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

JAMES LUCIUS OLIVER,	)	No. C 09-3840 RMW (PR)
	)	
Plaintiff,	)	ORDER DENYING DEFENDANTS’
	)	MOTION TO DISMISS; FURTHER
v.	)	SCHEDULING ORDER
	)	
C. NOLL, Warden, et al.,	)	
	)	(Docket Nos. 90, 95)
Defendants.	)	
_____	)	

Plaintiff, a California state prisoner, proceeding pro se, filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983 against prison officials at Silicon Valley State Prison. Defendants have moved to dismiss for failure to exhaust administrative remedies. Plaintiff has filed an opposition. Defendants have filed a motion for extension of time to file a reply, and their reply. Defendants’ motion is GRANTED. Defendants’ reply is deemed timely. Having carefully considered the papers submitted, the court hereby DENIES defendants’ motion to dismiss.

**DISCUSSION**

A. Legal Standard

The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 28 U.S.C. § 1997e(a). Nonexhaustion under

1 § 1997e(a) is an affirmative defense; that is, defendants have the burden of raising and proving  
2 the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding  
3 a motion to dismiss for failure to exhaust administrative remedies, the court may look beyond the  
4 pleadings and decide disputed issues of fact. Id. at 1119-20. If the court concludes that the  
5 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without  
6 prejudice. Id. at 1120.

7 The State of California provides its prisoners and parolees the right to appeal  
8 administratively “any departmental decision, action, condition or policy perceived by those  
9 individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order  
10 to exhaust available administrative remedies within this system, a prisoner must proceed through  
11 several levels of appeal: (1) informal review, (2) first formal written appeal on a CDC 602  
12 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third  
13 level appeal to the Director of the California Department of Corrections and Rehabilitation  
14 (“Director”). See Barry v. Ratelle, 985 F. Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code  
15 Regs. tit. 15, § 3084.5). A final decision from the Director’s level of review satisfies the  
16 exhaustion requirement under § 1997e(a). See id. at 1237-38.

17 Defendants have the burden of raising and proving the absence of exhaustion, and  
18 inmates are not required to specifically plead or demonstrate exhaustion in their complaints.  
19 Jones v. Bock, 549 U.S. 199, 215-17 (2007). A movant claiming lack of exhaustion must  
20 demonstrate that pertinent relief remains available, whether at unexhausted levels or through  
21 awaiting the results of the relief already granted as a result of that process. Brown v. Valoff, 422  
22 F.3d 926, 936-37 (9th Cir. 2005).

23 B. Analysis

24 In plaintiff’s amended complaint, he alleges that defendant Gallegos attempted to kill  
25 him, and defendants Variz, Medina, and Jordan failed to protect him, even after they learned  
26 about his complaint, by failing to process several administrative appeals in which he raised that  
27 claim. Defendants move to dismiss this action, arguing that plaintiff has not exhausted his  
28 administrative appeals with regard to the allegation that Gallegos tried to kill him on December

1 29, 2005.

2 Defendants submit evidence that Appeals Coordinators Medina and Variz – two of the  
3 defendants in this action – never received any inmate appeal from plaintiff regarding the  
4 underlying claim against Gallegos.<sup>1</sup> Defendants also note that, between 2005 and 2010, plaintiff  
5 filed 43 administrative appeals, which indicates that plaintiff understood the administrative  
6 appeals process.

7 Plaintiff submits that he attempted to file four grievances regarding Gallegos’ attempted  
8 murder, but each grievance was ignored. Specifically, he states that he attempted to file an  
9 administrative appeal on the night of the incident – December 29, 2005. (Amended Compl. at  
10 3C.) Then, after not receiving any response, plaintiff re-filed his administrative appeal with  
11 Appeals Coordinators Variz and Medina several times thereafter, on January 30, 2006, February  
12 14, 2006, March 30, 2006, and April 19, 2006. (*Id.* at 3D.) Plaintiff’s opposition states the  
13 same.<sup>2</sup> Plaintiff also argues that he attempted to file complaints with several different agencies  
14 regarding his claim, but did not receive a response until February 2006. (*Id.* at 3C; *Opp.* at 2-3.)

15 “[W]hile the absence of evidence that a grievance was officially filed may indicate [that]  
16 Plaintiff never submitted the grievance, it may also indicate that the grievance was discarded or  
17 ignored by staff, as Plaintiff contends.” *Buchanan v. Santos*, 2010 WL 1267353, \*5 (E.D. Cal.  
18 Mar. 31, 2010); *see Spence v. Director of Corr.*, 2007 WL 61006, \*3 (E.D. Cal. Jan. 8, 2007) (If  
19 prison officials “are interfering with inmates’ ability to properly file their 602s, then there will be  
20 no official record of the 602s having been ‘accepted.’”), findings and recommendations adopted  
21 in full, 2007 WL 738528 (E.D. Cal. Mar. 6, 2007).

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22  
23 <sup>1</sup> Although defendants’ motion generally argues that plaintiff’s claims are unexhausted,  
24 defendants appear only to specifically argue that plaintiff’s claim against Gallegos is  
25 unexhausted.

26 <sup>2</sup> Like a verified complaint, a verified motion functions as an affidavit. *See Johnson v.*  
27 *Meltzer*, 134 F.3d 1393, 1400 (9th Cir. 1998). However, plaintiff’s opposition is not sworn  
28 under penalty of perjury. Nevertheless, in light of plaintiff’s pro se status, the court assumes for  
purpose of resolving the instant motion, that the declaration was properly sworn. Because the  
opposition merely supports what plaintiff states in his amended complaint, even if the opposition  
was rejected as evidence, the motion would still be denied.

1 The PLRA requires that an inmate exhaust such administrative remedies “as are  
2 available.” 42 U.S.C. § 1997e(a). As the Ninth Circuit has repeatedly reiterated, the PLRA does  
3 not require exhaustion when circumstances render administrative remedies “effectively  
4 unavailable.” Sapp v. Kimbrell, 623 F.3d 813, 822 (9th Cir. 2010). If employees of a facility  
5 prevent the filing of a grievance or the inmate’s ability to exhaust administrative remedies, the  
6 exhaustion requirement may be “unavailable” and defendants estopped from raising  
7 non-exhaustion as an affirmative defense. See Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th  
8 Cir. 2002). Courts have repeatedly held that an administrative remedy becomes “unavailable”  
9 for purposes of the exhaustion requirement if prison officials do not respond to a properly filed  
10 grievance or if they otherwise use affirmative misconduct to thwart a prisoner’s attempts to  
11 exhaust. See e.g., Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010); Brown v. Valoff, 422  
12 F.3d 926 n.18 (9th Cir. 2005); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (finding  
13 allegations that prison officials failed to respond to his written requests for grievance forms were  
14 sufficient to raise an inference that the prisoner had exhausted his “available” administrative  
15 remedies).

16 Plaintiff’s amended complaint, signed under penalty of perjury, alleges that he filed a  
17 timely grievance form and also resubmitted the grievance at least four times when he did not  
18 receive a response. “In a situation such as this in which the parties offer differing versions of  
19 events based on competing declarations, the issue is one of witness credibility and the court  
20 cannot make that requisite assessment on a motion to dismiss.” Buchanan, 2010 WL 1267353,  
21 \*5 (E.D. Cal. Mar. 31, 2010). Thus, at this stage of the proceedings, the court is compelled to  
22 accept plaintiff’s allegations that he attempted to exhaust his administrative remedies but was  
23 thwarted in doing so by defendants.

24 Defendants’ motion to dismiss is DENIED without prejudice.

### 25 CONCLUSION

26 For the reasons stated above, the court orders as follows:

27 1. Defendants’ motion to dismiss for failure to exhaust is DENIED without  
28 prejudice.



1 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff  
2 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges  
3 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

4 4. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's  
5 opposition is filed.

6 5. The motion shall be deemed submitted as of the date the reply brief is due. No  
7 hearing will be held on the motion unless the court so orders at a later date.

8 6. All communications by the plaintiff with the court must be served on defendants'  
9 counsel by mailing a true copy of the document to defendants' counsel.

10 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
11 No further court order is required before the parties may conduct discovery.

12 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court  
13 and all parties informed of any change of address and must comply with the court's orders in a  
14 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
15 pursuant to Federal Rule of Civil Procedure 41(b).

16 IT IS SO ORDERED.

17 DATED: \_\_\_\_\_

  
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JAMES LUCIUS OLIVER,  
Plaintiff,

Case Number: CV09-03840 RMW

**CERTIFICATE OF SERVICE**

v.

CHIEF DEPUTY WARDEN et al,  
Defendant.

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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 November 17, 2011, 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.

James Lucius Oliver P-11301  
Soledad State Prison (C.T.F.) North  
Facility B, Lassen A, 116 Lower  
P.O. Box 705  
Soledad, CA 93960

Dated: November 17, 2011

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk