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

Eyen Anderson,  
Plaintiff,

vs.

Dr. G. Fishback, et al.,  
Defendants.

No. CV-05-0729-ROS (PC)

**ORDER**

(PC) Anderson v. Fishback et al

Doc. 41

**Background**

On June 1, 2004, Plaintiff, an inmate at the California Substance Abuse Treatment Facility at Corcoran (SATF), sought treatment from Defendant Dr. Fishback, the SATF dentist, for tooth pain (Docs. 1 Ex. A; 13 at 5). Two of Plaintiff's teeth were diagnosed as in need of "extensive restoration [and] crowns" because of "infection and ab[s]cesses" (Doc. 1 Ex. A). Plaintiff requested root canal treatment but was told extraction was the only available option (Docs. 1 Ex. A; 13 at 6-7). After attempting to resolve the dispute informally, Plaintiff filed a Form 602 appeal of Fishback's decision, pursuant to California Department of Corrections and Rehabilitation (CDCR) Regulations §§ 3084 *et seq.*, which was denied on July 7, 2004 by SATF Division Head Defendant Martinez (Doc. 1 Ex. C at 6-7). Plaintiff's appeal of Martinez's decision was denied on July 25, 2004 by SATF Chief Medical Officer (A) Defendant Dr. Suryadevara (Doc. 1 Ex. B at 1). Plaintiff's appeal of

1 Suryadevara's decision, to the CDCR Director, was denied on October 18, 2004 by N.  
2 Grannis, Chief of the Inmate Appeals Branch (Doc. 1 Ex. B at 2).<sup>1</sup>

3 On May 25, 2005, Plaintiff filed a 42 U.S.C. § 1983 action in the Eastern District of  
4 California, alleging Defendants' failure to perform root canals violated the Eighth  
5 Amendment (Doc. 1 at 5-6). On June 28, 2007, Magistrate Judge William Wunderlich  
6 dismissed the action for failure to state a claim, but granted leave to amend (Doc. 12). On  
7 July 26, 2007, an Amended Complaint was filed, alleging Defendants' failure to perform root  
8 canals and prescribe appropriate pain medication constituted deliberate indifference to  
9 Plaintiff's extreme suffering and thus violated the Eighth Amendment (Doc. 13). On July  
10 7, 2008, Judge Anthony W. Ishii dismissed Plaintiff's root canal allegations for failure to  
11 state a claim but permitted the pain medication claim to go forward (Doc. 16). On September  
12 16, 2008, the summons for Defendant Fishback, who had since died, was returned  
13 unexecuted (Doc. 21). On October 30, 2008, the summons for Defendant Martinez was  
14 returned unexecuted because there was no record of a J. Martinez employed at SATF  
15 Corcoran and the U.S. Marshals Service was unable to identify Defendant from the various  
16 J. Martinezes employed in the California Department of Corrections (Doc. 22).

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18 On November 25, 2008, the case was transferred to this Court (Doc. 23). On  
19 December 1, 2008, Defendant Suryadevara waived service and, on January 30, 2009, filed  
20 a Motion to Dismiss, alleging failure to state a claim and exhaust administrative remedies  
21 (Docs. 27-28). On March 19, 2009, Plaintiff responded and, on April 4, 2009, Defendant  
22 replied (Docs. 33-34). On April 24, 2009, a warning Order was issued, per Wyatt. v.  
23 Terhune, 315 F.3d 1108 (9th Cir. 2003) and Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998),  
24 and supplemental briefing was ordered. On May 15, 2009, Plaintiff filed a supplemental  
25 response and, on May 27, 2009, Defendant filed a supplemental reply (Docs. 38-39). For the

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28 On December 1, 2004, Plaintiff also submitted a claim to the California Victim Compensation  
and Government Claims Board, which was denied as untimely (Doc 1 Ex. B at 4, C at 2-5).

1 following reasons, Defendant’s motion will be granted and the Complaint will be dismissed  
2 for failing to exhaust administrative remedies.

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4 **Discussion**

5 **A. Standard**

6 **1. Failure to Exhaust Administrative Remedies**

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8 Title 42 U.S.C. § 1997e(a) provides: “[n]o action shall be brought with respect to  
9 prison conditions under section 1983 of this title, or any other Federal law, by a prisoner  
10 confined in any jail, prison, or other correctional facility *until such administrative remedies*  
11 *as are available are exhausted*” (emphasis added). Accordingly, administrative exhaustion  
12 is a mandatory prerequisite for filing a prisoner civil rights action in federal court. See Lira  
13 v. Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005) (“[A] district court must dismiss a case  
14 without prejudice ‘when there is no *presuit* exhaustion’ even if there is exhaustion while suit  
15 is pending.”) (citing McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002) (*per curiam*));  
16 see also Booth v. Churner, 532 U.S. 731, 741 n.5 (2001). To properly exhaust administrative  
17 remedies, a Plaintiff “must use all steps the prison holds out, enabling the prison to reach the  
18 merits of the issue.” Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). Failure to  
19 exhaust will result in dismissal without prejudice. See Wyatt, F.3d at 1120.

20 A motion to dismiss for failure to exhaust is treated as “an unenumerated Rule 12(b)  
21 motion rather than a motion for summary judgment” and so a “court may look beyond the  
22 pleadings and decide disputed issues of fact.” Id. at 1119-20. Because exhaustion is an  
23 affirmative defense, not a pleading requirement, the burden is on the movant. See Id. at  
24 1119 (“We hold that § 1997e(a) creates a defense -- defendants have the burden of raising  
25 and proving the absence of exhaustion.”). However, once the absence of exhaustion is  
26 sufficiently established, the burden then shifts to the non-movant to set forth specific facts,  
27 supported in declarations and other evidence outside the complaint, which prove exhaustion.

1 See Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th Cir.  
2 1988) (*per curiam*) (“The distinction between summary judgment and dismissal for matters  
3 in abatement bears on the district court’s authority to resolve factual disputes”); see also  
4 Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (once a summary judgment  
5 movant has met its burden, the burden then shifts to the non-moving party who must produce  
6 evidence sustaining a genuine issue of disputed material fact).

## 7 8 **2. Failure to State a Claim**

9 Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) permits challenge of a  
10 complaint for “failure to state a claim upon which relief can be granted.” A court’s inquiry  
11 “is limited to the allegations in the complaint, which are accepted as true and construed in  
12 the light most favorable to the plaintiff.” Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580,  
13 588 (9th Cir. 2008). This presumption applies only to facts and “is inapplicable to legal  
14 conclusions.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Moreover, a court “need not  
15 accept as true allegations contradicting documents that are referenced in the complaint or that  
16 are properly subject to judicial notice.” Lazy Y Ranch Ltd., 546 F.3d at 588; see also Lee  
17 v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (identifying “two exceptions to the  
18 requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary  
19 judgment motion” – material subject to judicial notice and material attached to or referenced  
20 in the complaint). The defendant bears the burden of proving plaintiff has failed to state a  
21 claim. See e.g. Hedges v. U.S., 404 F.3d 744, 750 (3d Cir. 2005); Bangura v. Hansen, 434  
22 F.3d 487, 498 (6th Cir. 2006); James Wm. Moore, 2 Moore’s Federal Practice § 12.34[1][a]  
23 at 12-73 (2008 ed.).

24 When plaintiff is *pro se* and alleges civil rights violations, the court must construe the  
25 allegations liberally and grant plaintiff leave to amend “unless it clearly appears that the  
26 deficiency cannot be overcome by amendment.” Gillespie v. Civiletti, 629 F.2d 637,  
27 640 (9th Cir. 1980) (internal citation omitted). See also Jones v. Cmty. Redevelopment  
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1 Agency of City of Los Angeles, 733 F.2d 646, 649 (9th Cir. 1984) (“The allegations of a pro  
2 se complaint, however inartfully pleaded, should be held to less stringent standards than  
3 formal pleadings drafted by lawyers”) (internal citation omitted).

## 4 5 **B. Motion to Dismiss**

### 6 **1. Failure to Exhaust Administrative Remedies**

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8 CDCR regulations provide a four-step administrative procedure through which  
9 prisoners may file and appeal grievances. The first step is to seek informal resolution of the  
10 grievance with the implicated staff. See Cal. Code Regs. tit. 15, §§ 3084.2(b); 3084.5(a).  
11 If informal resolution is unsuccessful, a CDCR Form 602 must be filed to initiate formal  
12 grievance proceedings. The Form 602, which must specifically describe the grievance as  
13 well as the requested remedy, is reviewed by a CDCR staff member who is neither implicated  
14 in the grievance nor subordinate in rank to any CDCR personnel implicated in the grievance.  
15 See Cal. Code Regs. tit. 15, §§ 3084.2(a); 3084.5(b), (e). If denied, the Form 602 may be  
16 appealed to the head officer of the institution where the complainant is incarcerated. See Cal.  
17 Code Regs. tit. 15, §§ 3084.5(c), (e)(1). If the first appeal is denied, a second appeal to the  
18 CDCR Director may be pursued; this is the final level of administrative review. See Cal.  
19 Code Regs. tit. 15, §§ 3084.5(d), (e)(2). The Director’s decision is not appealable and, if the  
20 appeal is denied by the Director, the claim is administratively exhausted. See Cal. Code  
21 Regs. tit. 15, § 3084.1(a) (“The decisions of the Departmental Review Board which serve as  
22 the director’s level decision, are not appealable and conclude the inmate’s or parolee’s  
23 departmental administrative remedy”).<sup>2</sup>

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27 See also e.g. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (“In order to exhaust  
28 administrative remedies within this system, a prisoner must proceed through several levels  
of appeal: (1) informal resolution, (2) formal written appeal on a [CDCR] 602 inmate appeal  
form, (3) second level appeal to the institution head or designee, (4) third level appeal to the  
director of the California Department of Corrections.”); Rhodes v. Dull, 2009 WL 839062,  
\*1 (N.D. Cal. 2009) (“A final decision from the Director’s level of review satisfies the

1 Defendant concedes Plaintiff filed a CDCR Form 602 and appealed the grievance  
2 through the final level of administrative review (Doc. 28 at 5). However, Defendant argues  
3 for dismissal because the Form 602 was not sufficiently specific “to alert the prison to [the]  
4 problem and facilitate its resolution,” thus failing to “properly exhaust” Plaintiff’s claim as  
5 required by § 1997e(a). Griffin, 557 at 1119-20; see also Cal. Code Regs. tit. 15, § 3084.2(a)  
6 (“The appellant shall use a [CDCR] Form 602 (rev. 12-87), Inmate/Parolee Appeal Form, to  
7 describe the problem and action requested.”) (emphasis added). Defendant contends  
8 Plaintiff’s Form 602 and subsequent administrative appeals addressed only allegations  
9 concerning the denied root canals, which were dismissed from the Amended Complaint in  
10 the July 7, 2008 screening Order for failure to state a claim. Defendant further contends the  
11 Form 602 failed to raise the sole allegation which survived the screening Order, that Plaintiff  
12 was refused medication to treat severe pain, and thus CDCR staff were not properly alerted  
13 to the problem. In support, Defendant submits an affidavit from the Chief of the Inmate  
14 Appeals Branch, who denied Plaintiff’s claim at the Director’s Level appeal, stating Plaintiff  
15 had submitted only one appeal to the CDCR Director which dealt solely with the question  
16 of denied root canals (Doc. 28 Ex. A). Plaintiff, citing to the administrative appeal record,  
17 responds that the issue of wrongfully denied pain medication was sufficiently presented to  
18 CDCR to satisfy the exhaustion requirement. Defendant’s interpretation of the appeal record  
19 is accurate and the Complaint will be dismissed for failing to exhaust administrative  
20 remedies.

21 Plaintiff’s first interaction with CDCR staff occurred on June 6, 2004, during  
22 Defendant Fishback’s initial examination of Plaintiff’s teeth. According to Fishback’s notes,  
23 Plaintiff did not request pain medication during the examination but rather focused  
24 exclusively on Fishback’s refusal to perform root canals:

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26 exhaustion requirement under § 1997e(a).”); Rideau v. Woodford, 2009 WL 747715, \*1  
27 (E.D. Cal. 2009) (same).

1           Showed x-ray to patient [and] explained that both teeth . . .  
2           would need extensive restoration [and] crowns EVEN IF there  
3           was no infection or ab[s]cesses [and] that posts, buildups [and]  
4           crowns are NOT done here, but both teeth are ab[s]cessed [and]  
5           all that I can do is to remove them. The patient asked if he  
6           could be sent to an outside dentist to get them fixed. Patient was  
7           told that it would be unlikely that he could get to an outside  
8           dentist. Patient became very upset [and] irritated [and] stated  
9           that he was going to 602 [and] that I was 'just lazy' [and] didn't  
10          want to help him. Patient left still complaining. (Doc. 1 Ex. A  
11          at 1) (capitalization in original).

12          Accordingly, at the informal level of review, CDCR staff did not address the question of pain  
13          medication and only denied the request for root canals: "Staff Response: Request for root  
14          canal denied" (Doc. 1 Ex. C at 7). When the Form 602 was filed, Plaintiff described the  
15          grievance in the following terms: "[T]he 'basic' dental treatments of a filling and/or root canal  
16          should be available if so prescribed. To not have these 'common' treatments violates the U.S.  
17          [Constitution]" (Doc. 1 Ex. C at 7). The "Action Requested" was "[t]o provide  
18          appropriate/standard dental care which includes but is not limited to, root canal, and filling  
19          treatments, and to treat Mr. Anderson with the appropriate dental care as initially pr[e]scribed.  
20          (root canal, and refilling)" (Doc. 1 Ex. C at 7). Nowhere in the Form 602 did Plaintiff  
21          mention pain medication. Thus, Defendant Martinez, in reviewing the Form 602, did not  
22          address the question of denied pain medication, but rather affirmed Fishback's denial of the  
23          root canals: "Patient was told the answer is the same as last [appointment]. The treatment  
24          patient wants is a 'restricted' service and may NOT be undertaken." (Doc. 1 Ex. 6 at 6).

25          The focus of Plaintiff's first appeal, to Defendant Suryadevara, was the same:  
26          "Dissatisfied: fillings/root canal is a common dental service." (Doc. 1 Ex. C. at 6). Plaintiff  
27          argues statements filed in a Supplemental Attachment to the first appeal were sufficient to  
28          notify CDCR that Plaintiff was improperly denied pain medication:

          "Anderson is entitled to appropriate relief. Mr. Anderson has a  
          significant illness/disability, and is in need of treatments to  
          alleviate severe pain. Root canals, fillings, and other 'basic'  
          treatments are afforded at other California State Prisons, and  
          Mr. Anderson is due this right" (Doc. 1 Ex. B at 1).

1 If read out of context, Plaintiff's statement of being in need of "treatments to alleviate severe  
2 pain" could be viewed as sufficient to notify CDCR that Plaintiff was denied pain  
3 medication, encompassed in the catch-all request for "other 'basic' treatment." However,  
4 the context of the Supplemental Attachment, in which Plaintiff solely discusses the previous  
5 denial of root canal treatment, belies the suggestion that "treatments to alleviate severe pain"  
6 refers to anything but root canals. Accordingly, when conducting the second-level review,  
7 Defendant Suryadevara only addressed the question of the denied root canals (Doc. 1 Ex. B  
8 at 2). Plaintiff's argument and the Director's response at the final level of review were the  
9 same; Plaintiff appealed the denial of the root canal and the Director affirmed the lower  
10 administrative decisions (Doc. 1 Ex. C. at 6, Ex. B at 3).

11 At no time during the administrative appeal process did Plaintiff raise the issue of  
12 denied pain medication with sufficient clarity to alert CDCR staff of the problem and thus  
13 it was not addressed. If Plaintiff was in fact denied pain medication that was medically  
14 necessary to alleviate severe pain caused by tooth decay, the issue must be addressed through  
15 the CDCR administrative process before reaching federal court.  
16

## 17 **2. Failure to State a Claim**

18 Because the Amended Complaint will be dismissed for failure to exhaust  
19 administrative remedies, Defendant's arguments concerning Plaintiff's failure to state a claim  
20 under the Eighth Amendment and failure to properly seek injunctive relief will not be  
21 reached (Doc. 28 at 6-9).

22 Accordingly,

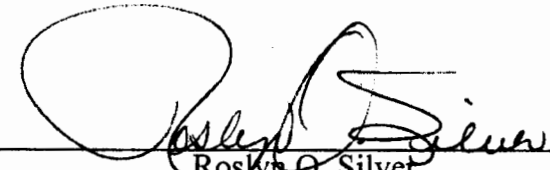
23 **IT IS ORDERED** Defendant Suryadevara's Motion to Dismiss (Doc. 28) **IS**  
24 **GRANTED.**

25 **FURTHER ORDERED** Plaintiff's Amended Complaint (Doc. 13) **IS**  
26 **DISMISSED.** The Clerk of Court shall close this case.  
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DATED this 6th day of August, 2009.



Roslyn O. Silver  
United States District Judge