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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KEVIN JACKSON,  
Plaintiff,

No. 2:08-cv-01954-MCE-JFM

v.

ORDER

ALVARO C. TRAQUINA, M.D.,  
Chief Medical Officer/Health  
Care Manager, of California  
Sate Prison-Solano of the  
California Department of  
Corrections and  
Rehabilitation, in his  
individual and official  
capacities; JASON A. ROHRER,  
M.D., an individual; XXX  
HSIEH, M.D.,

Defendants.

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Plaintiff Kevin Jackson ("Plaintiff"), a California prisoner  
filed the instant complaint alleging violations of his Eighth  
Amendment rights under the United States Constitution. Currently  
before the Court is Defendants' Motion to Dismiss Plaintiff's  
complaint on grounds that Plaintiff failed to exhaust his  
administrative remedies as required by the Prison Litigation  
Reform Act ("PLRA").

1 As set forth below, because Defendants failed to introduce  
2 evidence adequate to establish that Plaintiff failed to exhaust  
3 his administrative remedies, Defendants' motion must be denied.

4 A motion to dismiss for failure to exhaust administrative  
5 remedies prior to filing suit "should be treated as a matter in  
6 abatement subject to an unenumerated Rule 12(b) motion." Wyatt  
7 v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). "[F]ailure to  
8 exhaust is an affirmative defense under the PLRA, and [] inmates  
9 are not required to specially plead or demonstrate exhaustion in  
10 their complaints." Jones v. Bock, 549 U.S. 199, 216 (2007).  
11 Therefore, "defendants have the burden of raising and proving the  
12 absence of exhaustion." Wyatt, 315 F.3d at 1119.

13 Here, Defendants' Motion to Dismiss was supported by two  
14 declarations. Defs.' Mot. to Dismiss; Mem. of P. & A. Each  
15 declarant indicates that he or she searched the prison records to  
16 determine if Kevin Jackson, CDCR# D-30519, had filed an  
17 administrative appeal of the decision in question. Id. at Exs. A  
18 & B. Each declarant affirmed that Kevin Jackson, CDCR# D-30519  
19 had not filed any such appeal. Id.

20 In response, however, Plaintiff asserts that Defendants in  
21 fact searched for the wrong Kevin Jackson. Plaintiff has  
22 attached evidence that indicates that his CDCR# is C-73980, not  
23 D-30519. Pl.'s Opp'n to Defs.' Mot. to Dismiss at Ex. A.

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1 The evidence offered by the Defendants is accordingly  
2 inadequate to establish that Plaintiff failed to exhaust his  
3 administrative remedies. Because the burden is on Defendants to  
4 raise and prove the absence of exhaustion, Defendants' Motion to  
5 Dismiss is DENIED, without prejudice to renewing said motion upon  
6 an adequate evidentiary record.<sup>1</sup>

7 IT IS SO ORDERED.

8 Dated: March 11, 2009

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12 MORRISON C. ENGLAND, JR.  
13 UNITED STATES DISTRICT JUDGE  
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27 <sup>1</sup> Because oral argument will not be of material assistance,  
28 the Court ordered this matter submitted on the briefing. E.D.  
Local Rule 78-230(h).