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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 MICHAEL J. HICKS, B80852,) No. C 16-0738 CRB (PR)
10 Plaintiff(s),)
11 v.) ORDER GRANTING
12 SCOTT KERNAN, et al.,) SUMMARY JUDGMENT ON
13 Defendant(s).) GROUNDS OF FAILURE TO
14) PROPERLY EXHAUST
15) BEFORE FILING SUIT
16) (ECF No. 39)

17 Currently before the court for decision is defendants' motion for summary
18 judgment under Federal Rule of Civil Procedure 56 on the grounds that plaintiff
19 failed to properly exhaust available administrative remedies before filing suit, as
20 required by the Prison Litigation Reform Act (PLRA). For the reasons that
21 follow, the motion will be granted.

22 **STATEMENT OF THE CASE**

23 On February 12, 2016, while plaintiff was incarcerated at Salinas Valley
24 State Prison (SVSP), he filed a pro se complaint under 42 U.S.C. § 1983 alleging
25 violations of his federal rights while he was incarcerated at Mule Creek State
26 Prison (MCSP) and at the R. J. Donovan Correctional Facility (RJD) in 2015.

27 On February 19, 2016, plaintiff filed a motion for leave to file an amended
28 complaint to add allegations of violations of his federal rights at SVSP too, and,
on February 26, 2016, filed a notice of change of address informing the court that
he had been transferred back to MCSP.

1 On April 29, 2016, the court granted the motion to file an amended
2 complaint and screened the First Amended Complaint (FAC) pursuant to 28
3 U.S.C. § 1915A. In the FAC, plaintiff alleged that prison officials at MCSP, RJD
4 and SVSP were deliberately indifferent to his safety by failing to restrict other
5 inmates from accessing unpublished court orders identifying him as having been
6 convicted of a sexual crime and suffering from a sexual disorder, and subjected
7 him to cruel and unusual punishment by housing him in their respective
8 administrative segregation units (ASU) despite plaintiff's mental illness. The
9 court dismissed without prejudice plaintiff's § 1983 claims for violations of the
10 Eighth Amendment while he was housed at MCSP and RJD as improperly joined,
11 but ordered the United States Marshal to serve in this action plaintiff's arguably
12 cognizable claims for damages under § 1983 for violations of the Eighth
13 Amendment at SVSP against SVSP Warden B. Muniz.

14 On May 17, 2016, Plaintiff filed a motion for leave to file a second
15 amended complaint alleging, just as he did in the FAC, that he was subjected to
16 deliberate indifference to his safety and to cruel and unusual punishment in
17 violation of the Eighth Amendment while he was incarcerated at SVSP in 2016,
18 but naming new defendants SVSP Associate Warden R. Binkele, SVSP
19 Correctional Administrator R. Parin, SVSP Correctional Counselor H. Aguilera
20 and SVSP Appeals Coordinator V. Comeli, and voluntarily dismissing defendant
21 SVSP Warden B. Muniz. (Plaintiff also omitted all allegations regarding
22 occurrences/omissions at MCSP and RJD.)

23 On June 1, 2016, the court granted the motion to file a second amended
24 complaint and instructed the clerk to file plaintiff's proposed Second Amended
25 Complaint (SAC) as the operative complaint in this case. The court also screened
26 the SAC and found that, liberally construed, it states arguably cognizable claims
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1 for damages under § 1983 for violations of the Eighth Amendment at SVSP
2 against SVSP Associate Warden R. Binkele, SVSP Correctional Administrator R.
3 Parin, SVSP Correctional Counselor H. Aguilera, and SVSP Appeals Coordinator
4 V. Comeli (later correctly identified as V. Lomeli), and ordered the United States
5 Marshal to serve them (defendants).

6 On July 11, 2016, plaintiff filed a notice of change of address informing
7 the court that he had been transferred to California State Prison, Sacramento.

8 On July 18, 2016, defendants filed a motion to dismiss the SAC under
9 Federal Rule of Civil Procedure 12(b)(6) on the ground that it fails to state a
10 plausible Eighth Amendment claim upon which relief may be granted. After
11 plaintiff had an opportunity to respond and defendants to reply, the court granted
12 the motion in part and denied it in part, concluding that this action would proceed
13 only as to plaintiff's Eighth Amendment claim for damages that defendants "were
14 deliberately indifferent to his safety when they approved his transfer to MCSP
15 despite his protesting that he had numerous unlisted enemies there." Nov. 18,
16 2016 Order (ECF No. 35) at 10.

17 Defendants now move for summary judgment under Rule 56 on the
18 ground that plaintiff failed to properly exhaust available administrative remedies
19 as to his remaining claim because he did not exhaust before filing the SAC, as
20 required by the PLRA. After being advised of what is required of him to oppose
21 defendants' motion, plaintiff filed an opposition and defendants filed a reply.¹

22 **STATEMENT OF THE FACTS**

23 On February 4, 2016, plaintiff appeared before SVSP's Institution
24 Classification Committee (ICC). Plaintiff explained to the chairperson,

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26 ¹Plaintiff recently filed a notice of change of address informing the court that he
27 had been transferred to California State Prison, Corcoran.

1 Defendant SVSP Associate Warden R. Binkele, that the California Department of
2 Corrections and Rehabilitation’s (CDCR) “use of an unfiltered Lexis Nexis
3 program on the inmate law computer had caused plaintiff’s convictions and
4 [sexually violent predator (SVP)] mental health . . . treatment to become common
5 knowledge to Level IV EOP – SNY inmates.” SAC (ECF No. 16) ¶ 14. Plaintiff
6 “asked to be referred to the Department Review Board as ‘difficult to place.’” Id.

7 Binkele asked Defendant SVSP Correctional Counselor H. Aguilera “what
8 prisons were open to plaintiff.” Id. ¶ 15. Aguilera stated that MCSP was the
9 only Level IV EOP – SNY [prison] in which plaintiff had no documented
10 enemy.” Id. Plaintiff claims he explained that MCSP was “where the problem
11 first came to light in May 2015” and that he had been transferred to three
12 different prisons during the past eight months without resolution. Id. Binkele
13 examined plaintiff’s file and referred him for transfer to MCSP. Plaintiff claims
14 he again protested that he had “numerous unlisted enemies” at MCSP and would
15 have to request ASU placement upon arrival, but to no avail. Id. at ¶ 16.

16 On February 7, 2016, plaintiff submitted inmate appeal SVSP-16-00903
17 raising his enemy concerns at MCSP, and requesting referral to the Department
18 Review Board (DRB) for consideration of difficult-to-place status and placement
19 at a Difficult to Place Unit (DPU). He asked that the appeal be filed as an
20 “Emergency” and described it as “Transfer Appeal - Enemy Concerns.” Voong
21 Decl. (ECF No. 42) Ex. B at 3. The appeal was rejected by Defendant SVSP
22 Appeals Coordinator V. Lomeli two days later on grounds that it concerned “an
23 anticipated action or decision.” Id. at 15. But plaintiff resubmitted the appeal
24 and, on February 22, 2016, it was accepted at the first level of review. Id. at 3.

25 On February 25, 2016, plaintiff was transferred to MCSP. Two days later,
26 he identified several inmates who were involved in assaulting him in May 2015
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1 at MCSP, and MCSP officials “placed [him] once again into ASU for safety
2 concerns.” SAC ¶ 24.

3 On March 17, 2016, plaintiff received a first level response to the appeal
4 he had resubmitted at SVSP. In it, Aguilera and Defendant SVSP Correctional
5 Administrator R. Parin partially granted the appeal as to plaintiff’s request for an
6 expedited transfer, but denied it as to a referral to the DRB for consideration of
7 difficult-to-place status, noting that plaintiff’s “housing options remain
8 appropriate, as staff is continuously making every effort to house him [in] an
9 appropriate facility free of enemy concerns.” *Id.* Ex. D at 9-10; Voong Decl. Ex.
10 B at 7-8. Plaintiff appealed to the second level of review and, on May 12, 2016,
11 his appeal again was partially granted as to his request for an expedited transfer,
12 but denied as to a referral to the DRB for consideration of difficult-to-place
13 status, noting that plaintiff’s “case has been referred to the Classification Services
14 Unit (CSU) as a Difficult to Place Case.” Voong Decl. Ex. B at 9-11. Plaintiff
15 appealed to the third level of review and, on October 17, 2016, his appeal was
16 denied on the grounds that the second level of review “adequately addressed
17 [plaintiff’s] issues on appeal.” *Id.* at 1.

18 DISCUSSION

19 A. Standard of Review

20 “The PLRA mandates that inmates exhaust all available administrative
21 remedies before filing ‘any suit challenging prison conditions,’ including, but not
22 limited to, suits under § 1983.” *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.
23 2014) (en banc) (citing *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). To the extent
24 that the evidence in the record permits, the appropriate procedural device for
25 pretrial determination of whether administrative remedies have been exhausted
26 under the PLRA is a motion for summary judgment under Rule 56. *Id.* at 1168.

1 The burden is on the defendant to prove that there was an available
2 administrative remedy that the plaintiff failed to exhaust. Id. at 1172. If the
3 defendant meets that burden, the burden shifts to the prisoner to present evidence
4 showing that there is something in his particular case that made the existing and
5 generally available administrative remedies effectively unavailable to him. Id.
6 The ultimate burden of proof remains with the defendant, however. Id.

7 If undisputed evidence viewed in the light most favorable to the prisoner
8 shows a failure to exhaust, a defendant is entitled to summary judgment under
9 Rule 56. Id. at 1166. But if material facts are disputed, summary judgment
10 should be denied and the district judge rather than a jury should determine the
11 facts in a preliminary proceeding. Id.

12 B. Analysis

13 The PLRA amended 42 U.S.C. § 1997e to provide that “[n]o action shall
14 be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
15 other Federal law, by a prisoner confined in any jail, prison, or other correctional
16 facility until such administrative remedies as are available are exhausted.” 42
17 U.S.C. § 1997e(a). Section 1997e(a) requires “proper exhaustion” of available
18 administrative remedies. Woodford v. Ngo, 548 U.S. 81, 93 (2006). A prisoner
19 not only must pursue every available step of the prison appeal process but also
20 must adhere to “deadlines and other critical procedural rules” of that process. Id.
21 at 90. “[I]t is the prison’s requirements, and not the PLRA, that defines the
22 boundaries of proper exhaustion.” Jones v. Bock, 549 U.S. 199, 218 (2007).

23 A prisoner must “exhaust his administrative remedies prior to sending his
24 complaint to the district court.” Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th
25 Cir. 2006) (emphasis added). He cannot comply with the PLRA’s exhaustion
26 requirement “by exhausting available administrative remedies during the course
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1 of the litigation.” Akhtar v. Mesa, 698 F.3d 1202, 1210 (9th Cir. 2010) (citation
2 omitted). But he may file an amended complaint adding new claims that arose
3 after the initial filing so long as he exhausted administrative remedies as to the
4 new claims before filing the amended complaint. See Rhodes v. Robinson, 621
5 F.3d 1002, 1006 (9th Cir. 2010). And he may file an amended complaint adding
6 new claims that arose before the initial filing so long as he exhausted
7 administrative remedies as to the new claims before filing the amended
8 complaint. See Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014).

9 The California Department of Corrections and Rehabilitation (CDCR)
10 provides any inmate or parolee under its jurisdiction the right to appeal “any
11 policy, decision, action, condition, or omission by the department or its staff that
12 the inmate or parolee can demonstrate as having a material adverse effect upon
13 his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a).

14 CDCR’s appeal process consists of three levels of appeal: (1) first level appeal
15 filed with one of the institution’s appeal coordinators, (2) second level appeal
16 filed with the institution head or designee, and (3) third level appeal filed with
17 the CDCR director or designee. Id. §§ 3084.7, 3084.8. A prisoner exhausts
18 CDCR’s appeal process by obtaining a decision at each level. Id. § 3084.1(b);
19 Harvey v. Jordan, 605 F.3d 681, 683 (9th Cir. 2010). A “cancellation or
20 rejection” of an appeal does not exhaust administrative remedies.” Cal. Code
21 Regs. tit. 15, § 3084.1(b).

22 Defendants properly raise failure to exhaust in a Rule 56 motion for
23 summary judgment and argue that plaintiff failed to properly exhaust available
24 administrative remedies as to his Eighth Amendment damages claims against
25 them before filing suit. Defendants specifically argue that plaintiff was required
26 to exhaust available administrative remedies as to all of his Eighth Amendment
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1 claims against them before May 15, 2016, the date on which he handed the SAC
2 to prison officials for mailing to the court, see ECF No. 14-1 at 3, but failed to do
3 so. The court agrees.

4 The record shows that plaintiff submitted inmate appeal SVSP-16-00903
5 raising his enemy concerns at MCSP, and requesting referral to the DRB for
6 consideration of difficult-to-place status, on February 7, 2016. Voong Decl. Ex.
7 B at 3. He also asked that it be filed as an “Emergency.” Id. The appeal was
8 rejected by Defendant Lomeli two days later on grounds that it concerned “an
9 anticipated action or decision.” Id. at 15. But plaintiff resubmitted the appeal,
10 and it was partially granted at the first level of review – the portion of the appeal
11 requesting an expedited transfer was granted, and the remainder of the appeal
12 was denied. Id. at 3, 7-8. Plaintiff appealed to the second level of review, and
13 again the portion of the appeal requesting an expedited transfer was granted and
14 the remainder of the appeal was denied. Id. at 4, 9-11. Plaintiff then appealed to
15 the third and final level of review, which denied his appeal on October 17, 2016.
16 Id. at 1-2. Plaintiff therefore exhausted inmate appeal SVSP-16-00903 more
17 than five months after he handed the SAC to prison officials for mailing to the
18 court on May 15, 2016. But in order to comply with the PLRA’s exhaustion
19 requirement, he had to exhaust available administrative remedies as to all of his
20 claims against defendants before he handed the SAC to prison officials for
21 mailing to the court. See Cano, 739 F.3d at 1220; Rhodes, 621 F.3d at 1006;
22 Vaden, 449 F.3d at 1050-51. It matters not that he fully exhausted available
23 administrative remedies months later during the course of this litigation. See
24 Akhta, 698 F.3d at 1210; see also Vaden, 449 F.3d at 1051 (where administrative
25 remedies not exhausted before prisoner sends complaint to court, complaint
26 should be dismissed for failure to properly exhaust even if exhaustion is
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1 completed by time complaint is actually filed).

2 In response to defendants' showing that there was an available
3 administrative remedy that plaintiff failed to exhaust before sending the SAC to
4 the court, plaintiff argues that defendants made that remedy effectively
5 unavailable to him by "ignor[ing] his request for emergency processing and
6 violat[ing] policy time limits." Opp'n (ECF No. 49) at 10. According to plaintiff,
7 defendants improperly screened/treated plaintiff's "emergency" appeal as non-
8 emergency appeal, and thereby made the emergency appeal process (with shorter
9 response time limits) unavailable to him.

10 Under the law of the circuit, evidence of actions by prison officials
11 preventing proper exhaustion meet plaintiff's burden of production under Albino
12 because, if true, such actions would make administrative remedies effectively
13 unavailable. See Williams v. Parmo, 775 F.3d 1182, 1191-92 (9th Cir. 2015). So
14 would improper screening of a prisoner's administrative appeal. See Sapp v.
15 Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). But to fall within this exception,
16 the prisoner must show "that he attempted to exhaust his administrative remedies
17 but was thwarted by improper screening." Id. Plaintiff does not. The undisputed
18 evidence in the record shows that neither the initial rejection of his appeal, nor
19 the subsequent acceptance and treatment of it as a non-emergency appeal,
20 "thwarted" plaintiff's ability or attempts to exhaust. Plaintiff promptly
21 resubmitted the appeal for reconsideration, and proceeded to exhaust it fully
22 through the third and final level of review.

23 Plaintiff insists that his appeal should have been processed as an
24 emergency appeal, as he requested, but "it is the appeals coordinator and not the
25 inmate who determines whether an appeal is classified as an emergency or a non-
26 emergency appeal." Donte v. Swingle, No. 2:10-cv-0299 KJM JFM (PC), 2011

1 WL 976613, at *5 (E.D. Cal. Mar. 16, 2011) (citing relevant regulations). And
2 even if the appeals coordinator here should have determined that plaintiff's
3 appeal was an emergency rather than a non-emergency appeal, this did not
4 prevent or thwart plaintiff from properly exhausting available administrative
5 remedies through the third and final level of review. See Sapp, 623 F.3d at 823.
6 Nor did having to exhaust his Eighth Amendment damages claims via the
7 lengthier non-emergency appeal process prevent or thwart plaintiff from properly
8 exhausting available administrative remedies. See id.²

9 But unfortunately for plaintiff, he handed the operative SAC to prison
10 officials for mailing to the court more than five months before he properly
11 exhausted available administrative remedies on May 17, 2016, and it is well
12 established that under these circumstances "the district court must dismiss his suit
13 without prejudice." Vaden, 449 F.3d at 1051 (citation omitted).

14 CONCLUSION

15 For the foregoing reasons, defendants' motion for summary judgment
16 (ECF No. 39) on grounds of failure to properly exhaust before filing suit is
17 GRANTED, and plaintiff's Eighth Amendment claims for damages against
18 defendants are DISMISSED without prejudice.

19 SO ORDERED.

20 DATED: May 22, 2017


21 CHARLES R. BREYER
22 United States District Judge

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24 ²The Ninth Circuit recently recognized that if prison officials fail to respond to a
25 grievance within a reasonable time, the prisoner may be deemed to have exhausted
26 available administrative remedies. See Andres v. Marshall, No. 15-56057, slip op. at 6
27 (9th Cir. Apr. 21, 2017) (prisoner filed grievance in January 2013 and prison officials
28 had not responded by December 2014, when prisoner filed his federal action). But
plaintiff experienced no such unreasonable delay. The appeal he initiated on February
7, 2016 was fully exhausted through all three levels of review by October 17, 2016.