

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ISABEL TUBACH,

CASE NO. 1:10-cv-913 AWI SMS (PC)

Plaintiff,

ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS, DENYING ALL  
OTHER PENDING MOTIONS AS MOOT,  
AND DISMISSING ACTION WITHOUT  
PREJUDICE FOR FAILURE TO EXHAUST

v.

LAHIMORE, et al.,

Defendants.

(Docs. 39, 41-45, 47, 52-57, 63)

**I. Procedural History**

Plaintiff, Isabel Tubach (“Plaintiff”), is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on May 21, 2010.<sup>1</sup> (Doc. 1.) However, the Court is proceeding on Plaintiff’s Third Amended Complaint, filed June 21, 2011, against Defendant M. Guzman (“Defendant”) for violation of the Eighth Amendment arising from the conditions of Plaintiff’s confinement and for deliberate indifference to her serious medical needs. (Docs. 28, 33, 34.)

On March 12, 2012, Defendant filed a motion to dismiss for failure to exhaust the available administrative remedies. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff filed an opposition,<sup>2</sup> to which Defendant replied. (Docs. 64, 65.) The matter is deemed submitted. Local Rule 230(l).

<sup>1</sup> The Court may take judicial notice of court records and therefore, Defendant’s request for judicial notice is granted. United States v. 14.02 Acres of Land More or Less in Fresno County, 547 F.3d 943, 955 (9th Cir. 2008); United States v. Howard, 381 F.3d 873, 876, n.1 (9th Cir. 2004).

<sup>2</sup> Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on both December 27, 2011 and August 15, 2012. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003); (Docs. 37-1, 61.)

1 **II. Legal Standard**

2 Pursuant to the Prison Litigation Reform Act of 1995 (PLRA), “[n]o action shall be  
3 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
4 a prisoner confined in any jail, prison, or other correctional facility until such administrative  
5 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory under  
6 the PLRA and unexhausted claims cannot be brought in court. Jones v. Bock, 549 U.S. 199, 211,  
7 127 S.Ct. 910 (2007); Woodford v. Ngo, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006).

8 The failure to exhaust in compliance with the PLRA is an affirmative defense under  
9 which Defendants have the burden of raising and proving the absence of exhaustion. Jones, 549  
10 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust is  
11 subject to an unenumerated Rule 12(b) motion, and in resolving the motion, the Court may look  
12 beyond the pleadings and decide disputed issues of fact. Morton v. Hall, 599 F.3d 942, 945 (9th  
13 Cir. 2010); Wyatt, 315 F.3d at 1119-20. If the Court concludes that Plaintiff has failed to  
14 exhaust, the proper remedy is dismissal without prejudice. Jones, 549 U.S. at 223-24; Lira v.  
15 Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

16 **III. Discussion**

17 **A. Factual Allegations**

18 At all times relevant, Plaintiff was a state inmate in the custody of the CDCR at Central  
19 California Women’s Facility (CCWF), in Chowchilla, California and Defendant was employed at  
20 CCWF as a correctional officer. (Doc. 28, 3rd.A.C.; Doc. 33, Cog. Claim O.)

21 Plaintiff alleges that Defendant incited Plaintiff’s cellmates to place poison in her nose  
22 and to provoke her to have a heart attack. (Doc. 28, 3rd.A.C.; Doc. 33, Cog. Claim O.) Plaintiff  
23 also alleges that her cellmates held her down to place the poison in her nose which caused her to  
24 become unable to speak, to become breathless, and caused her blood pressure to climb to “230”  
25 for which she was taken to the hospital. (Doc. 28, 3rd.A.C.; Doc. 33, Cog. Claim O.)

26 Plaintiff further alleges that Defendant is stopping Dr. Ezenwngo from treating her  
27 tongue cancer, which has spread to her throat, palate, and gums. (Doc. 28, 3rd.A.C.; Doc. 33,  
28 Cog. Claim O.) Plaintiff claims that Defendant is aware of her condition and knows that ice

1 chips are her only relief from burning in the areas where she has cancer, but that Defendant “is  
2 stopping and denying a [sic] ice-chrono.” (Id.) Plaintiff also alleges that Defendant gives her  
3 cellmates poison, sends them to put it in her nose, and encourages them to harass and provoke  
4 her into having a heart attack, which has actually caused her to have two heart attacks. (Id.)

5 Defendant argues that Plaintiff did not submit any appeals that were accepted at any level  
6 of review concerning Defendant’s alleged actions. (Doc. 42, MTD; Foston Decl. ¶¶ 6-9; Hall  
7 Decl. ¶¶ 3-7; Zamora Decl. ¶ 5.)

8 **B. Defendant’s Motion**

9 **1. Grievance Procedure**

10 Before January 28, 2011, to exhaust the appeal process, the inmate had to proceed  
11 through four levels of appeal: (1) informal resolution; (2) first formal level; (3) second formal  
12 level; and (4) third level appeal to the Director of CDCR. (Doc. 42-2, MTD; Fotson Decl. ¶ 2.)  
13 The informal and first formal level may be bypassed in certain circumstances outlined in Title 15,  
14 section 3084.7 of the California Code of Regulations. (Id.) In an appeal, the inmate must  
15 specifically state each claim and identify each form of relief desired. (Id., at ¶ 3.) Failure to  
16 identify each claim or the form of relief sought results in a failure to exhaust those issues through  
17 the administrative appeal process. (Id.) If staff grants only some of the relief requested in the  
18 inmate’s appeal, or if the inmate believes that he or she is entitled to any other form of relief or  
19 otherwise finds the resolution unacceptable for any reason, the inmate must continue the  
20 exhaustion process to the third level of review. (Id., at ¶ 4.) Therefore, an inmate seeking  
21 judicial relief in excess of administrative relief granted at any level must present his or her claim  
22 to the third level and this relief remains unexhausted until the examiner renders a decisions at the  
23 third level. (Id.)

24 The Office of Third Level Appeals (“OTLA”) for California Correctional Health Care  
25 Services (“CCHCS”) was established on August 1, 2008. (Doc. 42-4, MTD; Zamora Decl. ¶¶ 1,  
26 2.) OTLA receives and maintains inmate appeals concerning health care that are accepted for  
27 review and renders decision on such appeals at the third and final level of review in the inmate  
28 appeals process. (Id., at ¶ 2.) OTLA did not begin receiving and reviewing complaints against

1 medical staff until November of 2008. (Id., at ¶ 3.) The Health Care Appeals and Risk Tracking  
2 System (“HCARTS”) logs and tracks inmate appeals that have been accepted and adjudicated by  
3 OTLA at the third level and by the various prison institutional at the first and second levels of  
4 review as well. (Id., at ¶ 4.) HCARTS also holds information on appeals that were screened-out  
5 and the reason for screening. (Id.)

## 6 **2. Defendant’s Evidence and Argument**

7 Since June of 2000, Plaintiff submitted only one inmate appeal that was accepted for third  
8 level review. (Doc. 42-2, MTD; Fotson Decl. ¶ 6.) From July 2, 2008 through May 21, 2010,  
9 Plaintiff withdrew the four inmate appeals she submitted which were accepted at the first level of  
10 formal review. (Doc. 42-3, MTD; Hall Decl. ¶ 3.) Information maintained in HCARTS shows  
11 that, between August 20, 2007 and May 21, 2010, Plaintiff did not file any appeals that reached  
12 OTLA. (Doc. 42-4, MTD; Zamora Decl. ¶ 5.) Plaintiff is required to exhaust the prison  
13 administrative grievance process on her claims before commencing a lawsuit, but failed to do so  
14 in this case. (Doc. 42-1, MTD, 2:3-4.) On that basis, Defendant contends his motion to dismiss  
15 should be granted. (Id.)

## 16 **C. Plaintiff’s Opposition**

17 Plaintiff argues:

18 . . . my grievances are not processed in the prison, only the ones before  
19 sent this complaints processed some, . . . Defendant M. Guzman is  
20 comitting, abuse of authority, because he has power to stop, the  
21 grievances 602, Medical Administratives to unable me to the Court  
22 process – my complaints. M. Guzman is acting premeditated to cause  
23 harm me. I have sent several information to the Warden Ms. Johnson,  
24 through the office of Investigations, but the warden is unable to stop,  
25 only the Governor Brown, and he is refusing to take-action.<sup>3</sup>

26 (Doc. 64, Opp to MTD, pp. 1-2.) The remainder of Plaintiff’s opposition contains  
27 rambling recitations of factual allegations from this action and from events that have apparently  
28 happened subsequent to the date she filed this action. (Id.) Plaintiff attached copies of five  
inmate appeals as exhibits to her opposition – all of which are dated subsequent to the date she

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<sup>3</sup> This is a verbatim excerpt of Plaintiff’s writing in her opposition – without any effort to correct the grammatical and spelling errors as to do so makes it even more difficult for the reader to follow.

1 filed this action.<sup>4</sup> (Doc. 64, Opp to MTD, pp. 9-14.)

2 **C. Analysis**

3 The PLRA requires proper exhaustion, which demands compliance with an agency's  
4 deadlines and other critical procedural rules, Woodford, 548 U.S. at 90, and prisoners may not  
5 satisfy the PLRA by filing untimely or otherwise procedurally defective appeals. Id. at 83-84;  
6 Sapp v. Kimbrell, 623 F.3d 813, 821 (9th Cir. 2010); Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th  
7 Cir. 2009). The procedural rules are defined by the institution's grievance procedure and not by  
8 the PLRA; therefore, all that is required to properly exhaust under the PLRA is compliance with  
9 the institution's grievance procedure. Jones, 549 U.S. at 218; Sapp, 623 F.3d at 821; Griffin, 557  
10 F.3d at 1119. The doctrine of exhaustion protects administrative agency authority by giving the  
11 agency an opportunity to correct its own mistakes before being haled into court, and it  
12 discourages disregard of the agency's procedures. Woodford, 548 U.S. at 89.

13 Plaintiff's bare assertion that her grievances were not processed and that Defendant was  
14 abusing his authority and stopping grievances is insufficient to defeat Defendant's motion. The  
15 court is mindful that the failure to respond to a properly filed grievance may result in a finding  
16 that exhaustion occurred. Abney v. McGinnis, 380 F.3d 663, 667 (2d 2004) (inability to utilize  
17 inmate appeals process due to prison officials' conduct or the failure of prison officials to timely  
18 advance appeal may justify failure to exhaust); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir.  
19 2002) (when prison officials fail to respond, the remedy becomes unavailable, and exhaustion  
20 occurs); Foulk v. Charrier, 262 F.3d 687, 698 (8th Cir. 2001) (district court did not err when it  
21 declined to dismiss claim for failure to exhaust where prison failed to respond to grievance); see  
22 also Brown v. Valoff, 422 F.3d 926, 943 n.18 (9th Cir. 2005).

23 Here, however, Plaintiff has not submitted any evidence demonstrating that she made any  
24 efforts to properly file an inmate appeal grieving the facts giving rise to her claims in this action  
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26 <sup>4</sup> Plaintiff filed this action on May 21, 2010. (Doc. 1, Orig. Compl.) Judicial notice may be taken of court  
27 records, public records, and administrative materials. Botelho v. U.S. Bank, N.A., 692 F.Supp.2d 1174, 1178 (N.D.  
28 Cal. 2010). Facts subject to judicial notice may be considered by a court on a motion to dismiss. Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir.2001). The inmate appeals Plaintiff attached as exhibits to her opposition are dated November 30, 2010, May 11, 2011, June 30, 2011, April 2, 2012, and May 5, 2012. (Doc. 64, Opp to MTD, pp. 9-14.)

1 prior to filing her original complaint. The vague assertion that her grievances were not processed  
2 and that Defendant was stopping them from being processed is insufficient to make the requisite  
3 showing that exhaustion either occurred or was excused due to some form conduct on the part of  
4 prison officials which rendered the appeals process unavailable. King v. Tracy, 2007 WL  
5 220988, No. 1:06-cv-00108-AWI-SMS PC, \*1 (E.D.Cal. Jul. 30, 2007) (motion to dismiss for  
6 failure to exhaust granted because no evidence submitted demonstrating an appeal was properly  
7 filed in compliance with all applicable procedural rules); Reynolds v. California Dep't of Corr.,  
8 2007 WL 1080529, No. 1:05-cv-01014-AWI-SMS PC, \*2-3 (E.D.Cal. Apr. 5, 2007)  
9 (recommendation that motion to dismiss for failure to exhaust be denied in light of submission of  
10 evidence that an appeal grieving the conduct at issue in the lawsuit was timely filed in  
11 compliance with applicable procedural rules), adopted in full, 2007 WL 1597104, No. 1:05-cv-  
12 01014-LJO-SMS PC (E.D.Cal. Jun. 1, 2007).

13 Plaintiff fares no better when the inmate appeals that she attached as exhibits to her  
14 opposition are considered. Even though one exhibit addresses some of her allegations against  
15 Defendant, all of the grievances Plaintiff submitted postdate her initiation of this action. Thus,  
16 none of the inmate appeals Plaintiff submitted could possibly have been fully exhausted prior to  
17 the date she filed this action.

18  
19 **IV. Order**

20 For the reasons set forth herein, IT IS HEREBY ORDERED that:

- 21 1. Defendant's motion to dismiss for failure to exhaust, filed on March 12, 2012 (Doc. 42),  
22 is GRANTED;
- 23 2. All other pending motions (Docs. 39, 41, 43-45, 47, 52-57, 63) are DENIED as moot;
- 24 3. This action is dismissed, without prejudice, for failure to exhaust; and
- 25 4. The Clerk of the Court shall CLOSE this case.

26 IT IS SO ORDERED.

27 Dated: September 27, 2012

28   
CHIEF UNITED STATES DISTRICT JUDGE