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2 HONORABLE RICHARD A. JONES
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 JERMAINE SATTERWHITE,

12 Plaintiff,

13 v.

14 MARIA LUISA DY, et al.,

15 Defendants.
16

CASE NO. C11-528 RAJ

ORDER DENYING MOTION TO
DISMISS AND MOTION TO
SUPPLEMENT

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18 This matter comes before the court on the motions to dismiss and to supplement
19 the record by federal defendants Maria Dy, Manuell Lacist, Kendall Hirano,¹ and Denise
20 Duble. Dkt. # 35, #42. With respect to the motion to dismiss, defendants argue that
21 plaintiff Jermaine Satterwhite's claims should be dismissed with prejudice because he
22 failed to comply with the mandatory exhaustion requirement of the Prison Litigation
23 Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Satterwhite argues that defendants have
24 failed to demonstrate that administrative remedies are available, and that prisoners are not
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27 ¹ The court dismissed defendant Hirano pursuant to the stipulation of the parties.
Accordingly, the court has not addressed Mr. Hirano's arguments regarding absolute immunity.

1 required to exhaust remedies when prison officials render administrative relief
2 constructively unavailable.

3 Having considered the memoranda, exhibits, and the record herein, the court
4 DENIES the motion to supplement (Dkt. # 42) and the motion to dismiss (Dkt. # 35).

5 **A. Motion to Supplement**

6 On January 12, 2012, defendants moved to supplement the record based on one
7 sentence: “Federal Defendants request leave to update the Court and the record as to
8 Plaintiff Jermaine Satterwhite’s current status and location, as well as the applicability of
9 the BOP’s Administrative Remedy Procedure to Mr. Satterwhite, in light of the Plaintiff’s
10 changed circumstances, which is set forth in the attached declaration.” Dkt. # 42.

11 Plaintiff argues that defendants improperly introduced new evidence and argument that
12 violates Fed. R. Civ. P. 56(c), and that plaintiff is exempt from PLRA exhaustion
13 requirements because he is no longer a prisoner for purposes of PLRA. Dkt. # 43.

14 Defendants respond that plaintiff is bound by the PLRA because he was a prisoner at the
15 time the action commenced. Dkt. # 44.

16 Plaintiff has not moved the court to strike material attached for the first time in
17 defendants’ reply in support of their motion to dismiss (*see* Dkt. #40 (Ringwood Decl.)),
18 or attached to the motion to supplement the record (*see* Dkt. #42-1 (Straight Decl.)).

19 Local Civ. R. 7(g). Rather, plaintiff asks the court to deny both of defendants’ motions
20 because they “improperly submit evidence and arguments that existed at the time they
21 filed their original motion to dismiss and the documents and any argument pertaining to
22 them should have been included in that motion.” Dkt. # 43 at 4.

23 Plaintiff quotes the Sixth Circuit for the proposition that when new evidence or
24 argument is included in a reply memorandum and a non-movant’s ability to respond to
25 the new evidence has been vitiated, a problem arises with respect to Rule 56. Dkt. # 43 at
26 6 (quoting *Seay v. Tenn. Valley Authority*, 339 F.3d 454, 481-82 (6th Cir. 2003)). In that
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1 case, the district court relied on new evidence submitted with a reply in entering
2 summary judgment three days after the reply brief was submitted. *Seay*, 339 F.3d at 481.
3 The court concluded that plaintiff was not provided an adequate opportunity to respond to
4 the new evidence. *Id.* In contrast to the nonmoving party in *Seay*, plaintiff has had
5 opportunity to respond to the new evidence and arguments in his opposition to the motion
6 to supplement.²

7 Nevertheless, the declarations of Mr. Straight (Dkt. # 42-1) and Mr. Ringwood
8 (Dkt. # 40) do not comply with 28 U.S.C. § 1746 because they do not declare under
9 penalty of perjury “that the foregoing is true and correct.” Rather, they declare that “in
10 accordance with the provisions of 28 U.S.C. § 1746 that the above is accurate to the best
11 of my knowledge and belief.” Dkt. # 40 at 8, # 42-1 at 5. Although the declarations
12 reference section 1746, attesting that “the above is accurate to the best of my knowledge
13 and belief” is not the same as attesting to the truth of the statement. Mr. Ringwood’s
14 failure to declare that his statements are true is not surprising given that portions of Mr.
15 Ringwood’s declaration do not appear to be based on personal knowledge. Rather,
16 portions of the declaration appear to be pure speculation of what could have happened
17 and improper opinion testimony. Fed. R. Evid. 602, 701. Additionally, Mr. Straight’s
18 declaration incorrectly states that “inmate Satterwhite has not filed any administrative
19 remedies” despite defendants’ concession that he did.

20 Accordingly, the court STRIKES the Straight and Ringwood declarations because
21 they do not attest that their statements are true and correct as required by 28 U.S.C. §
22 1746.³ Dkt. # 40, 42-1. *See Davenport v. Bd. of Trustees of State Ctr. Cmty. Coll. Dist.*,

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25 ² The court notes that plaintiff incorrectly relies on Fed. R. Civ. P. 15(d), which governs
26 supplemental pleadings. Motions and declarations are not considered pleadings under the
27 Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 7.

27 ³ The court notes that the declarations of Jennifer Vickers and David Roff suffer from the
same defect. Dkt. # 36 and # 37. Accordingly, the court also STRIKES these declarations. The

1 654 F. Supp. 2d 1073, 1083 (E.D. Cal. 2009) (declarations that state only that declarant
2 had “personal knowledge of the facts” and “will testify to these at trial” rejected); *Cobell*
3 *v. Norton*, 310 F. Supp. 2d 77, 84-85 (D.D.C. 2004) (statement based on “knowledge,
4 information and belief” insufficient). The court will, however, take judicial notice of
5 Exhibit 1 to the Ringwood Declaration, Program Statement 1330.16 (Dkt. # 40-1), which
6 provides the Bureau of Prison’s procedural guidelines for the administrative remedy
7 program, and is available at www.bop.gov. See *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
8 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of official information posted on
9 a governmental website, the accuracy of which was undisputed); *City of Sausalito v.*
10 *O’Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) (taking judicial notice of a record of a
11 state agency not subject to reasonable dispute).

12 Plaintiff seems to concede that the fact of plaintiff’s release from prison is
13 irrelevant, but then argues that the PLRA exhaustion requirements no longer apply to
14 him. Dkt. #43 at 4:10-11, 9-11. The Ninth Circuit has held that “only individuals who
15 are prisoners (as defined by 42 U.S.C. § 1997e(h)) at the time they file suit must comply
16 with exhaustion requirements of 42 U.S.C. § 1997e(a).⁴ *Talamantes v. Leyva*, 575 F.3d
17 1021, 1024 (9th Cir. 2009). Accordingly, a prisoner who files a lawsuit after s/he is
18 released from custody is not required to exhaust administrative remedies. *Id.*

19 There is no dispute that plaintiff filed his complaint while he was a prisoner.
20 Accordingly, plaintiff would still be required to exhaust administrative remedies. See *id.*
21 (“[W]e will also adhere to the plain language of the statute as applied to a person who has
22 been released from prison altogether.”); *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir.

24 court notes that even if it had not stricken the declarations submitted by defendants, their motion
25 to dismiss would still be denied for the reasons stated below.

26 ⁴ 42 U.S.C. 1997e(a) provides: “No action shall be brought with respect to prison
27 conditions under section 1983 of this title, 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.”

1 2000) (holding that “only individuals who, at the time they seek to file their civil actions,
2 are detained as a result of being accused of, convicted of, or sentenced for criminal
3 offenses are ‘prisoners’ within the definition of 42 U.S.C. § 1997e and 28 U.S.C. §
4 1915.”). *See also Cox v. Mayer*, 332 F.3d 422, 425 (6th Cir. 2003) (plaintiff required to
5 exhaust administrative remedies because he was a prisoner when he brought suit and suit
6 implicates prison conditions); *Dixon v. Page*, 291 F.3d 485, 489 (7th Cir. 2002) (the fact
7 that plaintiff was no longer a prisoner at the time of the appeal did not excuse him from
8 exhaustion since he was a prisoner at the time the complaint was filed); *Becker v. Vargo*,
9 Case No. 02-7380CO, 2004 WL 1068779, *3 (D.Or. 2004) (rejecting plaintiff’s argument
10 that since he had been released from prison, he was no longer a prisoner subject to PLRA
11 exhaustion requirements).

12 Given that the court finds that the PLRA exhaustion requirements apply upon
13 plaintiff’s release from prison, the court finds that his change in status is irrelevant to the
14 court’s analysis of the motion to dismiss.

15 Accordingly, the court DENIES defendants’ motion to supplement. Dkt. # 42.

16 **B. Motion to Dismiss**

17 Failure to exhaust administrative remedies under section 1997e(a) of the PLRA is
18 an affirmative defense, and defendants have the burden of proving the absence of
19 exhaustion. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108,
20 1119 (9th Cir. 2003). The proper procedure for challenging a prisoner’s complaint for
21 failure to exhaust administrative remedies is to file “an unenumerated 12(b) motion rather
22 than a motion for summary judgment.” *Wyatt*, 315 F.3d at 1119. “In deciding a motion
23 to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the
24 pleadings and decide disputed issues of fact.” *Id.* at 1119-20. A defendant must
25 demonstrate that pertinent relief remained available, whether at unexhausted levels of the
26 grievance process or through awaiting the results of the relief already granted as a result
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1 of that process. *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). Relevant
2 evidence in so demonstrating includes “statutes, regulations, and other official directives
3 that explain the scope of the administrative review process; documentary or testimonial
4 evidence from prison officials who administer the review process, and information
5 provided to the prisoner concerning the operation of the grievance procedure in this case,
6 such as in the response memoranda in these cases.” *Id.* at 937. “With regard to the latter
7 category of evidence, information provided the prisoner is pertinent because it informs
8 [the court’s] determination of whether relief was, as a practical matter, ‘available.’” *Id.*
9 “The ‘availability’ of relief does not turn on what the prisoners might have been told at
10 the time they filed their complaints, but rather on how the prison viewed and treated their
11 complaint based on its own procedures.” *Id.* at 942 n.17. “If the district court concludes
12 that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal
13 of the claim without prejudice.” *Wyatt*, 315 F.3d at 1120.

14 Program Statement 1330.16 provides the procedure for the administrative remedy
15 program. The court finds section 13, entitled Remedy Processing, particularly relevant:

16 a. Receipt. Upon receiving a Request or Appeal, the Administrative
17 Remedy Clerk shall stamp the form with the date received, log it into
18 the SENTRY index as received on that date, and write the “Remedy
ID” as assigned by SENTRY on the form. . . .

19 All submissions received by the Clerk, whether accepted or rejected,
20 shall be entered into SENTRY in accordance with the SENTRY
21 Administrative Remedy Technical Reference Manual.

* * *

22 b. Investigation and Response Preparation. The Clerk or
23 Coordinator shall assign each filed Request or Appeal for
investigation and response preparation.

* * *

24 Requests or Appeals shall be investigated thoroughly, and all
25 relevant information developed in the investigation shall ordinarily
26 be supported by written documents or notes of the investigator’s
27 findings. Notes should be sufficiently detailed to show the name,
title, and location of the information provided, the date the

1 information was provided, and a full description of the information
2 provided. Such documents and notes shall be retained with the case
3 file copy. When deemed necessary in the investigator's discretion,
4 the investigator may request a written statement from another staff
5 member regarding matters raised in the Request or Appeal.
6 Requested staff shall provide such statements promptly. . . .

7 c. Responses. Responses ordinarily shall be on the form designed
8 for that purpose, and shall state the decision reached and the reasons
9 for the decision. The first sentence or two of a response shall be a
10 brief abstract of the inmate's Request or Appeal, from which the
11 SENTRY abstract should be drawn. This abstract should be
12 complete, but as brief as possible. The remainder of the response
13 should answer completely the Request or Appeal, be accurate and
14 factual, and contain no extraneous information. . . .

15 Program Statements, Operations Memoranda, regulations, and
16 statutes shall be referred to in responses whenever applicable,
17 including section numbers on which the response relies. . . .

18 Dkt. # 40-1 at 11-13 (Ex. 1 to Ringwood Decl.).

19 Here, plaintiff submitted a Request on October 19, 2009. Dkt. # 39 at 6 (Ex. 1 to
20 Satterwhite Decl.). It is undisputed that the Request was never entered into SENTRY as
21 required by Program Statement 1330.16. It appears that on or around October 26, 2009,
22 plaintiff's Request was rejected in a handwritten note: "A BP-9 is not the proper
23 procedure for monetary damages. You must submit a tort claim form to the Western
24 Regional Office Legal Counsel." *Id.* No response memorandum was entered into
25 SENTRY, and the handwritten response does not seem to comply with Program
26 Statement 1330.16. Most importantly, no other information was communicated to
27 plaintiff in the response. The response did not state that the Request was rejected because
it was untimely. *Contrast Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (form
rejecting appeal stated it was not timely filed). The response did not state that the
Request was rejected because plaintiff submitted it to the wrong institution. The

1 Response did not state that further review or appeal was available. The Response did not
2 state or otherwise indicate that an investigation would be undertaken.⁵ The Response did
3 not state that administrative remedies were available. Rather, the response stated “You
4 **must** submit a tort claim” Dkt. # 39 at 6 (Ex. 1 to Satterwhite Decl.).

5 The court finds that the reasonable interpretation of the two sentence rejection is
6 that no administrative relief was available. *See Brown*, 422 F.3d at 937-38 (no further
7 administrative relief available where memorandum did not counsel that any further
8 review was available). *See also Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010)
9 (holding that “improper screening of an inmate’s administrative grievances renders
10 administrative remedies ‘effectively unavailable’ such that exhaustion is not required
11 under the PLRA.”). After the fact pontifications of what could have happened or possible
12 reasons for rejection, without admissible evidence, does not satisfy defendants’ burden.
13 *See Brown*, 422 F.3d at 940 (“Establishing, as an affirmative defense, the existence of
14 further ‘available’ administrative remedies requires evidence, not imagination.”); *Sapp*,
15 623 F.3d at 825 (considering actual reasons administrative grievance was screened out).

16 Accordingly, the court finds that defendant has failed to meet its burden of
17 demonstrating that pertinent relief remained available. *Brown*, 422 F.3d at 936-37.

18 **C. Conclusion**

19 For all the foregoing reasons, the court DENIES defendants’ motion to dismiss
20 (Dkt. # 35) and motion to supplement (Dkt. # 42).

26 ⁵ The court notes that defendants have not presented any evidence that an investigation
27 actually was undertaken prior to the rejection.

1 Dated this 5th day of March, 2012.

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5 The Honorable Richard A. Jones
6 United States District Judge
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