

1 In their objections, defendants argue that the findings and recommendations
2 should not be adopted as to Claim 1e because the ultimate recommendation is inconsistent with
3 the Magistrate Judge’s findings. Defendants are correct. As to Claim 1e (and 1f), the Magistrate
4 Judge found that the claim was unexhausted but did not recommend dismissal of Claim 1e (but
5 did for Claim 1f). This inconsistency appears to have resulted from a clerical error. The court
6 agrees with the Magistrate Judge’s finding that Claim 1e is unexhausted. This claim will be
7 dismissed.

8 Defendants also argue that the Magistrate Judge’s recommendation as to Claim 1g
9 is inconsistent with the Magistrate Judge’s finding was to this claim. The Magistrate Judge
10 found at footnote seven that the only remaining defendant named in Claim 1g is Marshall, who
11 has not been served. Defendants contend this finding is inconsistent with the Magistrate Judge’s
12 conclusion at page 41 of the findings and recommendations that this action proceed “. . . as to
13 Claims 1a-e and 1g (against defendants Kaiser and Marshall)” because Claim 1g does not name
14 Kaiser. The court does not see any inconsistency. The Magistrate Judge correctly found that
15 this action would proceed as to Claims 1a-d¹ and 1g, among others. Those claims, in the
16 aggregate, name defendants Kaiser, Marshall, and Etheredge. Therefore, the Magistrate Judge’s
17 ultimate recommendation – which encompasses multiple claims – is not inconsistent with the
18 specific finding that Claim 1g proceeds against Marshall only.²

19 Next, defendants contend that the Magistrate Judge’s recommendation that this
20 action proceed on Claim 5d is inconsistent with the Magistrate Judge’s finding was to this claim.
21 Without addressing this argument, the court notes that it has previously been determined that
22 plaintiff cannot state a stand-alone claim based on the grievance process. Claim 5d is just such a

23 ¹ As discussed above the court agrees with defendants that Claim 1e is
24 unexhausted.

25 ² If, however, defendant Marshall is later dismissed under Federal Rule of Civil
26 Procedure 4(m) for failure to effect timely service, then Claim 1g would no longer be before the
court because no defendant named in that claim would remain in the action.

1 claim. Therefore, the court agrees with defendants that this claim is not properly before the court
2 (nor is any other claim which asserts a stand-alone claim based on the prison grievance
3 process).³

4 Next, defendants argue that the Magistrate Judge's recommendation at page 41 of
5 the findings and recommendations that this action should proceed as to claims 9a-c is
6 inconsistent with the finding at footnote 17 that Claim 9a is no longer before the court because
7 all defendants named in that claim have been dismissed. Again, this inconsistency appears to
8 have resulted from a clerical error. The court agrees with the Magistrate Judge's finding that
9 Claim 9a is no longer before the court.

10 Defendants next contend that the Magistrate Judge's recommendation at page 41
11 that the action should proceed as against defendants Kanipe and King, among others, is in error
12 because these defendants are not named in any surviving claims. Defendants are not correct.
13 Defendant King is named in Claim 8a, as to which the court agrees with the Magistrate Judge's
14 finding that this claim is exhausted. Similarly, Kanipe is named as a defendant in Claim 10w,
15 and the court agrees with the Magistrate Judge that this claim remains in the action. The
16 omission of defendants King and Kanipe from the recommendation at page 41 listing the
17 defendants specified in remaining claims appears to have resulted from a clerical error.

18 The parties' remaining objections are unpersuasive.

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24 ³ To the extent Claim 5d, and other similar claims alleging that access to the
25 grievance process was thwarted, constitutes plaintiff's contention that exhaustion as to other
26 substantive claims should be excused, the court agrees with the Magistrate Judge that plaintiff
has not presented any evidence upon which the court could determine that exhaustion should be
excused because access to the grievance process was thwarted.

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-
2 304, this court has conducted a de novo review of this case. Having carefully reviewed the
3 entire file, the court finds the findings to be supported by the record and by proper analysis.

4 Accordingly, IT IS HEREBY ORDERED that:

5 1. The findings and recommendations filed February 21, 2008, are adopted
6 in full except as outlined above;

7 2. Defendants' motion to dismiss (Doc. 175) be granted in part and denied in
8 part as outlined above;

9 3. Defendant Whittle's motion for judgment on the pleadings (Doc. 177) be
10 granted;

11 4. Claims 1e-f, Claim 2 (in its entirety), Claims 3a, 3e-f, Claim 4 (in its
12 entirety), Claim 5b, Claim 6 (in its entirety), Claims 8d, 8g, 8j, 8l, and 8n, Claim 9f, Claims 10a-
13 b, 10j, and 10u-v be dismissed as unexhausted;

14 5. Ali, Fowler, Mesa, Nelson, O'Connor, Stewart, Vasquez, and Whittle be
15 dismissed as defendants to this action;

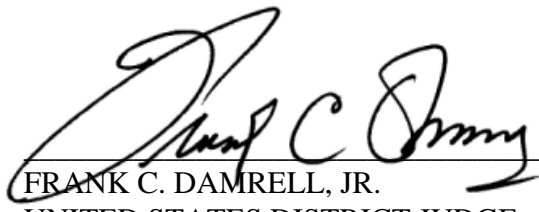
16 6. This action shall proceed against defendants C. Brown, Danziger,
17 Etheredge, Gunning, Gutierrez, Hein, Hogan, Kaiser, Kanipe, Keeland, King, Lattimore,
18 Marshall, Murray, Poe, Saucedo, Smith, Warren, and Warvarovski only as to Claims 1a-d and 1g
19 (against defendants Etheredge, Kaiser, and Marshall), Claims 3b-c and 3g (against defendant
20 Kaiser), Claims 5a and 5c (against defendants C. Brown and Warren), Claim 7 (against
21 defendants Hogan and Warren), Claims 8a-c, 8f, and 8h (against defendants Gunning, Gutierrez,
22 Kaiser, King, Lattimore, Murray, Poe, Smith, and Warren), Claims 9b-c (against defendants
23 Etheredge, Gutierrez, and Warren), Claims 10d-i, 10m, 10o, 10q-s, and 10w-x (against
24 defendants Danziger, Etheredge, Gutierrez, Hein, Hogan, Kanipe, Keeland, Lattimore, Saucedo,
25 Warren, and Warvarovski), and Claims 12a-b (against defendants Gutierrez and Lattimore); and

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7. This matter is referred back to the Magistrate Judge for further proceedings.

DATED: September 16, 2009.



FRANK C. DAMRELL, JR.

UNITED STATES DISTRICT JUDGE