IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SALADIN RUSHDAN,

Plaintiff, No. 2:06-cv-0729 GEB KJN P

vs.

T. PERBULA, et al.,

Defendant. FINDINGS AND RECOMMENDATION

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I. Introduction

Plaintiff, a state prisoner proceeding without counsel, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is a motion to dismiss filed by defendants J. Dovey, A. Ramirez-Palmer, S. Hall, and P. Van Cor,[1] on the grounds that plaintiff's claims are time-barred, plaintiff has failed to exhaust his administrative remedies, and has failed to state a claim. (Dkt. No. 59.) Plaintiff filed an opposition on January 19, 2010. Moving defendants filed a reply on February 2, 2010. For the reasons that follow, the court recommends that the motion be granted as set forth below, and this action be dismissed.

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[1] Two other named defendants, Perbula and Stratton, have not yet been served with process.

II. Background

In Rushdan v. Weden, et al., Case No. 3:90-cv-2895,[2] plaintiff filed a civil rights action based on the alleged denial of medical care and the alleged denial of access to appropriate and competent medical care for plaintiff's keloid condition. (See Dkt. No. 37 at 3.)

On December 22, 1993, the Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, dismissed Case No. 3:90-cv-2895. Id. The dismissal was a 90-day conditional dismissal. (Id., Dkt. No. 115.) On February 28, 1994, a stipulation and order was entered dismissing the case with prejudice. (Id., Dkt. No. 116.) Neither of these docket entries reference a compromise and release or refer to an attached compromise and release,[3] and there is no order retaining jurisdiction over the action. Id. Nevertheless, it appears that these dismissals were based on a compromise and release (hereafter "agreement") by which the parties reached settlement of the claims raised in Northern District Case No. 3:90-cv-2895. (Dkt. No. 37 at 3-11.) Specifically, the agreement apparently provided for plaintiff to receive medical treatment for his keloid condition from U.C.S.F. dermatologist Dr. Roy C. Grekin, housing at California Medical Facility ("CMF") during such treatment, as well as single cell status until the completion of surgery. (Dkt. No. 37 at 3-11.) The agreement also provided for the California Department of Corrections (now California Department of Corrections and Rehabilitation) "to fully comply with any and all prescriptions and/or orders for medical care . . . by Dr. Grekin." (Dkt. No. 37 at 5-6.) Plaintiff was to be "housed in a single cell with a lower bunk for a period not less than fifteen (15) months" beginning the date the agreement was signed, and he was to be "housed at CMF for the period that he is receiving

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[2] A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

[3] On December 21, 1993, there is a docket entry reflecting "MEMORANDUM by Judge Lynch to Judge Henderson re: agreed terms of settlement in the case." (Id., Dkt. No. 114.)

medical care from Dr. Grekin."[4] (Dkt. No. 37 at 6.)

The agreement provides that "in the event that any provision of this Agreement is not implemented the Claimant (plaintiff) may bring an action against the Director to obtain performance of any of the provisions of this Agreement." (Dkt. No. 37 at 7.) The agreement further provides "that the terms of this Agreement with respect to his responsibility to implement this Agreement are contractual; and not a mere recital." (Dkt No. 37 at 10.)

On December 7, 2006, plaintiff filed an amended complaint ("AC") alleging various violations of the terms of the 1994 settlement agreement and the Eighth Amendment, and raising various state law claims. Plaintiff seeks monetary damages only.[5]

On January 26, 2007, this action was dismissed based on lack of jurisdiction.[6] On December 20, 2008, the Court of Appeals for the Ninth Circuit vacated the judgment and remanded the action finding that this court had jurisdiction based on plaintiff's Eighth Amendment claims and therefore may have had supplemental jurisdiction over plaintiff's claim for breach of the settlement agreement, citing 18 U.S.C. § 3626(c), (g)(1), (g)(6) (distinguishing between "consent decrees" and "private settlement agreements" in actions concerning prison conditions, and explaining that only "private settlement agreements" are not enforceable in

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[4] The agreement was signed by four different parties on four different dates; the last party signed the document on February 1, 1994. (Dkt. No. 37 at 8.)

[5] It appears plaintiff may be a member of the Plata v. Schwarzenegger, No. C 01-1351 THE (N.D. Cal.), class action involving a constitutional challenge to the adequacy of medical care provided throughout the California state prison system. (Amended Complaint ("AC") at 21.) As a member of the Plata class, all claims for equitable relief must be brought through the class representative until the class action is over or the consent decree is modified. Frost v. Symington, 197 F.3d 348, 359 (9th Cir. 1999).

[6] The previously assigned magistrate judge found that because the settlement agreement was reached in the United States District Court for the Northern District of California, this court did not have jurisdiction to consider plaintiff's claims, citing 18 U.S.C. § 3626(c)(2); see also Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) (district court has jurisdiction only if the action in which the settlement agreement provided that the court retained jurisdiction.). (Dkt. No. 13 at 2.) The findings and recommendations were adopted by the district court on January 26, 2007.

federal court). (Dkt. No. 35.)

III. Request for Judicial Notice

Defendants filed a request for judicial notice ("RJN") (Dkt. No. 59 at 3.) A court may take judicial notice of court records. See, e.g., Bennett v. Medtronic, Inc., 285 F.3d 801, 803 n.2 (9th Cir. 2002) ("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue'"). Therefore, this court takes judicial notice of the court records in the following cases: 1) Eastern District Case No. 01-cv-0364 LKK GGH P filed against defendants Cal Terhune, Ana Ramirez-Palmer and Sgt. S. Hall on February 22, 2001;[7] and 2) Eastern District Case No. 02-cv-1468 EJG PAN P, filed against defendants Edward Alameda, Ana Ramirez-Palmer, G. Stratton, T. Permbula, and Sgt. S. Hall on July 5, 2002.[8] (Dkt. No. 59, Exs. A-H.)

IV. Motion to Dismiss

"On a motion to dismiss for failure to state a claim [pursuant to Fed. R. Civ. P. 12(b)(6)], the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citation omitted).

a. Statute of Limitations

Defendants argue that plaintiff's claims against defendants Ramirez-Palmer and Sgt. Hall are barred by the statute of limitations. "Dismissal on statute of limitations grounds can be granted pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.' . . . " TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999) (citation omitted).

California law determines the applicable statute of limitations in this § 1983

[7] This action was dismissed based on plaintiff's failure to file an amended complaint. Id.

[8] This action was dismissed based on plaintiff's failure to first exhaust his administrative remedies. Id.

action. Fink v. Shedler, 192 F.3d 911, 914 (9th Cir. 1999). Until December 31, 2002, the applicable state limitations period was one year. See Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004) (citing Cal. Civ. Proc. Code § 340(3) (West Supp. 2002); see also Maldonado v. Harris, 370 F.3d 945, 954-55 (9th Cir. 2004).[9] Effective January 1, 2003, the applicable California statute of limitations was extended to two years. See Jones, 393 F.3d at 927 (citing Cal. Civ. Proc. Code § 335.1). However, the new statute of limitations period does not apply retroactively. Maldonado, 370 F.3d at 955. California law also tolls for two years the limitations period for inmates "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life." Cal. Civ. Proc. Code § 352.1.[10]

The Ninth Circuit has held that a limitations period may be tolled while a claimant pursues an administrative remedy. Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001.)

Plaintiff's allegations as to defendant Ramirez-Palmer (AC, ¶ 32) and defendant Hall (AC, ¶ 32) all occurred at the California Medical Facility ("CMF") where plaintiff was housed from 1993 to September 11, 2001. (AC, at 6, 16.) Because the last possible date defendants Ramirez-Palmer and Hall could have violated plaintiff's constitutional rights was September 11, 2001, the applicable statute of limitations period was one year because it precedes the 2003 extension of the limitations period. Maldonado, 370 F.3d at 955.

Plaintiff is entitled to tolling of the statute of limitations period for an additional two years. Jones, 393 F.3d at 927 n.5. Thus, plaintiff was required to bring his civil rights claims against defendants Ramirez-Palmer and Hall on or before September 11, 2003. Plaintiff

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[9] Federal law governs when plaintiff's § 1983 claims accrued and when the limitations period begins to run. Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998). Under federal law, "the claim generally accrues when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.' " Id. (citations omitted).

[10] "The California courts have read out of the statute the qualification that the period of incarceration must be 'for a term less than for life' in order for a prisoner to qualify for tolling." Jones, 393 F.3d at 927 n.5 (citations omitted).

did not file the instant action until June 5, 2006. Plaintiff is not entitled to tolling for any time he attempted to initiate the administrative grievance process because he did not file his grievance until May 26, 2004, after the statute of limitation period expired.

Moreover, even if this court applied the additional year of tolling granted in 2003, extending his filing deadline to September 11, 2004, and plaintiff were granted tolling for the duration of his initial grievance, appeal No. SAC-H-04-01038, liberally construed as against Ramirez-Palmer, signed March 18, 2004, and cancelled November 30, 2004 (Dkt. No. 59-5 at 11), a period of just over eight months, his filing would have been due in federal court in early June, 2005. The instant filing occurred approximately one year too late.[11]

Plaintiff argues that his claims against defendants Ramirez-Palmer and Hall are based on the 1994 settlement agreement with the Department of Corrections and the agreement contains no statute of limitations. However, the plain language of the agreement demonstrates that plaintiff entered into the agreement with the California Department of Corrections. (Dkt. No. 37 at 3.) Neither defendant Ramirez-Palmer or defendant Hall are listed in the "Parties to be Released" portion of the agreement. (Id.) Thus, they were not parties to the agreement.

Finally, plaintiff concedes he was without funds during "this period"[12] and had to wait for disposition of his civil suit against his former lawyer before he could re-file the instant action. (AC at 19.)

Federal courts generally apply the forum state's law regarding equitable tolling. Fink, 192 F.3d at 914. Under California law, however, a plaintiff must meet three conditions to equitably toll a statute of limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product of forces beyond his control; and (3) the defendants must not be

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[11] Because plaintiff's grievance against defendant Hall was signed August 25, 2000 (Dkt. No. 59-5 at 3-6), prior to this court's liberal construction of the violation deadline of September 11, 2001, no tolling for defendant Hall would apply.

[12] It appears plaintiff is referring to the period between 2003, the date he was informed of the administrative exhaustion requirement, and June 5, 2006, the date he filed the instant action.

prejudiced by the application of equitable tolling. See Hull v. Central Pathology Serv. Med. Clinic, 28 Cal. App. 4th 1328, 1335, 34 Cal. Rptr. 2d 175 (1994).

Plaintiff's alleged lack of funds is insufficient to demonstrate plaintiff is entitled to equitable tolling for part or all of the delay in filing in federal court. Review of the record demonstrates plaintiff has not diligently pursued his claims. Thus, plaintiff is not entitled to equitable tolling.

Plaintiff's claims against defendants Ramirez-Palmer and Hall were filed outside the statute of limitations period and should be dismissed.[13]

b. *Sua Sponte* Review of Statute of Limitations

Defendants Perbula and Stratton have not yet been served with process in this action. However, review of the AC demonstrates that plaintiff's claims against these defendants are also barred by the statute of limitations.

Where the running of the statute of limitations is apparent on the face of the complaint, dismissal for failure to state a claim is proper. See Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993).

A claim under 42 U.S.C. § 1983 accrues when the "wrongful act or omission results in damages." Wallace v. Kato, 549 U.S. 384, 388, 391 (2007); Hardin v. Staub, 490 U.S. 536, 543-44 (1989) (federal law governs when a § 1983 cause of action accrues). In other words, a claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." Maldonado, 370 F.3d at 954-55.

The AC reflects the following allegations as to defendant Perbula. The alleged "attacks" on plaintiff began on September 22, 1998. (AC at 9.) On December 2, 1998, defendant Perbula allegedly added language to plaintiff's central file that plaintiff was not eligible for single cell status. (AC at 10.) On December 13, 2000, defendant Perbula allegedly

[13] In light of this recommendation, the court need not reach defendants' other arguments in support of dismissing claims against defendant Hall.

documented plaintiff's file to state he didn't meet the single cell critera. (AC at 15.) On March 5, 2001, defendant Perbula allegedly told plaintiff he must get a single cell chrono. (AC at 13.) Defendant Perbula repeated this statement to plaintiff on April 6, 2001. (Id.) On April 11, 2001, defendant Perbula allegedly called a special classification committee meeting to remove plaintiff's single cell status from his file. (AC at 14.) On April 12, 2001, defendant Perbula allegedly attempted to double cell plaintiff. (AC at 15.)

All of these alleged acts took place prior to the September 11, 2001 transfer of plaintiff from CMF to CSP-Sacramento. In any event, defendant Perbula, who worked at CMF, could not have violated plaintiff's rights once plaintiff was transferred to CSP-Sacramento on September 11, 2001. Based on the statute of limitations analysis set forth above, all of these claims are time-barred for the same reasons. This conclusion is clear from the face of plaintiff's amended complaint. Accordingly, plaintiff's claims against defendant Perbula are time-barred and should be dismissed with prejudice.

Plaintiff's claims against defendant Stratton should be dismissed for the same reason. The AC reflects one specific allegation as to defendant Stratton. On April 11, 2001, defendant Stratton, an Associate Warden, allegedly attended plaintiff's classification hearing during which defendant Perbula allegedly challenged plaintiff's single cell status. (AC at 15.) Again, this allegation is time-barred as set forth above, and any alleged claim plaintiff may have as to defendant Stratton would have taken place prior to his September 11, 2001 transfer. Accordingly, plaintiff's claims against defendant Stratton should also be dismissed as they are time-barred as demonstrated on the face of the AC.

c. Exhaustion

Defendants argue plaintiff failed to exhaust his administrative remedies and thus this action must be dismissed. However, defendants provide argument and evidence only as to defendants working at CMF. Because the court has recommended that plaintiff's claims against defendants Ramirez-Palmer and Hall be dismissed as time-barred, the court will only address the

issue of exhaustion as to the remaining defendant, Director Dovey.

The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding the conditions of their confinement, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

Exhaustion of all "available" remedies is mandatory; those remedies need not meet federal standards, nor must they be "plain, speedy and effective." Id. at 524; Booth v. Churner, 532 U.S. 731, 740, n. 5 (2001). Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532 U.S. at 741. A prisoner "seeking only money damages must complete a prison administrative process that could provide some sort of relief on the complaint stated, but no money." Id. at 734.[14]

A prisoner need not exhaust further levels of review once he has either received all the remedies that are "available" at an intermediate level of review, or has been reliably informed by an administrator that no more remedies are available. Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). As there can be no absence of exhaustion unless some relief remains available, a movant claiming lack of exhaustion must demonstrate that pertinent relief remained available, whether at unexhausted levels or through awaiting the results of the relief

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[14] The fact that the administrative procedure cannot result in the particular form of relief requested by the prisoner does not excuse exhaustion because some sort of relief or responsive action may result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes of exhaustion requirement include allowing prison to take responsive action, filtering out frivolous cases, and creating administrative records).

already granted as a result of that process. Brown, 422 F.3d at 936-37.

The PLRA requires proper exhaustion of administrative remedies. Woodford v. Ngo, 548 U.S. 81, 83-84 (2006). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to properly exhaust. Id. The PLRA's exhaustion requirement cannot be satisfied "by filing an untimely or otherwise procedurally defective administrative grievance or appeal." Id. at 83-84.

The State of California provides its prisoners the right to appeal administratively "any departmental decision, action, condition or policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). It also provides them the right to file appeals alleging misconduct by correctional officers and officials. Id. § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the CDCR. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal.Code Regs. tit. 15, § 3084.5). A final decision from the Director's level of review satisfies the exhaustion requirement under § 1997e(a). Id. at 1237-38.

Analysis

Defendants provided a declaration of D. Foston, Acting Chief of the Inmate Appeals Branch ("IAB"). (Dkt. No. 59-4 at 2-8.) Appended to the declaration is a copy of a printout from the IAB listing plaintiff's appeals. (Id., Ex. 1.) Defendants also provided a declaration of Cindy Scholl, Staff Services Analyst, who is authorized to access and copy inmate records. (Dkt. No. 59-5 at 2.) She provided copies of plaintiff's inmate appeals and decisions, none of which contain a Director's Level of Review. (Dkt. No. 59-5 at 3-23.) Plaintiff provided his own copies of grievances and appeals, but none of them reflect a Director's Level of Review,

and do not rebut defendants' evidence. (Opp'n 17-22; 31-44.)

Moreover, plaintiff concedes he was unaware of the passage of the PLRA or its requirement that he must exhaust his administrative remedies prior to filing in federal court in 2002. (AC at 18.) The court informed plaintiff of the exhaustion requirement in Case No. 02-cv-1468 EJG PAN P, which was dismissed on December 18, 2003, based on plaintiff's failure to exhaust his administrative remedies. Id. Plaintiff was specifically informed that "[a] decision on the director's level of review concludes the [exhaustion] process." (Id., Dkt 30 at 4.) Plaintiff did not attempt to grieve his administrative remedies as to CMF defendants until May 26, 2004, appeal No. SAC-H-04-01038, at which time his grievance was denied as untimely.[15] (Dkt. No. 63 at 17-19.) Moreover, IAB (Director's Level Review) reflects no record of having received plaintiff's appeal No. SAC-H-04-01038 from plaintiff. (Dkt. No. 59-4 at 4.) Thus, plaintiff failed to obtain a Director's Level Decision prior to filing the instant action.

Plaintiff failed to properly exhaust his administrative remedies before filing the complaint as to defendant Dovey, and therefore, his claim that defendant Dovey violated his constitutional rights should also be dismissed without prejudice. McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002); see also, Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010) (district court required to dismiss complaint when administrative remedies not exhausted).

d. Failure to State a Claim

Defendants move to dismiss plaintiff's claims as to defendant Van Cor, Health Care Analyst at California State Prison-Sacramento, arguing that the allegations fail to state a cognizable claim under 42 U.S.C. § 1983.

Plaintiff alleges defendant Van Cor "very, very, very loudly yelled at plaintiff to

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[15] A prisoner cannot satisfy the PLRA's exhaustion requirement "by filing an untimely or otherwise procedurally defective administrative grievance or appeal." Woodford, 548 U.S. at 83-84; see also Runge v. Ippollito, 2008 WL 618914, at *5 (N.D.Cal. Mar.4, 2008) ("Because plaintiff's grievances were filed long after expiration of the fifteen-day period to file, they were procedurally defective and thus not sufficient to exhaust.").

sign a release for records from U.C.S.F. or she would not process plaintiff's appeal." (AC at 19.) Plaintiff refused to sign a release, stating he appended to the appeal Dr. Grekin's last order which "stated return plaintiff in six weeks for surgery in April 2001." (AC at 19.) Plaintiff alleges defendant Van Cor was "very disrespectful and emotional and began yelling at the top of her lungs at plaintiff." (AC at 20.)

Mere verbal abuse and disrespect do not violate the Eighth Amendment proscription against cruel and unusual punishment. Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). Accordingly, as to defendant Van Cor's verbal abuse, plaintiff's AC fails to state a cognizable claim.

Plaintiff further alleges defendant Van Cor cancelled plaintiff's grievance because he refused to sign a "consent giving her unlimited access to plaintiff's medical records at U.C.S.F." (Opp'n at 4-5.) However, the first level appeal response provided by plaintiff states it was necessary to obtain Dr. Grekin's medical records to determine his treatment plan, and Van Cor's subsequent efforts to obtain the information without plaintiff's release were unsuccessful. (Dkt. No. 63 at 19.) Plaintiff also argues that the "Dermatology Minor Procedure Reports" located in his prison medical file provided the information defendant Van Cor needed. (AC at 20; Opp'n at 5, citing Ex. 10.) However, review of these reports attached as Exhibit 10 reflect they were all issued in 2000, and would not have assisted CSP-Sacramento officials in determining whether plaintiff had been ordered to return in April of 2001. (See AC at 20.) Even if plaintiff appended a copy of Dr. Grekin's handwritten notes requiring his return in April 2001, it was not unreasonable for prison officials to seek confirmation from Dr. Grekin.

In any event, plaintiff has failed to allege a constitutional violation by defendant Van Cor. Even construing plaintiff's AC as asserting a due process violation, which it does not, plaintiff also fails to state a claim with regard to Van Cor. Inmates lack a separate constitutional entitlement to a specific prison grievance procedure. See Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003) (citation omitted.) Plaintiff's claims against defendant Van Cor should be dismissed.

e. Breach of Contract

Throughout the AC, plaintiff maintains he is seeking money damages for breach of contract. Indeed, the plain language of the 1994 compromise and release identifies the agreement as "contractual" in nature. Plaintiff contends his last surgery was April 10, 2001. (AC at 16.)

As the Court of Appeals for the Ninth Circuit pointed out, this court may or may not have jurisdiction over this claim, depending on whether the agreement is deemed to be a "consent decree" or a "private settlement agreement." (Dkt. 31 at 2.) See also Hull v. Rothhammer Intern., Inc., 2006 WL 988818 (N.D.Cal. 2006.) The distinction is important because only "private settlement agreements" are not enforceable in federal court. (Dkt. 31 at 2.) Neither party addressed this issue. However, after review of the record, this court has determined that in this case it is a distinction without a difference, because plaintiff has failed to take certain steps to protect his rights either in federal court or state court.

i. Federal Court

The PLRA, 42 U.S.C. § 1997e(a), provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Id. In Booth, 532 U.S. at 731, the Supreme Court held that inmates must exhaust administrative remedies, regardless of the relief offered through administrative procedures. Booth, 532 U.S. at 741. Therefore, inmates seeking money damages must also completely exhaust their administrative remedies. Booth, 532 U.S. 731 (inmates seeking money damages are required to exhaust administrative remedies even where the grievance process does not permit awards of money damages).

Plaintiff concedes he was unaware of the exhaustion requirement until the court informed him in 2003. (AC at 18.) Most of the alleged breaches of the contract first took place while plaintiff was incarcerated at CMF, from 1994 to 2001. (AC, *passim*.) Plaintiff alleges he

had problems with single cell housing and nonconformance with Dr. Grekin's orders shortly after his treatment with Dr. Grekin began. (Id.) Arguably, plaintiff should have filed grievances concerning those alleged breaches and then filed a breach of contract action once he received a Director's Level Review. However, even assuming the alleged breach of contract occurred when plaintiff was not returned to Dr. Grekin's care in April of 2001, plaintiff should have filed an administrative appeal as soon as he was not returned to Dr. Grekin. However, plaintiff failed to do so.

Because plaintiff failed to exhaust his administrative remedies for any federal breach of contract claim he might have prior to the filing of the instant action, his federal breach of contract should be dismissed without prejudice.

ii. State Law Claims

Defendants argue that all of plaintiff's state law claims, including the state breach of contract claim, must be dismissed because plaintiff has failed to allege compliance with the California Tort Claims Act. Plaintiff failed to address this issue in his opposition.

The California Tort Claims Act "requires that any civil complaint for money damages first be presented to and rejected by the pertinent public entity." Ard v. County of Contra Costa, 93 Cal. App. 4th 339, 343, 112 Cal. Rptr. 2d 886 (2001); see Cal. Govt. Code §§ 910, 912.4, 912.8, 945.4.) Upon receiving a claim, the public entity must grant or deny it within 45 days; if the entity fails to act within that time, the claim is considered denied. Cal. Govt. Code § 912.4. "[I]f the injured party fails to file a timely claim, a written application may be made to the public entity for leave to present such claim." Ard, 93 Cal. App. 4th at 343; see Cal. Govt. Code § 911.4(a). "If the public entity denies the application, section 946.6 authorizes the injured party to petition the court for relief from the claim requirements." Ard, 93 Cal. App. 4th at 343. "If the court makes an order relieving the petitioner from [the claim requirements], suit on the cause of action to which the claim relates shall be filed with the court within 30 days thereafter." Id.

Throughout his AC, plaintiff asserts he is only seeking monetary damages.[16] Plaintiff has not demonstrated compliance with the California Tort Claims Act prior to filing the instant action. Plaintiff has not addressed this issue in his opposition. Accordingly, plaintiff's state law breach of contract claim, as well as the remaining state law claims, must be dismissed without prejudice.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' December 15, 2009 request for judicial notice is granted; and

2. The June 8, 2010 order is vacated.

IT IS HEREBY RECOMMENDED that the motion to dismiss (Dkt. No. 59), filed on December 15, 2009, be granted, as set forth above, and

1. Defendants Ramirez-Palmer, Hall and Van Cor be dismissed from this action.

2. Defendants Perbula and Stratton be dismissed from this action.

3. Defendant Dovey be dismissed without prejudice.

4. Plaintiff's state law claims be dismissed without prejudice.

5. This action be dismissed.

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

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[16] Plaintiff adds: "We are not in the instant matter merely discussing a breach of contract. . . plaintiff is arguing a "health issue." (Opp'n at 10.) Plaintiff notes refusal to take a patient to a doctor's appointment is a violation and that "any" persistent pain is a serious medical need. (Id.) If plaintiff is currently in pain or in need of medical treatment, and current prison officials are deliberately indifferent to plaintiff's serious medical needs at this time, he should file a new grievance concerning that issue. If his grievance is denied at the Director's Level, he may file a new § 1983 action raising Eighth Amendment claims based on current alleged violations.

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

DATED: June 15, 2010

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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