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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WARREN FRANK, JR.,  
Plaintiff,  
v.  
JEFF MACOMBER, et al.,  
Defendants.

No. 2:15-cv-2133 CKD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. The claims which remain are for excessive force in violation of the Eighth Amendment against defendants Shinnette and Mohr (defendants). The claims arise out of events occurring March 17, 2015 at California State Prison, Sacramento. Defendants have filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure arguing plaintiff failed to exhaust administrative remedies with respect to his remaining claims prior to filing suit.

Section 1997(e)(a) of Title 42 of the United States Code provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997(e)(a). Administrative procedures generally are exhausted with respect to the California prisoner grievance process once the third level of review is complete. The third level of review constitutes the decision of the

1 Secretary of the California Department of Corrections and Rehabilitation (CDCR). Cal. Code  
2 Regs. tit. 15, § 3084.7.

3 The exhaustion requirement demands “proper” exhaustion. Woodford v. Ngo, 548 U.S.  
4 81, 90-91 (20016). In order to “properly exhaust” administrative remedies the prisoner must  
5 generally comply with the prison’s procedural rules throughout the administrative process. Jones  
6 v. Bock, 218 U.S. 199, 218 (2006).

7 Dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to  
8 exhaust administrative remedies is appropriate only if it is clear on the face of a complaint that  
9 administrative remedies have not been exhausted. Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir.  
10 2014). Material properly attached to a complaint is generally considered part of the complaint  
11 when considering whether the court should dismiss a complaint under Rule 12(b)(6). See Hal  
12 Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989).<sup>1</sup>

13 Attached to his complaint is a copy of the grievance plaintiff submitted concerning the  
14 alleged use of excessive force by defendants at issue in this case. ECF No. 1 at 33-36. Plaintiff  
15 ultimately submitted his grievance to the third level of review, but the grievance was rejected on  
16 August 26, 2015 because plaintiff failed to submit a medical report he references in his grievance  
17 as required by CDCR regulations. Id. at 8, 34. Plaintiff was given instructions as to how he  
18 could obtain the required document if he did not possess it and told he could resubmit his  
19 grievance once he did so. Id. at 8. There is nothing in plaintiff’s pleadings indicating he ever  
20 resubmitted his grievance to the third level and therefore he never “properly” exhausted  
21 administrative remedies.

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23 <sup>1</sup> Exhibits attached to defendants’ motion to dismiss and plaintiff’s opposition are not proper for  
24 consideration, except to the extent the exhibits are also attached to plaintiff’s complaint. Also,  
25 defendants ask that the court take judicial notice “of the fact that Plaintiff failed to exhaust  
26 administrative remedies before filing suit relative to Appeal Log No. SAC-15-1546.” ECF No.  
27 16. This is the ultimate issue to be decided with respect to defendants’ motion to dismiss and the  
28 court will rule on that issue within the confines of the motion to dismiss. Defendants’ request for  
judicial notice is denied as the fact that they request be noticed is not “generally” known within  
the jurisdiction of this court (e.g. the Sacramento River separates Sacramento from West  
Sacramento), nor can it be readily be determined from sources whose accuracy cannot reasonably  
be questioned (e.g. the court’s docket). See Fed. R. Evid. 201(b).

1 In his opposition, plaintiff argues he was not required to proceed to the third level because  
2 his grievance was “partially granted” at the second level. However, the appeal was granted only  
3 to the extent plaintiff requested an inquiry into the actions of defendants. The appeal was denied  
4 with respect to plaintiff’s request that “they be held accountable for their actions.” Id. at 9.  
5 Plaintiff was specifically informed at the second level that it was the decision of the reviewer that  
6 defendants did not violate CDCR policy, and that plaintiff could appeal that decision to the third  
7 level. Id. at 9-10. Plaintiff was also specifically informed that administrative remedies would  
8 not be deemed “exhausted” until a decision had been rendered at the third level. Id.

9 For all of the foregoing reasons, it is clear from plaintiff’s complaint, and documents  
10 attached thereto, that plaintiff failed to exhaust administrative remedies with respect to his  
11 remaining claims prior to filing suit. Accordingly, defendants’ motion to dismiss should be  
12 granted, and this case should be closed.

13 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court  
14 assign a district court judge to this case.

15 IT IS HEREBY RECOMMENDED that

- 16 1. Defendants’ motion to dismiss (ECF No. 15) be granted;
- 17 2. Plaintiff’s complaint be dismissed for failure to exhaust available administrative  
18 remedies; and
- 19 3. This case be closed.

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

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

4 Dated: July 15, 2016



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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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