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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT MARTINEZ,

Plaintiff,

No. 2:06-cv-0088 FCD DAD (PC)

vs.

LOU BLANAS,

Defendant.

ORDER AND

FINDINGS & RECOMMENDATIONS

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on a claim raised in plaintiff’s second amended complaint, filed September 2, 2008, against defendant Lou Blanas. Specifically, plaintiff claims that his rights under the Eighth Amendment were violated during a period of incarceration at the Sacramento County Jail when he was subjected to “substandard, unsanitary, and inhumane conditions” at the jail which caused him to develop an “unknown fungal or bacterial rash on his left foot.” Second Amended Complaint, filed September 2, 2008, at 5-6. This matter is before the court on defendant Blanas’ motion for summary judgment. Defendant Blanas seeks summary judgment on the grounds that (1) there are no allegations of his personal involvement in the events complained of; and (2) plaintiff failed to exhaust his administrative remedies prior to

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1 filing suit as required by 42 U.S.C. § 1997e(a). Despite receiving a sixty day extension of time,  
2 plaintiff has not filed an opposition to the motion.

3 The exhaustion of administrative remedies prior to bringing a prisoner civil rights  
4 action is required by 42 U.S.C. § 1997e(a). The statute provides:

5 No action shall be brought with respect to prison conditions under  
6 [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
7 confined in any jail, prison, or other correctional facility until such  
8 administrative remedies as are available are exhausted.

8 42 U.S.C. § 1997e(a). The exhaustion requirement that it imposes is mandatory. Booth v.  
9 Churner, 532 U.S. 731, 741 (2001). A prisoner is required to exhaust administrative remedies  
10 for claims contained within a complaint before the complaint is filed. Rhodes v. Robinson, 621  
11 F.3d 1002, 1005 (9th Cir. 2010). Compliance with this requirement is not achieved by satisfying  
12 the exhaustion requirement during the course of an action. See McKinney v. Carey, 311 F.3d  
13 1198 (9th Cir. 2002).

14 In support of his motion, defendant has presented evidence that the Sacramento  
15 County Jail has a three-level procedure for grieving conditions of confinement at the jail. At the  
16 first level, an inmate sends a “Message Request” form to his floor officer. See Declaration of  
17 Chief James Lewis in Support of Defendant’s Motion for Summary Judgment, filed September  
18 28, 2010, at ¶ 3. If the inmate is dissatisfied with the response received at that level, he may file  
19 a formal grievance using a form entitled “Inmate Grievance/Suggestion.” Id. at ¶ 4. Finally, an  
20 inmate may proceed to the third and final level of review by appealing from the response to the  
21 formal grievance. Id. at ¶ 5. Defendant has also presented evidence that plaintiff did not file any  
22 message request, grievance, or appeal of a grievance concerning the events complained of in the  
23 civil complaint he filed with this court. See Declaration of Jillian Kingston in Support of  
24 Defendant’s Motion for Summary Judgment, filed September 28, 2010, at ¶ 2. None of this

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1 evidence is disputed by plaintiff.<sup>1</sup>

2           Based on the foregoing, this court finds that plaintiff failed to exhaust  
3 administrative remedies prior to filing this action as required. For that reason, this action must be  
4 dismissed without prejudice. See McKinney, 311 F.3d at 1200-01.

5           In accordance with the above, IT IS HEREBY ORDERED that defendant's  
6 September 28, 2010 request for judicial notice is denied as unnecessary; and

7           IT IS HEREBY RECOMMENDED that:

8           1. Defendant's September 29, 2010 motion for summary judgment be granted;  
9 and

10           2. This action be dismissed without prejudice for failure to exhaust administrative  
11 remedies prior to suit.

12           These findings and recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
14 days after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
17 objections shall be filed and served within fourteen days after service of the objections. The

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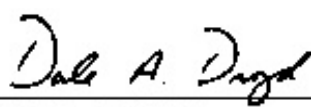
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22           <sup>1</sup> As defendant notes, in his second amended complaint plaintiff alleges that he exhausted  
23 his administrative remedies. However, plaintiff's assertion in this regard is predicated on  
24 grievances he filed at Avenal State Prison and claims filed against the County of Sacramento and  
25 with the Victim Compensation and Government Claims Board, not compliance with the  
26 Sacramento County Jail grievance procedures. See Ex. A to Second Amended Complaint.  
Defendant's request for judicial notice of the second amended complaint will be denied as  
unnecessary. The second amended complaint and its exhibits are a part of the record in this  
action.

1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: March 9, 2011.

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7 DALE A. DROZD  
8 UNITED STATES MAGISTRATE JUDGE

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8 mart0088.57

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