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11  
 12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 14 SACRAMENTO DIVISION

15  
 16 **KEVIN JACKSON,**

17 Plaintiff,

18 v.

19 **ROBIN DEZEMBER, et al.,**

20 Defendants.

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

**DEFENDANTS' NOTICE OF MOTION  
 AND MOTION TO DISMISS;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

Hearing Date: February 6, 2009

Time: 9:00 a.m.

Courtroom: 7

Judge: Honorable Morrison C. England

21  
 22 **TO PLAINTIFF AND HIS ATTORNEY OF RECORD:**

23 **PLEASE TAKE NOTICE THAT** under Rule 12(b) of the Federal Rules of Civil  
 24 Procedure, and Local Rule 78-230(b), on February 6, 2009, at 9:00 a.m., in Courtroom 7 of this  
 25 Court located at 501 I Street, Sacramento, California, Defendants Hsieh, Rohrer, and Traquina  
 26 will move to dismiss this action on the basis that Plaintiff did not exhaust his administrative  
 27 remedies prior to filing this lawsuit.

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**DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS  
 AND AUTHORITIES**

1 This motion is based upon this notice of motion and motion, the attached memorandum of  
2 points and authorities, and the records and pleadings in this action.

3 Dated: November 20, 2008

4 Respectfully submitted,

5 EDMUND G. BROWN JR.  
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10 */s/ Christopher J. Becker*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This case must be dismissed because Plaintiff failed to exhaust his administrative remedies  
4 before filing this lawsuit.

5 **SUMMARY OF FACTS**

6 Plaintiff alleges that while housed at California State Prison Solano (CSP Solano), he was  
7 diagnosed with Hepatitis C. (Am. Compl. p. 5). Plaintiff claims that he had a liver biopsy in  
8 2000, which was normal. (Am. Compl. p. 5). According to Plaintiff, he should have been given  
9 another liver biopsy within five years. (Am. Compl. p. 5). However, Plaintiff did not receive a  
10 second liver biopsy until August 27, 2007. (Am. Compl. p. 5). Plaintiff avers that the second  
11 biopsy revealed that Plaintiff had stage II Hepatitis C. (Am. Compl. p. 5).

12 Plaintiff contends that Defendants are responsible for the delay in his second biopsy and  
13 that the undue delay has caused him irreparable harm and unnecessary advancement of his  
14 disease. (Am. Compl. p. 6). Plaintiff also claims that Defendants refused to treat him for stage  
15 II Hepatitis C because of cost concerns. (Am. Compl. p. 6).

16 Plaintiff claims that he exhausted his administrative remedies. (Am. Compl. p. 5).  
17 However, Plaintiff never pursued any inmate grievances at CSP Solano from the year 2000  
18 through November 2008, concerning any claims of inadequate medical treatment for his  
19 Hepatitis C condition. (See Exhibit A, Declaration of S. Cervantes, 2: 8-13). Furthermore,  
20 Plaintiff never pursued an inmate appeal to the third-level of review concerning claims of  
21 inadequate medical treatment for Hepatitis C at CSP Solano. (See Exhibit B, Declaration of N.  
22 Grannis, "Grannis Decl." 2: 1-6).

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1 **ARGUMENT**

2 **I.**

3 **PLAINTIFF'S SUIT AGAINST DEFENDANTS MUST BE DISMISSED**  
4 **BECAUSE PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE**  
5 **REMEDIES.**

6 **A. Applicable Legal Standard for an Unenumerated 12(b) Motion**

7 Although Federal Rule of Civil Procedure 12 does not explicitly address exhaustion, the  
8 Ninth Circuit has held that the failure to exhaust nonjudicial remedies "should be treated as a  
9 matter in abatement subject to an unenumerated Rule 12(b) motion." *Wyatt v. Terhune*,  
10 315 F.3d 1108, 1119 (9<sup>th</sup> Cir. 2003). Authority for the "unenumerated" 12(b) motion derives  
11 from this Court's inherent power to regulate actions, including authorizing motions not explicitly  
12 recognized by the rules. *Ritza v. Int'l Longshoremen's and Warehousemen's Union*,  
13 837 F.2d 365, 369 (9<sup>th</sup> Cir. 1988). "In deciding a motion to dismiss for failure to exhaust  
14 nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of  
15 fact." *Wyatt*, 315 F.3d at 1119-20. Because no presumption of truthfulness attaches to plaintiff's  
16 allegations in such matters, the court may resolve any disputed material facts before proceeding  
17 further. *Ritza*, 837 F.2d at 368-69. If the court concludes that the prisoner has not exhausted  
18 nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice. *Wyatt*, 315  
19 F.3d at 1120.

20 **B. Plaintiff's Claims Against Defendants Should Be Dismissed Because**  
21 **He Failed To Exhaust His Administrative Remedies Prior to Bringing**  
22 **this Action As Required By the Prison Litigation Reform Act**

23 The plain language of 42 U.S.C. § 1997e(a) mandates exhaustion of administrative  
24 remedies *prior to* filing the complaint in federal court. *McKinney v. Carey*, 311 F.3d 1198, 1199  
25 (9<sup>th</sup> Cir. 2002) (emphasis added). The Prison Litigation Reform Act ("PLRA") amended  
26 42 U.S.C. § 1997e to require exhaustion of administrative remedies under all circumstances in

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1 § 1983 actions brought by prisoners:

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

5 42 U.S.C. § 1997e.

6 In *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court held that this amendment  
7 "eliminated both the discretion to dispense with administrative exhaustion and the condition that  
8 the appeals process be 'plain, speedy and effective' before exhaustion could be required."  
9 Moreover, the *Booth* Court held that Congress "mandated exhaustion clearly enough, regardless  
10 of the relief offered through administrative procedures." *Id.* at 741. Exhaustion of  
11 administrative remedies is a prerequisite to suit. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).  
12 Further, an inmate is required to provide sufficient information so as to put prison officials on  
13 notice as to the facts at issue in his claim. *See Id.* at 531.

14 The State of California provides its prisoners and parolees the right to administratively  
15 appeal "any departmental decision, action, condition or policy perceived by those individuals as  
16 adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust  
17 available administrative remedies, a prisoner must proceed through an initial informal level, and  
18 three formal levels of review, culminating in a Director's Level Decision. *Id.* at § 3084.5;  
19 *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal.1997). A final decision at the Director's  
20 level satisfies the exhaustion requirement under § 1997e(a). *Id.* at 1237-38.

21 Recently, the Supreme Court held that proper exhaustion of administrative remedies is  
22 necessary to satisfy the Prison Litigation Reform Act's exhaustion requirement. *Woodford v.*  
23 *Ngo*, 126 S.Ct. 2378, 2385-2388. Proper exhaustion demands compliance with an agency's  
24 deadlines and other critical procedural rules because no adjudicative system can function  
25 effectively without imposing some orderly structure on the course of its proceedings. *Id.* When  
26 a grievance is filed shortly after the event giving rise to the grievance, witnesses can be  
27 identified and questioned while memories are still fresh, and evidence can be gathered and  
28 preserved. *Id.* The benefits of exhaustion can be realized only if the prison grievance system is

1 given a fair opportunity to consider the grievance. *Id.* The prison grievance system will not  
2 have such an opportunity unless the grievant complies with the system's critical procedural rules.  
3 *Id.* Importantly, the Supreme Court recognized that the PLRA provided a sanction for a prisoner  
4 who did not comply with a prison's procedure, to wit: no judicial relief. *Id.*

5 Here, Plaintiff never even attempted to exhaust his administrative remedies regarding the  
6 claims set forth in his complaint. Plaintiff's failure to pursue an appeal at any level deprived  
7 CSP Solano and the California Department of Corrections and Rehabilitation (CDCR) of the  
8 opportunity to address his concerns before having to incur the expense of defending this lawsuit.  
9 For these reasons, Defendants request that Plaintiff's complaint be dismissed for failure to  
10 exhaust his administrative remedies.

### 11 CONCLUSION

12 Plaintiff failed to exhaust his administrative remedies against Defendants, therefore,  
13 Plaintiff's lawsuit must be dismissed.

14 Dated: November 20, 2008

15 Respectfully submitted,

16 EDMUND G. BROWN JR.  
Attorney General of the State of California

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