.

9 A review of the Administrative Segregation Unit’s (ASU) Isolation Logbook
10 indicates that you have been provided access to the Law Library every
11 Monday, which is the allotted time slot for ASU inmates. The ASU staff also
12 confirms that you have been provided with station[e]ry supplies as allowed in
13 the ASU.

14 **APPEAL DECISION:**

15 Based on the aforementioned, your appeal is **Granted** at the First Formal Level
16 of Review.

17 (Id.)

18 In response to plaintiff’s opposition, defendants argue plaintiff’s claim was not
19 exhausted when it was granted at the first level of review because plaintiff continued to seek
20 relief at the second and third (Director’s) levels of review after she received the February 4,
21 2008 response. In particular, plaintiff, in her second-level appeal filed on March 6, 2008,
22 stated she “disagree[d] with the remarks contained in the [first-level response]” and that she
23 continued to be denied access to the law library and legal resources following the first-level
24 interview. (Id. at 8-9.) At the second level of review, plaintiff’s request for law library
25 access was granted because the first level response indicated she was receiving such access,
26 and her request for legal supplies was partially granted on the ground that such supplies
27 would be issued to her if she could show she was indigent. (Id. at 10.) Plaintiff was not
28 satisfied with the second-level response, however, and appealed to the Director’s level of
review on June 19, 2008, claiming her complaints had been misstated in the second-level
response and stating she continued to be denied access to legal materials and supplies
adequate to litigate her civil actions. (Id. at 10-13.)

A prisoner is required to pursue the exhaustion of administrative remedies as long as
prison officials can take some responsive action to the prisoner’s grievance. See Booth v.

1 Churner, 532 U.S. 731, 733-34 (2001). “The obligation to exhaust available remedies
2 persists as long as some remedy remains ‘available.’” Brown v. Valoff, 422 F.3d 926, 935
3 (9th Cir. 2005). Based on the above-noted course of events that followed the first-level
4 response to plaintiff’s appeal, the Court agrees with defendants that plaintiff’s express
5 disagreement with the decision granting her appeal, and her continued pursuit of further
6 responsive action from prison officials, show that “some remedy” remained available to her
7 even after the first-level appeal was granted. Consequently, the Court finds plaintiff’s claim
8 was not exhausted by issuance of the first-level response.

9 Plaintiff further argues she should be allowed to proceed with her claim because
10 prison officials intentionally interfered with her ability to exhaust her administrative appeals
11 by “indefinitely” delaying the response to her first-level appeal. Specifically, plaintiff claims
12 that under prison regulations a response to her appeal should have been issued within twenty
13 days, but in the instant case her first-level appeal was submitted on August 17, 2007 and she
14 did not receive a response thereto until approximately five and one-half months later, when
15 the first-level response was issued on February 4, 2008. While Woodford left open the
16 possibility that proper exhaustion might not be required where prison administrators “devise
17 procedural requirements that are designed to trap unwary prisoners and thus to defeat their
18 claims,” 548 U.S. at 102, the Court finds the evidence herein does not support such a finding.
19 Specifically, the evidence shows: plaintiff filed her first-level appeal on August 17, 2007; she
20 was transferred from CCWF back to the county jail two days later on August 19, 2007; she
21 did not return to CCWF until November 6, 2007; after her return she was in the
22 administrative segregation unit at CCWF until February 2008; she received a first-level
23 response to her appeal on February 4, 2008. There is no evidence indicating when plaintiff
24 first acted to revive her appeal following her return to CCWF. The Court concludes the facts
25 derived from plaintiff’s evidence fail to support her assertion that defendants intentionally
26 and indefinitely delayed her access to the administrative appeals process for purposes of
27 exhausting her claim of denial of access to the courts.

28 Based on the foregoing, the Court finds unpersuasive plaintiff’s argument that her

1 failure to exhaust her administrative remedies as to her claims against the CCWF defendants
2 should be excused. Defendants have met their burden of raising and proving the absence of
3 exhaustion by showing plaintiff's appeal was not addressed at the Director's level of review
4 until more than seven months after she filed the instant action, and that administrative
5 remedies remained available to her to obtain the relief she sought after her first-level appeal
6 was granted. Plaintiff has not produced evidence to the contrary, nor has she shown an
7 inability to exhaust resulting from any procedural requirements designed to "trap" her and
8 make it impossible for her to complete the administrative appeals process. Accordingly, the
9 Court finds plaintiff did not properly exhaust her administrative remedies, and defendants'
10 motion to dismiss the claims against them as unexhausted will be granted.

11 D. Unserved Defendant

12 In its April 30, 2009 Order of Service, the Court directed the United States Marshal
13 ("Marshal") to serve the three CCCJ employees and the three CCWF employees named as
14 defendants to this action. The Marshal successfully served all defendants except Warden
15 Gail Patrick, the former warden of CCWF. The address provided by plaintiff for defendant
16 Patrick was a post office box at the headquarters of the CDCR in Sacramento. (Docket No.
17 12.) On November 23, 2009, the unexecuted summons was returned to the court with a
18 notation by the Marshal that the summons had been returned to the Marshal by the CDCR on
19 August 4, 2009, for the reason that the summons could not be delivered as addressed and
20 could not be forwarded. (Docket No. 8.)

21 To date, Patrick has not been served. It is clear, however, that the claims against her
22 are subject to dismissal for the reasons discussed above. Specifically, plaintiff alleges that
23 Patrick oversaw the actions of CCWF defendants Gibson and Roberts, and there is no
24 suggestion in the TAC and exhibits attached thereto, or in the briefs and exhibits filed in
25 connection with the instant motion to dismiss, that the analysis of the nonexhaustion
26 argument with respect to Patrick would differ in any respect from the analysis of such
27 argument with respect to Gibson and Roberts. Given the Court's finding that plaintiff has
28 failed to produce evidence showing she exhausted her administrative remedies with respect

1 to her claim against Gibson and Roberts for denial of access to the courts, plaintiff cannot
2 prevail on that same claim as against Patrick. Accordingly, the Court will dismiss the claim
3 against defendant Patrick as unexhausted. See Abagninin v. AMVAC Chemical Corp., 545
4 F.3d 733, 742 (9th Cir. 2008) (holding district court properly granted motion for judgment on
5 pleadings as to unserved defendants where such defendants were in position similar to served
6 defendants against whom claim for relief could not be stated); Columbia Steel Fabricators,
7 Inc. v. Ahlstrom Recovery, 44 F.3d 800, 803 (9th Cir. 1995) (affirming grant of summary
8 judgment in favor of nonappearing defendant where plaintiff, in response to summary
9 judgment motion filed by defendant who had appeared, had “full and fair opportunity to brief
10 and present evidence” on dispositive issue as to claim against nonappearing defendant).

11 **CONCLUSION**

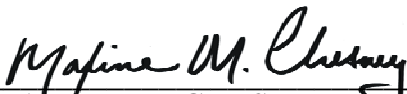
12 For the foregoing reasons, the motion to dismiss plaintiff’s denial of access to the
13 courts claim as unexhausted is hereby GRANTED as to defendants Gibson, Roberts and
14 Patrick.

15 Upon the filing, concurrently herewith, of the Court’s separate order granting the
16 motion to dismiss filed by defendants Cavin, Chertkow and Rupf, the Clerk shall enter
17 judgment in favor of all defendants and close the file.

18 This order terminates Docket No. 44

19 IT IS SO ORDERED.

20 DATED: March 18, 2010

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22 MAXINE M. CHESNEY
23 United States District Judge
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