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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

Tracy Foley, )  
 ) CV-08-769-DCB P  
Plaintiff, )  
 )  
vs. )  
 ) **ORDER**  
K.M. Gerstel, et al., )  
 )  
Defendants. )  
 )

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Finding the complaint, liberally construed, stated cognizable claims, the Court ordered service upon Defendants. On July 29, 2009, Defendants filed a motion to dismiss for Plaintiff's failure to exhaust administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).<sup>1</sup> Plaintiff filed an opposition to the motion and Defendant filed a reply. For the reasons discussed below, the Court will grant the motion and dismiss the action without prejudice.

**BACKGROUND**

Plaintiff was incarcerated at the California Substance Abuse and Treatment Facility (SATF). Plaintiff alleges that he was seen by Defendant Ancheta (a dentist at SATF) on June 26, 2006, in response to

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<sup>1</sup>This motion was timely filed, consequently the Plaintiff's request for default (Doc. No. 15) is denied.

1 the administrative grievance that he filed. Plaintiff allegedly begged  
2 Defendants to pull his tooth and Defendants allegedly told Plaintiff that  
3 he would be seen by a dentist within two weeks if he dropped his  
4 administrative grievance. Because of this assurance, he claims he  
5 withdrew his administrative appeal. Plaintiff allegedly waited in pain  
6 for over a year to be seen by a dentist. Plaintiff claims that this  
7 delay resulted from Defendants' failure to schedule him for a dental  
8 procedure. Plaintiff filed two appeals relating to his dental treatment  
9 at SATF. Plaintiff withdrew the first grievance on June 26, 2006, when  
10 he was put on the waiting list for treatment. He filed another appeal on  
11 June 24, 2007, stating that, on May 9, 2007, Defendant Ancheta, after  
12 examining him and performing x-rays, determined that he needed extensive  
13 treatment and made Plaintiff's treatment "high-priority." He stated that  
14 Defendant has noted that he had been on the waiting list for over a year.

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16 Plaintiff filed no other grievances relating to his dental care.

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#### **DISCUSSION**

18 The Prison Litigation Reform Act of 1995, Pub.L. No. 104-134, 110  
19 Stat. 1321 (1996) (PLRA), amended 42 U.S.C. § 1997e to provide that "[n]o  
20 action shall be brought with respect to prison conditions under [42  
21 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any  
22 jail, prison, or other correctional facility until such administrative  
23 remedies as are available are exhausted." 42 U.S.C. § 1997e(a).  
24 Exhaustion is mandatory and no longer left to the discretion of the  
25 district court. *Woodford v. Ngo*, 548 U.S. 81 (2006) (citing *Booth v.*  
26 *Churner*, 532 U.S. 731, 739 (2001)). "Prisoners must now exhaust all  
27 'available' remedies, not just those that meet federal standards." *Id.*

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1 Even when the relief sought cannot be granted by the administrative  
2 process, *i.e.*, monetary damages, a prisoner must still exhaust  
3 administrative remedies. *Id.* at 2382-83 (citing *Booth*, 532 U.S. at 734).

4 "The text of 42 U.S.C. § 1997e(a) strongly suggests that the PLRA  
5 uses the term 'exhausted' to mean what the term means in administrative  
6 law, where exhaustion means proper exhaustion." *Id.* at 2387. Therefore,  
7 the PLRA's exhaustion requirement requires "proper exhaustion" of  
8 available administrative remedies. *Id.* "Proper exhaustion demands  
9 compliance with an agency's deadlines and other critical procedural rules  
10 because no adjudicative system can function effectively without imposing  
11 some orderly structure on the course of its proceedings." *Id.* at 2386  
12 (footnote omitted). In other words, the PLRA's exhaustion requirement  
13 cannot be satisfied "by filing an untimely or otherwise procedurally  
14 defective administrative grievance or appeal." *Id.* at 2382. Furthermore,  
15 administrative remedies may not be exhausted where the grievance,  
16 liberally construed, does not have the same subject and same request for  
17 relief. *See generally O'Guinn v. Lovelock Correctional Center*, 502 F.3d  
18 1056, 1062-63 (9th Cir.2007).

19 The State of California provides its inmates and parolees the right  
20 to appeal administratively "any departmental decision, action, condition,  
21 or policy which they can demonstrate as having an adverse effect upon  
22 their welfare." Cal.Code Regs. tit. 15, § 3084.1(a). It also provides  
23 its inmates the right to file administrative appeals alleging misconduct  
24 by correctional officers. *See id.* § 3084.1(e). In order to exhaust  
25 available administrative remedies within this system, a prisoner must  
26 proceed through several levels of appeal: (1) informal resolution, (2)  
27 formal written appeal on a CDC 602 inmate appeal form, (3) second level

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1 appeal to the institution head or designee, and (4) third level appeal  
2 to the Director of the California Department of Corrections and  
3 Rehabilitation. *Id.* § 3084.5; *Barry v. Ratelle*, 985 F.Supp. 1235, 1237  
4 (S.D.Cal.1997). This satisfies the administrative remedies exhaustion  
5 requirement under § 1997e(a). *Id.* at 1237-38. A prisoner need not  
6 proceed further and also exhaust state judicial remedies. *Jenkins v.*  
7 *Morton*, 148 F.3d 257, 259-60 (3d Cir.1998).

8         Although Federal Rule of Civil Procedure 12 does not explicitly  
9 address exhaustion, the Ninth Circuit has held that the failure to  
10 exhaust nonjudicial remedies "should be treated as a matter in abatement  
11 subject to an unenumerated Rule 12(b) motion." *Wyatt v. Terhune*, 315 F.3d  
12 1108, 1119 (9th Cir. 2003). Authority for the "unenumerated" 12(b) motion  
13 derives from this Court's inherent power to regulate actions, including  
14 authorizing motions not explicitly recognized by the rules. *Ritza v.*  
15 *Int'l Longshoremen's and Warehousemen's Union*, 837 F.2d 365, 369 (9th  
16 Cir. 1988). "In deciding a motion to dismiss for failure to exhaust  
17 nonjudicial remedies, the court may look beyond the pleadings and decide  
18 disputed issues of fact." *Wyatt*, 315 F.3d at 1119-1120. Because no  
19 presumption of truthfulness attaches to plaintiff's allegations in such  
20 matters, the court may resolve any disputed material facts before  
21 proceeding further. *Ritza*, 837 F.2d at 368-69. If the court concludes  
22 that the prisoner has not exhausted nonjudicial remedies, the proper  
23 remedy is dismissal of the claim without prejudice. *Wyatt*, 315 F.3d at  
24 1120.

25         The State of California provides its prisoners and parolees the  
26 right to administratively appeal "any departmental decision, action,  
27 condition or policy perceived by those individuals as adversely affecting  
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1 their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust  
2 available administrative remedies, a prisoner must proceed through an  
3 initial informal level, and three formal levels of review, culminating  
4 in a Director's Level Decision. *Id.* at § 3084.5; *Barry v. Ratelle*, 985  
5 F. Supp. 1235, 1237 (S.D. Cal.1997). A final decision at the Director's  
6 level satisfies the exhaustion requirement under § 1997e(a). *Id.* at 1237-  
7 38.

8 Under *Wyatt* and *Ritza*, this Court may properly look to the  
9 declarations of R. Hall, SATF Appeals Coordinator, and N. Grannis, Chief  
10 of the Inmate Appeals Branch. These declarations show that Plaintiff  
11 failed to file a grievance that would put Defendants on notice that  
12 Defendant Ancheta obstructed Plaintiff's ability to be seen by a dentist.  
13 Plaintiff is required to file an appeal even if he believes doing so  
14 would be futile, in that the appeal would not be accepted. *Jernigan v.*  
15 *Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). Plaintiff's appeal,  
16 additionally, would not have been be duplicative as it would have been  
17 a staff complaint, not a request for services, relating to the fact that  
18 Defendant Ancheta failed to schedule him for an appointment after she  
19 assured him that she would.

20 Plaintiff's second appeal relating to his dental treatment was  
21 exhausted at the Director's level on March 25, 2008. In this appeal  
22 Plaintiff states that Defendant Ancheta examined him on May 9, 2007, that  
23 she believed he needed "priority treatment" and that she noted he had  
24 been on the waiting list for over a year. Plaintiff additionally states,  
25 when appealing to the formal level, that if he had not run into Defendant  
26 Ancheta he would still be on the waiting list. This is not enough to put  
27 Defendants on notice that Defendant Ancheta obstructed Plaintiff's access  
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1 to dental treatment by failing to schedule him for a dental procedure.

2 A prisoner must exhaust his available administrative remedies  
3 before he or she filed suit, even if the prisoner fully exhausts while  
4 the suit is pending. *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.  
5 2002). Plaintiff did not fully exhaust this claim at the time he filed  
6 the complaint.

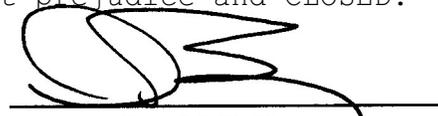
7 **CONCLUSION**

8 Having considered all the evidence submitted by both parties, the  
9 Court finds that Defendants have met their burden to demonstrate that  
10 Plaintiff failed to exhaust available administrative remedies. The  
11 proper remedy is dismissal without prejudice. *Wyatt*, 315 F.3d at 1119-20.  
12 Based on the Court's finding that Plaintiff did not exhaust the available  
13 administrative remedies prior to filing suit, the Court does not reach  
14 Defendants' other arguments.

15 Accordingly,

16 IT IS ORDERED that Defendants' Motion to Dismiss (Doc. No. 14) is  
17 GRANTED. This action is DISMISSED without prejudice and CLOSED.

18 DATED this 25<sup>th</sup> day of August, 2009.

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21 David C. Bury  
22 United States District Judge  
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