



1 prison life and prison officials, and because he corresponds with public officials, files grievances  
2 and pursues litigation to vindicate his rights, defendants have threatened to transfer him, brought  
3 false allegations against him, interfered with his access to his publisher and to government  
4 officials, and stolen, destroyed, hidden, delayed and otherwise interfered with plaintiff's mail.  
5 Plaintiff seeks money damages, including punitive damages.

## 6 II. MOTION TO DISMISS

7 Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim  
8 as to defendant Schroeder, and for failure to exhaust administrative remedies under  
9 nonenumerated Rule 12(b) as to defendants O'Brien and Stratton. Motion to Dismiss (MTD),  
10 ECF No. 85.

11 Plaintiff stipulates to the dismissal of defendants Schroeder and O'Brien. Opposition  
12 (Opp.), ECF No. 88 at 1. Plaintiff thus opposes the motion only as to defendant Stratton. Id.

### 13 A. Legal Standard Non-Enumerated FRCP 12(b) Motion to Dismiss

14 Pursuant to the Prison Litigation Reform Act ("PLRA"):

15 No action shall be brought with respect to prison conditions under  
16 section 1983 of this title, or any other Federal law, by a prisoner  
17 confined in a jail, prison, or other correctional facility until such  
administrative remedies as are available are exhausted.

18 42 U.S.C. § 1997e (a); see also Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009); Brown v.  
19 Valoff, 422 F.3d 926, 934 (9th Cir. 2005) (The PLRA "creates 'a general rule of exhaustion' for  
20 prisoner civil rights cases.") (quoting Porter v. Nussle, 534 U.S. 516, 525 n.4 (2002)).

21 Compliance with the exhaustion requirement is mandatory for any type of relief sought.  
22 Booth v. Churner, 532 U.S. 731, 739, 741 (2001) (holding that prisoners must exhaust their  
23 administrative remedies regardless of the relief they seek, i.e., whether injunctive relief or money  
24 damages, even though the latter is unavailable pursuant to the administrative grievance process);  
25 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam); accord Jones v. Bock, 549  
26 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and  
27 that unexhausted claims cannot be brought in court."); see also Panaro v. City of North Las  
28 Vegas, 432 F.3d 949, 954 (9th Cir. 2005) (The PLRA "represents a Congressional judgment that

1 the federal courts may not consider a prisoner’s civil rights claim when a remedy was not sought  
2 first in an available administrative grievance procedure.”).

3 “Proper exhaustion demands compliance with an agency’s deadlines and other critical  
4 procedural rules[.]” Woodford v. Ngo, 548 U.S. 81, 90 (2006). The PLRA’s exhaustion  
5 requirement cannot be satisfied “by filing an untimely or otherwise procedurally defective  
6 administrative grievance or appeal.” Id. at 83-84. All steps must be completed before a civil  
7 rights action is filed. McKinney, 311 F.3d at 1200; but see Rhodes v. Robinson, 621 F.3d 1002  
8 (9th Cir. 2010) (PLRA exhaustion requirement satisfied with respect to new claims within an  
9 amended complaint so long as administrative remedies exhausted prior to filing amended  
10 complaint). “The level of detail necessary in a grievance to comply with the grievance  
11 procedures will vary from system to system and claim to claim, but it is the prison’s  
12 requirements, and not the PLRA, that define the boundaries of proper exhaustion.” Jones, 549  
13 U.S. at 218. Further,

14 A grievance need not include legal terminology or legal theories  
15 unless they are in some way needed to provide notice of the harm  
16 being grieved. A grievance also need not contain every fact  
17 necessary to prove each element of an eventual legal claim. The  
primary purpose of a grievance is to alert the prison to a problem  
and facilitate its resolution, not to lay groundwork for litigation.

18 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009); see also McCollum v. CDCR, 647 F.3d  
19 870, 876 (9th Cir. 2011) (“While an inmate need not articulate a precise legal theory, a grievance  
20 must alert the prison to the nature of the wrong for which redress is sought.”).

21 The PLRA’s exhaustion requirement is not jurisdictional; rather, it creates an affirmative  
22 defense that a defendant may raise in an unenumerated Rule 12(b) motion. See Jones, 549 U.S. at  
23 213-14; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), cert. denied, 540 U.S. 810 (2003).  
24 The defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315  
25 F.3d at 1119. When a prisoner has not exhausted administrative remedies on a claim, “the proper  
26 remedy is dismissal of the claim without prejudice.” Id. at 1120.

27 In deciding a motion to dismiss for failure to exhaust, a court may “look beyond the  
28 pleadings and decide disputed issues of fact.” Wyatt, 315 F.3d at 1119-20.

1           B. California Prisons' Grievance Procedures

2           California regulations allow a prisoner to appeal any action or decision by a prison official  
3 that adversely affects the prisoner's welfare. 15 Cal.Code Regs. § 3084.1(a). Prior to January 28,  
4 2011, to exhaust a grievance, an inmate had to pursue his appeal through four levels, one  
5 "informal" and three "formal." Id. at §§ 3084.5, 3084.1(a) (2009); Barry v. Ratelle, 985 F. Supp.  
6 1235, 1237 (S.D. Cal. 1997). An inmate was required to file the initial grievance within 15  
7 working days of the action being appealed, and file each administrative appeal thereafter within  
8 15 working days of receiving an adverse decision at a lower level. Id. at § 3084.6(c) (2009).

9           The CDCR's administrative exhaustion procedure was modified by amendment on  
10 December 13, 2010, becoming operative on January 28, 2011. See 15 Cal.Code Regs. § 3084 .7.  
11 In order to exhaust, an inmate must proceed through the following levels of review: (1) first level  
12 written appeal on a CDCR 602 inmate appeal form ("appeal" or "602") (which level may be  
13 bypassed by the appeals coordinator in certain instances not implicated here), (2) second level  
14 appeal for review by "the hiring authority or designee at a level no lower than Chief Deputy  
15 Warden, Deputy Regional Parole Administrator, or the equivalent" and (3) third level appeal to  
16 the Secretary of the California Department of Corrections and Rehabilitation for review by the  
17 Office of the Chief of Inmate Appeals. 15 Cal.Code Regs. §§ 3084.2, 3084.7. The third level of  
18 review satisfies the exhaustion requirement. Id.

19           Under 15 Cal. Code Regs. § 3084.5(b)(4), an appeal describing illegal, unethical or  
20 otherwise improper staff behaviors may be processed as a routine appeal, a staff complaint appeal  
21 inquiry or referred to Internal Affairs for an investigation. An inmate is to be notified by the  
22 appeals coordinator that unrelated matters in an appeal processed as a staff complaint must be  
23 separately appealed in order to be resolved. Id. at § 3084.9(i)(2).<sup>1</sup>

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26 <sup>1</sup> "When an appeal is accepted alleging staff misconduct that also includes any other issue(s), the  
27 appeals coordinator at the time the appeal is accepted as a staff complaint shall notify the inmate  
28 or parolee that any other appeal issue(s) may only be appealed separately and therefore  
resubmission of those issues is required if the intention is to seek resolution of such matters. Upon  
receiving such a notice, the inmate or parolee has 30 calendar days to submit separate appeal(s)  
regarding the other issue(s)." 15 Cal. Code Regs. § 3084.9(i)(2)

1           C. Analysis

2           Defendant Stratton contends that plaintiff failed to exhaust administrative remedies as to  
3 any claim against him. Defendant produces evidence that plaintiff filed forty-three inmate  
4 appeals between 2008 and September 30, 2013 (the filing date of the SAC). Of these, eight were  
5 withdrawn, one was cancelled, fourteen were granted in whole or (more often) in part, and twenty  
6 were denied, four of those at the third level. During the same time period plaintiff submitted  
7 thirty additional appeals that were screened out for procedural defects. MTD, ECF No. 85-2  
8 (Declaration of J. Lynch, CSP-Sac appeals coordinator).

9                   1.       Exhaustion of Plaintiff's First Claim for Relief Against Stratton

10           In his First Claim for relief, plaintiff alleges specific retaliatory acts committed by the  
11 defendants individually. Here plaintiff alleges that on April 17, 2009, Stratton convinced  
12 plaintiff's cellmate Alonso Dearujo to falsely claim that Manning had raped him. Dearaujo later  
13 admitted this was a lie which Stratton had put him up to. SAC ¶ 33(g). The First Claim for  
14 Relief also incorporates the allegation that on October 30, 2012, the first day after Stratton was  
15 assigned control of plaintiff's building, Stratton ordered plaintiff from work to lockdown in  
16 retaliation for plaintiff's books, correspondence with attorneys and officials and for filing the  
17 instant lawsuit. Id. at ¶14.

18           Defendant has made a preliminary showing that none of plaintiff's appeals that reached  
19 the third level complained of these incidents. Plaintiff has pointed to no appeal of either incident  
20 that might satisfy the exhaustion requirement. At argument on the motion, plaintiff's counsel  
21 acknowledged that neither of these discrete incidents had been appealed through the third level.  
22 Accordingly, the undersigned recommends that plaintiff's First Claim for Relief be dismissed for  
23 lack of exhaustion as against defendant Stratton.

24                   2.       Exhaustion of Plaintiff's Second Claim for Relief Against Stratton

25           Plaintiff's conspiracy claim presents a different situation. Plaintiff alleges that Stratton  
26 conspired with defendants Ralls, Wenker, Humphries and Johnson, as well as former defendant  
27 Jiminez, in a campaign to suppress plaintiff's speech by interfering with his mail and book sales  
28 and by subjecting him to harassment. The SAC makes specific allegations of statements made by

1 various co-conspirators reflecting the existence of an agreement among them. See, e.g., SAC ¶  
2 12 (statement by Ralls reflecting conspiracy with others including Stratton), ¶ 19 (statement by  
3 Johnson reflecting conspiracy with others including Stratton). The Second Claim for Relief  
4 incorporates the various alleged acts of individual defendants as overt acts in furtherance of the  
5 conspiracy. Stratton is implicated in the systematic interference with plaintiff's mail, writing,  
6 publishing, and access to public officials and the courts.

7 Defendant contends in essence that the conspiracy claim as to Stratton is unexhausted  
8 because no inmate appeal or combination of appeals exhausted every conspiracy-related  
9 allegation as to him. That is not the standard, however. Plaintiff is required to exhaust his  
10 administrative remedies in such a way as to provide prison officials with "adequate notice of the  
11 problem for which the prisoner seeks redress." Griffin, 557 F.3d at 1120. Here, that problem was  
12 a conspiracy of harassment intended to stop plaintiff from writing, publishing, and complaining.  
13 Because the conspiracy claim was newly added in the Second Amended Complaint, it must have  
14 been exhausted prior to the filing of that pleading on September 30, 2013. See Rhodes, supra,  
15 621 F.3d 1002.

16 Plaintiff contends that the requisite notice of the conspiracy claim against Stratton was  
17 provided by three grievances that were filed prior to the Second Amended Complaint: Log No.  
18 SAC-09-01147; Log No. SAC-12-01401; and Log No. SAC-13-00336. ECF No. 88 at 4. The  
19 court discusses these in turn.

20 a. Log No. SAC-12-01401

21 This appeal, filed May 14, 2012 and denied at the third level, alleges "threats to transfer,  
22 lock up and retaliate." Def. Ex. 36, ECF No. 85-11 at 12. In it plaintiff recounts specific  
23 retaliatory threats made by Officer Clink on behalf of an unspecified group of prison staff, as  
24 reflected by the use of the first person plural:

25 [Officer Clink] said he is a friend of A.W. Mike Bunnell and they  
26 have friends in every prison. And if I don't forget book writing  
27 he'd be sure I'd get locked up and/or transferred. He stated that the  
28 "mail scam was not about you. We stole 200 inmates mail. You  
are not special. But this is Folsom. We will lock you up and  
pretend it is for your safety. We will give you a celly that we  
choose and use him to set you up. We'll use a 'kite' to set you up.

1 Leave the book writing alone. And don't mention mail anymore. . .  
2 And we will leave you alone.”

3 Id. at 13.

4 Plaintiff requested an investigation into the extent of the conspiracy against him. Id. In  
5 submitting the appeal to the second level, plaintiff alleged that the retaliation was continuing and  
6 specifically named defendant Stratton as one of the conspirators: “When Sgt. Stratton takes over  
7 Bldg 8 (in October) they will get me. I must stop writing books.” Id. at 14. In taking the appeal  
8 to the third level plaintiff again elaborated his allegations and named additional officers,  
9 defendants here, who were alleged to have participated in the plot against him. Id. (naming  
10 Officers Crouch and Wenke). Contrary to defendant’s argument, the addition of details during  
11 the course of an appeal does not defeat exhaustion. Plaintiff did not change the substance of his  
12 complaint, or add details that rendered the issue entirely new. See 15 Cal. Code Regs. §  
13 3084.6(b)(16) (appeal may be rejected when “[t]he appeals issue or complaint emphasis has been  
14 changed at some point in the process to the extent that the issue is entirely new, and the required  
15 levels of review and assessment have thereby been circumvented.”).

16 This appeal put prison officials on notice that plaintiff alleged a conspiracy among  
17 institutional staff, including defendant Stratton, to retaliate against him for his writing and his  
18 appeals of issues with the mail. Plaintiff’s failure to identify Stratton by name at the first level is  
19 not fatal to exhaustion. See Jones, 549 U.S. at 217 (“[N]othing in the [PLRA] imposes a “name  
20 all defendants’ requirement.”). This appeal alleged with reasonable specificity the existence of an  
21 organized campaign to punish plaintiff for protected conduct by interfering with his mail, locking  
22 him up, transferring him, and setting him up for false charges. Accordingly, the undersigned  
23 finds that this appeal exhausted the conspiracy claim.

24 b. Log No. SAC-13-00336

25 This appeal, which was pursued through the third level, challenged the opening of legal  
26 mail (“2 missives from Yale Law School”) outside plaintiff’s presence. Plaintiff asked for a mail  
27 room audit “to ensure mail is not being stashed, stolen and shredded again.” Def. Ex. 42, ECF  
28 No. 85-12 at 29. This request for action made it clear that plaintiff was complaining not only

1 about the handling of two specific pieces of mail, but about the handling of mail generally. In  
2 pursuing the appeal to the second and third levels, plaintiff explained that the interference with  
3 his mail was part of an ongoing pattern of retaliatory conduct involving Couch, Wenke, Bunnell,  
4 Statton, et al. Id. at 30-32. This appeal provided additional notice of plaintiff's conspiracy claim  
5 and of defendant Statton's alleged involvement in the conspiracy.

6 c. Log No. SAC-09-01147

7 Plaintiff points to this appeal of a forfeiture of credits and canteen privileges, in which he  
8 alleged that due process had been violated in relation to a disciplinary the hearing. Def. Ex. 10,  
9 ECF No. 85-4 at 57.<sup>2</sup> The underlying disciplinary charge of Delaying a Peace Officer's Duties  
10 had been brought by Sgt. Statton. Id. at 65-67. Because the appeal addressed the violation of  
11 time limits and other procedural matters related to the disciplinary process, and did not  
12 substantively challenge the disciplinary charge or Sgt. Statton's conduct, this appeal had no  
13 exhaustion effect as to plaintiff's conspiracy claim.

14 d. Log No. SAC-13-00817

15 Although not raised by plaintiff, the court has identified this appeal as relevant to the  
16 exhaustion analysis. The appeal complained of a missing or undelivered book, and specifically  
17 alleged that the book was withheld in retaliation for plaintiff's "lawsuit against the mailroom."  
18 Def. Ex. 43, ECF No. 85-12 at 36-37. In his explanation of the issue, plaintiff wrote: "On 3/13/13  
19 Sgt. Stratton stated that my books and mail will continue to come up missing until I drop my  
20 lawsuit against him. Stratton stated I could end up transferred, in ad-seg and/or with a new celly  
21 if I did not drop my lawsuit against him." Id. at 37. He also commented, "Sgt. Stratton must be  
22 instructed to discontinue retaliating and the mailroom also must cease stealing my mail." Id. The  
23 latter comment was included in the explanation of the issue. Under "action requested," plaintiff  
24 stated that he wanted his book either delivered or replaced. Id.

25 This appeal was partially granted at the second level, and plaintiff was reimbursed for the  
26 book. Id. at 52-53. Having received relief, plaintiff was not obliged to pursue the matter to the  
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28 <sup>2</sup> Plaintiff's citation to the relevant exhibit, ECF No. 88 at 4, is inaccurate.



1 third level in order administratively exhaust. See Harvey v. Jordan, 605 F.3d 681, 685 (9th Cir.  
2 2010) (“[a]n inmate has no obligation to appeal from a grant of relief, or a partial grant that  
3 satisfies him, in order to exhaust his administrative remedies.”). Defendant argues that the partial  
4 grant at the second level exhausts only the issue of the undelivered book and not the claim of  
5 retaliation by Stratton, but at hearing on the motion counsel for defendant was unable to identify  
6 any further relief that plaintiff could have obtained by pursuing the matter further. Accordingly,  
7 further exhaustion was not required. See Brown v. Valoff, 422 F.3d at 935 (an inmate “need not  
8 press on to exhaust further levels of review” if he has received all “available” remedies at an  
9 intermediate level or “been reliably informed” by an official that no such remedies are available).

10 Consideration of these inmate appeals leads to the conclusion that plaintiff  
11 administratively exhausted his claim that Sgt. Stratton conspired to retaliate against him. Log  
12 Nos. SAC-12-01401, SAC-13-00336 and SAC-13-00817 were sufficient to “alert[] the prison to  
13 the nature of the wrong for which redress is sought.” Griffin v. Arpaio, 557 F.3d at 1120.  
14 Accordingly, the court need not and does not address the factual dispute created by the parties’  
15 competing declarations on the question whether plaintiff attempted to file an appeal in February  
16 of 2013 alleging that defendant Stratton had pulled a baton on plaintiff and threatened him.<sup>3</sup>

#### 17 CONCLUSION

18 For the reasons explained above, defendant Stratton’s motion to dismiss should be granted  
19 as to the first claim for relief and denied as to the second claim for relief. Because defendant  
20 Stratton has already answered the Second Amended Complaint, there need be no further order in  
21 that regard. Because the motion to dismiss is unopposed as to defendants Schroeder and O’Brien,  
22 it should be granted in full as to them.

23 Accordingly, IT IS RECOMMENDED that the motion to dismiss brought by defendants  
24 Schroeder, Stratton and O’Brien (ECF No. 85) be granted in part and denied in part as follows:

- 25 1. Granted as to defendants Schroeder and O’Brien;
- 26 2. Granted as to Claim 1 against defendant Stratton; and

27 \_\_\_\_\_  
28 <sup>3</sup> See ECF No. 88-1 (Declaration of Plaintiff Sherman Manning); ECF No. 89 at 7-8 (Declaration  
of T. Woods); ECF No. 89 at 10-11 (Declaration of B. Arent).

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3. Denied as to Claim 2 against defendant Stratton.

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)(1). 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 reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Courts order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 1, 2014

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE