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

JOSEPH BECKER,

Plaintiff,

No. CIV S-10-0519 KJM EFB P

vs.

DAHL, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendants Dahl, Lisle, Martel, and Moazam (“defendants”) move for summary judgment and to dismiss on the ground that plaintiff failed to exhaust his administrative remedies prior to filing suit. Dckt. No. 40. For the reasons stated below, the court finds that plaintiff failed to exhaust his administrative remedies prior to filing suit and therefore recommends that the motion be granted.

**I. Background**

Plaintiff proceeds on his March 3, 2010 complaint which claims that defendants were deliberately indifferent to his medical/psychological needs in violation of the Eighth Amendment. Plaintiff alleged in his complaint that he is a prisoner at Mule Creek State Prison, where he is a participant in the Enhanced Outpatient Program. He alleged that defendants placed

1 him in the Enhanced Outpatient Program because of his suicidal ideation and attempts to commit  
2 suicide in the preceding three years. Plaintiff alleged defendants were deliberately indifferent  
3 because they were removing him from the Enhanced Outpatient Program, thereby exposing him  
4 to a risk of harm to his future health.

5 With his complaint, plaintiff filed a motion for a preliminary injunction seeking to  
6 prevent defendants from removing him from the Enhanced Outpatient Program. Dckt. No. 2.  
7 On July 21, 2010, the district judge adopted the undersigned's recommendation to deny that  
8 motion. Dckt. No. 26.

9 On December 10, 2010, defendants moved for summary judgment on the grounds that:  
10 (1) there is no evidence defendants were deliberately indifferent to plaintiff's medical or  
11 psychological needs because plaintiff was never removed from the Enhanced Outpatient  
12 Program and is still a participant in that program; (2) plaintiff cannot maintain an Eighth  
13 Amendment claim against Martel and Moazam based upon a theory of respondeat superior; and  
14 (3) defendants are entitled to qualified immunity. Defendants also moved the court to dismiss  
15 this case on the ground that plaintiff failed to exhaust his administrative remedies prior to filing  
16 suit. Plaintiff opposed the motions and defendants filed a reply. Dckt. Nos. 46-48, 50.

17 The court considers the exhaustion issue first, as exhaustion is a prerequisite to suit. *See*  
18 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions . . . until  
19 such administrative remedies as are available are exhausted.”); *see also McKinney v. Carey*, 311  
20 F.3d 1198, 1199 (9th Cir. 2002) (per curiam) (requiring dismissal where prisoner fails to exhaust  
21 administrative remedies before filing suit and tries to do so while case is pending).

## 22 **II. Exhaustion Under The PLRA**

23 The Prison Litigation Reform Act (“PLRA”) provides that “[n]o action shall be brought  
24 with respect to prison conditions [under section 1983 of this title] until such administrative  
25 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). “Prison conditions” subject to  
26 the exhaustion requirement have been defined broadly as “the effects of actions by government

1 officials on the lives of persons confined in prison . . . .” 18 U.S.C. § 3626(g)(2); *Smith v.*  
2 *Zachary*, 255 F.3d 446, 449 (7th Cir. 2001); *see also Lawrence v. Goord*, 304 F.3d 198, 200 (2d  
3 Cir. 2002). To satisfy the exhaustion requirement, a grievance must alert prison officials to the  
4 claims the plaintiff has included in the complaint, but need only provide the level of detail  
5 required by the grievance system itself. *Jones v. Bock*, 549 U.S. 199, 218-19 (2007); *Porter v.*  
6 *Nussle*, 534 U.S. 516, 524-25 (2002) (purpose of exhaustion requirement is to give officials  
7 “time and opportunity to address complaints internally before allowing the initiation of a federal  
8 case”).

9 Prisoners who file grievances must use a form provided by the California Department of  
10 Corrections and Rehabilitation, which instructs the inmate to describe the problem and outline  
11 the action requested. The grievance process, as defined by California regulations, has three  
12 levels of review to address an inmate’s claims, subject to certain exceptions. *See Cal. Code*  
13 *Regs. tit. 15, § 3084.7*. Administrative procedures generally are exhausted once a plaintiff has  
14 received a “Director’s Level Decision,” or third level review, with respect to his issues or claims.  
15 *Id.* § 3084.1(b).

16 Proper exhaustion of available remedies is mandatory, *Booth v. Churner*, 532 U.S. 731,  
17 741 (2001), and “[p]roper exhaustion demands compliance with an agency’s deadlines and other  
18 critical procedural rules[.]” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). For a remedy to be  
19 “available,” there must be the “possibility of some relief. . . .” *Booth*, 532 U.S. at 738. Relying  
20 on *Booth*, the Ninth Circuit has held:

21 [A] prisoner need not press on to exhaust further levels of review once he has  
22 received all “available” remedies at an intermediate level of review or has been  
reliably informed by an administrator that no remedies are available.

23 *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

24 Although a motion to dismiss for failure to exhaust administrative remedies prior to filing  
25 suit is normally brought under Rule 12(b) of the Federal Rules of Civil Procedure, when ruling  
26 on such a motion requires the court to look beyond the pleadings in the context of disputed

1 issues of fact the court must do so under “a procedure closely analogous to summary judgment.”  
2 *Wyatt v. Terhune*, 315 F.3d 1108, 1119, n.14 (9th Cir. 2003). Because care must be taken not to  
3 resolve credibility on paper as it pertains to disputed issues of material fact, the undersigned  
4 applies the Rule 56 standards to exhaustion motions that require consideration of materials  
5 extrinsic to the complaint. *See Chatman v. Felker*, No. Civ. S-06-2912 LKK EFB, 2010 WL  
6 3431806, at \*2-3 (E.D. Cal. Aug. 31, 2010).

7 Defendants bear the burden of proving plaintiff’s failure to exhaust. *Wyatt*, 315 F.3d at  
8 1119. To bear this burden:

9 a defendant must demonstrate that pertinent relief remained available, whether at  
10 unexhausted levels of the grievance process or through awaiting the results of the  
11 relief already granted as a result of that process. Relevant evidence in so  
12 demonstrating would include statutes, regulations, and other official directives  
13 that explain the scope of the administrative review process; documentary or  
14 testimonial evidence from prison officials who administer the review process; and  
15 information provided to the prisoner concerning the operation of the grievance  
16 procedure in this case . . . . With regard to the latter category of evidence,  
17 information provided [to] the prisoner is pertinent because it informs our  
18 determination of whether relief was, as a practical matter, “available.”

19 *Brown*, 422 F.3d at 936-37 (citations omitted).

20 On April 12, 2010, the court advised plaintiff of the requirements for opposing a motion  
21 to dismiss for failure to exhaust available administrative remedies as well as a motion pursuant  
22 to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957  
23 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999); *Klinge v. Eikenberry*, 849 F.2d  
24 409 (9th Cir. 1988); *Wyatt*, 315 F.3d at 1120, n.14.

### 25 **III. Discussion**

26 Defendants contend that plaintiff could not have exhausted his administrative remedies  
prior to filing suit because he only initiated the administrative grievance process six days before  
commencing this action. Defs.’ Mot., Mem. of P. & A in Supp. Thereof at 11. To support this  
argument, defendants point to plaintiff’s admission in his verified complaint that he had not yet

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1 completed the administrative appeals process. *Id.*; *see also* Compl. at 2<sup>1</sup> (alleging administrative  
2 exhaustion process was not completed because “[t]he appeal is undergoing severe time delays on  
3 part of the prison’s appeals office beyond my control.”).

4 Defendants also submit the declaration of Karen McLean, Health Care Appeals  
5 Coordinator for the California Department of Corrections and Rehabilitation at Mule Creek State  
6 Prison. Defs.’ Mot., Decl. of K. McLean in Supp. Thereof ¶ 1. McLean testifies that plaintiff  
7 submitted an inmate appeal regarding the events alleged in this action on February 25, 2010 and  
8 that it was assigned tracking number MCSP-16-10-10634. *Id.* ¶ 3-4 (“This appeal was a medical  
9 appeal and Becker requested that he did not want to be discontinued from the Enhanced  
10 Outpatient Program (EOP).”); *Id.*, Ex. A (appeal number MCSP-16-10-10634) (explaining risk  
11 of suicide if removed from Enhanced Outpatient Program). McLean’s declaration reveals that it  
12 was not until after March 3, 2010, the date plaintiff initiated this action, that plaintiff received  
13 even a first level response to this appeal. *Id.* ¶¶ 3-5, Ex. A.

14 Thus, it is apparent from defendants’ evidence that even if plaintiff pursued appeal  
15 number MCSP-16-10-10634 through the Director’s Level of Review, he did not do so prior to  
16 commencing this action, as the PLRA requires. *See McKinney*, 311 F.3d at 1200 (“Congress  
17 could have written a statute making exhaustion a precondition to judgment, but it did not. The  
18 actual statute makes exhaustion a precondition to *suit*.”); *Vaden v. Summerhill*, 449 F.3d 1047,  
19 1051 (9th Cir. 2006). Accordingly, the court finds that defendants have satisfied their initial  
20 burden of proving plaintiff’s failure to exhaust his administrative remedies prior to filing suit.

21 In his opposition, plaintiff does not dispute defendants’ contention that he failed to  
22 pursue appeal number MCSP-16-10-10634 through the final level of review before initiating this  
23 action. *See* Dckt. No. 46. Rather, plaintiff contends that a December 27, 2007 response from the  
24 Director’s Level of Review, relating to appeal number RJD-07-00954, satisfies the exhaustion

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26 <sup>1</sup> These and subsequent page number citations to plaintiff’s filings are to the page  
number reflected on the court’s CM/ECF system and not to page numbers assigned by plaintiff.

1 requirement. *Id.* at 5, 10, 15-16. Plaintiff filed appeal number RJD-07-00954 while he was  
2 housed at Richard J. Donovan Correctional Facility. *Id.* at 15-16. In the appeal, plaintiff  
3 complained that on November 16, 2006, a psychiatrist forced injections on him, that a doctor  
4 knew plaintiff attempted suicide but did not admit plaintiff into the Correctional Treatment  
5 Center, and that when plaintiff returned to his housing unit he was in a condition that left him  
6 unable to fend off an attack by his cellmate and/or inmates. *Id.* As with this action, appeal  
7 number RJD-07-00954 concerns plaintiff's psychological state and housing needs. However, its  
8 focus is on events that occurred at Richard J. Donovan Correctional Facility several years before  
9 the events giving rise to this action. It would not have put Mule Creek State Prison Officials on  
10 notice of the harm being grieved in this action – plaintiff's removal from Mule Creek's  
11 Enhanced Outpatient Program despite plaintiff's suicidal ideation – and therefore, does not  
12 satisfy the exhaustion requirement for this lawsuit. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120  
13 (9th Cir. 2009).

14 Plaintiff also references appeal number MCSP-16-09-13151 as evidence that his  
15 administrative remedies are exhausted. Dckt. No. 46 at 10. However, this appeal would not  
16 have put prison officials on notice of the issues raised by this lawsuit, nor is there evidence that  
17 plaintiff even pursued this appeal through the final level of review. *See id.* at 4 (arguing he was  
18 prevented from pursuing the appeal through the final level of review). According to plaintiff's  
19 exhibits, plaintiff filed this appeal on October 30, 2009, while housed at Mule Creek State  
20 Prison. *Id.* at 18. Plaintiff complained that he did not have an assigned doctor for over one  
21 month, requested a new health care clinician, and asked that he “not be subjected to any  
22 alteration of [his] current ‘EOP’ level of care.” *Id.* Although this appeal suggests plaintiff's  
23 preference to be housed in the Enhanced Outpatient Program, it does not suggest that plaintiff  
24 was removed from that program, that anyone threatened to remove plaintiff from that program,  
25 or that plaintiff needed to be housed in that program because of his claimed psychological needs,  
26 namely, suicidal ideation. It therefore would not have put prison officials on notice of the harm

1 grieved in this action.

2           Moreover, plaintiff's exhibits show he had only received a first level response to appeal  
3 number MCSP-16-09-13151 prior to filing this action, and that the appeal was screened out at  
4 the second level of review as untimely on August 17, 2010, over five months after plaintiff  
5 initiated this action. *See id.* at 19, 23, 25 (August 17, 2010 Mule Creek Screening Form) (“Mr.  
6 Becker, your previous Appeal No. MCSP-16-09-13151 was partially granted at the first level of  
7 review and the original . . . was returned to you on January 4, 2010. You had 15 business days  
8 from January 4, 2010 to submit that appeal for second level of review), 27 (August 23, 2010  
9 Mule Creek Screening Form) (“You state that you submitted a copy of the medical appeal log  
10 number MCSP-16-09-13151 with section F completed for a second level of review. Your  
11 medical appeal history has been reviewed. The Health Care Appeals Office does not have record  
12 of the appeal being submitted for a second level of review.”). Plaintiff claims that he  
13 experienced delays in receiving responses to this appeal and that he made every effort to exhaust  
14 the appeal before filing the complaint in this action. *Id.* at 4, 11. While plaintiff produces a  
15 February 8, 2010 letter complaining of an irregularity in the first level response to the appeal, he  
16 does not show that he timely submitted the appeal at the second level of review, or otherwise  
17 show how the alleged delays with the appeal excuse him from the exhaustion requirement in this  
18 lawsuit. *Marella v. Terhune*, 568 F.3d 1024, 1026 (9th Cir. 2009) (“If a prisoner had full  
19 opportunity and ability to file a grievance timely, but failed to do so, he has not properly  
20 exhausted his administrative remedies.”)

21           Finally, plaintiff claims that his membership in and satisfaction of the exhaustion  
22 requirement in the *Coleman* class action excuse him from exhausting his claims in this action.  
23 Dckt. No. 46 at 6, 13; *see also Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995).  
24 However, whether plaintiff satisfied the exhaustion requirement in another action is irrelevant to  
25 whether plaintiff satisfied the exhaustion requirement in this action.

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1 Based on the above, the court concludes that plaintiff has not satisfied the exhaustion  
2 requirement for purposes of this action. Further, and as defendants point out in their reply brief,  
3 *see* Dckt. No. 50 at 4, plaintiff previously admitted that he had not pursued the relevant  
4 administrative appeal through the final level of review before commencing this action. Dckt.  
5 No. 33 (Plaintiff’s November 16, 2010 Declaration in Support of Motion for Continuance) ¶ 5  
6 (“I am still awaiting the decision from the health care receivership pertaining to the final level of  
7 my administrative remedies in this matter. Even though I had once before in 2007 exhausted a  
8 very similar problem, that was before the CDCR mental health care was overseen by the now J.  
9 Clark Kelso, Prison health Care Receivership.”); *see also* *Wyatt*, 315 F.3d at 1120 (stating that a  
10 prisoner’s concession to nonexhaustion is a valid ground for dismissal of an action).

11 **IV. Conclusion**

12 The court finds that plaintiff failed to exhaust available administrative remedies prior to  
13 filing suit and that defendants are entitled to dismissal of this action on that ground. *See id.*  
14 (explaining that if the court concludes that a prisoner has failed to exhaust, the proper remedy is  
15 dismissal without prejudice).

16 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 17 1. Defendants’ December 10, 2010 motion for summary judgment and motion to dismiss  
18 be granted without prejudice on the ground that plaintiff failed to exhaust administrative  
19 remedies; and
- 20 2. The Clerk be directed to close this case.

21 These findings and recommendations are submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
23 after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: August 31, 2011.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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