IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY ASBERRY,

Plaintiff, No. 2:11-cv-2462 KJM KJN P

vs.

MATTHEW CATE, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

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I. Introduction

Plaintiff is a state prisoner, proceeding without counsel and in forma pauperis, with an action filed pursuant to 42 U.S.C. § 1983. This case is proceeding on plaintiff's third amended complaint against defendants Virga, Phelps, McCarval, Bobbala, Nangalama, Wedell, Ali, Elston, Dhillon, Duc, and Chen.[1] Plaintiff alleges that defendants violated his Eighth Amendment right to be protected from harm caused by another inmate, and that he subsequently received inadequate medical care in violation of the Eighth Amendment. Plaintiff also includes several state law claims. (Dkt. No. 55.) Pending before the court are defendants' motions to

[1] It appears that defendants Elston and Chen were incorrectly named as "Elton," and "Chin," in the third amended complaint. (Dkt. No. 84 at 1.) Defendant Cate and plaintiff's retaliation claims were dismissed on September 27, 2012. (Dkt. No. 78.)

dismiss these claims based on a failure to first exhaust administrative remedies (except as to defendant Phelps), and failure to plead facts sufficient to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6), based on plaintiff's alleged failure to comply with the California Government Tort Claims Act. After careful review of the record, the undersigned concludes that defendants' motions to dismiss should be granted in part, and denied in part.

II. Plaintiff's Third[2] Amended Complaint

Plaintiff's claims arise from a cell move on January 25, 2010, and plaintiff's claim that he was assaulted by his new cellmate, inmate Wilson, the following day, during which plaintiff suffered injuries to his back and neck.[3] (Dkt. No. 49.) Plaintiff claims that (a) defendant Elston failed to protect plaintiff by bringing inmate Wilson to plaintiff's cell on January 25, 2010, and ordering plaintiff to accept Wilson as his cellmate or plaintiff would face disciplinary action; (b) defendant McCarvel failed to protect plaintiff from inmate Wilson's attack on January 26, 2010; (c) defendant Virga failed to protect plaintiff by improperly classifying inmate Wilson; and (d) defendant Chen failed to protect plaintiff because he misdiagnosed Wilson, and it was defendant Chen's evaluation of inmate Wilson that eventually led to plaintiff being housed with inmate Wilson, resulting in plaintiff's injuries (dkt. no. 93 at 6).

Plaintiff alleges that defendant Dr. Bobbala examined plaintiff in February of 2010, by punching and chopping plaintiff in the back, and attempting to bend plaintiff over, all while asking plaintiff "does that hurt?," and without giving plaintiff any medical treatment, except for ordering an x-ray. (Dkt. No. 49 at 9-10.) On March 30, 2010, plaintiff claims his back went out, but all defendant Dr. Nangalama did was ask a few questions, and prescribed

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[2] Although plaintiff entitled his filing as a "Second Amended Complaint," plaintiff first amended his complaint on November 21, 2011 (dkt. no. 12), and filed a second amended complaint on December 1, 2011 (dkt. no. 13).

[3] In the third amended complaint, plaintiff does not challenge the subsequent rules violation report No. C10-01-033 (hereafter "RVR"), signed on February 5, 2010, or raise due process claims concerning the hearing on the RVR (dkt. no. 80 at 52-55). (Dkt. No. 49, *passim*.)

plaintiff no pain medication. (Id. at 10.) On April 9, 2010, plaintiff was seen by defendant Dr. Wedell, who told plaintiff he would need muscle relaxers, physical therapy, and a waist chain chrono. On September 7, 2010, plaintiff was seen by defendant Dr. Ali, who allegedly told plaintiff that he needed back surgery, but that "it was up to others to order it;" Dr. Ali ordered methadone, an MRI, a back brace, and a wheelchair chrono for plaintiff. (Id.) On April 26, 2011, plaintiff was seen by defendant Dr. Dhillon for MRI test results; plaintiff alleges Dr. Dhillon would not reveal the MRI results, but instead ordered a second MRI. On July 12, 2011, plaintiff saw Dr. Dhillon again, and when plaintiff asked him about the MRI results, Dr. Dhillon allegedly told plaintiff that his knee was within normal limits, and that plaintiff had Hepatitis-C. Plaintiff states he did not receive an MRI for his knee and does not have Hepatitis-C. On October 20, 2011, plaintiff was escorted to medical by Correctional Officer Conely to see defendant Dr. Duc, and obtain the results from the second MRI. (Id. at 11.) When plaintiff asked for his results, plaintiff alleges Officer Conely began gesturing to Dr. Duc as if to say "don't tell him the results," and defendant Dr. Duc allegedly told plaintiff that another doctor would give plaintiff the second MRI results. (Id.) Plaintiff alleges these medical doctors denied and delayed plaintiff's medical care in violation of the Eighth Amendment.

III. Motions to Dismiss - Failure to Exhaust

Defendants claim plaintiff failed to first exhaust his administrative remedies as to all defendants except defendant Phelps. Plaintiff was informed of the requirements for opposing a motion to dismiss for failure to exhaust administrative remedies on August 20, 2012, and October 30, 2012. (Dkt. Nos. 63, 84.) Plaintiff filed oppositions (dkt. nos. 80, 93), and defendants filed replies (dkt. nos. 83, 95.)

A. Legal Standard re Exhaustion

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 conditions of 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. 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). The Supreme Court has cautioned courts against reading futility or other exceptions into the PLRA exhaustion requirement. See Booth, 532 U.S. at 741 n.6.

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). Because 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 already granted as a result of that process. Id., at 936-37.

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As noted above, 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 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. When the rules of the prison or jail do not dictate the requisite level of detail for proper review, a prisoner's complaint "suffices if it alerts the prison to the nature of the wrong for which redress is sought." Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). This requirement is because the primary purpose of a prison's administrative review system is to "notify the prison of a problem and to facilitate its resolution." Griffin, 557 F.3d at 1120.

Non-exhaustion under § 1997e(a) is an affirmative defense which should be brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Moreover, the court may look beyond the pleadings to determine whether a plaintiff exhausted his administrative remedies. Id. at 1119-20.

B. California Prisons' Grievance Procedures

California regulations allow a prisoner to appeal any action or decision by a prison official that adversely affects the prisoner's welfare. Cal. Code Regs. tit. 15, § 3084.1(a). To exhaust a grievance, an inmate must pursue his appeal through four levels, one "informal" and three "formal." Id. §§ 3084.5, 3084.1(a). An inmate must file the initial grievance within 15 working days of the action being appealed, and he must file each administrative appeal within 15 working days of receiving an adverse decision at a lower level. Id. § 3084.6(c).

At the informal level, an inmate must seek to have the involved prison employee resolve the problem. Id. § 3084.5(a). If this request is unsuccessful, the inmate must then fill out

a "Form 602," the "Inmate/Parolee Appeal Form," describing the problem and action requested. Id. § 3084.2(a). An "appeals coordinator" at the prison "screen[s]" each appeal before forwarding it on for review on the merits. Id. § 3084.3(a). The appeals coordinator may reject, or "screen," an appeal for various reasons, including failure to comply with the 15-day time limit, incompleteness or omission of necessary supporting documents, or failure to attempt to resolve the grievance informally. Id. §§ 3084.3, 3084.6(c). When the appeals coordinator rejects an appeal, he must fill out a form that explains why the appeal is unacceptable and instructs the inmate on what he must do to qualify the appeal for processing. Id. § 3084.3(d). If it appears from the appeal form that the prisoner has difficulty describing the problem in writing, the appeals coordinator must arrange an interview with the prisoner to help clarify or complete the appeal. Id. § 3084.3(b)(3). Once the appeals coordinator allows an appeal to go forward, the inmate must pursue it through three levels of formal review. Id. § 3084.5.

C. Administrative Appeals

Plaintiff filed his original complaint on September 16, 2011, and provided exhibits which the court has reviewed in connection with this motion. (Dkt. Nos. 1-1, 1-2.) At the time the underlying claims accrued, plaintiff was housed at California State Prison - Sacramento ("CSP-SAC"). Defendants provided the declaration of J.D. Lozano, Chief of the Office of Appeals for the California Department of Corrections and Rehabilitation ("CDCR"). Chief Lozano described the grievance procedure for inmates held in the CDCR, and submitted copies of plaintiff's grievances submitted between January 26, 2010, and September 16, 2011. (Dkt. No. 63-3 at 1-43.) Defendants also provided the declaration of K. Daly, Appeals Coordinator for CSP-SAC, who described the screening process for appeals, and filed copies of plaintiff's appeals that were screened out during the relevant time frame. (Dkt. No. 63-4 at 1-21.) Finally, defendants submitted the declaration of L.D. Zamora, Chief of the Office of Third Level Appeals ("OTLA") for California Correctional Health Care Services ("CCHCS") in Sacramento, California. (Dkt. No. 63-5 at 1-2.) Chief Zamora described the procedure for

appeals concerning health care, and provided copies of medical appeals filed by plaintiff during the relevant time period. (Dkt. No. 63-5 at 1-33.)

D. Third Level Appeals

As noted above, Chief Lozano provided copies of plaintiff's appeals that were denied at the third level of review. The court reviewed these appeals[4] and determined that only third level appeals SAC-10-00226 and SAC-10-10-12683 raised claims relevant herein. (Dkt. Nos. 63-3 at 12-15; 63-5 at 10.)

1. Appeal SAC-10-00226

In appeal SAC-10-00226, signed February 1, 2010, plaintiff sought an investigation into his claims, and to be compensated in some form. (Dkt. No. 63-3 at 12.) Plaintiff alleged that on January 25, 2010, defendant Phelps made a cell move that resulted in plaintiff being celled with inmate Wilson. Plaintiff alleged that inmate Wilson suffers from a mental disorder, has an anger problem, and is violent, unclean, and refused to shower. Plaintiff alleged that inmate Wilson attacked him because plaintiff offered Wilson a bar of soap. Plaintiff stated that he requested an investigation into why defendant Phelps moved inmate Wilson into plaintiff's cell. (Dkt. No. 63-3 at 15.) Plaintiff noted that at 7:00 a.m. on January 26, 2010, while housed in a medical holding cell next to inmate Wilson, plaintiff remarked to defendant

[4] Appeals SAC-09-01676 and SAC-09-1633 challenged food service issues. (Dkt. No. 63-3 at 4-10.) Appeal SAC-01246 challenged the denial of showers. (Id. at 17-20.) Appeal SAC-11-00227 claimed misuse of force by a nondefendant correctional officer on February 7, 2011. (Id. at 22-29.) Appeal SAC-11-00443 challenged the improper turning off of plaintiff's toilet flushing mechanism. (Id. at 31-34.) Appeal SAC-00501 challenged an April 9, 2011 cell search. (Id. at 36-43.) Appeal SAC-11-00417 was a staff complaint against a nondefendant correctional officer on an unspecified date. (Dkt. No. 63-4 at 8-11.) Appeal SAC-10-10-12500 complained of medical care received for itching and scratching. (Dkt. No. 63-5 at 4-8.) Appeal SAC-HC-11013255 sought clarification of a comprehensive accommodation chrono issued January 18, 2011. (Id. at 16-20.) Finally, appeal SAC-10-10-13021 challenged plaintiff's medical treatment for nightmares and PTSD by Dr. Delgado and Dr. Chen. (Id. at 22-31.) However, plaintiff does not name Dr. Delgado as a defendant, and plaintiff does not challenge Dr. Chen's medical care in the third amended complaint. Rather, plaintiff alleges it was Dr. Chen's evaluation that allowed for inmate Wilson to be double-celled, resulting in plaintiff's injuries. This appeal does not raise such a claim as to Dr. Chen. Thus, appeal SAC-10-10-13021 does not serve to exhaust plaintiff's administrative remedies as to Dr. Chen.

Phelps that inmate Wilson should be single-celled. (Dkt. No. 63-3 at 15.) Plaintiff alleged defendant Phelps responded, "I know he (Wilson) should not even be on the mainline with main population inmates." (Id.) Plaintiff claimed this statement "implies that [defendant] Phelps already knew moving inmate Wilson in the cell with [plaintiff] would be a problem." (Id.)

In the first level appeal response, Correctional Sgt. Rose summarized plaintiff's appeal as alleging defendant Phelps housed plaintiff improperly with a cellmate who should have been on single cell status, and defendant Phelps was aware of this fact. (Dkt. No. 1-1 at 6.) Sgt. Rose noted that during the interview, plaintiff stated that his "main concern was that [defendant] Phelps housed you with inmate Wilson knowing you were not compatible." (Id.) Sgt. Rose noted that defendant Phelps was interviewed on March 5, 2010, and stated that plaintiff was housed with Wilson because both were "double-cell cleared and were compatible." (Id.)

Plaintiff sought a second level review, stating he was dissatisfied with the first level decision, without specifying any further factual allegations. (Dkt. No. 63-3 at 13.) Defendant Virga provided the second level decision, summarizing plaintiff's appeal by articulating plaintiff's claims set forth in his initial appeal. (Dkt. No. 1-1 at 8.) Defendant Virga reiterated the first level appeal response that both plaintiff and inmate Wilson were cleared for double-cell housing, and no incompatibility factors were revealed in a records review. (Id.) Defendant Virga found that staff acted appropriately. (Id.)

In seeking third level review, plaintiff stated that the prior reviewers failed to acknowledge his request for an investigation into plaintiff's issues, "particularly inmate Wilson's mental health issues, and Wilson's inability to effectively program in the main population as a double cell status prisoner." (Dkt. Nos. 63-3 at 13; 1-1 at 3.)

The third level review reiterated plaintiff's claims against defendant Phelps. The third level review examiner found that plaintiff provided no credible evidence to substantiate his claim that CSP-SAC staff knowingly housed him with a violent, mentally ill inmate. (Dkt. No. 1-1 at 11.) "Staff attested that both inmates were cleared for double cell housing and there were

no documented incompatibility factors." (Id.) In connection with plaintiff's claim that Wilson struck him in the face in response to plaintiff's offer of soap, the examiner noted that plaintiff failed to advise staff at the time so that Wilson could be removed. (Id.)

In this appeal, SAC-10-00226, plaintiff does not allege facts concerning or challenging the January 26, 2010 attack on plaintiff by inmate Wilson, or plaintiff's claim that defendant McCarvel failed to protect plaintiff. (Dkt. No. 63-3 at 12-15.)

Defendants contend that this appeal only exhausts plaintiff's claims as to defendant Phelps, because it fails to allege any wrongdoing on the part of defendant McCarvel, and was filed prior to any alleged wrongdoing on the part of the other named defendants.

In his opposition, plaintiff claims he did not learn of defendant Virga's involvement until much later in plaintiff's investigation. (Dkt. No. 80 at 4.) Plaintiff states that although he could not appeal the classification of another inmate, he could include that claim in appealing the RVR that he claims resulted from defendant Virga's classification of inmate Wilson, as well as the actions of defendant McCarvel who authored the RVR. (Id.) The hearing on the RVR, postponed pending the district attorney's decision to prosecute, occurred on July 30, 2010. Plaintiff contends he could not file an appeal until he was found guilty of the RVR, issued a final copy of the RVR, as well as a 128-G chrono approving the disciplinary process by a classification committee. (Id. at 5.) Plaintiff argues that he did not timely receive a copy of the final RVR. (Id.) On August 18, 2010, plaintiff went before the classification committee, and submitted his appeal of the RVR on the same day. (Id. at 6.) However, the appeal was rejected based on plaintiff's failure to attach the complete RVR, and plaintiff included too many issues in one appeal. (Id.) Plaintiff alleges he tried on many occasions to obtain a copy of the RVR, but claims he did not receive a copy until November 1, 2010, and filed his appeal the same day. (Id. at 7.) The appeal was rejected as untimely. (Id.) Plaintiff claims these efforts demonstrate that plaintiff was not allowed to exhaust his claims as to defendants McCarvel and Virga. (Id. at 9.)

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Plaintiff also argues that appeal SAC-10-00226 exhausts plaintiff's claims against defendants McCarvel, and Virga, but does not explain why. (Dkt. No. 80 at 24:6-8.) In his verified supplemental opposition, plaintiff contends that this appeal exhausted his administrative remedies as to defendants Elston and Chen. (Dkt. No. 93 at 5.) Although plaintiff did not reference defendant Elston by name in the appeal, plaintiff contends he referenced defendant Elston's actions, which was to tell plaintiff that if he refused a cellmate, he would face a range of disciplinary actions, including placement in administrative segregation. (Id., citing Dkt. No. 63-3 at 14.) Plaintiff also argues that he did not learn of defendant Chen's involvement until much later. (Dkt. No. 93 at 6.) Moreover, plaintiff contends that the CDCR would not process an appeal from a prisoner that revealed information about another inmate's mental health. (Id.)

In reply, defendants argue that appeal SAC-10-00226 does not reference defendant McCarvel's response to the January 26, 2010 alleged cell fight, or defendant Virga's classification of inmate Wilson. (Dkt. No. 83 at 3.) Thus, defendants contend this appeal failed to put prison officials on notice of any wrongdoing on the part of defendants McCarvel and Virga. (Id.)

A grievance suffices to exhaust a claim if it puts the prison on adequate notice of the problem for which the prisoner seeks redress. To provide adequate notice, the prisoner need only provide the level of detail required by the prison's regulations. Jones v. Bock, 549 U.S. 199, 218 (2007). The California regulations require only that an inmate "describe the problem and the action requested." Cal. Code Regs. tit. 15, § 3084.2(a). Where a prison's regulations are "incomplete as to the factual specificity [required in an inmate's grievance], a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." Griffin, 557 F.3d at 1120 (9th Cir. 2009) (internal quotation marks omitted).

The court finds that plaintiff's appeal SAC-10-00226 challenged the alleged improper cell move placing inmate Wilson in the same cell as plaintiff on January 25, 2010, and specifically named defendant Phelps. Plaintiff included language as to defendant Elston that

tracks the language contained in the instant complaint. Plaintiff is not required to name all potential defendants in his administrative grievance. See Jones, 549 U.S. at 219, citing Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) ("We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance process is not a summons and complaint that initiates adversarial litigation."). Plaintiff's allegation that he was forced to accept a cellmate or receive disciplinary action was sufficient to put prison officials on notice of plaintiff's allegations. Here, plaintiff claims that defendant Elston failed to protect plaintiff by forcing him to accept a cellmate or receive disciplinary action. Thus, defendants' motion to dismiss plaintiff's claim as to defendant Elston should be denied.

Plaintiff's allegations as to defendants Virga and Dr. Chen present a closer question. The Ninth Circuit has explained that a prisoner is not required to allege every fact necessary to prove a legal claim in his administrative appeal. See Griffin, 557 F.3d at 1120. Instead, "the primary purpose of a grievance is to notify the prison of the problem and facilitate its resolution, not to lay the groundwork for litigation." Id., 557 F.3d at 1120-21; see also Gomez v. Winslow, 177 F.Supp.2d 977, 983, 985 (N.D. Cal. 2001) (California prisoner need not provide prison officials with a "preview of his lawsuit by reciting every possible theory of recovery or every factual detail that might be relevant."); Irvin v. Zamora, 161 F.Supp. 2d 1130, 1134-35 (S.D. Cal. 2001) (holding that so long as the plaintiff's grievance "present[s] the relevant factual circumstances giving rise to a potential claim," the basic purposes of the exhaustion requirement are fulfilled).

Here, defendants are correct that plaintiff did not specifically challenge defendant Virga's classification of inmate Wilson for double cell housing, and did not argue that inmate Wilson's psychiatrist misdiagnosed Wilson, or improperly evaluated Wilson to find it appropriate for Wilson to be double celled. However, plaintiff noted that inmate Wilson had a mental disorder, and asked prison officials to investigate why defendant Phelps placed Wilson in

plaintiff's cell. In the first level review, the summary of the appeal noted plaintiff's allegation that inmate Wilson should have been on single cell status. (Dkt. No. 1-1 at 6.) These allegations were sufficient to put prison officials on notice that plaintiff challenged the decision to double-cell inmate Wilson based on Wilson's mental disorder. Plaintiff was not required to give prison officials a "preview of his lawsuit by reciting every possible theory of recovery or every factual detail that might be relevant" in the appeal, Gomez, 177 F.Supp. 2d at 983; plaintiff only needed to describe the facts that gave rise to potential claims he might raise.

Liberally construed, plaintiff's factual allegations should have led prison officials to investigate inmate Wilson's classification for double cell housing, and, because plaintiff noted inmate Wilson's mental disorder, should also have led prison officials to review Wilson's psychiatrist's recommendation or evaluation concerning Wilson's double cell status, if any. Moreover, plaintiff alleges he did not learn of the involvement of defendant Virga and Chen in inmate Wilson's cell move until much later. And, in seeking third level review, plaintiff argued that prison officials failed to acknowledge his request for an investigation into plaintiff's issues, "particularly inmate Wilson's mental health issues, and Wilson's inability to effectively program in the main population as a double cell status prisoner." (Dkt. Nos. 63-3 at 13; 1-1 at 3.) Had plaintiff filed second or third appeals once he learned of the involvement of defendants Virga and Dr. Chen, plaintiff risked the screening out of such appeals as duplicative of appeal SAC-10-00226. Because plaintiff described the relevant factual circumstances that gave rise to these related claims, and pled them sufficiently, the court finds that plaintiff provided prison officials with adequate notice, and exhausted these failure to protect claims as to defendants Virga and Dr. Chen. Accordingly, the court recommends that defendants' motion to dismiss plaintiff's claims as to defendants Virga and Dr. Chen be denied.

On the other hand, appeal SAC-10-00226 makes no mention of defendant McCarvel or his alleged actions on January 26, 2010. Indeed, it appears plaintiff's allegations in this appeal end the morning of January 26, 2010, before the altercation between plaintiff and

inmate Wilson that led to plaintiff's back and neck injuries. Because there are no factual allegations sufficient to put prison officials on notice of plaintiff's claim that defendant McCarvel failed to protect plaintiff on January 26, 2010, appeal SAC-10-00226 cannot serve to exhaust plaintiff's claims as to defendant McCarvel.

2. Appeal SAC-10-10-12683

In appeal SAC-10-10-12683, signed November 5, 2010, plaintiff requested to receive physical therapy for his back, and to be provided the necessary transportation to get to and from physical therapy, including a wheelchair and a back brace. (Dkt. No. 63-5 at 10.) Plaintiff alleges that on April 9, 2010, Dr. Wedell prescribed physical therapy for plaintiff's back and neck injuries, but plaintiff was not provided transportation for his first physical therapy session until May 25, 2010, and therefore did not receive physical therapy until May 25, 2010. (Id. at 12.) Plaintiff informed the therapist that he was housed in administrative segregation, that he did not have a medical chrono to be cuffed in the front or with waist chains, so the therapist would have to make temporary arrangements until plaintiff could get the medical chrono. (Id.) Plaintiff claimed the therapist told plaintiff the therapist would take care of it. (Id.) Plaintiff saw defendant Dr. Wedell on May 30, 2010, and reported the transportation issues, and plaintiff alleged that Dr. Wedell said he "would take care of the mix-up." (Id.) Plaintiff was not provided physical therapy. His June 11, 2010 physical therapy appointment was again cancelled due to a transportation issue. On September 7, 2010, plaintiff saw defendant Dr. Ali, who allegedly told plaintiff he would order physical therapy. On October 19, 2010, plaintiff was taken for physical therapy, but the next three sessions were cancelled. On November 4, 2010, plaintiff saw defendant Dr. Duc. Finally, plaintiff claimed that he was confined to his cell 24 hours a day since March 30, 2010, the date his back went out, except for doctor visits, and was denied medical assistance to be able to go outside or make it to physical therapy, a period of approximately eight months. (Id. at 13.)

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In the operative complaint, plaintiff alleges that Dr. Wedell told plaintiff he would need physical therapy, and a waist chain chrono. (Dkt. No. 49 at 10.) Plaintiff alleges defendants delayed giving plaintiff needed medical treatment. (Id. at 21.)

Defendants contend that in appeal SAC-10-10-12683, plaintiff sought transportation to and from physical therapy, and failed to put prison officials on notice that plaintiff was not receiving adequate treatment from Doctors Bobbala, Ali, Wedell, or Nangalama, because the appeal noted that plaintiff was prescribed physical therapy.

However, defendants read this appeal too narrowly. Plaintiff alleges facts demonstrating that he was prescribed physical therapy, but because he did not have the proper medical chrono,[5] it presented a transportation issue, which prevented plaintiff from receiving the physical therapy he needed. Moreover, plaintiff alleges he met with Dr. Wedell, who allegedly told plaintiff he would rectify the problem, yet the problem persisted. Plaintiff later saw Dr. Ali, who told plaintiff he would prescribe physical therapy, yet plaintiff still did not receive timely physical therapy. Arguably, this appeal put prison officials on notice that plaintiff was not receiving physical therapy as ordered by plaintiff's doctor. This appeal is sufficient to exhaust remedies as to defendants Dr. Wedell and Dr. Ali solely as to plaintiff's Eighth Amendment claim related to the provision of a waist chain chrono, and physical therapy, as part of the medical care required following plaintiff's January 26, 2010 injury. However, because the appeal was signed on November 5, 2010, the day after he saw Dr. Duc, and the grievance raises no factual allegations as to whether Dr. Duc addressed the issue of physical therapy or the waist chain chrono, this grievance cannot serve to exhaust plaintiff's administrative remedies as to Dr. Duc. Similarly, plaintiff did not raise any other claims concerning medical care following the

[5] While not entirely clear, it appears plaintiff's transportation issues stemmed from not having a waist chain chrono to avoid the painful handcuffing from behind, and from not having a wheelchair chrono, based on his alleged inability to walk to physical therapy. The court finds appeal SAC-10-10-12683 sufficient to put prison officials on notice regarding both the wheelchair and the waist chain.

January 26, 2010 incident, and therefore this appeal cannot serve to exhaust plaintiff's medical claims against the remaining doctor defendants.

iii. Conclusion Regarding Third Level Appeals

Thus, the record demonstrates that plaintiff exhausted his failure to protect claims as to defendants Elston, Virga, and Dr. Chen, and his medical claims as to Dr. Wedell and Dr. Ali, as to the provision of a wheelchair, waist chain chrono, and physical therapy only.

E. Appeals Not Resolved at the Third Level

1. Appeal SAC HC-11013531

On February 15, 2011/March 10, 2011, plaintiff filed an appeal claiming he had been suffering from back pain for over a year, noting he had been unable to attend yard since March 30, 2010. (Dkt. No. 80 at 96.) Plaintiff stated that he was seeing defendant Dr. Ali for most of plaintiff's medical appointments, and Dr. Ali was well informed about plaintiff's back pains, and prescribed plaintiff Methadone for pain relief, which plaintiff took from time to time to break up the constant pain. However, plaintiff claimed that this medication would not fix plaintiff's back, and that Dr. Ali ordered physical therapy and a back brace, which plaintiff had not received. Despite Dr. Ali's February 1, 2011 order for an MRI, no appointment was set, and plaintiff's physical therapy was thwarted by the loss of the wheelchair chrono issued by Dr. Ali. (Id. at 97.) Plaintiff alleged that when he informed Dr. Ali that plaintiff did not get the wheelchair chrono, the back brace or the MRI, Dr. Ali "got upset" and told plaintiff it was not the doctor's problem, "it's [plaintiff's] problem," and "stop talking to Dr. Ali about [plaintiff's] problems." (Id.) When plaintiff asked Dr. Ali what he should do when he doesn't receive what Dr. Ali ordered, Dr. Ali allegedly told custody that plaintiff's appointment was over. On the way out, plaintiff asked Dr. Ali what his options were, and he responded, "Tony [plaintiff] you fix it, it's your problem not mine." (Id.)

Plaintiff complained that medical personnel and custody staff were being deliberately indifferent to plaintiff for exercising his right to file appeals, and that staff

misconduct and unprofessionalism constitutes cruel and unusual punishment. (Dkt. No. 80 at 98.) Plaintiff claimed that staff and medical personnel were dragging out medical assistance in reprisal. Plaintiff asked to be seen by an outside independent professional medical doctor. (Id.)

On March 1, 2011, plaintiff's appeal was returned based on plaintiff's excessive filings, citing California Code of Regulations, Title 15, § 3084.6(b)(3).[6] (Dkt. No. 80 at 99.) On March 3, 2011, plaintiff objected to the return of the appeal, challenging the appeals coordinator's interpretation of the regulation, and reiterating that he has been suffering back pain for fourteen months, and alleging that CDCR played a role in plaintiff's January 26, 2010 injury, and again sought help to determine why his back has been hurting for 14 months. (Id.) On March 9, 2011, plaintiff's appeal was again returned based on plaintiff's excessive filings. (Dkt. No. 80 at 101.) On March 10, 2011, plaintiff again objected to the interpretation of the filing regulation, and argued the appeal could be processed because he was still being affected in the same manner. (Id.) On May 3, 2011, plaintiff's appeal was returned again based on plaintiff's excessive filings. (Id. at 103.) Plaintiff was informed that this was the third screen-out of his appeal, and warned that if he re-submitted this appeal, it would be retained by the health care appeals office. (Id.)

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[6] Section 3084.6(b)(3) provides:

> (b) An appeal may be rejected for any of the following reasons, which include, but are not limited to:
>
> > (3) The inmate or parolee has exceeded the allowable number of appeals filed in a 14 calendar day period pursuant to the provisions of subsection 3084.1(f).

Cal. Code Regs. tit. 15 § 3084.6(b)(3). Section 3084.1(f) states:

> (f) An inmate or parolee has the right to file one appeal every 14 calendar days unless the appeal is accepted as an emergency appeal. The 14 calendar day period shall commence on the day following the appellant's last accepted appeal.

Cal. Code Regs. tit. 15 § 3084.1(f).

On May 4, 2011, plaintiff wrote a letter to the health care appeals coordinator, again raising his objection as to the time line involved with excessive filings, and noting that he was trying to exhaust administrative remedies, so if the appeal is cancelled again, he had done all he could. (Dkt. No. 80 at 105.)

The PLRA "does not require exhaustion when circumstances render administrative remedies 'effectively unavailable.'" Sapp v. Kimbrell, 623 F.3d 813, 822 (9th Cir. 2010). An administrative remedy becomes unavailable for purposes of exhaustion if prison officials do not respond to properly filed grievances, or if they otherwise use affirmative misconduct to thwart an inmate's attempts to exhaust. See Nunez v. Duncan, 591 F.3d 1217, 1224, 1226 (9th Cir. 2010) (failure to exhaust excused where prisoner "took reasonable and appropriate steps to exhaust his . . . claim and was precluded from exhaustion, not through his own fault but by the Warden's mistake.").

In his opposition, plaintiff does not deny that he filed excessive appeals, but claims that once an appeal is cancelled, he cannot appeal to the next level, apparently arguing further remedies were unavailable. (Dkt. Nos. 80 at 24-25; 93 at 5.) Defendants contend this appeal was screened out on three occasions because plaintiff failed to comply with regulations. (Dkt. No. 83 at 4.)

The undersigned finds that plaintiff's allegations fail to demonstrate that his administrative remedies were effectively unavailable. First, the record reflects that plaintiff filed numerous appeals, many of which challenged multiple perceived injustices. While some of the facts relating to these grievances overlap, the grievances assert various allegations and requests for relief. Responses were provided to many of these grievances, including several partial grants. (Dkt. Nos. 1-1, 1-2 *passim*.)

Second, prison officials were entitled to disregard plaintiff's grievances on the basis that he filed excessive appeals. Pursuant to the provisions of Cal. Code Regs., tit. 15, § 3084.1 and 3084.6, an inmate may only submit one grievance every fourteen calendar days, and

the appeal may be rejected if an inmate files more than one non-emergency appeal within a fourteen calendar day period. Id. Plaintiff's response to the grievance reflects that he did not challenge the alleged multiple filing of appeals; rather, he claimed that he had not violated the seven day restriction.[7] In the appeal, plaintiff complained of suffering back pain for fourteen months, which did not constitute an emergency. Thus, prison officials were entitled to reject plaintiff's grievances because his grievances exceeded the appeal maximum provided under Cal. Code Regs., tit. 15, § 3084.6(b)(3). Plaintiff failed to demonstrate that defendants interfered with his ability to exhaust his administrative remedies, or otherwise show that his administrative remedies were effectively unavailable. Thus, plaintiff's appeal SAC HC-11013531 cannot serve to exhaust plaintiff's claims as to defendant Dr. Ali.

2. Appeal Nos. SAC 10-10-10964 & SAC-10-10-11472

In both Appeal Nos. SAC 10-10-10964 and SAC-10-10-11472, plaintiff contends that he did not refuse to attend the medical appointment for review of the appeals, but that because he did not have a waist chain chrono, being cuffed in the back would have subjected him to more pain. Thus, it appears plaintiff opted not to attend the medical appointment in order to avoid such pain. The court will set forth the details and history of each appeal, and will then analyze whether the appeals exhaust any of plaintiff's claims against the medical defendants.

i. Appeal No. SAC 10-10-10964

On March 30, 2010, plaintiff submitted appeal, #10-10964, and sought a written explanation for his unnecessary pain and suffering, and why it has taken over two months to get

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[7] The seven day time frame was changed to fourteen days by amendments to the regulations on December 13, 2010, which became operative on January 28, 2011. The prior regulation, to which plaintiff appeared to refer, stated that an inmate may only submit one grievance within a seven-calendar-day period. Cal. Code Regs., tit. 15, § 3084.4(a). If an inmate files more than one non-emergency appeal within a seven-calendar-day period, such submission shall be considered excessive and those additional "excessive" grievances may be suspended. Cal. Code Regs., tit. 15, § 3084.4(a)(1) ("When an appellant submits excessive appeals, the first appeal received shall be processed normally and all subsequent non-emergency appeals filed within the seven-calendar-day period by that individual shall be suspended.")

some medical relief. (Dkt. No. 80 at 66; 1-1 at 22.) Plaintiff stated that on January 26, 2010, plaintiff was ordered to cuff up in his cell, but once he cuffed up, his cellmate attacked him. (Id.) Plaintiff stated he was unable to protect himself, and asked to be uncuffed or released, but was denied. Plaintiff claimed he was being choked, and pressure was being placed on his back. Eventually, the lieutenant came and ordered that plaintiff's cell be opened. About two to three days later, plaintiff began feeling severe back and neck pain. (Id. at 67; 24.) Plaintiff claimed he had not gotten any medical treatment by March 30, 2010. Plaintiff stated that he was seen by defendant Dr. Bobbala who did not offer plaintiff any help, but "punched" and "chopped" plaintiff's back, and then tried to bend plaintiff over, which was very painful. (Id.) Plaintiff stated he was not provided adequate medical care for over two months, and was unable to sleep most nights, or function without serious pain. (Id.)

The informal and formal levels of review were bypassed. The appeal was cancelled at the first level based on plaintiff's refusal to "come to the clinic on May 13, 2010, for evaluation and for the 602-appeal interview." (Dkt. No. 80 at 71.) A refusal of treatment form is appended to the appeal, which states "refused MD line," and indicates that plaintiff refused to sign the form on May 13, 2010, and was witnessed by LVN Durago, and Correctional Officer R. Culverson (Dkt. No. 80 at 69.)

On April 27, 2010/May 31, 2010, plaintiff filed an appeal to the second level, stating he did not refuse to see the doctor, but was currently in administrative segregation and could not just go to the doctor, but must be taken by staff. Plaintiff claimed that Correctional Officer Culverson came to plaintiff's cell to escort him to the doctor, but that Culverson knew plaintiff suffered from severe back pain and could not cuff up from the back, and that plaintiff did not have a medical chrono for cuffing up in the front or for waist chains, so Culverson offered to escort plaintiff cuffed in the back, subjecting plaintiff to more pain, or refuse to see the doctor. (Dkt. No. 80 at 74.) Plaintiff added that there could be no guarantee he would obtain relief from the doctor if plaintiff went. (Id.) Plaintiff alleges that Culverson refused to allow

plaintiff to sign the refusal form, and "piled on a couple of his C/O worker's signatures." (Id.) Plaintiff argued that it made no sense for plaintiff to refuse to see the doctor when he previously put in fourteen different medical request slips, one medical appeal for not being seen, and several SA-22 forms requesting the status of the medical appeal, to finally get a doctor's appointment. (Id.) Plaintiff alleged that Culverson and Dr. Wedell were attempting to undermine plaintiff's right to medical care, and his right to appeal. (Id.) Meanwhile, plaintiff alleged he had continued pain and suffering. (Id.)

Plaintiff provided a copy of a May 31, 2010 letter he wrote to the Warden to complain about the handling of the refusal of treatment form, that plaintiff had been in severe pain for over four months, and had not been to the yard in two months. (Dkt. No. 80 at 76.)

On July 21, 2010, plaintiff was informed that his appeal was being returned for "abuse of the appeal procedure: California Code of Regulations, Section 3084.4." (Id. at 78.) Plaintiff was informed that he could not appeal a screening issue. (Id.)

ii. Appeal No. SAC-10-10-11472

On May 25, 2010, plaintiff filed an appeal seeking to be seen by an outside doctor at U.C. Davis Medical Center, and to have his neck and back pain addressed in a professional manner. (Dkt. No. 80 at 80.) Plaintiff noted he was attacked on January 25, 2010, and during the attack he felt a "snapping noise and a sharp pain" in his back, and that plaintiff's neck and back are stiff and sore. (Id.) Plaintiff added that at first he did not complain because he thought the pain would go away, but it did not. (Id. at 80, 82.) Plaintiff alleged he had been seeking medical care for the last four months. (Id. at 82.) Plaintiff claimed that he was seen by defendant Dr. Bobbala in February, 2010, but that the doctor punched and chopped plaintiff's back, while asking, "does that hurt?," and ended with the doctor's attempt to bend plaintiff over, despite plaintiff's complaints of pain. (Id.) Plaintiff allegedly received no medication from Dr. Bobbala. Plaintiff alleged that he continued putting in medical slips with no response. (Id.)

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On March 30, 2010, plaintiff went down, and was unable to stand. Plaintiff was carried by stretcher to B-medical to see Dr. Nangalama. Plaintiff stated that Dr. Nangalama gave plaintiff 500 mg of salsalate which did nothing for plaintiff's pain. On April 7 or 8, 2010, plaintiff was seen by Dr. Wedell; plaintiff claimed the doctor was not listening, responded "no" to every request plaintiff made, and informed plaintiff that he would not be receiving any pain medications. (Id.) However, Dr. Wedell did order treatment for plaintiff's back, but plaintiff had not received any treatments for his back or neck. (Dkt. No. 80 at 83.) Plaintiff added that Dr. Wedell told him the doctor would order staff to allow plaintiff to be handcuffed in the front, but staff told plaintiff that was not true. (Id. at 83.) Dr. Wedell ordered plaintiff a seven day prescription of 750 mg of methocarbamol. Plaintiff claimed he was suffering every day, and was unable to go to yard since March 30, 2010, due to neck and back pains. (Id.) Plaintiff stated that his back felt as though a knife was in it; it was stiff and sore all the time, and it hurt to bend, sit and stand for too long. Also, with allergy season, it hurt plaintiff's back and neck to sneeze. Plaintiff claimed that medical staff would not prescribe plaintiff allergy medication. (Id.)

On June 9, 2010, plaintiff's appeal was assigned to the Health Care Appeals Office for a First Level response. (Dkt. No. 80 at 94.)

On June 16, 2010, plaintiff's appeal was cancelled because plaintiff refused to come down to the Medical Officer's Line for his 602-appeal interview. Plaintiff was informed that "all Administrative Remedies have been exhausted." (Dkt. No. 80 at 84.) The refusal form, dated June 24, 2010, stated that plaintiff refused MD line because plaintiff had no waist chain chrono. (Id. at 86.) Plaintiff's handwritten note on the form stated:

> The handcuffs in the back causes me a lot of pain. In fact, it's difficult for me to stand or walk once the cuffs come off. I've tried over and over again to explain this problem. I need the doctor to find out why the cuffs inflame my back and neck the way it does. It did not used to be this way. The only way I can see the doctor is to cuff-up. Because I'm in ad-seg and the only way to get fixed is to see the doctor but to see the doctor under these conditions is like saying let me kick you in your back first and then you can see the doctor.

(Dkt. No. 80 at 86.)

iii. Analysis

At bottom, plaintiff claims he needed a waist chain chrono in order to go to medical without suffering undue pain from being cuffed from behind, and appears to contend this should excuse him from having to exhaust his administrative remedies. However, the record reflects that plaintiff was seen by defendant Dr. Bobbola in February of 2010. Plaintiff raised no allegations as to whether he asked defendant Dr. Bobbola for a waist chain chrono at that time. Plaintiff was seen by defendant Dr. Wedell on April 9, 2010, who told plaintiff he would need a waist chain chrono. (Dkt. No. 49 at 10.) Plaintiff did not receive his medical chrono to wear a waist chain until August 4, 2010. (Dkt. No. 1-2 at 28.) However, plaintiff points to no appeal putting prison officials on notice, prior to April 9, 2010, that plaintiff suffered severe pain when handcuffed from behind and needed a waist chain chrono. Plaintiff produced no appeal after the April 9, 2010 appointment stating that despite defendant Dr. Wedell's order, plaintiff had not yet received such chrono. It wasn't until November 5, 2010, in appeal SAC-10-10-12683, that plaintiff also contended, in the initial grievance, that he was not provided a medical chrono to be cuffed in the front or with waist chains, which appeared to interfere with his transport to physical therapy. (Dkt. No. 63-5 at 12.)

Although plaintiff raised the issue of handcuffing behind his back in subsequent objections to appeals SAC 10-10-10964 and SAC-10-10-11472, he did not raise the issue in the initial grievance in appeal SAC 10-10-10964. In appeal SAC-10-10-11472, plaintiff recounted the orders Dr. Wedell made at the April, 2010 appointment, stating that Dr. Wedell told him the doctor would order staff to allow plaintiff to be handcuffed in the front, but staff told plaintiff that was not true. (Dkt. No. 80 at 83.) Plaintiff did not include, in the action requested portion of the appeal, a request that he be granted a waist chain chrono, or that staff comply with Dr. Wedell's order for a waist chain chrono. Moreover, it does not appear that plaintiff filed a separate appeal raising the waist chain chrono issue after appeals SAC 10-10-10964 and

SAC-10-10-11472 were cancelled. The record reflects plaintiff was seen by defendant Dr. Bobbola in February, and defendant Dr. Wedell in April, and presumably plaintiff was transported to those appointments with his hands handcuffed from behind.[8]

The PLRA "does not require exhaustion when circumstances render administrative remedies 'effectively unavailable.'" Sapp, 623 F.3d at 822. An administrative remedy becomes unavailable for purposes of exhaustion if prison officials do not respond to properly filed grievances or if they otherwise use affirmative misconduct to thwart an inmate's attempts to exhaust. See Nunez, 591 F.3d at 1226; Brown, 422 F.3d at 943 n.18.

Defendants adduced evidence that appeals SAC 10-10-10964 and SAC-10-10-11472 were cancelled because plaintiff would not be escorted to medical for the appeal review. While plaintiff contends he had no choice but to refuse because he did not have a waist chain chrono and would suffer pain if handcuffed from behind, plaintiff failed to demonstrate he took steps to put prison officials on timely notice, prior to simply refusing to go to medical, that he was in need of such a chrono, or that prison officials failed to provide one after defendant Dr. Wedell ordered the chrono. While the court is sympathetic to plaintiff not wanting to increase his pain by being handcuffed from behind, prison regulations require inmates to have medical chronos when seeking to deviate from security procedure, and plaintiff failed to demonstrate that he availed himself of the processes available to justify his refusal on two occasions. While it was certainly plaintiff's prerogative to opt not to be escorted to medical under these conditions, by doing so he risked having his appeal cancelled. See Woodford, 548 U.S. at 88 (explaining that the PLRA requires proper exhaustion of administrative remedies, which means that a prisoner must complete the administrative review process in accordance with the applicable procedural rules as a precondition to bringing suit); see also Cal. Code Regs. tit.

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[8] In the June 24, 2010 refusal form, plaintiff claimed that being cuffed from behind did not previously inflame his back and neck. (Dkt. No. 80 at 86.) However, plaintiff does not indicate when this inflammation began.

15, § 3084.6(c)(8) ("An appeal may be cancelled" if "[t]he appellant refuses to be interviewed or to cooperate with the reviewer.")

Accordingly, the court finds that the circumstances surrounding appeals SAC 10-10-10964 and SAC-10-10-11472 did not render plaintiff's administrative remedies effectively unavailable.

F. Un-Numbered Appeals - Plaintiff's Exhibit 9

Plaintiff argues that his August 18, 2010 and August 26, 2010 appeals, contained in his exhibit 9 to his original complaint, demonstrate that plaintiff exhausted his administrative remedies as to defendants Virga and McCarvel.[9] (Dkt. No. 80 at 24.) Plaintiff contends he had a difficult time obtaining a complete copy of the incident report, and once he finally obtained the complete copy, his appeal was rejected as untimely.

a. August 26, 2010 Appeal

In the August 26, 2010 appeal, plaintiff filed an appeal stating that he had not received the final copy of the CDC-115 or the 128-G classification chrono. (Dkt. No. 1-2 at 32.) Plaintiff asked that he be given copies of those documents. Plaintiff does not discuss the January 26, 2010 incident, or allege facts pertinent to the instant claims against defendants Virga and McCarvel. Thus, this appeal cannot serve to exhaust plaintiff's claims as to defendants Virga and McCarvel.

b. August 18, 2010 Appeal

In the August 18, 2010 appeal, plaintiff sought a rehearing of the RVR so he could tell his side of the story. (Dkt. No. 1-2 at 27.) Plaintiff also sought a transfer, and "some medical assistance for his back and nightmares, and an explanation why [he] could not be let out of the cell before [his] injuries occurred." (Id.) Plaintiff began describing the problem by stating he

[9] Plaintiff also provided a copy of his August 18, 2010 appeal as Exhibit 5 to his opposition, and a copy of his August 26, 2010 appeal as Exhibit 10 to his opposition. (Dkt. No. 80 at 38-41; 63-64.)

was issued a CDC 115, Log No. C-10-01-033 ("RVR") on January 26, 2010. (Id.) Plaintiff stated that he cannot wear handcuffs in the back, but did not receive his medical chrono to wear a waist chain until August 4, 2010, so on July 3, 2010, the hearing lieutenant would not allow plaintiff to use a waist chain. (Id. at 28.) Thus, plaintiff alleged he was not allowed to present a defense. (Id.) On August 12, 2010, Officer A. Johnson gave plaintiff a 629-A SHU term assessment worksheet, which plaintiff did not understand, and claimed that on July 7, 2010, a classification hearing was held without his presence again because he did not have a medical chrono for waist chains. Plaintiff claimed that because he was unable to attend the hearing, he was not aware of the guilty finding until August 18, 2010. (Id.) Plaintiff alleged he still had not received the final copy of the CDC 115 or the 128-G chrono for the July 7, 2010 classification action.

Plaintiff then recounted the events of January 26, 2010, and alleged that defendant McCarvel's orders put plaintiff's life in danger, and that his compliance with defendant McCarvel's order left plaintiff defenseless against inmate Wilson. (Dkt. No. 1-2 at 29.) Plaintiff alleged that inmate Wilson suffers from a range of mental disorders, and had since been returned to EOP housing and single cell status. Plaintiff stated that "classification knew or should have known that Wilson could not be housed with [plaintiff]." (Dkt. No. 1-2 at 29.)

On August 31, 2010, plaintiff's appeal was returned to plaintiff with a screening form noting that plaintiff had not adequately completed the appeal form, and asking plaintiff to attach the CDC 115 "After Completion of RVR." (Dkt. No. 1-2 at 30.) The appeals coordinator also noted that plaintiff's "request for transfer and medical assistance require separate appeals; please remove heading from appeal form or submit new appeal." (Id.)

Plaintiff also provided the court with an inmate request for interview form in which he sought the final copy of the CDC-115 dated January 26, 2010, Log No. C10-01-033, and incident reported dated January 26, 2010, Log No. SAC-FAC-10-01-0059, as well as the 128-G for the 7-7-10 and 8-18-10 classifications. (Dkt. No. 1-2 at 31.) The form was initially

dated 8-19-10, but the "19" is crossed out, and "26" is written above. There are no marks indicating the form was received by prison officials. (Id.)

On October 5, 2010, plaintiff sought transfer to a prison of his choice, and an investigation into the contents of his appeal. Plaintiff alleged that in late February or early March of 2010, Correctional Officer Scruggs issued plaintiff a CDCR incident report concerning the January 26, 2010 incident, and after reading the report, plaintiff decided to mail the original copy of the incident report out of the prison because he believed there would be "foul play" after he filed an appeal. (Dkt. No. 1-2 at 40.) On July 1, 2010, plaintiff was issued a copy of the Investigative Employee Report, related to the January 26, 2010 incident, and a copy of the January 26, 2010 incident report. (Id. at 41.) However, upon closer inspection, plaintiff determined the incident report was "fake,"[10] and threw it onto the tier, but a correctional officer returned it. The first two pages of the report had come loose, and plaintiff stored those pages in a different location, but left the rest of the report on his desk. On August 25, 2010, plaintiff was allegedly ordered out of his cell so the cable guy could fix the cable box, and had to leave his cell for about an hour and a half. On September 30, 2010, a nondefendant correctional officer delivered mail, handing plaintiff a large yellow envelope that was open. Plaintiff contended the envelope contained a copy of the "fake" incident report that was sitting on plaintiff's desk because it was missing the first two pages. Plaintiff alleged this incident demonstrated an attempted cover-up regarding the events of January 26, 2010. (Id. at 41-42.) Plaintiff named numerous correctional officers in this appeal, but none of them are named defendants in this action. Plaintiff did not name defendant McCarvel, or raise allegations concerning the specific events of January 26, 2010, or regarding plaintiff's failure to protect claim. (Dkt. No. 1-2 at 40-42.)

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[10] Plaintiff did not explain in what way he believed the report to be "fake."

On October 8, 2010, plaintiff's October 5, 2010 appeal was screened out, stating that plaintiff failed to adequately complete the appeal form, and that plaintiff was required to attach a copy of his most recent CDC-128G regarding classification, and that requests for transfers needed to be submitted on a different form. (Id. at 44.)

Plaintiff's October 24, 2010 request for interview stated that plaintiff's October 5, 2010 appeal was about staff taking legal documents out of his mail. (Dkt. No. 1-2 at 43.) Subsequent requests and documents re-confirmed that plaintiff's October 5, 2010 appeal was about staff allegedly "stealing" legal documents out of plaintiff's mail. (Id. at 47, 49, 50, 56, 58.)

An inmate who has "properly" availed himself of the state's administrative process through the highest available administrative level satisfies the exhaustion requirement. Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005). That is, inmates must file their grievance claims and appeals in the place, at the time, and in the manner the administrative rules require. Woodford, 548 U.S. at 94; see, e.g., Cal. Code Regs., tit. 15, § 3084.2(c) (an initial grievance must be submitted within fifteen working days of the event giving rise to the grievance). The appeals coordinator may reject untimely grievances. Cal. Code Regs., tit. 15, § 3084.6(c). A claim rejected as untimely or as otherwise procedurally defective remains unexhausted for PLRA purposes. Woodford, 548 U.S. at 83-86, 90-91, 103 (defective claims or appeals rejected as defective do not satisfy the exhaustion requirement, considering "the informality and relative simplicity of prison grievance systems like California's"). "The obligation to exhaust 'available' remedies persists as long as some remedy remains 'available.'" Brown, 422 F.3d at 935, citing Booth, 532 U.S. 731 (a prisoner must "press on to exhaust further levels of review" until he has either received all "available" remedies at an intermediate level of review "or been reliably informed by an administrator that no remedies are available").

However, the Ninth Circuit has held California prison regulations "explicitly create an exception to the timely filing requirement. If [a prisoner] was unable to file within the fifteen-day filing period, his failure to file timely does not defeat his claim." Marella v. Terhune,

568 F.3d 1024, 1027 (9th Cir. 2009). Nevertheless, [i]f a prisoner had full opportunity and ability to file a grievance timely, but failed to do so, he has not properly exhausted his administrative remedies." Id. at 1028 (citing Woodford, 548 U.S. at 88).

Because the court previously found that appeal SAC-10-00226 exhausted plaintiff's claim as to defendant Virga, the court need not address whether plaintiff's August 18, 2010 appeal exhausted plaintiff's claim as to defendant Virga.

With regard to defendant McCarvel, it appears plaintiff was under the misapprehension that he could not file an appeal concerning defendant McCarvel's actions on January 26, 2010, until the RVR was decided. Unfortunately, plaintiff was mistaken. Plaintiff's due process challenge to the RVR, as well as his challenge to the guilty finding, were issues separate from plaintiff's claim that defendant McCarvel failed to protect plaintiff from inmate Wilson's attack. The RVR alleged that plaintiff committed battery on his cellmate with a weapon with serious bodily injury. (Dkt. No. 80 at 52.)

Here, defendant McCarvel responded to plaintiff's cell on January 26, 2010, and plaintiff alleges defendant McCarvel failed to protect plaintiff from inmate Wilson's attack. However, plaintiff did not file this appeal until August 18, 2010, claiming that defendant McCarvel failed to protect plaintiff. Thus, plaintiff's appeal was untimely under CDCR regulations, as it was not presented fifteen working days after January 26, 2010. It appears that after plaintiff was seen in the C Facility clinic for medical evaluation, he was re-housed into administrative segregation pending investigation. (Dkt. No. 80 at 54.) Thus, it does not appear plaintiff was prevented from filing an appeal alleging defendant McCarvel failed to protect plaintiff.

However, prison officials did not screen out plaintiff's August 18, 2010 appeal as untimely. Rather, the appeals coordinator marked the box, noting plaintiff had not adequately completed the appeal form or attached the property documents, and the box "CDC 115 After Completion of RVR." (Dkt. No. 1-2 at 30.) Although the RVR was completed on August 8,

2010 (dkt. no. 80 at 53), it was not entered into OBIS until August 18, 2010 (id. at 52), which might explain the reference to "after completion of RVR." However, the appeals coordinator also noted that plaintiff's "request for transfer and medical assistance require separate appeals; please remove heading from appeal form or submit new appeal." (Id.) It is a violation of California Code of Regulations, Title 15, section 3084.2(a)(1) to file an appeal combining issues. In the August 18, 2010 appeal, plaintiff raised multiple issues. Thus, plaintiff's August 18, 2010 appeal was properly screened out, and cannot serve to exhaust plaintiff's claim against defendant McCarvel.

Plaintiff did not file a subsequent appeal challenging defendant McCarvel's actions on January 26, 2010. Thus, the court finds that plaintiff failed to exhaust his administrative remedies as to defendant McCarvel.

G. State Law Claims

Defendants request that the court take judicial notice of the records and claims contained in the files of the Victim Compensation and Government Claims Board ("VCGCB"). (Dkt. No. 67.) Defendants provided a declaration from Eric Rivera, Custodian of Records for the VCGCB, who reviewed, and appended copies of, plaintiff's claim received on August 15, 2011. (Dkt. No. 67-1 at 2-17.) Mr. Rivera determined that plaintiff's claim was not accompanied by the required filing fee, or an affidavit or request for waiver of the filing fee, and therefore the claim was not accepted by the VCGCB as a government claim. (Id.) Defendants contend that plaintiff's state law claims should be dismissed on that basis.

Plaintiff believes that he did submit a fee waiver form, and states he will submit a second fee waiver form as soon as possible. (Dkt. No. 80 at 21.)

Under the California Tort Claims Act ("CTCA"), set forth in California Government Code sections 810 et seq., a plaintiff may not bring a suit for monetary damages against a public employee or entity unless the plaintiff first presented the claim to the California Victim Compensation and Government Claims Board ("VCGCB" or "Board"), and the Board

acted on the claim, or the time for doing so expired. "The Tort Claims Act requires that any civil complaint for money or damages first be presented to and rejected by the pertinent public entity." Munoz v. California, 33 Cal. App. 4th 1767, 1776 (1995). The purpose of this requirement is "to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." City of San Jose v. Superior Court, 12 Cal.3d 447, 455 (1974) (citations omitted). Compliance with this "claim presentation requirement" constitutes an element of a cause of action for damages against a public entity or official. State v. Superior Court (Bodde), 32 Cal. 4th 1234, 1244 (2004). Thus, in the state courts, "failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." Id. at 1239 (fn. omitted).

Consistently, federal courts require compliance with the CTCA for pendant state law claims that seek damages against state public employees or entities. Willis v. Reddin, 418 F.2d 702, 704 (9th Cir. 1969); Mangold v. California Public Utilities Commission, 67 F.3d 1470, 1477 (9th Cir. 1995). State tort claims included in a federal action, filed pursuant to 42 U.S.C. § 1983, may proceed only if the claims were first presented to the state in compliance with the claim presentation requirement. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 627 (9th Cir. 1988); Butler v. Los Angeles County, 617 F. Supp. 2d 994, 1001 (C.D. Cal. 2008).

To be timely, a claim must be presented to the VCGCB "not later than six months after the accrual of the cause of action." Cal. Govt. Code § 911.2. Should a claimant miss this deadline, the claimant may file a written application for leave to file a late claim, within a year after the accrual of the cause of action. Id., § 911.4. If the Board denies the application, the notice of denial must include a warning to the claimant that no court action may be brought on the claim unless the claimant first files a petition with the appropriate court requesting relief from the claim presentation requirement, and obtains a court order granting such relief. Id., § 911.8. Failure to obtain such relief bars any suit on the claim.

An individual who files a claim pursuant to the CTCA is charged with knowledge of the applicable statute of limitations. See Hunter v. Los Angeles County, 262 Cal. App. 2d 820, 822 (1968) ("once a claimant has filed his claim, he demonstrates familiarity with the statutory procedures governing his grievance, and can reasonably be charged with knowledge of the time limitations that are part of that procedure").

First, defendants' request for judicial notice is granted. (Dkt. No 67.)

Second, it appears that plaintiff is correct. Review of the forms submitted by Mr. Rivera reflect that plaintiff appended a completed affidavit for waiver of government claims filing fee and financial information form, and was marked received on the same day as his first claim, August 15, 2011, on form VCGCB-GC-0010 8/04, and bears the VCGCB claim number, G599138, which was also written on the claim form. (Dkt. No. 67-1 at 6-7.)[11] Thus, despite Mr. Rivera's declaration claiming that plaintiff failed to submit "an affidavit or request for waiver of the filing fee," it appears from the documents appended to Mr. Rivera's declaration, that plaintiff did submit such a form. Because the defendants' motions to dismiss plaintiff's state law claims is based on plaintiff's alleged failure to comply with the claim presentation requirements of the California Government Claims Act, and the declaration upon which they rely appears internally inconsistent with the exhibits appended thereto, the court recommends that the motions to dismiss plaintiff's state law claims be denied without prejudice should defendants be able to clarify the inconsistency or address the timeliness or substance of plaintiff's claim.[12]

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[11] Mr. Rivera similarly declares that plaintiff's second, unrelated, claim G604262 was not accompanied by the filing fee or an affidavit or request for waiver of the filing fee, but the appended documents provide a copy of the completed affidavit/waiver form signed by plaintiff, received by the VCGCB on the same day as the claim, and bearing the same claim number. (Dkt. No. 67-1 at 8-13.)

[12] In his opposition, plaintiff complains that defendants did not inform plaintiff that there was a problem with his claim form, and that if there was a problem, the defendants should have returned plaintiff's application with an explanation for why plaintiff's application could not be processed. (Dkt. No. 80 at 14-15.) However, the VCGCB is not part of the CDCR, and defendants are under no such obligation.

IV. Conclusion

In accordance with the above, IT IS HEREBY ORDERED that defendants' request for judicial notice is granted (dkt. no 67); and

IT IS RECOMMENDED that:

1. Defendants' motions to dismiss (dkt. nos. 63 & 84) be granted in part, and denied in part, as follows:

a. Defendants' motion to dismiss plaintiff's failure to protect claims as to defendants Elston, Virga, and Dr. Chen be denied;

b. Defendants' motion to dismiss plaintiff's Eighth Amendment claims as to defendants Dr. Wedell and Dr. Ali be denied as to plaintiff's claims that he was not timely provided physical therapy or a waist chain chrono;

c. Defendants' motion to dismiss plaintiff's state law claims be denied without prejudice; and

d. In all other respects, defendants' motion to dismiss be granted based on plaintiff's failure to exhaust his claims as to defendants McCarvel, Dr. Bobbala, Dr. Nangalama, Dr. Dhillon, and Dr. Duc.

2. Defendants Phelps, Elston, Virga, Dr. Chen, Dr. Wedell, and Dr. Ali be directed to file an answer within fourteen days from any district court order adopting the instant findings and recommendations.

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 fourteen 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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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: March 6, 2013

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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