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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

RICHARD MANUEL BURGOS,

No. 2:09-cv-3276-MCE-CMK-P

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

MATTHEW L. CATE, et al.,

Defendants.

\_\_\_\_\_ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion to dismiss (Doc. 23). Plaintiff filed an opposition to the motion, and defendants filed a reply. This motion was filed prior to the Ninth Circuit’s decision in Woods v. Carey, 684 F.3d 934 (9th Cir. 2012). In accordance with the Ninth Circuit’s direction, plaintiff was provided additional notice as to what is required to oppose a motion to dismiss and an opportunity to file a supplemental opposition if he so chose. No further briefs were filed in support or opposition to the motion to dismiss.

**I. BACKGROUND**

This action proceeds on plaintiff’s first amended complaint (Doc. 12). Plaintiff alleges in his amended complaint that the defendants were deliberately indifferent to his serious

1 medical needs, in violation of his Eighth Amendment rights, by interfering with his prescribed  
2 medical treatment. Specifically, plaintiff alleges the defendants refused to provide him with a  
3 firm foam mattress, replace his pillows, and have refused to allow him unlimited toilet flushes.

## 4 II. MOTION TO DISMISS

5 Defendants bring this motion to dismiss on the basis that plaintiff failed to  
6 exhaust his administrative remedies for all of his claims prior to filing this action. In their  
7 motion, defendants challenge both the claim relating to the foam mattress and the claim relating  
8 to the toilet flushes. However, plaintiff challenges the exhaustion issue in his opposition,  
9 claiming he has exhausted his claims and providing support for his claim relating to the foam  
10 mattress. The defendants do not challenge plaintiff's exhaustion argument relating to the foam  
11 mattress in their reply, but persevere regarding plaintiff's toilet flushes claim.

12 A motion to dismiss based on a prisoner's failure to exhaust administrative  
13 remedies is properly the subject of an unenumerated motion under Federal Rule of Civil  
14 Procedure 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). "In deciding a  
15 motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the  
16 pleadings and decide disputed issues of fact." Id. at 1119-20. Where the court looks beyond the  
17 pleadings to a factual record in deciding the motion to dismiss, which is "a procedure closely  
18 analogous to summary judgment," the court must assure that the plaintiff has fair notice of his  
19 opportunity to develop a record. Id. at 1120 n.14 (referencing the notice requirements outlined in  
20 Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d  
21 409 (9th Cir. 1988). Defendants bear the burden of establishing that the plaintiff failed to  
22 exhaust administrative remedies prior to filing suit. See Wyatt, 315 F.3d at 1120. If the court  
23 concludes that administrative remedies have not been exhausted, the unexhausted claim should  
24 be dismissed without prejudice. See id. at 1120; see also Jones v. Bock, 127 S. Ct. 910 (2007).

25 Prisoners seeking relief under § 1983 must exhaust all available administrative  
26 remedies prior to bringing suit. See 42 U.S.C. § 1997e(a). This requirement is mandatory

1 regardless of the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001) (overruling  
2 Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999)). Because exhaustion must precede the filing of  
3 the complaint, compliance with § 1997e(a) is not achieved by exhausting administrative remedies  
4 while the lawsuit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). The  
5 Supreme Court recently addressed the exhaustion requirement in Jones v. Bock, 549 U.S. 199  
6 (2007), and held: (1) prisoners are not required to specially plead or demonstrate exhaustion in  
7 the complaint because lack of exhaustion is an affirmative defense which must be pleaded and  
8 proved by the defendants; (2) an individual named as a defendant does not necessarily need to be  
9 named in the grievance process for exhaustion to be considered adequate because the applicable  
10 procedural rules that a prisoner must follow are defined by the particular grievance process, not  
11 by the PLRA; and (3) the PLRA does not require dismissal of the entire complaint if only some,  
12 but not all, claims are unexhausted.

13           The Supreme Court also held in Woodford v. Ngo that, in order to exhaust  
14 administrative remedies, the prisoner must comply with all of the prison system’s procedural  
15 rules so that the agency addresses the issues on the merits. 548 U.S. 81, 89-96 (2006). Thus,  
16 exhaustion requires compliance with “deadlines and other critical procedural rules.” Id. at 90.  
17 Partial compliance is not enough. See id. Substantively, the prisoner must submit a grievance  
18 which affords prison officials a full and fair opportunity to address the prisoner’s claims. See id.  
19 at 90, 93. The Supreme Court noted that one of the results of proper exhaustion is to reduce the  
20 quantity of prisoner suits “because some prisoners are successful in the administrative process,  
21 and others are persuaded by the proceedings not to file an action in federal court.” Id. at 94.

22           A prison inmate in California satisfies the administrative exhaustion requirement  
23 by following the procedures set forth in §§ 3084.1-3084.7 of Title 15 of the California Code of  
24 Regulations. In California, inmates “may appeal any departmental decision, action, condition, or  
25 policy which they can demonstrate as having an adverse effect upon their welfare.” Cal. Code  
26 Regs. tit. 15, § 3084.1(a). These regulations require the prisoner to proceed through several

1 levels of appeal: (1) informal resolution; (2) formal appeal; (3) second level appeal to institution  
2 head; (4) third level appeal to the director of the California Department of Corrections and  
3 Rehabilitation. A decision at the third formal level, which is also referred to as the director's  
4 level, is not appealable and concludes a prisoner's departmental administrative remedy. See Cal.  
5 Code Regs. tit. 15, §§ 3084.1(a) and 3084.5(e)(2). Departmental appeals coordinators may  
6 summarily reject a prisoner's untimely administrative appeal. See Cal. Code Regs. tit. 15, §§  
7 3084.3(c)(6) and 3084.6(c). If a group of inmates intend to appeal the same decision or action,  
8 one grievance form is used and a list of the participating inmates must be attached. The list must  
9 be legible and state the inmates' names, departmental identification numbers, and housing  
10 assignment. The form must also be signed by all participating inmates. Currently, California  
11 regulations do not contain any provision specifying who must be named in the grievance.

12           In certain circumstances, the regulations make it impossible for the inmate to  
13 pursue a grievance through the entire grievance process. See Brown v. Valoff, 422 F.3d 926, 939  
14 n. 11 (9th Cir. 2005). Where a claim contained in an inmate's grievance is characterized by  
15 prison officials as a "staff complaint" and processed through a separate confidential process,  
16 prison officials lose any authority to act on the subject of the grievance. See id. at 937 (citing  
17 Booth, 532 U.S. at 736 n. 4). Thus, the claim is exhausted when it is characterized as a "staff  
18 complaint." See id. at 940. If there are separate claims in the same grievance for which further  
19 administrative review could provide relief, prison regulations require that the prisoner be notified  
20 that such claims must be appealed separately. See id. at 939. The court may presume that the  
21 absence of such a notice indicates that the grievance did not present any claims which could be  
22 appealed separate from the confidential "staff complaint" process. See id.

23           Here, defendants argue plaintiff failed to exhaust his administrative remedies as to  
24 two of his claims: denial of a foam mattress and denial of unlimited toilet flushes. Defendants  
25 argue plaintiff failed to submit his inmate grievance to the Director's Level of review. According  
26 to the defendants, the only relevant inmate grievance the plaintiff pursued through the third level

1 was appeal number CSP-S-09-02177, which involved lost personal property including plaintiff's  
2 pillows. However, this grievance did not include the issue of plaintiff's mattress or right to  
3 unlimited toilet flushes.

4 In his opposition, plaintiff provides information on other inmate grievances he  
5 filed, including SOL-24-09-12899 and SOL-24-09-10467. In 09-12899, plaintiff does raise the  
6 issue of a foam mattress. It is a bit unclear whether the specific issue raised in the inmate  
7 grievance is the same as the claim raised in this action, but it does appear that plaintiff was  
8 unhappy about his mattress and that issue was addressed in the appeal. See Doc. 25, at 23-35,  
9 31-32. Defendants do not challenge this in their reply brief. The burden is on the moving party  
10 to establish that plaintiff failed to exhaust his administrative remedies, which was not met in  
11 regards to plaintiff's mattress claim. See Wyatt, 315 F.3d at 1120. Thus, the motion to dismiss  
12 this claim should be denied.

13 As to plaintiff's unlimited flushes claim, plaintiff appears to have raised that issue  
14 in his inmate appeal 09-10467. However, plaintiff only filed this grievance to the First Level,  
15 and did not complete the process. At the First Level response, it was found that plaintiff's  
16 request for unlimited toilet flushes was not medically indicated and was thus denied. The  
17 decision specifically states "Your request for a chrono for unlimited toilet flushes is denied."  
18 Doc. 25 at 6. While other portions of this grievance were granted, this request was not. There  
19 are circumstances where a partial grant of an inmate grievance at a lower level is sufficient to  
20 exhaust a claim, but this is not one of them. See Harvey v. Jordan, 605 F.3d 681, 685 (9th Cir.  
21 2010) ("An inmate has no obligation to appeal from a grant of relief, or a partial grant that  
22 satisfies him, in order to exhaust his administrative remedies.") This is not one of those  
23 situations. Plaintiff's request for unlimited toilet flushes was specifically denied and he did not  
24 appeal that decision to the next level. As such, he failed to exhaust this claim. The motion to  
25 dismiss should therefore be granted as to this claim. This is the only claim related to the Doe  
26 defendants, who should likewise be dismissed from this action.

1                   **III. CONCLUSION**

2                   Based on the foregoing, the undersigned recommends that defendants' motion to  
3 dismissed be granted in part, plaintiff's claims relating to the denial of unlimited toilet flushes be  
4 dismissed, the Doe defendants be dismissed, and this action continue on plaintiff's claims  
5 relating to the foam mattress and pillows against defendants Capel, Clay and Haseltine.  
6 Defendants Capel, Clay and Haseltine should further be directed to file an answer within 14 days  
7 of the order adopting these findings and recommendations.

8                   These findings and recommendations are submitted to the United States District  
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
10 after being served with these findings and recommendations, any party may file written  
11 objections with the court. Responses to objections shall be filed within 14 days after service of  
12 objections. Failure to file objections within the specified time may waive the right to appeal.  
13 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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15 DATED: December 17, 2012

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17 **CRAIG M. KELLISON**  
18 UNITED STATES MAGISTRATE JUDGE  
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