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**\*E-FILED - 12/18/08\***

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

RICHARD G. GUTIERREZ,	)	No. C 07-3834 RMW (PR)
	)	
Plaintiff,	)	ORDER GRANTING MOTION TO
	)	DISMISS; DENYING MOTION TO
vs.	)	SUPPRESS; GRANTING MOTION
	)	TO SEAL
CHIEF E. FLORES, et al.,	)	
	)	(Docket No. 35)
Defendants.	)	
_____	)	

Plaintiff, a California prisoner proceeding pro se, filed a civil rights action pursuant to 42 U.S.C. § 1983, against officials and employees of the Santa Clara County Jail (“SCCJ”), where plaintiff was formerly housed. On September 20, 2007, plaintiff filed an amended complaint superseding the original complaint. The court found that the amended complaint, when liberally construed, stated cognizable claims for relief, and ordered service upon defendants. Defendants have filed a motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that plaintiff failed to exhaust administrative remedies. On June 11, 2008, plaintiff filed a document entitled “Exhausted Administrative Remedies.”<sup>1</sup> Defendants did not file a

<sup>1</sup>Although this document was not signed or served on defendants, the court has nevertheless construes, and hereinafter refers to, it as plaintiff’s “opposition” to the motion to dismiss.

1 reply. For the reasons explained below, the motion to dismiss is GRANTED and the  
2 instant action is DISMISSED without prejudice.

### 3 BACKGROUND

4 Plaintiff alleges that during his incarceration at the SCCJ, medical and correctional  
5 staff did not adequately respond to his requests for treatment of his back pain. He alleges  
6 that he underwent two spinal cord surgeries in 2005 and was subsequently taking a wide  
7 variety of medication for his condition. He further alleges that while he was at the SCCJ  
8 in January 2007, he was experiencing pain in his back and requested treatment from  
9 SCCJ officials. According to plaintiff, they delayed providing him with any medical  
10 treatment, subsequently mishandled him, causing more pain and damage to his back, and  
11 failed to bring him to a hospital.

### 12 DISCUSSION

#### 13 A. Standard of Review

14 Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants  
15 have the burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315  
16 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an  
17 unenumerated Rule 12(b) motion rather than in a motion for summary judgment. Id. In  
18 deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may  
19 look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.<sup>2</sup> If the court  
20 concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is  
21 dismissal without prejudice. Id. at 1120.

#### 22 B. Analysis

23 The Prison Litigation Reform Act (“PLRA”) of 1995 amended 42 U.S.C. § 1997e  
24 to provide that “[n]o action shall be brought with respect to prison conditions under [42  
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27 <sup>2</sup>If the court looks beyond the pleadings in deciding an unenumerated motion to  
28 dismiss for failure to exhaust -- a procedure closely analogous to summary judgment --  
the court must give the prisoner fair notice of his opportunity to develop a record. Wyatt,  
315 F.3d at 1120 n.14. Plaintiff was given such notice in the order of service.

1 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or  
2 other correctional facility until such administrative remedies as are available are  
3 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the discretion  
4 of the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006) (citing Booth v.  
5 Churner, 532 U.S. 731, 739 (2001)). Exhaustion is a prerequisite to all prisoner lawsuits  
6 concerning prison life, whether such actions involve general conditions or particular  
7 episodes, whether they allege excessive force or some other wrong, and even if they seek  
8 relief not available in grievance proceedings, such as money damages. Porter v. Nussle,  
9 122 S. Ct. 983, 988, 992 (2002).

10 Section 1073 of Title 15 of the California Code of Regulations provides county jail  
11 inmates with a right to “appeal and have resolved grievances” relating to their  
12 confinement. Pursuant to Section 1073, Santa Clara County has established grievance  
13 procedures for inmates at both facilities of the SCCJ, the Main Jail and the Elmwood  
14 Correctional Facility.<sup>3</sup> (See Asban Decl. Ex. C.) An inmate may grieve “any condition of  
15 confinement” by first raising the complaint informally with the guard in charge of the  
16 inmate’s housing unit. (Id. at 8.) If the complaint is not resolved, the inmate may then  
17 write the complaint on an “Inmate Grievance Form” and hand it to any jail officer. (Id.)  
18 If the officer cannot resolve the complaint, the grievance is forwarded to a Sergeant, and  
19 then, if the Sergeant cannot resolve it, to the Watch Commander, who will “ensure” a  
20 written response to the inmate. (Id.) Finally, an inmate may then appeal any denial of the  
21 grievance to the Division Commander of the facility where the inmate is housed. (Id. at  
22 8-9.) The Division Commanders at the time of the events alleged in the complaint were  
23 Captain David Sepulveda at the Main Jail, and Captain Toby Wong at the Elmwood  
24 Correctional Facility. (Marti-Torres Decl. at ¶ 12; Rivera Decl. at ¶ 3.)

25 Defendants present evidence that SCCJ officials reviewed their records of inmate  
26 grievances and found a total of ten grievances filed by plaintiff related to the claims

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28 <sup>3</sup>Plaintiff does not dispute that he received a copy of these procedures on August 20,  
2006, as evinced by his acknowledgment of such receipt. (Asban Decl. Ex. B.)

1 raised in this action. (Marti-Torres Decl. at ¶¶ 1-11 & Exs. A-I; Rivera Decl. at ¶¶ 1-2 &  
2 Ex. A.) Although these grievances were presented to and denied by the Lieutenants  
3 acting as Watch Commanders at the relevant times, there is no record that plaintiff  
4 appealed any of these denials to the highest level of administrative review, by the  
5 Division Commanders, Captain Wong or Captain Sepulveda.<sup>4</sup> (Marti-Torres Exs. A-I;  
6 Rivera Decl. at Ex. A.)

7 Plaintiff contends in his amended complaint that he filed grievances “over and  
8 over” again, but he does not point to or present evidence of any additional grievances  
9 other than those described above. (See Amended Complaint at 2B.) Plaintiff also does  
10 not dispute that he never appealed the denial of any of these grievances to the Division  
11 Commanders. Rather, in his amended complaint, plaintiff argues that he is not obligated  
12 to exhaust his administrative remedies because he is seeking monetary relief. (*Id.* at 2A.)  
13 That argument has been rejected by the United States Supreme Court. See *Woodford*,  
14 548 U.S. at 85-86 (citing *Booth*, 532 U.S. at 734). Plaintiff also asserts in his amended  
15 complaint, as well as in his opposition, that he exhausted his administrative remedies by  
16 “calling” or “writing” to “Internal Affairs,” “human relations,” the “California Board of  
17 Corrections” and the “Chief of Corrections.” (Amended Complaint at 7; Opposition at 2.)  
18 Plaintiff has provided no documentation or proof of these calls or letters, nor has he  
19 described in any way what he said in them. In any event, even assuming that these calls  
20 or letters were made, and that they concerned the claims herein, they do not or satisfy the  
21 exhaustion requirement of pursuing the final available administrative remedy available to  
22 plaintiff, namely appealing grievances to the SCCJ Division Commanders.

23 Lastly, in his opposition, plaintiff states that he wrote a “letter” on February 1,  
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25 <sup>4</sup>The court also notes that five of these grievances were filed after the commencement  
26 of this action on July 26, 2007, and thus, even if they had been completely exhausted they  
27 would not satisfy the exhaustion requirement. See *McKinney v. Carey*, 311 F.3d 1198,  
28 1199 (9th Cir. 2002) (an action must be dismissed unless the prisoner exhausted his  
available administrative remedies before he or she filed suit, even if the prisoner fully  
exhausts while the suit is pending).

1 2007 to “Elmwood Division Commander.” (Opposition at 2.) Defendants have  
2 submitted declarations of the SCCJ officials in charge of maintaining records of  
3 correspondence to the Division Commanders who state that there is no record or any  
4 correspondence from plaintiff to the Division Commanders. (Marti-Torres Decl. at ¶ 12;  
5 Rivera Decl. at ¶ 3.) Plaintiff has submitted no documentation or other proof of the  
6 existence of such a letter, nor has he described its content or indicated whether it  
7 concerned the claims herein. In any event, even assuming plaintiff wrote such a letter, he  
8 wrote it *before* filing any of the inmate grievances at the lower levels of administrative  
9 review, by the SCCJ officers and Watch Commanders, contrary to the SCCJ’s grievance  
10 procedures.<sup>5</sup> The PLRA’s exhaustion requirement cannot be satisfied by filing a  
11 “procedurally defective administrative grievance or appeal.” Woodford v. Ngo, 548 U.S.  
12 81, 84 (2006). “Proper exhaustion demands compliance with an agency’s deadlines and  
13 other critical procedural rules because no adjudicative system can function effectively  
14 without imposing some orderly structure on the course of its proceedings.” Id. at 90-91.  
15 As plaintiff did not follow the proper procedures of pursuing his grievances at the lower  
16 levels of administrative review prior to writing a purported letter to the Division  
17 Commander on February 1, 2007, such a letter does not “properly exhaust” his  
18 administrative remedies, as required by the PLRA.

19 Plaintiff was required to file a formal grievance and exhaust all administrative  
20 remedies available to him through the SCCJ grievance procedures before he could pursue  
21 his § 1983 claims in federal court. Booth, 532 U.S. at 741 n.6; accord Porter, 534 U.S. at  
22 524. He did not do so. Nor has he shown that he should be excused from exhausting  
23 before filing suit because the Prisoner Grievance System was not available to him or  
24 because of some extraordinary circumstance. Therefore, plaintiff’s action must be  
25 dismissed without prejudice. See Wyatt, 315 F.3d at 1120; see also McKinney v. Carey,  
26 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be dismissed without prejudice  
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28 <sup>5</sup>The first grievance filed by plaintiff was in March 2007. (Marti-Torres Decl. Ex. A.)

1 unless prisoner exhausted available administrative remedies before he filed suit, even if  
2 prisoner fully exhausts while the suit is pending).<sup>6</sup>

3 **CONCLUSION**

4 Defendants' motion to dismiss for failure to properly exhaust available  
5 administrative remedies under 42 U.S.C. § 1997e(a) before filing suit is GRANTED  
6 (Docket No. 35). The action is DISMISSED without prejudice.

7 The clerk shall close the file and terminate all pending motions.

8 IT IS SO ORDERED.

9 DATED: 12/17/08

*Ronald M. Whyte*

10 RONALD M. WHYTE  
United States District Judge

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26 <sup>6</sup>Although not granted leave to do so, plaintiff also filed two "amendments" to his  
27 complaint, on July 10, 2008 and August 11, 2008, respectively. These amendments to the  
28 amended complaint name additional defendants allegedly involved in the incidents alleged in the  
amended complaint. Neither such amendments provide any argument or indication that  
plaintiff has exhausted his claims. As such, they do not alter the court's conclusion  
reached herein..