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**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

MARLIN RIGGS, individually, and JOSE PIÑA, JOE  
ROCHA, ANDREW IBARRA, JOSHUA  
KELLY, RAY BARRIOS, and RANDY  
ENZMINGER, individually and on behalf of a class of  
all other persons similarly situated,

Plaintiff,

v.

PHILLIP VALDEZ, NORMA RODRIGUEZ,  
CHRISTOPHER ROSE, STEVEN DANFORTH,  
and WILLIAM DEAN, individually and in their  
official capacities; and CORRECTIONS  
CORPORATION OF AMERICA, Inc.

Defendants.

Case No. 1:09-cv-00010-S-BLW

**DEFENDANTS'  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT**

Defendants Corrections Corporation of America, Inc., Phillip Valdez,  
Norma Rodriguez, Christopher Rose, Steven Danforth, and William Dean move to  
dismiss Plaintiffs Pina, Rocha, Ibarra, Kelly, Barrios, and Enzminger, and all of their

claims. None of these Plaintiffs properly exhausted their administrative remedies prior to the commencement of this lawsuit. In addition, Plaintiff Ibarra lacks standing because the relief he is seeking has become moot. This Motion is supported by the accompanying Memorandum.

DATED this 14<sup>th</sup> day of July 2010.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/ Daniel P. Struck

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Attorneys for CCA, Valdez, Rodriguez, Rose,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of July 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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Case No. 1:09-cv-00010-S-BLW

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT**

**(DKT NO. 73)**

Defendants Corrections Corporation of America, Inc. ("CCA"), Phillip  
Valdez, Norma Rodriguez, Christopher Rose, Steven Danforth, and William Dean  
(collectively "Defendants") move to dismiss Plaintiffs Pina, Rocha, Ibarra, Kelly,

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SECOND  
AMENDED COMPLAINT (DKT NO. 73) - 1**

Barrios, and Enzminger, and all of their claims. None of these Plaintiffs properly exhausted their administrative remedies prior to the commencement of this lawsuit, as required under the Prison Litigation Reform Act ("PLRA"). Therefore, their claims are barred. In addition, Plaintiff Ibarra lacks standing to bring his claims because the relief he seeks is now moot.

**I. PROCEDURAL HISTORY**

Inmate Marlin Riggs filed a *pro se* complaint against Defendants Rodriguez, Danforth, and Dean on January 12, 2009 for injuries he allegedly sustained while incarcerated at the Idaho Correctional Center ("ICC"). (Dkt. # 3.) Riggs alleged that these Defendants failed to protect him and were deliberately indifferent to his medical needs in violation of his Eighth and Fourteenth Amendment rights. (*Id.*) Riggs sought monetary damages, as well as declaratory and injunctive relief. (*Id.*)

This Court subsequently appointed counsel for Riggs. (Dkt. # 11.) Riggs' counsel then amended the complaint on March 11, 2010, to add inmates Pina, Rocha, Ibarra, Kelly, and Barrios as Plaintiffs, and Valdez, Rose, and CCA as additional Defendants. (Dkt. # 16.) These new Plaintiffs alleged that Defendants denied them reasonable protection from assault, in violation of their Eighth and Fourteenth Amendment rights, by employing the following policies:

- (1) failure to hire an adequate number of staff;
- (2) failure to adequately train its staff;
- (3) failure to adequately investigate each prisoner assault to determine whether it could have been prevented by staff and whether staff misconduct or malfeasance caused or contributed to the assault;
- (4) failure to issue adequate written findings, conclusions, and recommendations after each assault;
- (5) failure to eliminate "the code of silence that pervades ICC";

(6) failure to ensure that noncompliant or untrained staff receive the discipline they deserve or additional training they need to prevent violence at ICC;

(7) failure to adequately punish those inmates who commit assaults on prisoners; and

(8) failure to provide adequate medical care.

(*Id.*, ¶¶ 484–485, 489.) In a second claim, these Plaintiffs alleged that Defendants pursued policies of refusing to take x-rays and provide adequate medical care. (*Id.*) These claims were made both individually and on behalf of a class consisting of all current and future inmates at ICC. (*Id.*) Only declaratory and injunctive relief was requested. (*Id.*) Riggs maintained his individual claim for failure to protect and failure to provide adequate medical care. (*Id.*) His claim was not made on behalf of any one else.

Defendants moved to dismiss these added claims for lack of exhaustion under the PLRA. (Dkt. # 50, 62.) Specifically, none of the five added Plaintiffs had properly exhausted their claims in accordance with ICC’s grievance procedures. (*Id.*) In response, Plaintiffs filed a motion to amend their amended complaint, which was granted. (Dkt. # 64, 65, 70.) The second amended complaint, filed June 30, 2010, added inmate Enzminger as a Plaintiff. (Dkt. # 71, ¶ 2.) Enzminger raised the same claims and sought “the same declaratory and injunctive relief as [was] already being sought by” Pina, Rocha, Ibarra, Kelly, and Barrios. (Dkt. # 65 at 2, # 71.) The complaint further expanded the scope of their claims to include the failure to provide sufficient living space to each inmate, and the issuance of disciplinary offense reports (“DORs”) to the victims of an assault (“DOR claim”).<sup>1</sup> (Dkt. # 71, ¶ 488.) Thus, Pina, Rocha, Ibarra, Kelly, Barrios, and Enzminger (hereafter collectively referred to as “Plaintiffs”) all have identical claims against Defendants.

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<sup>1</sup> All other claims will be referred to as “non-DOR claims” collectively.

**II. PLAINTIFFS HAVE NOT PROPERLY EXHAUSTED THEIR ADMINISTRATIVE REMEDIES**

**A. The Prison Litigation Reform Act**

Under the PLRA, a prisoner must properly exhaust available administrative remedies before filing a federal lawsuit challenging prison conditions. 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v Nussle*, 534 U.S. 516, 532 (2002). Proper exhaustion requires a prisoner to complete the detention facility's "administrative review process in accordance with the applicable procedural rules, including deadlines." *Woodford v. Ngo*, 548 U.S. 81, 88, 90–91 (2006). Exhaustion must occur "before the filing of a complaint," and not after the suit has been filed. *McKinney v. Carey*, 311 F.3d 1198, 1199–1200 (9<sup>th</sup> Cir. 2002) (emphasis added). Exhaustion is mandatory under the PLRA, and unexhausted claims cannot be brought in court. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

**B. ICC's Grievance Procedure**

ICC follows the Idaho Department of Correction ("IDOC") Offender Grievance Process, which is a three-step process. (Ex. 1, ¶¶ 6–7.) An inmate must first attempt to resolve the issue informally by submitting a "concern form" addressed to the staff person most capable of responding to and, if appropriate, resolving the issue. (*Id.*, ¶ 10.) The staff person must respond to the inmate's concern within seven (7) days of receiving the form. (*Id.*)

If the issue is not resolved informally, the inmate must then file a grievance form. (Ex. 1, ¶ 11.) The grievance form must be filed within thirty (30) days of the incident that is being grieved, and it must include specific information, including the nature of the complaint, dates, places, and names. (*Id.*, ¶¶ 11–12.) The inmate must also attach a copy of the completed concern form showing his attempt to resolve the issue

informally. (*Id.*, ¶ 12.) If the grievance form is completed correctly, the grievance coordinator will assign the grievance to the staff member most capable of responding to and, if appropriate, resolving the issue. (*Id.*) The staff member must then answer and return the grievance form to the grievance coordinator within ten (10) days, who then forwards the grievance and response to a “reviewing authority,” who is usually a deputy warden. (*Id.*) The grievance coordinator then files the original grievance form and returns a copy to the offender with the responses of the assigned staff member and the reviewing authority. (*Id.*)

If the inmate is not satisfied with the reviewing authority’s response, he must file an appeal within five (5) days of receiving the response. (Ex. 1, ¶ 13.) Once the grievance coordinator receives the appeal, it is entered into an electronic database and is forwarded to the “appellate authority,” who is typically the facility head. (*Id.*, ¶ 14.) The appellate authority must respond within fourteen (14) days. (*Id.*) The grievance coordinator then forwards the response to the inmate. (*Id.*)

Inmates at ICC must complete all three steps in order to exhaust the administrative grievance process. (Ex. 1, ¶ 15.) Upon their admission, all ICC inmates are given a copy of the Grievance and Informal Resolution Process for Offenders Offender Handout, and verbal instructions regarding the grievance procedure, including a question and answer period. (*Id.*, ¶¶ 3–5.) This procedure was effective at all times relevant to Plaintiffs’ claims. (*Id.*, ¶ 6.) DORs are not matters that can be challenged through the grievance process, but rather must be challenged pursuant to ICC’s disciplinary procedures. (*Id.*, ¶ 16.)

### **C. ICC’s Disciplinary Procedure**

ICC follows the Idaho Department of Correction Disciplinary Procedures, which is an administrative process. (Ex. 2, ¶ 3.) Upon learning that an inmate has committed a rule violation, a staff member will complete a DOR. (*Id.*, ¶ 4.) The DOR is

then given to the inmate. (*Id.*, ¶ 5.) A disciplinary hearing officer will then schedule a disciplinary hearing within seven (7) days of serving the inmate, but must provide at least 24 hours for the inmate to prepare. (*Id.*, ¶ 6.) The inmate is required to attend the hearing, unless he waives his presence in writing, and if in attendance, he can admit or deny the allegations, present witness statements, and provide testimony. (*Id.*) The disciplinary hearing officer will then either find the inmate guilty or not guilty, and if guilty, will impose a sanction. (*Id.*)

If a DOR is confirmed, an inmate can appeal that decision to the “faculty head,” which is typically the warden. (*Id.*, ¶ 7.) The inmate must submit a disciplinary appeal form within fifteen (15) days of the disciplinary hearing officer’s decision, and provide a reason why the DOR and/or sanction is not appropriate. (*Id.*) The faculty head then has fourteen (14) days to either affirm, dismiss, or modify the DOR. (*Id.*) If the inmate is unhappy with that decision, he may submit an appeal to the Virtual Prison Program, which will review the DOR finding and prior appeal, and render a final decision. (*Id.*, ¶ 8.) The inmate must submit a copy of the DOR and the hearing result, and a copy of the initial appeal to the faculty head to perfect this appeal. (*Id.*) This procedure was effective at all times relevant to Plaintiffs’ claims. (*Id.*, ¶ 3.)

**D. Because Plaintiffs’ Claims Accrued After Suit Was Filed The PLRA’s Exhaustion Requirement Cannot Be Satisfied**

Exhaustion must occur “prior to filing suit.” *McKinney*, 311 F.3d at 1199–1200. An inmate cannot exhaust his remedies after the complaint has been filed or during the course of litigation. *Id.* Thus, a claim that has accrued *after* the complaint is filed cannot be exhausted in compliance with the PLRA. *Gann v. Neotti*, 2010 WL 2486826, \*3 (S.D. Cal. 2010); *Pauline v. Patel*, 2009 WL 454653, \*7 (D. Haw. 2009); *Williams v. Adams*, 2007 WL 1595457, \*1 (E.D. Cal. 2007). And a plaintiff cannot circumvent the PLRA’s exhaustion requirement by simply amending his complaint after exhaustion. *See Crittendon v. Garza*, 111 Fed.Appx. 906 (9<sup>th</sup> Cir. 2004); *Friske v. Scutt*, 2008 WL

5211613, \*1 (E.D. Mich. 2008); *Ellenburg v. Mahoney*, 2008 WL 1992162, \*5 (D. Mont. 2008); *Harnden v. Key*, 2006 WL 3734148, \*1 (E.D. Cal. 2006); *Holley v. California Dep't. of Corr.*, 2006 WL 1581907, \*2 (E.D. Cal. 2006). This would thwart the mandate of § 1997e(a), which requires claim exhaustion *prior to* filing suit and not during the pendency of the litigation. *Pauline*, at \*7; *Williams*, at \*1; *Ellenburg*, at \*5.

The original complaint in this lawsuit was filed on January 12, 2009. (Dkt. # 3.) Plaintiffs' claims, both DOR and non-DOR, are based on events that occurred *after* this time—March and October 2009. (Dkt. # 71, ¶¶ 145–170, 352–372; Ex. 1, Att. F–J; Ex. 3.) Consequently, they cannot be properly exhausted. Although the complaint was subsequently amended (March and June 2010), such tactics contravene the PLRA, and do not cure noncompliance with its express mandate that exhaustion occur “prior to filing suit.” *McKinney*, 311 F.3d at 1199–1200. All of Plaintiffs' claims are barred.

**E. Timeliness Aside, Plaintiffs Pina, Rocha, Ibarra, Kelly, And Barrios Did Not Even Attempt To Complete ICC's Grievance Process**

These Plaintiffs' claims are based on events (their alleged assault by other inmates) that occurred in October 2009. (Dkt. # 71, ¶¶ 352–372.) ICC's Grievance Coordinator, Captain Chester Penn, has reviewed ICC's grievance database, and no grievances were submitted, processed or logged by any of these Plaintiffs with respect to their non-DOR claims in the second amended complaint. (Ex. 1, ¶¶ 18–24 & Att. F–I.) Their failure to properly exhaust bars their claims. *See Woodford*, 548 U.S. at 88, 90–91 (proper exhaustion requires a prisoner to complete the detention facility's “administrative review process in accordance with the applicable procedural rules, including deadlines”).

**F. Timeliness Aside, Plaintiff Enzminger Did Not Comply With ICC's Grievance Process**

Plaintiff Enzminger's claims are based on events (his assault by other inmates) that occurred in March 2009. (Dkt. # 71, ¶¶ 145–170.) ICC's grievance database indicates that Enzminger filed the following grievance on May 26, 2009:

CCA's non-actions in failing to protect me from assault. My nose was broken on March 29th 2009 on K pod. I want my nose fixed and Dr. Stander has refused such and further stated his company doesn't do Medicare. Fix my nose.

(Ex. 1, Att. J; Ex. 4, ¶ 3.) Grievance Coordinator Jennifer Gardner returned the form on May 27, 2009 because Enzminger had failed to attach a copy of his concern form, as required under ICC's grievance procedure. (*Id.*) But she allowed Enzminger to resubmit the grievance form with the attached concern form despite the fact that more than 30 days had transpired from the date of the incident—March 29, 2009. (*Id.*) Enzminger then filed a concern form on June 4, 2009, addressed to “Kirt Sander M.O” and requesting that he contact “doctor wise” to “fix my nose” and further requesting “the doctors phone number and address.” (Ex. 1, Att. J.) ICC's grievance database reveals that Enzminger had not *previously* filed a concern form on this issue. (Ex. 1, ¶ 24.) A staff member responded to the concern form that same day, informing Enzminger that he would have to be referred to the doctor upon approval from “corporate.” (Ex. 1, Att. J.) Enzminger then attached that June 4 concern form and response to his May 26 grievance form, and resubmitted it on June 22, 2009. (Ex. 1, Att. J; Ex. 4, ¶ 4.) Upon discovering that Enzminger had not filed a concern form *prior to* his May 26 grievance form, and instead initiated it *after* filing that grievance, Gardner returned the grievance to Enzminger without action because he did not comply with the 30-day time limit to file a concern form *and* grievance form. (*Id.*)

Enzminger did not properly exhaust his administrative remedies because he did not complete the grievance procedure in accordance with ICC's procedural rules. First, Enzminger did not timely file his concern form and grievance form. ICC's grievance procedure requires inmates to file a concern form before filing a grievance form, and further requires the latter to be filed within 30 days of the incident. (Ex. 1, ¶¶ 10–12.) Enzminger did not file a concern form until June 4. (Ex. 1, ¶ 24 & Att. J.) The corresponding grievance form was not filed until June 22, more than 30 days after

the March 29 incident. (*Id.*) It was rejected for that reason. (Ex. 4, ¶ 4.) Proper exhaustion requires a prisoner to complete the detention facility's "administrative review process in accordance with the applicable procedural rules, including deadlines." *Woodford*, 548 U.S. at 88, 90–91. This was not done. Although Gardner's May 27 response indicated that she would excuse an untimely grievance form, this was only on the condition that the grievance form was resubmitted with proof that a concern form had *previously* been filed. (Ex. 4, ¶ 4.) But Enzminger had not filed a concern form, and only did after Gardner's response. (Ex. 1, ¶ 24 & Att. J.)

Moreover, ICC's grievance procedure specifically requires a grievance to "contain specific information such as dates, places, and names." (Ex. 1, ¶ 12.) Enzminger's grievance form did not name any of the individual Defendants; it only referred to "Dr. Stander." (Ex. 1, Att. J.) Thus, at a minimum, Enzminger did not exhaust any claims against Defendants Valdez, Rodriguez, Rose, Danforth, or Dean. *Cf. Jones*, 549 U.S. at 218–19 (inmate not required to name, in grievance, defendant that they later sued, where institution's policy did not contain name provision).

Finally, if anything is determined to be timely and properly exhausted, it can only be a claim for failure to provide adequate medical treatment. This was the only allegation made in *both* the concern form and the grievance form. (Ex. 1, Att. J.) There was no "failure to protect" claim in the June 4 concern form, nor was there any mention of the other allegations in the second amended complaint. (Ex. 1, Att. J; Dkt. # 71, ¶ 488.) A grievance must alert the prison "to the nature of the wrong for which redress is sought," and "provide enough information ... to allow prison officials to take appropriate responsive measures." *Griffin v. Arpaio*, 557 F.3d 1117, 1120–21 (9<sup>th</sup> Cir. 2009) (citations omitted). Enzminger's concern form only requested assistance to "fix my nose," and his grievance form alleged that "Dr. Stander" refused to do so. (Ex. 1, Att. J.) This certainly did not provide enough information to allow CCA to take appropriate

responsive measures to cure any of the other allegations. At a minimum, all other claims must be dismissed.<sup>2</sup> *See Jones*, 549 U.S. at 220–24 (requiring dismissal of unexhausted claims even if prisoner’s complaint also includes exhausted claims).

**III. PLAINTIFF IBARRA NO LONGER HAS STANDING TO BRING HIS CLAIMS**

The second amended complaint asserts that Plaintiff Ibarra has been “recently released on parole.” (Dkt. # 71, n.1.) A prisoner’s release from a prison moots any claims for declaratory and injunctive relief relating to the prison’s policies. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9<sup>th</sup> Cir. 2004); *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9<sup>th</sup> Cir. 1995); *Johnson v. Moore*, 948 F.2d 517, 519 (9<sup>th</sup> Cir. 1991); *Darring v. Kinchloe*, 783 F.2d 874, 876 (9<sup>th</sup> Cir. 1986); *see generally Preiser v. Newkirk*, 422 U.S. 395, 402–03, 95 S. Ct. 2330 (1975). Ibarra only seeks declaratory and injunctive relief, both pertaining to ICC’s policies. (Dkt. # 71, p. 76–77.) Because the relief he seeks is now moot, he no longer has standing in this case. In addition to failing to properly exhaust his administrative remedies, Ibarra should be dismissed for lack of standing. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (“[M]ootness, however it may have come about, deprives us of the power to act; there is nothing for us to remedy, even if we were disposed to do so.”). That Ibarra was incarcerated at the time the complaint was filed is irrelevant. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.”).

**CONCLUSION**

For these reasons, Defendants respectfully request this Court to dismiss Plaintiffs Pina, Rocha, Ibarra, Kelly, Barrios, and Enzminger, and all of their claims.

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<sup>2</sup> Enzminger also filed grievances in March/April 2010 regarding CCA’s alleged failure to report an assault to the Ada County Sheriff’s Office, and not getting requested forms. (Ex. 1, Att. J.) But he does not allege either of these as a basis for his claims in the second amended complaint. (Dkt. # 71, ¶¶ 145–170, 487–490.) Thus, it has no relevance. *Griffin*, 557 F.3d at 1120–21. Enzminger did not file any other grievances. (Ex. 1, ¶ 24.)

DATED this 14<sup>th</sup> day of July 2010.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/ Daniel P. Struck

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