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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ROBERT JAMES DIXON,

Plaintiff,

v.

JAMES A. YATES, et al.,

Defendants.

CASE NO. 1:09-CV-00657-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DEFENDANT  
IGBINOSA’S MOTION TO DISMISS BE  
GRANTED (DOC. 24)

OBJECTIONS DUE WITHIN TWENTY-ONE  
DAYS

**Findings And Recommendation**

**I. Background**

Plaintiff Robert James Dixon (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). This action is proceeding on Plaintiff’s amended complaint against Defendants F. Igbinoza and J. Diep<sup>1</sup> for violation of the Eighth Amendment. Pending before the Court is Defendant Igbinoza’s motion to dismiss, filed September 20, 2010, for Plaintiff’s failure to exhaust administrative remedies. Def.’s Mot. Dismiss, Doc. 24. On May 31, 2011, Plaintiff filed his opposition to Defendant’s motion.<sup>2</sup> Pl.’s

<sup>1</sup> Defendant Diep has not been served or appeared in this action.

<sup>2</sup> Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on April 30, 2010. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003); see Second Informational Order, Doc. 13.

1 Opp'n, Doc. 35.<sup>3</sup> The matter is deemed submitted pursuant to Local Rule 230(l).

2 **II. Summary of Amended Complaint**

3 Plaintiff received a prostate biopsy at an outside clinic on August 1, 2008. Am. Compl.

4 1. On August 4, 2008, during a D-yard clinic visit with Plaintiff, doctor Paja called the outside  
5 clinic and learned that the biopsy results indicated Plaintiff had prostate cancer. First Am.  
6 Compl. ("FAC") 1. The treatment for this cancer was not chemo or radiation, but a radical  
7 prostatectomy. FAC 1. Plaintiff received a copy of the biopsy results from urologist doctor  
8 Sable of the outside clinic, who set a time line of 90 days for the surgery. FAC 2. Plaintiff  
9 handed a copy of these results to Defendant Doctor John Diep at PVSP. FAC 2. It was  
10 understood that surgery was urgent. FAC 2. Defendant Diep read the results of the biopsy,  
11 placed a copy into Plaintiff's file, and faxed a copy to Doctor Pido. FAC 2. Surgery was set for  
12 September 10, 2009, with doctors Sable and Hennary, who were to perform the surgery and  
13 repair a hernia. FAC 3.

14 On August 15, 2008, Plaintiff was called to D-yard clinic, where Dr. Pido informed  
15 Plaintiff that he was being transferred out of PVSP because it was a valley fever area and chemo  
16 treatment weakened the immune system. FAC 3. Plaintiff informed Dr. Pido that he was not  
17 going to receive chemo, but surgery. FAC 3. Dr. Pido informed Plaintiff that there was no  
18 request for urgent surgery in his file, and that the transfer order had already been sent to  
19 Defendant CMO Igbiosa to be signed. FAC 3-4. Registered nurse M. Griffith informed Dr.  
20 Pido that a transfer would prolong the date of surgery past the recommended time line. FAC 4.  
21 Dr. Pido stated again that the transfer was done. FAC 4. Defendant Igbiosa signed the transfer  
22 order on August 15, 2008, with full knowledge of risk of prolonging the time before surgery.  
23 FAC 4.<sup>4</sup>

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26 <sup>3</sup> The parties' filings were found to be deficient. Defendant's exhibit A in support of his motion was not  
27 properly authenticated. Plaintiff's opposition, filed November 5, 2010, was not signed. The parties were ordered to  
28 supplement their filings. Defendant submitted an authenticated Exhibit A on May 10, 2011. Doc. 35. Plaintiff  
submitted his signed opposition on May 31, 2011. Doc. 36.

<sup>4</sup> Plaintiff's claims against Defendant Diep are omitted as unnecessary for purposes of this motion.

1 **III. Exhaustion Of Administrative Remedies**

2 **A. Legal Standard**

3 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with  
4 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
5 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
6 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
7 administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007); *McKinney*  
8 *v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam). Exhaustion is required  
9 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,  
10 *Booth v. Churner*, 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all  
11 prisoner suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516, 532 (2002).

12 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative  
13 defense under which defendants have the burden of raising and proving the absence of  
14 exhaustion. *Jones*, 549 U.S. at 216; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The  
15 failure to exhaust nonjudicial administrative remedies that are not jurisdictional is subject to an  
16 unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Wyatt*, 315 F.3d at  
17 1119 (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365, 368 (9th  
18 Cir. 1998) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative  
19 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Id.* at  
20 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative remedies,  
21 the proper remedy is dismissal without prejudice. *Id.*

22 **B. Discussion**

23 The California Department of Corrections and Rehabilitation has an administrative  
24 grievance system for prisoner complaints. Cal. Code Regs. tit. 15, § 3084.1 (2010). At the time  
25 the grievance was filed, the process was initiated by submitting a CDC Form 602. *Id.* §  
26 3084.2(a). Four levels of appeal were involved, including the informal level, first formal level,  
27 second formal level, and third formal level, also known as the “Director’s Level.” *Id.* § 3084.5.  
28 Appeals must be submitted within fifteen working days of the event being appealed, and the

1 process is initiated by submission of the appeal to the informal level, or in some circumstances,  
2 the first formal level. *Id.* §§ 3084.5, 3084.6(c). In order to satisfy § 1997e(a), California state  
3 prisoners are required to use this process to exhaust their claims prior to filing suit. *Woodford v.*  
4 *Ngo*, 548 U.S. 81, 85-86 (2006); *McKinney*, 311 F.3d at 1199-1201. Exhaustion does not *always*  
5 require pursuit of an appeal through the Director’s Level of Review. What is required to satisfy  
6 exhaustion is a fact specific inquiry, and may be dependent upon prison officials’ response to the  
7 appeal. *See Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (listing examples of  
8 exceptions to exhaustion requirement from other circuits); *Brown v. Valoff*, 422 F.3d 926, 935-36  
9 (9th Cir. 2005) (“[E]ntirely pointless exhaustion” not required).

10 Defendant contends that Plaintiff did not exhaust administrative remedies regarding this  
11 claim. Def.’s Mot. Dismiss 5:17-6:6, Doc. 24. Defendant contends that Plaintiff’s inmate  
12 grievance No. PVSP-D-09-00245, which Plaintiff cites as his inmate grievance regarding this  
13 claim, failed to exhaust administrative remedies. Def.’s Ex. A., Doc. 35. Defendant contends  
14 that the grievance failed to “‘alert[] the prison to the nature of the wrong for which redress is  
15 sought.’” *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (quoting *Strong v. David*, 297  
16 F.3d 646, 650 (7th Cir. 2002)).

17 Plaintiff contends that his grievance was partially granted at the first level of review, and  
18 that partial grants are the equivalent of exhaustion of available administrative remedies. Pl.’s  
19 Opp’n, Doc. 36. In support of his contention, Plaintiff attaches form CDC 128C as Exhibit A,  
20 which was allegedly signed by Defendant Igbinsa on August 15, 2008, and authorized  
21 Plaintiff’s transfer from Pleasant Valley State Prison because of his medical condition and the  
22 presence of valley fever in the area.

23 Having reviewed the submitted documents, the Court agrees with Defendant. Grievance  
24 No. PVSP-D-09-00245 concerned Plaintiff’s grievance with the rough transportation from  
25 Pleasant Valley State Prison to outside specialty clinics. There is no mention of any issues  
26 regarding being transferred to another prison. Grievance No. PVSP-D-09-00245 thus does not  
27 exhaust Plaintiff’s claim against Defendant Igbinsa, as it failed to alert the prison of the wrong  
28 for which redress was sought. *Griffin*, 557 F.3d at 1120. Plaintiff’s argument that partial grants

1 of inmate grievances constitute exhaustion is unsupported by any case law. Plaintiff's Exhibit A  
2 is not evidence that demonstrates exhaustion, as a form CDC 128 C is not a proper method for  
3 exhausting administrative remedies in CDCR. Plaintiff has failed to exhaust administrative  
4 remedies as to his claims against Defendant Igbinosa. The proper remedy is dismissal of  
5 Plaintiff's claim without prejudice. *Wyatt*, 315 F.3d at 1120.

6 **IV. Conclusion And Recommendation**

7 Based on the foregoing, it is HEREBY RECOMMENDED that

- 8 1. Defendant Igbinosa's motion to dismiss for Plaintiff's failure to exhaust  
9 administrative remedies pursuant to 42 U.S.C. § 1997e(a), filed September 20,  
10 2010, should be GRANTED;
- 11 2. Plaintiff's claim against Defendant Igbinosa be dismissed without prejudice; and
- 12 3. Defendant Igbinosa be dismissed from this action.

13 These Findings and Recommendations will be submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-**  
15 **one (21) days** after being served with these Findings and Recommendations, the parties may file  
16 written objections with the Court. The document should be captioned "Objections to Magistrate  
17 Judge's Findings and Recommendations." The parties are advised that failure to file objections  
18 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
19 *Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

20 IT IS SO ORDERED.

21 **Dated: July 8, 2011**

22 /s/ Dennis L. Beck  
23 UNITED STATES MAGISTRATE JUDGE  
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