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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN JACKSON,
Plaintiff,
v.

No. 2:08-cv-01954-MCE-JFM

MEMORANDUM AND ORDER

ALVARO TRAQUINA, M.D.,
Chief Medical Officer/Health
Care Manager of California
state Prison-Solano of the
California Department of
Corrections and
Rehabilitation, in his
individual and official
capacities; JASON A. ROHRER,
M.D., an individual; XXX
HSIEH, M.D., and DOES 1-10,
Defendants.

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Through the present action, Plaintiff Kevin Jackson
("Plaintiff") seeks redress for alleged violations, while
incarcerated within the State of California's prison system, of
his Eighth Amendment rights under the United States Constitution.
Defendants include the Medical Director and two physicians
working at the California State Prison-Solano, where Plaintiff
was incarcerated.

1 Presently before the Court is Defendants' Motion to Dismiss
2 Plaintiff's complaint on grounds that he failed to exhaust his
3 administrative remedies before bringing suit, as required by the
4 Prison Reform Litigation Act ("PLRA"). For the reasons set forth
5 below, Defendants' Motion will be denied.¹

6
7 **BACKGROUND**
8

9 Plaintiff's initial complaint, filed July 8, 2008, sought
10 injunctive relief on a class-wide basis for California inmates
11 infected with hepatitis C who were denied liver biopsies and
12 combination drug therapy for Stage II liver disease. Plaintiff, who
13 was diagnosed with a chronic hepatitis C infection in 2000, alleged
14 that treatment delays violated class members' rights to adequate
15 medical care under the Eighth Amendment to the United States
16 Constitution. The only named Defendant initially named within the
17 specifically denominated "class action case" was Robin Dezember,
18 in her capacity as Director of Correctional Health Care Services
19 for the California Department of Corrections and Rehabilitation.

20 Plaintiff ultimately abandoned his class action complaint
21 after the Court issued an Order to Show Cause as to why the
22 action should not be transferred to the Northern District of
23 California for joinder with the ongoing class action litigation
24 in Plata v. Schwarzenegger, No. 3-01-1351, which already
25 challenged California's prison health care system.

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¹ Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).

1 Because Plaintiff's response specifically requested leave to file
2 an amended complaint on his own behalf, however, the Court
3 granted Plaintiff leave to amend for that purpose by its Minute
4 Order filed September 30, 2008.

5 Plaintiff's Amended Complaint, filed on October 10, 2008 in
6 accordance with the September 30 Order, sought damages only on
7 his own behalf and was instituted, not against Ms. Dezember on a
8 statewide basis, but rather only against doctors responsible for
9 patient care at California State Prison-Solano, where Plaintiff
10 was housed. Rather than seeking injunctive relief, Plaintiff
11 seeks damages on his own behalf for alleged exacerbation of liver
12 damage occasioned by Defendants' delays in providing treatment.

13 Defendants claim that Plaintiff failed to exhaust his
14 administrative remedies because his internal grievance
15 complaining of inadequate treatment was not concluded until
16 August 13, 2008, at the earliest, when his appeal was partially
17 granted, with hepatitis C treatment scheduled to begin after
18 contemplated knee surgery. Because that date was after Plaintiff
19 instituted his class action proceedings on July 8, 2008,
20 Defendants allege that his administrative remedies were not
21 exhausted prior to the institution of suit. The present Motion
22 to Dismiss for failure to exhaust is predicated on that alleged
23 shortcoming. Plaintiff, on the other hand, contends that because
24 he was allowed to file what amounted to a new complaint on his
25 own behalf against new defendants, the date that amended pleading
26 was filed (October 10, 2008) should control.

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1 According to Plaintiff, because his individual complaint was
2 filed after the administrative grievance had concluded, no
3 exhaustion issue is present.

4
5 **STANDARD**

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7 A motion to dismiss for failure to exhaust administrative
8 remedies prior to filing suit "should be treated as a matter in
9 abatement subject to an unenumerated Rule 12(b) motion."² Wyatt
10 v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). "[D]efendants
11 have the burden of raising and proving the absence of
12 exhaustion." Id. at 1119.

13 "In deciding a motion to dismiss for a failure to exhaust
14 nonjudicial remedies, the court may look beyond the pleadings and
15 decide disputed issues of fact." Id. at 1120. If the district
16 court concludes that the prisoner has failed to exhaust his non-
17 judicial remedies, the proper remedy is dismissal of the claim
18 without prejudice. Id.

19
20 **ANALYSIS**

21
22 The PRLA provides that "[n]o action shall be brought with
23 respect to prison conditions under section 1983 of this title,
24 until such administrative remedies as are available are
25 exhausted." 42 U.S.C. §1997e(a).

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² All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

1 California prison regulations provide administrative procedures
2 in the form of one informal and three formal levels of review to
3 address the plaintiff's claims. See Cal. Code Regs. tit. 15,
4 §§ 3084.1-3084.7.

5 Administrative procedures generally are exhausted once a
6 prisoner has received a "Director's Level Decision," or third
7 level review, with respect to his issue or claims. Cal. Code
8 Regs. tit. 15 § 3084.5. All steps must be completed before a
9 civil rights action is filed, unless a plaintiff demonstrates a
10 step is unavailable to him; exhaustion during the pendency of the
11 litigation will not save an action from dismissal. McKinney v.
12 Carey, 311 F.3d 1198, 1200 (9th Cir. 2002).

13 In the present matter, Plaintiff's administrative appeal was
14 partially granted. Plaintiff correctly points out that having
15 prevailed on the grievance at his first level appeal, there was
16 no reason why he had to appeal to the next level for exhaustion
17 purposes. The California regulations governing appeal and
18 disposition of prisoner appeals make this clear. See Cal. Code
19 Regs., tit. 15, § 3084.5(c) ("Second formal level. Second level
20 is for review of appeals denied at first level."). Consequently
21 this Court finds that exhaustion did occur.³

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23 _____
24 ³ While Defendants also appear, at least in part, to
25 predicate their exhaustion argument on a contention that
26 Plaintiff should have filed his initial administrative appeal
27 earlier, at the point when he allegedly learned that liver
28 biopsies should be performed every five years, the Court rejects
that argument, which leaves unanswered the underlying question of
when Plaintiff should have known that he had serious liver
disease warranting further treatment, as opposed to additional
testing.

1 The next step in the analysis is to determine whether the
2 timing of Plaintiff's exhaustion properly comported with his
3 commencement of suit in this matter. As indicated above, 42
4 U.S.C. § 1997e(a) provides that no action can be brought on
5 behalf of a prisoner with respect to prison conditions until
6 available administrative remedies have been exhausted. This
7 prerequisite has been interpreted as requiring exhaustion prior
8 to the filing of suit. McKinney v. Carey, 311 F.3d 1198,1200
9 (9th Cir. 2002). Because Plaintiff's class action was filed on
10 July 8, 2008, and since Plaintiffs' first level appeal was not
11 resolved until October 13, 2008, Defendants claim that the
12 instant case is premature and must be dismissed under Rule 12(b).

13 The Court concludes that Defendants' argument is misplaced
14 given the particular circumstances of this case. Plaintiff's
15 initial complaint, filed before he exhausted his own
16 administrative remedies, was a class action proceeding seeking
17 injunctive and declaratory relief, only. The entire character of
18 the action changed when, on September 26, 2008, Plaintiff
19 withdrew his request for class action injunctive relief and
20 instead sought to amend his complaint to seek redress for the
21 damages he personally sustained as a result of treatment delays.
22 The Court, by Minute Order dated September 30, 2008, permitted
23 Plaintiff to so amend, and the resulting amended complaint
24 contained both new defendants and a new theory of relief
25 (monetary damages) absent from the initially filed complaint.
26 For all intents and purposes, the amended complaint was an
27 entirely new proceeding.

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1 Rather than require him to file a completely new case, however,
2 it was this Court's decision to permit Plaintiff to proceed on an
3 amended pleading. Given the fact that Plaintiff's personal
4 administrative remedies were exhausted on or about August 13,
5 2008, almost two months before Plaintiff's amended pleading was
6 filed, it would elevate form over substance given the facts
7 present here to now dismiss Plaintiff's amended pleading as
8 premature.

9
10 **CONCLUSION**

11
12 For the foregoing reasons, Defendants' Motion to Dismiss
13 (Docket No. 39) is DENIED. The parties shall file a Joint Status
14 Report not later than twenty (20) calendar days after this Order
15 is filed electronically.

16 IT IS SO ORDERED.

17 Dated: October 2, 2009

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20 MORRISON C. ENGLAND, JR.
21 UNITED STATES DISTRICT JUDGE
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