

1 identities of “John Doe” Defendants (docket nos. 7, 13). In addition, both Plaintiff and
2 Defendants have moved for a protective order and Plaintiff has moved to compel
3 discovery (docket nos. 15, 22, 40, 41). Defendants responded to Plaintiff’s protective
4 order by moving to stay discovery, but have not otherwise filed an opposition to
5 Plaintiff’s motion to compel. The motions are now DENIED as moot (docket nos. 7,
6 13, 15, 22, 40, 41).

7 Plaintiff’s motion for an extension of time to file an opposition (docket no. 25)
8 and Defendant’s motion for an extension of time to file a reply (docket no. 30) are
9 GRANTED (docket nos. 25, 30) and their subsequent filings are deemed timely filed.
10 Plaintiff’s motion in opposition to Defendant’s extension is DENIED (docket no. 34).

11 **BACKGROUND**

12 Defendants file a motion to dismiss the complaint, alleging that Plaintiff has
13 failed to administratively exhaust his claims, as required by the Prison Litigation
14 Reform Act. In support of the motion, Defendants provide a sworn declaration from
15 Steven Smith, Correctional Counselor II in the Inmate Appeals Office (IAO) of SVSP
16 (docket no. 19). In his declaration, Smith states that he serves as one of the authorized
17 custodians of record in the IAO at SVSP and that his office maintains a log of all inmate
18 appeals filed and processed from the first formal level through the second level of
19 review. Declaration of Steven Smith (“Smith Decl.”) in Support of Motion at 1.
20 Appeals filed at the third level of review are processed in the Inmate Appeals Branch in
21 Sacramento. *Id.* at 2. When an appeal is received by the IAO at SVSP and accepted for
22 review, it is given an appeal number and logged into the system for processing. *Id.* The
23 inmate appeal records are made at or near the time that the inmate grievance is received
24 and are made by a person with knowledge of the records, in the regular course of
25 business. *Id.*

26 Smith searched the records of SVSP for appeals submitted by Plaintiff and
27 accepted for processing by the IAO. *Id.* Smith provides a true and correct copy of all of
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1 Plaintiff's inmate appeals that were received and accepted for review by the IAO at
2 SVSP during the time Plaintiff was incarcerated there. Smith Decl., Exhibit A ("Exh.
3 A"). Only one of Plaintiff's appeals was filed after the incident that gave rise to the
4 complaint and that complaint involved phone call policies. Smith Decl. at 2. Smith
5 declares that there is no evidence from reviewing Plaintiff's record of any appeal with
6 regard to this claim being submitted, rejected, or cancelled. *Id.* However, Smith does
7 not specify in the declaration whether it is the practice of the IAO to document all
8 appeals that are submitted, regardless of whether they are screened out and returned to
9 the inmate who submitted them instead of accepted for review. In their reply,
10 Defendants submit additional declarations from E. Medina, Inmate Appeals Coordinator
11 at SVSP and D. Foston, Chief of the Inmate Appeals Branch of CDCR in Sacramento.
12 Medina declares that if Plaintiff's appeal had been rejected or cancelled, that
13 information would be documented in the official records, but there was no information
14 in Plaintiff's record of rejected or cancelled appeals at that time. E. Medina Declaration
15 in Support of Reply ("Medina Decl.") at 3. Medina also states that when an inmate's
16 request for an interview is received, the request is stamped with the date received and a
17 signed response is returned to the inmate, ordinarily within three working days. *Id.*
18 There is no record of a request for interview from Plaintiff in Appeals Office records
19 regarding this matter. Medina declares that it would be "highly unusual for an inmate
20 not to receive a response to an interview request." *Id.*

21 Plaintiff has submitted a sworn opposition to the motion to dismiss, as well as a
22 separate declaration in support thereof. Plaintiff's Motion in Opposition, docket nos.
23 27, 28. In his opposition to the motion, Plaintiff alleges that on Monday, May 26, 2008,
24 Plaintiff was an inmate at Salinas Valley State Prison (SVSP) and was placed on
25 contraband watch and remained so until June 6, 2008, when Plaintiff was taken to an
26 hospital and given an X-ray and cleared. Plaintiff's Declaration ("Plaintiff Decl.") in
27 Support of Opposition at 1. Prior to being placed on contraband watch, Plaintiff had
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1 been searched with a metal detector which had gone off, but he was denied an x-ray by
2 prison staff although he had informed them that he was not hiding contraband, but
3 instead had a bullet lodged in his body. *Id.*

4 On June 16, 2008, Plaintiff submitted a California Department of Corrections
5 and Rehabilitation (CDCR) 602 appeal form “into the grey appeals box located in
6 building C-3. It was in the early morning on the second watch shift.” *Id.* at 2. Plaintiff
7 declares that the copy was signed, dated, and addressed to the appeals coordinator.
8 Plaintiff has attached a copy of the front side of the appeal as Exhibit B in support of the
9 complaint.

10 On June 26, 2008, Plaintiff submitted a GA-22 Inmate Request for Interview
11 form to the appeals coordinator, along with a complete two-sided copy of the original
12 June 16, 2008 602 appeal. *Id.* Plaintiff also placed a fresh signature and date on the
13 602 form. Plaintiff did this in order to “check the status of my [original June 16] appeal
14 and obtain a notice slip and log number.” *Id.* Plaintiff placed both documents into an
15 envelope addressed to the appeals coordinator and “handed it to building C-3 staff for
16 mailing to the appeals coordinator at that evening’s mail pick up.” *Id.* Plaintiff
17 maintains that he has previously been denied the right to copy his appeals by staff at
18 SVSP, because a “602 appeal is not considered legal material.” He had obtained a two-
19 sided copy of his June 16 appeal form, but when he submitted the interview request on
20 June 26, 2008, he was unable to obtain a copy of both sides of the form. *Id.* at 2-3.

21 On July 6, 2008, Plaintiff wrote Warden Evans that he had made prior attempts
22 to address the contraband watch issue with appeals staff to no avail. *Id.* at 4. On July 8,
23 2008, Plaintiff received a response from the Warden of SVSP. *Id.* The Warden’s
24 response informed Plaintiff that letter did not constitute a second-level appeal and that
25 he had to abide by established prison procedure for filing an appeal. *Id.*

26 On July 14, 2008, Plaintiff sent another GA-22 Inmate Request for Interview to
27 the SVSP appeals coordinator inquiring as to the status of his 602 appeal, and seeking a
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1 notice slip and log number. *Id.* Plaintiff handed the form in a CDC envelope to
2 “building C-3 staff for mailing to the appeals coordinator at that evenings [sic] mail
3 pick up.” Plaintiff never received a response from the appeals coordinator. *Id.*

4 On July 17, 2008, Plaintiff wrote to the SVSP warden, responding to the memo
5 he had received from him on July 8, 2008. In his letter, Plaintiff notified the warden
6 that he had submitted a 602 appeal on June 16, 2008, but had not received a log number
7 or any response letting him know the status of his 602. *Id.* Plaintiff requested that the
8 warden have the appeals coordinator process his appeal and forward him the log
9 number. *Id.* A copy of the letter is attached to Plaintiff’s complaint as Exhibit B.
10 Plaintiff mailed the letter to the warden through legal mail. *Id.* Plaintiff states that he
11 received no response to his second letter to the warden. *Id.* at 4-5.

12 On August 13, 2008, Plaintiff wrote the Director of the CDCR. *Id.* at 5. In the
13 letter, he informed the Director of CDCR that he had received no log number or
14 response despite several requests and requested that the Director “force SVSP officials
15 to comply with the established process and accept and log my 602.” *Id.* Plaintiff
16 attached his original 602, as well as a new 602 for filing. A copy of Plaintiff’s letter is
17 attached to the complaint as Exhibit B. The Director’s response informed Plaintiff that
18 his appeal did not comply with the established appeal procedures in California Code of
19 Regulations (CCR) Title 15, Article 8, and was thus screened out. *Id.* Plaintiff was
20 advised that he needed to have his appeal completed at the second level of review
21 before filing with the Director of CDCR. *Id.*

22 In the motion, Defendants claim that Plaintiff has failed to specifically identify
23 an inmate appeal or provide a copy that he lodged with the Inmate Appeals Office
24 which the office accepted and considered for review. Defendants also argue that
25 Plaintiff knows how to properly file an inmate appeal and complete it through the
26 highest level of review because he had filed at least eight appeals before June 2008. *Id.*
27 They argue that Plaintiff’s attempts to follow up on the appeal by writing letters to the
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1 Warden and to the IAB in Sacramento do not excuse him from complying with the
2 department's rules for completing the grievance process. *Id.*

3 Plaintiff argues in opposition that the evidence provided by Defendants is
4 inadequate to establish that the plaintiff failed to exhaust his available remedies.
5 Opposition at 7. Plaintiff contends that Defendants do not deny that the Plaintiff gave
6 his appeal to prison officials for forwarding to the appeals office, only that it was not
7 received. *Id.* Plaintiff argues that his efforts were sufficient to exhaust the available
8 administrative remedies, although those efforts were thwarted by prison officials, and
9 no further remedies are available to plaintiff within the meaning of 1997(e). *Id.* at 10.
10 Because non-exhaustion is an affirmative defense, Plaintiff argues that Defendants have
11 failed to demonstrate that pertinent relief remained available to him. *Id.* at 11.

12 Defendants filed a reply to the opposition. Defendants argue that Plaintiff failed
13 to exhaust his complaint, as he never submitted an appeal to the second or third formal
14 levels of review. Reply at 3. Further, Plaintiff was aware that the complaint was
15 unexhausted because he never received any acknowledgment of the 602 appeal that he
16 claimed to have sent in the first place. *Id.* Defendants argue that Warden Evans'
17 response to the Plaintiff letter told him what he needed to do to pursue an inmate appeal
18 in this case. *Id.* at 6. Defendants further argue that Plaintiff has not put forth evidence
19 to establish that prison officials refused to process his appeal or prevented him from
20 exhausting his appeal, and further, no evidence to support his claim that he exhausted in
21 this case. *Id.* at 8-9.

22 DISCUSSION

23 A. Standard of Review

24 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to
25 provide that "[n]o action shall be brought with respect to prison conditions under [42
26 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or
27 other correctional facility until such administrative remedies as are available are
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1 exhausted." 42 U.S.C. § 1997e(a). Although once within the discretion of the district
2 court, exhaustion in prisoner cases covered by § 1997e(a) is now mandatory. *Porter v*
3 *Nussle*, 122 S. Ct. 983, 988 (2002). All available remedies must now be exhausted;
4 those remedies "need not meet federal standards, nor must they be 'plain, speedy, and
5 effective.'" *Id.* (citation omitted). Even when the prisoner seeks relief not available in
6 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.*;
7 *Booth v Churner*, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a prerequisite to
8 all inmate suits about prison life, whether they involve general circumstances or
9 particular episodes, and whether they allege excessive force or some other wrong.
10 *Porter*, 122 S. Ct. at 992. An action must be dismissed unless the prisoner exhausted his
11 available administrative remedies *before* he or she filed suit, even if the prisoner fully
12 exhausts while the suit is pending. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.
13 2002); *see Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (where
14 administrative remedies are not exhausted before the prisoner sends his complaint to the
15 court it will be dismissed even if exhaustion is completed by the time the complaint is
16 actually filed).

17 The State of California provides its inmates and parolees the right to appeal
18 administratively "any departmental decision, action, condition or policy perceived by
19 those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, §
20 3084.1(a). It also provides its inmates the right to file administrative appeals alleging
21 misconduct by correctional officers. *See id.* § 3084.1(e). In order to exhaust available
22 administrative remedies within this system, a prisoner must proceed through several
23 levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate
24 appeal form, (3) second level appeal to the institution head or designee, and (4) third
25 level appeal to the Director of the California Department of Corrections. *See id.* §
26 3084.5; *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). A final decision at
27 the director's level satisfied the exhaustion requirement under § 1997e(a). *Id.* at 1237-

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2 Nonexhaustion under § 1997e(a) is an affirmative defense. *Wyatt v Terhune*, 315
3 F.3d 1108, 1119 (9th Cir 2003) (noting that the burden of establishing nonexhaustion
4 falls on the defendants). It should be treated as a matter of abatement and brought in an
5 “unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment.” *Id.*
6 (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative
7 remedies under § 1997e(a), the court may look beyond the pleadings and decide
8 disputed issues of fact. *Id.* at 1119-20. If the court concludes that the prisoner has not
9 exhausted California’s prison administrative process, the proper remedy is dismissal
10 without prejudice. *Id.* at 1120.

11 Exhaustion of all “available” remedies is mandatory; those remedies need not
12 meet federal standards, nor must they be “plain, speedy and effective.” *Porter*, 534 U.S.
13 at 524; *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5 (2001). The obligation to
14 exhaust persists as long as some remedy is available; when that is no longer the case,
15 the prisoner need not further pursue the grievance. *Brown v. Valoff*, 422 F.3d 926, 934-
16 35 (9th Cir. 2005). A prisoner need not exhaust further levels of review once he has
17 either received all the remedies that are “available” at an intermediate level of review,
18 or has been reliably informed by an administrator that no more remedies are available.
19 *Id.* at 935. For instance, there was no need to exhaust further levels of review after an
20 inmate received a form rejecting his appeal at the first formal level as untimely filed and
21 the form did not permit him to appeal that decision. *Marella v. Terhune*, 568 F.3d 1024,
22 1026 (9th Cir. 2009).

23 Similarly, an inmate complaining about staff misconduct need not exhaust
24 further levels of review upon being deemed to have exhausted all available remedies,
25 because once an investigation had been ordered at the second formal level under
26 California’s “staff complaint” process, the authorities lacked any remaining authority to
27 act on the subject of the complaint. *Brown*, 422 F.3d at 937-40 (citing *Booth*, 532 U.S.
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1 at 736 n.4). By contrast, an inmate who was informed at the second formal level that
2 his administrative appeal would be treated as a staff complaint, that any non-staff claims
3 should be separately appealed, that if he were dissatisfied further review was available,
4 and that the appeal was denied, rather than partially granted as with the first inmate, did
5 not exhaust all available remedies. *Brown*, 422 F.3d at 940-43.

6 The PLRA's exhaustion requirement cannot be satisfied "by filing an untimely or
7 otherwise procedurally defective administrative grievance or appeal." *Woodford v.*
8 *Ngo*, 548 U.S. 81, 84 (2006). "The text of 42 U.S.C. § 1997e(a) strongly suggests that
9 the PLRA uses the term 'exhausted' to mean what the term means in administrative law,
10 where exhaustion means proper exhaustion." *Id.* at 92. Therefore, the PLRA
11 exhaustion requirement requires proper exhaustion. *Id.* "Proper exhaustion demands
12 compliance with an agency's deadlines and other critical procedural rules because no
13 adjudicative system can function effectively without imposing some orderly structure on
14 the course of its proceedings." *Id.* at 90-91 (footnote omitted).

15 The filing of an untimely grievance or appeal is not proper exhaustion. *See*
16 *Woodford v. Ngo*, 548 U.S. at 83-84. A prisoner must complete the administrative
17 review process in accordance with the applicable procedural rules, including deadlines,
18 as a precondition to bringing suit in federal court. *Id.* In California state prisons, the
19 deadline for filing an administrative grievance is 15 working days from the date the
20 administrative decision or action being complained of is taken. *See* 15 Cal. Code Regs.
21 § 3084.6(c); *Ngo v. Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008) ("*Ngo II*") (finding
22 claims unexhausted where filed more than 15 working days after date of decision, i.e.,
23 after deadline in Cal. Code Regs. tit. 15, § 3084.6(c) had passed). However, California
24 prison regulations explicitly create an exception to the timely filing requirement if the
25 inmate does not have the opportunity to file his grievance during the 15-day filing
26 period. *Marella*, 568 F.3d at 1027 (remanding for district court to consider whether
27 plaintiff had the opportunity to file a grievance within 15 days after assault where his
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1 injuries and subsequent segregation rendered grievance form inaccessible). The appeals
2 coordinator is only permitted to reject an untimely appeal if "[t]ime limits for submitting
3 the appeal are exceeded *and* the appellant had the opportunity to file within the
4 prescribed time constraints." *Id.* (quoting Cal. Code Regs. tit. 15, §§ 3084.6(c) and
5 3084.3(c)(6) (emphasis added)).

6 **B. Analysis**

7 Here, Plaintiff contends that he submitted an inmate appeal at the first level of
8 review to the IAO at SVSP, but provides no evidence that he complied with the inmate
9 administrative grievance process by filing an appeal to the second or third level of
10 review, after he received no response at the first level. Although Plaintiff wrote letters
11 to the Warden of SVSP and the Director of CDCR in Sacramento complaining about the
12 lack of a response after submitting a 602 at the first level of administrative review, both
13 the Warden and the Chief of the Inmate Appeals Branch of CDCR informed him that
14 his letter to them was not sufficient to exhaust the required appeals at each level of
15 review and that he must return to the lower level of appeal to exhaust his complaint.

16 Plaintiff's July 8, 2008 letter from the Warden of SVSP specifically advised him
17 that his letter did not constitute exhaustion of the complaint and advised him, "Please
18 forward your appeal and supporting documents to the Appeals Coordinator." Instead of
19 resubmitting the appeal and supporting documents to the appeals coordinator at the first
20 level of review as he had been advised to do, Plaintiff sent an interview request to the
21 IAO, which did not include the appeal itself. That is not sufficient to exhaust available
22 administrative remedies. When Plaintiff later wrote the Director of CDCR about the
23 lack of response from the first level of review, the Chief of Inmate Appeals notified him
24 in a letter of response on September 12, 2008 that his appeal could only be resolved
25 after it had been completed through the second level of review by the warden. After
26 receiving the Chief's letter, Plaintiff again failed to resubmit his 602 to the first level of
27 review at the prison. While Plaintiff's evidence establishes that he attempted to submit
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1 decided by this order and enter judgment in this matter.

2 IT IS SO ORDERED.

3 DATED: SEP 23 2010

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5 JEFFREY S. WHITE
6 United States District Judge

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Completed by the ordering office indicated in this report

IT IS SO ORDERED

SEP 3 2010

[Handwritten signature]
Special Agent in Charge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DE'ARCEY J. STEWART,
Plaintiff,

Case Number: CV09-01527 JSW
CERTIFICATE OF SERVICE

v.

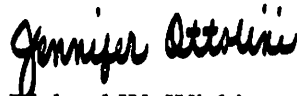
M.S. EVANS et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 23, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

De'Arcey Jamul Stewart
J15499
P.O. Box 5002
Calipatria, CA 92233

Dated: September 23, 2010



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk