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

WILLIE HAMPTON,  
CDCR #V-26407,

Plaintiff,

vs.

J. YATES;  
F. IGBINOSA,

Defendants.

Civil No. 1:08cv01493 JLS (AJB)

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT PURSUANT TO  
FED.R.CIV.P. 12(b)**

**I. PROCEDURAL BACKGROUND**

Plaintiff, a state prisoner proceeding *pro se* first filed this civil rights action in Fresno County Superior Court alleging violations of his constitutional rights occurring at Pleasant Valley State Prison (PVSP). On October 8, 2008, Defendants filed a Notice of Removal pursuant to 28 U.S.C. § 1441(b).

On November 26, 2008, the case was assigned to this Court [Doc. No. 6]. On February 25, 2009, the Court *sua sponte* dismissed Plaintiff's Complaint for failure to state a claim pursuant to 28 U.S.C. § 1915A(b), but granted Plaintiff an opportunity to amend [Doc. No. 8]. On March 25, 2009, Plaintiff filed a First Amended Complaint (FAC) [Doc No. 9], and on March 31, 2009, the United States Marshal was directed to effect service on Plaintiff's behalf [Doc. No.

1 12].

2 On August 24, 2009, Defendants filed a Motion to Dismiss Plaintiff's First Amended  
3 Complaint pursuant to FED.R.CIV.P. 12(b) [Doc. No. 15]. Defendants moved to dismiss solely  
4 on grounds that Plaintiff failed to exhaust administrative remedies prior to suit in accordance with  
5 42 U.S.C. § 1997e(a). Pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119-21 (9th Cir. 2003), the  
6 Court issued an Order, dated September 1, 2009 [doc. no. 16], notifying Plaintiff of Defendants'  
7 motion and advising him of his right to file an Opposition by November 5, 2009. Defendants  
8 were given an opportunity to file a reply to any Opposition by November 12, 2009.

9 Plaintiff has failed to file an Opposition or statement of no opposition within the allotted  
10 time. The Court now considers the Defendants' Motion to Dismiss fully briefed and hereby  
11 issues its ruling without hearing or oral argument.

## 12 **II. STANDARDS OF REVIEW**

### 13 **A. FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a)**

14 Defendants claim Plaintiff failed to exhaust available administrative remedies pursuant to  
15 42 U.S.C. § 1997e(a) before bringing this suit, therefore, they seek dismissal under the "non-  
16 enumerated" provisions of FED.R.CIV.P. 12(b). The Ninth Circuit has held that "failure to  
17 exhaust nonjudicial remedies is a matter of abatement" not going to the merits of the case and is  
18 properly raised pursuant to a motion to dismiss, including a non-enumerated motion under  
19 FED.R.CIV.P. 12(b). See *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365,  
20 368-69 (9th Cir. 1988); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (finding a non-  
21 enumerated motion under Rule 12(b) to be "the proper pretrial motion for establishing non-  
22 exhaustion" of administrative remedies under 42 U.S.C. § 1997e(a)).<sup>1</sup> *Wyatt* also holds that non-  
23 exhaustion of administrative remedies as set forth in 42 U.S.C. § 1997e(a) is an affirmative  
24 defense which defendant prison officials have the burden of raising and proving. *Wyatt*, 315 F.3d  
25 at 1119. However, unlike under Rule 12(b)(6), "[i]n deciding a motion to dismiss for failure to  
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27 <sup>1</sup> In so finding, the Ninth Circuit also made clear that unlike a motion for summary judgment,  
28 "dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits." *Wyatt*, 315 F.3d at 1119 (citation omitted). Thus, if the court finds that the prisoner has failed to exhaust nonjudicial remedies, "the proper remedy is dismissal of the claim without prejudice." *Id.* (citing *Ritza*, 837 F.2d at 368 & n.3).

1 exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues  
2 of fact.” *Id.* at 1120 (citing *Ritza*, 837 F.2d at 369).

3 **B. Exhaustion of Administrative Remedies Under 42 U.S.C. § 1997e(a)**

4 The Prison Litigation Reform Act (“PLRA”) amended 42 U.S.C. § 1997e(a) to provide  
5 that “[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a  
6 prisoner confined in any jail, prison or other correctional facility until such administrative  
7 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “Once within the discretion of  
8 the district court, exhaustion in cases covered by § 1997e(a) is now mandatory.” *Porter v.*  
9 *Nussle*, 534 U.S. 516, 532 (2002). 42 U.S.C. § 1997e(a) has been construed broadly to “afford  
10 [ ] corrections officials time and opportunity to address complaints internally before allowing  
11 the initiation of a federal case, *id.* at 525-26, and to encompass inmate suits about both general  
12 circumstances and particular episodes of prison life--including incidents of alleged excessive  
13 force. *Id.* at 532. Finally, “[t]he ‘available’ ‘remed[y]’ must be ‘exhausted’ before a complaint  
14 under § 1983 may be entertained,” “regardless of the relief offered through administrative  
15 procedures.” *Booth v. Churner*, 532 U.S. 731, 738, 741 (2001); *see also McKinney v. Carey*,  
16 311 F.3d 1198, 1200-01 (9th Cir. 2002) (finding that prisoner’s civil rights action must be  
17 dismissed without prejudice unless prisoner exhausted available administrative remedies *before*  
18 he filed suit, even if he fully exhausts while the suit is pending).

19 The State of California provides its prisoners and parolees the right to administratively  
20 appeal “any departmental decision, action, condition or policy perceived by those individuals  
21 as adversely affecting their welfare.” CAL. CODE REGS., tit. 15 § 3084.1(a). In order to exhaust  
22 available administrative remedies within this system, a prisoner must proceed through several  
23 levels: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3)  
24 second level appeal to the institution head or designee, and (4) third level appeal to the Director  
25 of the California Department of Corrections. *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D.  
26 Cal. 1997) (citing CAL. CODE REGS. tit. 15 § 3084.5). The third or “Director’s Level” of review  
27 “shall be final and exhausts all administrative remedies available in the Department [of  
28 Corrections.]” *See* Cal. Dep’t of Corrections Operations Manual, § 54100.11, “Levels of

1 Review;” *Barry*, 985 F. Supp. at 1237-38; *Irvin v. Zamora*, 161 F. Supp. 2d 1125, 1129 (S.D.  
2 Cal. 2001).

### 3 **III. DISCUSSION**

4 Plaintiff’s substantive claim is that, due to an outbreak of a fungal infection called Valley  
5 Fever at his prison, he contracted the infection and Defendants exhibited deliberate indifference  
6 to his medical needs by refusing his request for a transfer to avoid re-infection or a worsening  
7 of the infection. (FAC at 3.) Plaintiff states he exhausted his administrative remedies and  
8 asserts “the appeal was partially granted and screened out on the ground of procedural bar for  
9 further exhaustion.” (*Id.* at 2.)

10 As outlined above, the failure to exhaust administrative remedies is an affirmative defense  
11 under the PLRA which the Defendants must plead and prove. *See Jones v. Bock, et al.* 594 U.S.  
12 199, 216 (2007). Here, to support their claim that Plaintiff did not exhaust his administrative  
13 remedies, Defendants submit two declarations from employees of the California Department of  
14 Corrections and Rehabilitation. (*See* Grannis Decl. & Huckaby Decl.) The first declaration is  
15 from N. Grannis, Chief of the Inmate Appeals Branch. He states his division receives all inmate  
16 Director’s-Level appeals (the third and final review required for exhaustion) and records them  
17 on a computer database known as the Inmate Appeals Tracking System (IATS) at Level III.  
18 (Grannis Decl. ¶¶ 1-3.) Grannis has attached a computer printout from his division that reflects  
19 Plaintiff did not file a third level review. (*Id.* at ¶ 4.) Defendants also provide the declaration  
20 of C. Huckaby, the custodian of IATS records of appeals at Plaintiff’s particular prison, PVSP.  
21 (Huckaby Decl. ¶¶ 1-2.) Huckaby has attached two exhibits that reflect Plaintiff did not pursue  
22 his review of the transfer denial beyond the first formal level. (*Id.* at 5-6.)

23 A prisoner’s appeal may be “screened out” by a prison appeals coordinator on procedural  
24 grounds. *See* Cal.Code Regs. tit. 15, § 3084.3. This does not however excuse the prisoner from  
25 continuing to exhaust his administrative remedies because “[proper exhaustion] means ... a  
26 prisoner must complete the administrative review process in accordance with the applicable  
27 procedural rules ... as a precondition to bring suit in federal court.” *Woodford v. Ngo*, 548 U.S.  
28 81, 91 (2006) (“[N]o adjudicative system can function effectively without imposing some  
orderly

1 structure on the course of its proceedings.”). Here, the Defendants have also provided a copy  
2 of Plaintiff’s inmate appeal form (Form CDC 602) which reflects that a PVSP doctor reviewed  
3 Plaintiff’s first level appeal, directed Plaintiff to continue taking his current medications, and  
4 simply stated “Regarding Transfer. That is a custody issue.” Below this decision, on the form,  
5 there is an instruction that provides, “If dissatisfied, explain reasons for requesting a Second-  
6 Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days  
7 of receipt of response.” Plaintiff’s request for transfer was clearly not addressed with any  
8 satisfaction at this level but Plaintiff failed to express that dissatisfaction through the process  
9 outlined in the instruction.

10 Defendants have met their burden of showing that Plaintiff did not properly exhaust his  
11 administrative remedies as required by 42 U.S.C. § 1997e(a). Despite being granted an  
12 opportunity to file an Opposition, Plaintiff has failed to rebut Defendants’ proof.

13 **IV. CONCLUSION AND ORDER**


14 For all the foregoing reasons, **IT IS HEREBY ORDERED** that:

15 Defendants’ Motion to Dismiss for failure to exhaust administrative remedies pursuant  
16 to FED.R.CIV.P. 12(b) [Doc. No. 15] is **GRANTED**. Plaintiff’s First Amended Complaint is  
17 **DISMISSED** without prejudice.

18 The Clerk shall close the file.

19 **IT IS SO ORDERED.**

20  
21 DATED: December 3, 2009

22   
23 Honorable Janis L. Sammartino  
24 United States District Judge

25  
26 CC: HONORABLE MAGISTRATE JUDGE ANTHONY J. BATTAGLIA  
27 ALL PARTIES AND COUNSEL OF RECORD  
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