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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY VICTORY,

Plaintiff,

v.

BARBER, et al.,

Defendants.

CASE NO. 1:05-cv-01578-LJO-DLB (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANT
NEUBARTH’S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM BE
GRANTED IN PART AND DENIED IN PART

(Doc. 43)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANTS’ MOTION
TO DISMISS FOR FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES BE
GRANTED IN PART AND DENIED IN PART

(Docs. 44 and 49)

OBJECTIONS, IF ANY, DUE WITHIN 30
DAYS

I. Findings and Recommendations

A. Procedural History

Michael Anthony Victory (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s amended complaint, filed October 16, 2006, against defendants C. Barber, R. D. Smith, N. Kushner, P. Bresler, F. Salazar, M. D. Sacks, Neubarth, and Ortiz (“Defendants”) for deliberate indifference to Plaintiff’s medical needs, in violation of Plaintiff’s Eighth Amendment rights. On August 22, 2008, pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Neubarth filed a motion to dismiss for failure to state a claim upon which relief may be granted. (Doc. 43.) On August 22, 2008, pursuant to the unenumerated portion of Federal Rule of Civil

1 Procedure 12(b), defendants Ortiz, Bresler, Smith, and Barber filed a motion to dismiss based on
2 Plaintiff's failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). (Doc.
3 44.) On September 18, 2008, defendants Sacks, Salazar, and Kushner also filed a motion to
4 dismiss for failure to exhaust administrative remedies. (Doc. 49.) On October 23, 2008, Plaintiff
5 filed an opposition against all of Defendants' motions to dismiss. (Doc. 52.)¹ The Court will
6 address each motion separately as set forth below.

7 **B. Summary of Plaintiff's Amended Complaint**

8 Plaintiff was incarcerated at Pleasant Valley State Prison ("PVSP") at the time the alleged
9 events which gave rise to this action occurred. In his amended complaint, Plaintiff alleges that
10 he suffers from Osgood Schlatter disease, a degenerative disc disease, and osteoarthritis. (Doc.
11 12, Exh. A, Pl.'s Decl. ¶ 1.) Plaintiff allegedly suffered injuries in a September 2003 fall and
12 grieved the inadequacy of Plaintiff's subsequent medical treatment. Plaintiff alleges that
13 defendant Neubarth only ordered a ninety day low bunk chrono, and denied Plaintiff's requests
14 for: 1-year low bunk chrono, 1-year low tier chrono, 1-year eggcrate mattress chrono, MRI tests
15 on Plaintiff's low back, knees, and right shoulder, and a specialist to interpret the MRI. (Pl.'s
16 Decl. ¶¶ 1-2.) Plaintiff also alleges that defendant Neubarth had a conflict of interest by being on
17 the Chrono committee that denied Plaintiff's requested chronos. (Pl.'s Decl. ¶ 5.) Plaintiff
18 alleges that defendant Salazar, in his review of Plaintiff's grievance, submitted requests for
19 Plaintiff's chronos and for referral to an orthopedic specialist for determination of the necessity
20 of an MRI for Plaintiff's knees and shoulder. (Pl.'s Decl. ¶ 4.) Defendant Salazar failed to
21 include a request for MRI for Plaintiff's low back. (Pl.'s Decl. ¶ 4.) Plaintiff further alleges that
22 defendants Ortiz and Salazar interfered and interrupted any renewal of Plaintiff's prescription for
23 Neurontin without prescribing equivalent alternative medication. (Pl.'s Decl. ¶ 6.)

24 Plaintiff alleges he was seen by Dr. Tanji, an orthopedic specialist, who recommended a
25 pain management specialist, an eggcrate mattress, and a bone scan of Plaintiff's right shoulder.

26
27 ¹Defendants filed three separate Motions to Dismiss. Plaintiff twice requested extension of time to file his
28 Opposition, once after Defendants' second motion (Doc. 44), and after Defendants' third motion (Doc. 49). (See
Docs. 46 & 50.) The Court granted both of Plaintiff's motions. (See Docs. 48 & 51.) Plaintiff filed his Opposition
within the allotted time ordered by the Court. (Doc. 51.)

1 (Pl.’s Decl. ¶ 10.) Plaintiff alleges that defendant Kushner denied referral to a pain management
2 specialist, 1-year renewal of the eggcrate chrono, bone scan of Plaintiff’s right shoulder, and
3 denied previously prescribed medications (such as Celebrex) other than Tylenol. (Pl.’s Decl.
4 ¶¶12-14.) Plaintiff alleges that defendant Kushner falsely reported that Plaintiff had refused
5 treatment. (Pl.’s Decl. ¶12.) Plaintiff alleges that defendant Bresler ignored Plaintiff’s complaints
6 regarding defendant Kushner’s treatment. (Pl.’s Decl. ¶¶ 15-16.) Plaintiff alleges that
7 defendants Bresler and Smith did not identify all of Plaintiff’s spinal injuries in responding to
8 Plaintiff’s second appeal. (Pl.’s Decl. ¶¶ 17-20.) Plaintiff alleges that defendant Barber
9 misinterpreted the orthopedic specialist’s report and failed to follow the orthopedic specialist’s
10 recommendations. (Pl.’s Decl. ¶¶ 25-26.)

11 Plaintiff alleges that all defendants forced Plaintiff to be without pain medication, causing
12 Plaintiff to endure chronic and substantial pain on a daily basis. (Pl.’s Am. Compl. ¶ 3.)
13 Plaintiff alleges that all defendants denied or delayed Plaintiff’s requests for a renewal of his
14 previously prescribed chronos, namely the 1-year eggcrate mattress chrono, and a bone scan of
15 Plaintiff’s right shoulder. (Pl.’s Am. Compl. 5-7, ¶¶ 4-6.)²

16 **C. Failure to State a Claim**

17 **1. *Legal Standard***

18 “The focus of any Rule 12(b)(6) dismissal . . . is the complaint.” Schneider v. California
19 Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). In considering a motion to dismiss for
20 failure to state a claim, the court must accept as true the allegations of the complaint in question,
21 Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in
22 the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's
23 favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh’g denied, 396 U.S. 869 (1969). The federal
24 system is one of notice pleading. Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126
25 (2002). “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
26 exceptions,” none of which apply to section 1983 actions. Swierkiewicz v. Sorema N. A., 534

27
28 ² Plaintiff referred to requests for a “bone scan” of his right shoulder. In their first level decision to grievance No. PVSP-C-05-01182, defendants Bresler and Smith categorized a “bone scan” as an MRI request. (Doc. 12, Exh. C.) For purposes of this order, Plaintiff’s bone scan request is the equivalent of an MRI request.

1 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a
2 short and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed. R.
3 Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the plaintiff’s
4 claim is and the grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. Detailed factual
5 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action,
6 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937,
7 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-
8 65 (2007)). Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
9 that is plausible on its face.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).
10 While factual allegations are accepted as true, legal conclusion are not. Id. at 1949.

11 Discovery and summary judgment motions - not motions to dismiss - “define disputed
12 facts” and “dispose of unmeritorious claims.” Id. at 512. “The issue is not whether a plaintiff
13 will ultimately prevail but whether the claimant is entitled to offer evidence to support the
14 claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and
15 unlikely but that is not the test.” Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003) (quoting
16 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)); see also Austin v. Terhune, 367 F.3d 1167, 1171
17 (9th Cir. 2004) (quoting Fontana v. Haskin, 262 F.3d 871, 977 (9th Cir. 2001)) (“Pleadings need
18 suffice only to put the opposing party on notice of the claim . . .”).

19 **2. Defendant Neubarth’s Motion**

20 Defendant Neubarth argues that his motion to dismiss should be granted because 1) he is
21 no longer employed by PVSP so no injunctive relief can be granted; 2) he is entitled to qualified
22 immunity; and 3) Plaintiff has alleged no facts that support an Eighth Amendment violation
23 either during defendant Neubarth’s examination or because of defendant Neubarth’s presence on
24 the Chrono Committee that denied Plaintiff’s chronos. (Doc. 43, Def. Neubarth’s Mot. to
25 Dismiss 5-10.)

26 In his opposition, Plaintiff contends that 1) defendant Neubarth may still be working at a
27 California Department of Corrections and Rehabilitation (“CDCR”) facility, and if Plaintiff
28 should be transferred there, he will have need of an injunction; 2) defendant Neubarth is not

1 entitled to qualified immunity; and 3) Plaintiff’s allegations are sufficient to state an Eighth
2 Amendment claim. (Doc. 52, Pl.’s Opp’n to Defs.’ Mot. to Dismiss 34-41.) The Court will
3 address each argument as set forth below.

4 **a. Injunctive Relief**

5 Defendant contends that because Neubarth is no longer an employee of PVSP, there is no
6 case-or-controversy and thus Plaintiff’s claim for injunctive relief is moot. (Def. Neubarth’s
7 Mot. to Dismiss 5-6.) Defendant refers to the Waiver of Service Returned Executed by the U.S.
8 Marshals, which indicates that defendant Neubarth’s former employment address is PVSP. (Doc.
9 35.) Plaintiff argues that an injunction may be necessary if Plaintiff is transferred to a facility in
10 which defendant Neubarth is potentially working. (Pl.’s Opp’n 35-36.)

11 When an inmate seeks injunctive or declaratory relief concerning an institution at which
12 he is incarcerated, his claims for such relief become moot when he is no longer subjected to those
13 conditions. See Nelson v. Heiss, 271 F.3d 891, 897 (9th Cir. 2001); Dilley v. Gunn, 64 F.3d
14 1365, 1368 (9th Cir. 1995); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991). Plaintiff has
15 demonstrated no reasonable possibility that he will be incarcerated at a facility in which
16 defendant Neubarth works at any predictable time in the future. See Darring v. Kincheloe, 783
17 F.2d 874, 876 (9th Cir. 1986) (finding that inmate who was transferred to another facility failed
18 to show “reasonable expectation” or “demonstrated probability” of return to complained-of
19 facility). Plaintiff’s argument is too speculative.

20 The Court thus finds that Plaintiff’s request for injunctive relief against Neubarth should
21 be dismissed as moot.

22 **b. Qualified Immunity**

23 Defendant Neubarth contends that he is entitled to qualified immunity. (Def. Neubarth’s
24 Mot. to Dismiss 6-7.) Government officials enjoy qualified immunity from civil damages unless
25 their conduct violates “clearly established statutory or constitutional rights of which a reasonable
26 person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In ruling upon the
27 issue of qualified immunity, one inquiry is whether, taken in the light most favorable to the party
28 asserting the injury, the facts alleged show the defendant’s conduct violated a constitutional right.

1 Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part by Pearson v. Callahan, 129 S. Ct.
2 808, 813 (2009) (“Saucier procedure should not be regarded as an inflexible requirement”). The
3 other inquiry is whether the right was clearly established. Saucier, 533 U.S. at 201. The inquiry
4 “must be undertaken in light of the specific context of the case, not as a broad general
5 proposition” Id. “[T]he right the official is alleged to have violated must have been ‘clearly
6 established’ in a more particularized, and hence more relevant, sense: The contours of the right
7 must be sufficiently clear that a reasonable official would understand that what he is doing
8 violates that right.” Saucier, 533 U.S. at 202 (citation omitted). In resolving these issues, the
9 court must view the evidence in the light most favorable to plaintiff and resolve all material
10 factual disputes in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003).
11 Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the
12 law.” Malley v. Briggs, 475 U.S. 335, 341 (1986).

13 Here, Plaintiff alleges that Neubarth’s conduct violated Plaintiff’s Eighth Amendment
14 right which guarantees medical care without deliberate indifference to a serious medical need.
15 Plaintiff contends that his injury occurred on September 2003, when Plaintiff slipped and fell on
16 metal stairs, injuring himself. (Doc. 12, Pl.’s Decl. ¶ 1.) Plaintiff suffered a laceration, swelling
17 and pain in his right knee and shoulder, and back injuries. (Doc. 12, Pl.’s Am. Compl. 8, ¶ 7.)
18 On December 12, 2003, Plaintiff was scheduled for a follow-up appointment with defendant Dr.
19 Neubarth. (Doc. 12, Pl.’s Decl. ¶ 3.) Plaintiff contends that at a previous appointment, Dr.
20 Kushner had told Plaintiff if his injury persisted, he should request an MRI or X-ray for his back,
21 knee, and right shoulder from the doctor at his next visit. (Doc. 12, Pl.’s Decl. ¶ 3.) Plaintiff
22 made his requests, but defendant Neubarth denied them, despite Plaintiff’s well-documented
23 medical history. (Doc. 12, Pl.’s Decl. ¶ 1.) Plaintiff contends that he also requested a one-year
24 renewal for low tier, low bunk and eggcrate mattress chronos because of Plaintiff’s medical
25 history, which defendant Neubarth denied. (Doc. 12, Pl.’s Decl. ¶ 1.) Plaintiff contends that he
26 received a partial grant of his appeal at the first level, in which the Chrono Committee would
27 review his chrono requests. (Doc. 12., Pl.’s Decl. ¶ 4.) The Chrono Committee denied
28 Plaintiff’s requests. (Doc. 12, Pl.’s Decl. ¶ 14.) Plaintiff alleges that defendant Neubarth’s

1 presence on the Chrono Committee created a conflict of interest. (Doc. 12, Pl.’s Decl. ¶ 5.)

2 Based on these allegations, Plaintiff has stated a cognizable claim for an Eighth
3 Amendment violation against defendant Neubarth. Plaintiff has alleged that defendant Neubarth
4 knew of an excessive risk to Plaintiff’s health and disregarded it: Neubarth knew of Plaintiff’s
5 previous medical history and through his actions exacerbated Plaintiff’s pain. Plaintiff has
6 satisfied the inquiry of whether, taken in the light most favorable to the party asserting the injury,
7 the facts alleged show the defendant’s conduct violated a constitutional right. Saucier, 533 U.S.
8 at 201.

9 The next inquiry is whether the right is sufficiently clear such that “a reasonable official
10 would understand that what he is doing violates that right.” Id. at 202 (citation omitted).
11 Defendant Neubarth contends that a reasonable doctor would not have known that a difference of
12 opinion is a constitutional violation. (Def. Neubarth’s Mot. to Dismiss 9.) The Eighth
13 Amendment’s prohibition against cruel and unusual punishment clearly applies in the context of
14 deliberate indifference to a serious medical need. The Court finds that the alleged facts, taken in
15 the light most favorable to Plaintiff, indicate that Plaintiff has stated a cognizable claim. These
16 are not mere differences in opinion that the Plaintiff alleges, but rather a knowing disregard of an
17 excessive risk to Plaintiff’s health. A challenge to the merits of a claim, as opposed to the
18 pleading of a claim, is best done through a motion for summary judgment. See Swiekiewicz, 534
19 U.S. at 512.

20 Accordingly, the Court finds that Plaintiff has stated a cognizable Eighth Amendment
21 claim against defendant Neubarth and that defendant Neubarth is not entitled to qualified
22 immunity. Neubarth’s motion to dismiss for failure to state a claim should be denied.

23 **D. Failure to Exhaust Available Administrative Remedies**

24 ***1. Legal Standard***

25 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
26 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
27 confined in any jail, prison, or other correctional facility until such administrative remedies as are
28 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available

1 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney
2 v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the
3 relief sought by the prisoner and regardless of the relief offered by the process, Booth v. Chruner,
4 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all prisoner suits relating to
5 prison life, Porter v. Nussle, 534 U.S. 516, 532 (2002).

6 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
7 defense under which defendants have the burden of raising and proving the absence of
8 exhaustion. Jones, 549 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The
9 failure to exhaust nonjudicial administrative remedies that are not jurisdictional is subject to an
10 unenumerated Rule 12(b) motion, rather than a summary judgment motion. Wyatt, 315 F.3d at
11 1119 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th
12 Cir. 1988) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative
13 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Wyatt,
14 315 F.3d at 1119-20. If the court concludes that the prisoner has failed to exhaust administrative
15 remedies, the proper remedy is dismissal without prejudice. Id.

16 The California Department of Corrections has an administrative grievance system for
17 prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (Deering 2009). The process is initiated
18 by submitting a CDC Form 602. Id. § 3084.2(a). Four levels of appeal are involved, including
19 the informal level, first formal level, second formal level, and third formal level, also known as
20 the "Director's Level." Id. § 3084.5. Appeals must be submitted within fifteen working days of
21 the event being appealed, and the process is initiated by submission of the appeal to the informal
22 level, or in some circumstances, the first formal level. Id. §§ 3084.5, 3084.6(c). In order to
23 satisfy section 1997e(a), California state prisoners are required to use this process to exhaust their
24 claims prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 85 (2006); McKinney, 311 F.3d at
25 1199-1201.

26 Plaintiff does not have to name each defendant in his grievance form. See Jones, 549
27 U.S. at 218-19 ("The level of detail necessary in a grievance to comply with the grievances
28 procedures will vary from system to system and claim to claim, but it is the prison's

1 requirements, and not the PLRA, that define the boundaries of proper exhaustion

2 [E]xhaustion is not *per se* inadequate simply because an individual later sued was not named in
3 the grievances.”). The inmate appeal form CDC-602 does not require identification of specific
4 individuals. See Cal. Code Regs., tit. 15 § 3084.2(a).

5 **2. Analysis**

6 Defendants argue that Plaintiff has failed to exhaust any claims against Defendants Ortiz,
7 Bresler, Smith, Barber, Kushner, Salazar, and Sacks. Defendants submit evidence that Plaintiff
8 filed two grievances concerning medical issues, PVSP-C-04-00122 and PVSP-C-05-01182.
9 (Docs. 44-2, Huckabay Decl., and 44-3, Grannis Decl.) Grievance No. PVSP-C-04-00122 was
10 partially granted at the second level of review (Huckabay Decl. ¶ 4), and partially granted at the
11 Director’s level. (Doc. 44-3, Exh. A.) It concerned Plaintiff’s complaint regarding medical care
12 stemming from Plaintiff’s injury on September 2003. (Doc. 44-2, Exh. A.) Grievance No.
13 PVSP-C-05-01182 was denied at the second level of review and not appealed further. It also
14 concerned Plaintiff’s medical care. (Doc. 44-2, Exh. C.) Because grievance No. PVSP-C-05-
15 01182 was not appealed to the Director’s level, and no reason was given by Plaintiff as to why
16 not, Plaintiff cannot rely on grievance No. PVSP-C-05-01182 to demonstrate exhaustion of any
17 of Plaintiff’s claims. Thus, Plaintiff’s only exhausted claims are those which were raised in
18 Grievance No. PVSP-C-04-00122.

19 In his opposition, Plaintiff submits evidence in support of his arguments against each
20 Defendant. The Court will examine each argument as it pertains to each defendant.

21 **A. Defendant Ortiz**

22 Defendants contend that the two grievances concerning medical issues fail to exhaust any
23 claims against defendant Ortiz. (Doc. 44, Defs.’ Ortiz, Barber, Smith, and Bresler’s Mot. to
24 Dismiss 7-8.) Defendants contend that grievance No. PVSP-C-04-00122 did not concern
25 defendant Ortiz’s alleged interference with Plaintiff’s Neurontin prescription and thus did not
26 exhaust the claim. (Doc. 44, Defs.’ Mot. to Dismiss 7.) Defendants contend that the grievance
27 failed to exhaust administrative remedies as to defendant Ortiz because Ortiz’s alleged conduct
28 occurred well after Plaintiff had filed the grievance and that Plaintiff should have filed a separate

1 appeal. (Doc. 44, Defs.' Mot. to Dismiss 7.)

2 In his opposition, Plaintiff alleges that he had an appointment with defendant Ortiz on
3 January 26, 2004. (Doc. 52, Exh. A, Pl.'s Decl. ¶ 9.) Plaintiff alleges that he showed defendant
4 Ortiz grievance No. PVSP-C-04-00122. (Doc. 52, Exh. A, Pl.'s Decl. ¶ 9.) Plaintiff alleges that
5 he made a request for his low bunk/low tier chrono, an extra mattress chrono, and an MRI or X-
6 ray, but Ortiz denied them. (Doc. 52, Exh. A, Pl.'s Decl. ¶ 9.) Plaintiff argues that it would be
7 wasteful to have to file separate grievances against each doctor for every complaint he had in this
8 matter. (Pl.'s Opp'n 19-20; Doc. 52, Exh. A, Pl.'s Decl. 4-5.) Plaintiff submits as evidence his
9 appeals to the second and Director level. In these appeals, Plaintiff mentioned defendant Ortiz's
10 alleged conduct of failing to order an MRI for Plaintiff's knee, shoulder, and back (Doc. 52, Exh.
11 E) and interrupting and interfering with Plaintiff's Neurontin medication. (Doc. 52, Exh. F.)
12 Plaintiff alleges in his amended complaint only that defendant Ortiz interfered with Plaintiff's
13 Neurontin medication, and that all defendants violated his constitutional rights by denying
14 renewal of Plaintiff's 1-year eggcrate mattress chrono and his request for a bone scan of his right
15 shoulder. (Doc. 12, Pl.'s Decl. ¶ 6; Pl.'s Am. Compl. 6-7, ¶¶ 4-6.) Plaintiff also alleges that all
16 defendants denied Plaintiff's request for pain medication. (Pl.'s Am. Compl. 5, ¶ 3.) The Court
17 will only consider those claims alleged in Plaintiff's amended complaint.

18 In Grievance PVSP-C-04-00122, filed December 30, 2003, Plaintiff grieved a denial of
19 Plaintiff's low bunk, low tier and eggcrate mattress chronos, failure to order an MRI for
20 Plaintiff's low back, knees, and right shoulder for injuries stemming from the September 2003
21 fall, and failure to order a specialist to analyze the MRI tests. (Doc. 44-2, Exh. A.) On appeal to
22 the Director's level, Plaintiff included allegations that defendant Ortiz allegedly interfered with
23 Plaintiff's Neurontin prescription on March 24, 2004. (Doc. 12, Exh. B.) The Director's level
24 considered "all submitted documentation and supporting argument of the parties." (Doc. 12,
25 Exh. B.) Despite the statement, the Director's level decision discussed only the problems raised
26 by Plaintiff at the first level of review. The Court cannot find that prison officials actually
27 considered Plaintiff's claims regarding defendant Ortiz's alleged interference with Plaintiff's
28 Neurontin prescription. Therefore, Plaintiff did not properly exhaust this claim using grievance

1 No. PVS-C-04-00122.

2 Plaintiff also alleges that all defendants violated his constitutional rights by denying
3 renewal of Plaintiff's 1-year eggcrate mattress chrono and his request for a bone scan of his right
4 shoulder. (Pl.'s Am. Compl. 6-7, ¶¶ 4-6.) Plaintiff also alleges that all defendants denied
5 Plaintiff's request for pain medication. (Pl.'s Am. Compl. 5, ¶ 3.) The issue then is whether
6 Plaintiff has exhausted these claims for defendant Ortiz. In grievance No. PVSP-C-04-00122,
7 Plaintiff grieved, *inter alia*, the denial of his 1-year eggcrate mattress chrono and an MRI for his
8 right shoulder. (Doc. 52, Exh. D; Doc. 12, Exh. B.) These claims were considered at the
9 Director's level. (Doc. 52, Exh. G.) As stated previously, all an inmate is required to provide on
10 the grievance form is a description of the problem and the action requested, and there is no
11 requirement for naming of individuals. Cal. Code Regs., tit. 15 § 3084.2(a). Plaintiff described
12 this problem and the action requested in grievance No. PVSP-C-04-00122, as required by prison
13 regulation. Though defendant Ortiz's alleged actions occurred after defendant Neubarth's
14 alleged actions, defendant Ortiz's alleged conduct is a continuation of the same problem Plaintiff
15 grieved in grievance No. PVSP-C-04-00122. The Court finds that Plaintiff's claims for the
16 denial of 1-year eggcrate mattress chrono and request for a bone scan of his right shoulder were
17 exhausted, and therefore exhausted against defendant Ortiz. Plaintiff's allegation regarding his
18 pain medication was not exhausted, since it was not considered in grievance No. PVSP-C-04-
19 00122.³

20 For the above reasons, Plaintiff has failed to properly exhaust his administrative remedies
21 with regards to defendant Ortiz's interference with Plaintiff's Neurontin prescription. Plaintiff
22 however has properly exhausted his claims that defendant Ortiz denied Plaintiff's request for a
23 renewal of his 1-year eggcrate mattress chrono and a bone scan of his right shoulder.

24 **B. Defendant Salazar**

25 Defendants argue that grievance No. PVSP-C-04-00122 was filed before defendant
26 Salazar's alleged actions and thus cannot be used for exhaustion purposes. (Doc. 49, Defs.'
27

28 ³ Plaintiff's allegation that all defendants denied him pain medication was not considered in grievance No. PVSP-C-04-00122, and thus was not exhausted against all defendants.

1 Kushner, Salazar, and Sacks's Mot. to Dismiss 8-9.) Defendant Salazar allegedly reviewed
2 Plaintiff's first level appeal on February 17, 2004 and failed to recommend a MRI for Plaintiff's
3 low back, and allegedly interfered with Plaintiff's Neurontin prescription on May 28, 2004.
4 (Doc. 49, Defs.' Mot. to Dismiss 8). Defendants also contend that Plaintiff should have filed a
5 separate grievance against defendant Salazar in order to properly exhaust. (Doc. 49, Defs.' Mot.
6 to Dismiss 8-9.)

7 In his opposition, Plaintiff contends that Salazar was involved in Plaintiff's first level
8 response, interrupted Plaintiff's Neurontin prescription, failed to provide an adequate alternative,
9 and failed to list a request for a MRI of Plaintiff's low back. (Pl.'s Opp'n 20-21.) Plaintiff
10 contends that Salazar's inaction furthered Plaintiff's injury. (Doc. 52, Exh. E.)

11 Defendant Salazar's alleged conduct according to Plaintiff's amended complaint was
12 denial of Plaintiff's Neurontin prescription and omission of a recommendation for low back
13 MRI. (Doc. 12, Pl.'s Decl. ¶¶ 4, 6.) Plaintiff also alleged that defendant Salazar had submitted
14 requests to the Chrono Committee for 1-year renewals of low bunk, low tier, and eggcrate
15 mattress chronos, and for referral to an orthopedic specialist. (Doc. 12, Pl.'s Decl. ¶ 4.) Plaintiff
16 also alleged that all defendants had denied Plaintiff's request for 1-year eggcrate mattress chrono
17 and a bone scan of Plaintiff's right shoulder. (Pl.'s Am. Compl. 6-7, ¶¶ 4-6.)

18 The claim regarding omission of a recommendation for a low back MRI was raised for
19 the first time on appeal to the second level, and the claim of interference with the Neurontin
20 prescription was raised on appeal to the Director's level. (Doc. 52, Exh. E.) The second level
21 and Director's level decisions failed to discuss any of Plaintiff's additional claims. (Doc. 52,
22 Exhs. F and G.) The Court cannot find that these claims were considered by prison officials, and
23 thus these claims were not properly exhausted with grievance No. PVSP-C-04-00122.

24 Plaintiff had also alleged that all defendants violated his constitutional rights by denying
25 renewal of Plaintiff's 1-year eggcrate mattress chrono and his request for a bone scan of his right
26 shoulder. (Pl.'s Am. Compl. 6-7, ¶¶ 4-6.) As previously stated regarding defendant Ortiz, these
27 two claims were fully exhausted, and thus exhausted against defendant Salazar.

28 Accordingly, Plaintiff has failed to properly exhaust his administrative remedies as to

1 defendant Salazar's omission of a recommendation for a low back MRI and interference with
2 Plaintiff's Neurontin prescription. Plaintiff has properly exhausted his administrative remedies
3 as to denial of Plaintiff's 1-year eggcrate mattress chrono and bone scan of his right shoulder.

4 **C. Defendant Sacks**

5 Defendants contend that grievance No. PVSP-C-04-00122 does not concern defendant
6 Sacks. (Doc. 49, Mot. to Dismiss 9-10.) Defendant Sacks's alleged action occurred on March
7 30, 2004, when Sacks responded to Plaintiff's second level appeal. (Doc. 49, Mot. to Dismiss 9-
8 10.) Defendants contend that Plaintiff should have filed a grievance against defendant Sacks
9 then and his failure to do so resulted in Plaintiff's failure to exhaust administrative remedies
10 against him. (Doc. 49, Mot. to Dismiss 9-10.)

11 In his opposition, Plaintiff contends that defendant Sacks was aware of Plaintiff's
12 grievance by being involved at the first and second level review. (Doc. 52, Exhs. E & F.)
13 Plaintiff contends that Sacks's failure to properly remedy Plaintiff's grievance led to further
14 injury to Plaintiff.

15 The only allegation against defendant Sacks is that he, like the other defendants, denied
16 Plaintiff his 1-year eggcrate mattress chrono and his request for a bone scan of his right shoulder.
17 (Pl.'s Am. Compl. 6-7, ¶¶ 4-6.) As previously stated, these two claims were fully exhausted and
18 thus exhausted against defendant Sacks. Accordingly, Plaintiff has exhausted administrative
19 remedies as to the denial of Plaintiff's 1-year eggcrate mattress chrono and bone scan of his right
20 shoulder.

21 **D. Defendant Kushner**

22 Defendants argue that Grievance PVSP-C-04-00122 was filed before defendant
23 Kushner's alleged actions and thus cannot be relied on for exhaustion purposes. (Doc. 49, Mot.
24 to Dismiss 7-8.) On February 15, 2005, defendant Kushner allegedly treated Plaintiff. (Doc. 49,
25 Defs.' Mot. to Dismiss 7.) Defendants contend that this alleged action arose well after Plaintiff's
26 first grievance was filed and thus cannot be used to exhaust administrative remedies. (Doc. 49,
27 Defs.' Mot. to Dismiss 7.) Defendants contend that Plaintiff had the opportunity to exhaust his
28 claims against defendant Kushner with grievance No. PVSP-C-05-01182, but failed to appeal the

1 grievance past the second level. ((Doc. 49, Defs.' Mot. to Dismiss 8.)

2 Plaintiff contends that defendant Kushner's alleged actions violate the Director Level's
3 order regarding grievance No. PVSP-C-04-00122. (Doc. 52, Pl.'s Opp'n 27.) Plaintiff contends
4 that he showed defendant Kushner the Director's level order as well as other materials in order to
5 convince Kushner to order 1) treatment as recommended by Dr. Tanji and requested by Plaintiff,
6 including a bone scan of Plaintiff's right shoulder and pain management specialist, 2) an eggcrate
7 mattress chrono and 3) adequate medical prescription. (Doc. 52, Pl.'s Opp'n 26.) Plaintiff
8 contends that Kushner's alleged actions would thus fall within the scope of Grievance PVSP-C-
9 04-00122. (Doc. 52, Pl.'s Opp'n 25-27; Exh. A, at 5-6.)

10 In the amended complaint, Plaintiff's allegations against defendant Kushner include: (1)
11 denied Plaintiff's request for adequate pain prescription (namely Celebrex), (2) denied Plaintiff's
12 request for a pain management specialist, (3) falsely reported that Plaintiff refused treatment, (4)
13 conducted an inadequate physical examination, (5) denied 1-year eggcrate mattress chrono, and
14 (6) denied bone scan of right shoulder. (Doc. 12, Pl.'s Decl. ¶¶ 12-14.)

15 Grievance No. PVSP-C-04-00122 was exhausted, and thus all the claims properly raised
16 therein were exhausted, including, *inter alia*, Plaintiff's request for 1-year eggcrate mattress
17 chrono and the bone scan of Plaintiff's right shoulder. Plaintiff's other allegations against
18 defendant Kushner, namely the denial of a pain management specialist, adequate pain
19 prescriptions, false reporting of Plaintiff's refusal of treatment, and inadequate physical exam,
20 were raised only in grievance No. PVSP-C-05-01182. Grievance No. PVSP-C-05-01182 was not
21 exhausted, and thus those claims were not exhausted.

22 Accordingly, Plaintiff failed to properly exhaust his administrative remedies against
23 defendant Kushner for the following claims: denial of Plaintiff's request for adequate pain
24 prescription, denial of Plaintiff's request for a pain management specialist, falsely reporting that
25 Plaintiff refused treatment, and conducting an inadequate physical examination. Plaintiff did
26 properly exhaust his administrative remedies for the following claims against defendant Kushner:
27 denial of 1-year eggcrate mattress chrono, and denial of bone scan of right shoulder.

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1 **E. Defendants Bresler Smith, and Barber**

2 With regards to defendants Bresler, Smith, and Barber, Defendants contend that grievance
3 No. PVSP-C-04-00122 was filed before any alleged actions by them, and thus it cannot be used
4 to satisfy exhaustion requirements. (Doc. 44, Mot. to Dismiss 8-9.) Bresler’s alleged conduct
5 occurred on March 29, 2005 (interview for first level review) and April 18, 2005 (first level
6 appeal decision); Smith’s alleged conduct occurred on April 18, 2005 (first level appeal
7 decision); and Barber’s alleged conduct occurred on June 24, 2005 (second level appeal
8 decision). (Doc. 44, Mot. to Dismiss 8.) All of these alleged actions arose from reviewing
9 Plaintiff’s second grievance, grievance No. PVSP-C-05-01182, filed March 4, 2005.

10 In his opposition, Plaintiff argues that the three defendants are encompassed in grievance
11 No. PVSP-C-04-00122. (Doc. 52, Pl.’s Opp’n 28.) Defendants Bresler, Smith, and Barber were
12 responsible for reviewing Plaintiff’s second grievance. Plaintiff contends, however, that his first
13 inmate grievance put PVSP personnel on notice of Plaintiff’s grievance regarding inadequate
14 medical treatment subsequent to Plaintiff’s September 2003 fall. (Doc. 52, Pl.’s Opp’n 34; Exh.
15 A.)

16 In Plaintiff’s amended complaint, Plaintiff alleges that: defendant Bresler ignored
17 Plaintiff’s complaints regarding defendant Kushner’s treatment; defendants Bresler and Smith
18 failed to identify all of Plaintiff’s spinal injuries in their first level response to grievance No.
19 PVSP-C-05-01182; defendants Bresler and Smith failed to address defendant Kushner’s denial
20 of pain medication and inadequate treatment; and defendant Barber’s second level response
21 misinterpreted Dr. Tanji’s recommendations in denying the 1-year eggcrate mattress chrono,
22 bone scan of Plaintiff’s right shoulder, pain management specialist, and pain medication. (Doc.
23 12, Pl.’s Decl. ¶¶ 15-26.) Plaintiff had also alleged that all defendants denied Plaintiff’s request
24 for 1-year eggcrate mattress chrono and bone scan of Plaintiff’s right shoulder. (Pl.’s Am.
25 Compl. 6-7, ¶¶ 4-6.)

26 Plaintiff’s claims that were raised and properly exhausted in grievance No. PVSP-C-04-
27 00122 were the denial of the 1-year eggcrate mattress chrono and the the bone scan of Plaintiff’s
28 right shoulder. As stated previously, these claims were exhausted, and thus exhausted against

1 defendants Bresler, Smith, and Barber. Plaintiff's claims that were raised for the first time in
2 grievance No. PVSP-C-05-01182 however were not exhausted.

3 Accordingly, Plaintiff fails to exhaust administrative remedies for the following claims:
4 defendant Bresler ignoring Plaintiff's complaints regarding defendant Kushner's treatment;
5 defendants Bresler and Smith failing to identify all of Plaintiff's spinal injuries in their first level
6 response to grievance No. PVSP-C-05-01182; defendants Bresler and Smith failing to address
7 defendant Kushner's denial of pain medication and inadequate treatment; and defendant Barber
8 denying the requested pain management specialist and pain medication. Plaintiff however has
9 exhausted administrative remedies as to defendants Bresler, Smith, and Barber's denial of
10 Plaintiff's requests for 1-year eggcrate mattress chrono and bone scan of Plaintiff's right
11 shoulder.

12 **II. Conclusion and Recommendation**

13 Accordingly, the Court HEREBY RECOMMENDS that:

- 14 1. Defendant Neubarth's motion to dismiss for failure to state a claim, filed on
15 August 22, 2008, be GRANTED in part with regards to injunctive relief and
16 DENIED in part with regards to qualified immunity;
- 17 2. Defendants Ortiz, Bresler, Smith, and Barber's motion to dismiss for failure to
18 exhaust administrative remedies, filed on August 22, 2008, be GRANTED in part
19 and DENIED in part as stated herein; and
- 20 3. Defendants Kushner, Salazar, and Sacks's motion to dismiss for failure to exhaust
21 administrative remedies, filed on September 18, 2008, be GRANTED in part and
22 DENIED in part as stated herein.

23 These Findings and Recommendations will be submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
25 **thirty (30) days** after being served with these Findings and Recommendations, the parties may
26 file written objections with the Court. The document should be captioned "Objections to
27 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file
28 objections within the specified time may waive the right to appeal the District Court's order.

1 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: September 16, 2009

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE