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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 William Mathews,

13 Plaintiff,

14 v.

15 Joseph Arpaio,

16 Defendant.

NO. CV 06-1143-PHX-FJM (ECV)

MOTION TO DISMISS

17

18 Defendant Arpaio moves to dismiss this action pursuant to Rule 12(b),
19 Federal Rules of Civil Procedure, because Plaintiff Mathews has failed to
20 exhaust his administrative remedies as required by the Prison Litigation Reform
21 Act ("PLRA"), 42 U.S.C. §1997e(a). This motion is supported by the following
22 Memorandum of Points and Authorities, Affidavit, and Attachments.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL BACKGROUND**

3 **A. Plaintiff's Complaint**

4 On January 5, 2006, Plaintiff William Mathews was booked (P137390) into
5 the Maricopa County Jail's Intake Unit and transferred to the Fourth Avenue Unit
6 the same day. Affidavit of Zelean Tademay at ¶12, attached hereto as Exhibit 1.
7 On January 14, 2006, he was transferred to the Towers Unit. *Id.* On June 7,
8 2006, he was transferred to the Lower Buckeye Unit. *Id.* On June 12, 2006, he
9 was transferred back to the Towers Unit where he remains in custody. *Id.*

10 On April 24, 2006, he filed an action against Defendant Arpaio pursuant to
11 42 U.S.C. § 1983. Complaint (Doc. #1) at 1.

12 Plaintiff alleges that while he was detained at the Towers Unit, Defendant
13 Arpaio violated his constitutional rights by failing to provide adequate outdoor
14 recreational opportunities for him.¹ *Id.* at 6, ¶3. Plaintiff contends that the
15 alleged violation of his constitutional rights caused him to experience "bone, joint
16 and muscle problems; [elevated] blood pressure ... which may be leading to
17 heart disease or stroke; moderate depression and the first signs of obesity." *Id.*
18 6, ¶4. Plaintiff admits that he did not exhaust his administrative remedies for all
19 of those allegations, *id.* at 6, ¶5(b), (c), but he asserts that the "jail commander

20 _____
21 ¹ The Court dismissed Defendant Maricopa County Sheriff's Office
22 because the Sheriff's Office is not a proper defendant. Order (Doc. #2) at 3.
The Court also dismissed Counts I-II (overcrowded living conditions) because
Plaintiff failed to state a claim. Order at 3-4.

1 stated this was not a grievable issue,” *id.* at 6, ¶5(d).

2 **B. MCSO Inmate Grievance Procedure**

3 The Maricopa County Sheriff’s Office (“MCSO”) has established an inmate
4 grievance and appeal process for inmates to register complaints concerning the
5 interpretation and application of policies that govern their treatment in Maricopa
6 County Jail facilities. Exhibit 1 at ¶3. MCSO Policy & Procedure DJ-3 (“Policy
7 DJ-3”) describes that inmate grievance procedure. *Id.* at ¶4; Policy DJ-3,
8 attached hereto as Exhibit 1(A).

9 An inmate may submit a grievance about any issue. Ex. 1 at ¶9; Ex. 1(A)
10 at ¶¶1(C), 2. Between January 1, 2006 and April 30, 2006, inmates filed 27
11 grievances at the Towers Unit alleging inadequate outdoor recreational
12 opportunities. Ex. 1 at ¶11.

13 Detention officers do not ignore inmate grievances. Ex. 1 at ¶10. As part
14 of their daily shift duties, detention officers pass out grievance forms to inmates
15 who request them. *Id.* Moreover, detention officers do not restrict an inmate’s
16 privileges or otherwise retaliate against an inmate because that inmate has filed
17 a grievance form. *Id.*

18 MCSO evaluates and resolves inmate grievances by using a multi-tiered
19 administrative process. Ex. 1 at ¶5; Ex. 1(A). An inmate files a grievance by
20 completing an Inmate Grievance Form 5000-239 (“Inmate Grievance Form”).
21 Ex. 1 at ¶5. (A copy of the Inmate Grievance Form is attached hereto as Exhibit
22 1(B) and incorporated herein by this reference.) The inmate initiates the

1 informal grievance process by submitting the grievance form to detention
2 personnel in an attempt to resolve the issue. Ex. 1 at ¶5; Ex. 1(A) at ¶4. If the
3 detention officer cannot resolve the issue, the officer forwards the grievance to
4 the shift supervisor. Ex. 1 at ¶5; Ex. 1(A) at ¶4(A). If the shift supervisor is
5 unable to resolve the grievance, the shift supervisor forwards the grievance to a
6 hearing officer. Ex. 1 at ¶5; Ex. 1(A) at ¶4(B). The hearing officer then reviews
7 the matter and takes appropriate action. Ex. 1 at ¶5; Ex. 1(A) at ¶6.

8 If the inmate is not satisfied with the outcome of the informal grievance
9 process, he may then proceed to the formal grievance process by filing an
10 Institutional Grievance Appeal with the jail commander. Ex. 1 at ¶6; Ex. 1(A) at
11 ¶5. If the inmate is not satisfied with the jail commander's decision on appeal,
12 he may then file an External Grievance Appeal, which is forwarded to an
13 external referee. Ex. 1 at ¶6; Ex. (A) at ¶7. The external referee prepares a
14 response and written decision which concludes MCSO's formal grievance
15 procedure and exhausts the inmate's administrative remedies. Ex. 1 at ¶6; Ex.
16 1(A) at ¶¶7(F), 8.

17 During the booking process, MCSO provides each inmate with a copy of
18 the Rules and Regulations for Inmates ("Rules for Inmates") which describes the
19 inmate grievance procedure. *Id.* at ¶7; Rules for Inmates, attached hereto as
20 Exhibit 1(C).

21 **C. Plaintiff's Grievance Record**

22 On January 5, 2006, Plaintiff was booked into the Intake Unit and later

1 transferred to the Fourth Avenue Unit. Ex. 1 at ¶12. On January 14, 2006, he
2 was transferred to the Towers Unit. *Id.* On June 7, 2006, he was transferred to
3 the Lower Buckeye Unit. *Id.* On June 12, 2006, he was transferred back to the
4 Towers Unit where he remains in custody. *Id.* During his incarceration from
5 January 5, 2006 through the present, Plaintiff filed three inmate grievances. *Id.*
6 at ¶13. He filed those three grievances after he commenced the present action
7 on April 24, 2006. *Id.* None of those grievances relate to the allegations in this
8 action. *Id.* All of those grievances were resolved informally. *Id.*

9 **II. LEGAL ARGUMENT**

10 **A. A Motion to Dismiss is the Proper Avenue for this Challenge.**

11 An inmate's failure to exhaust administrative remedies pursuant to the
12 PLRA is treated as a matter in abatement subject to an unenumerated Rule
13 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), *cert.*
14 *denied*, U.S. 540 U.S. 810, 124 S.Ct. 50, 157 L.Ed.2d 23 (2003); *see also Ritza*
15 *v. Int'l Longshoremen's and Warehousemen's Union*, 837 F.2d 365, 368-69 (9th
16 Cir. 1988) ("Failure to exhaust non-judicial remedies is a matter in abatement,
17 not going to the merits of the claim, and as such is not properly raised in a
18 motion for summary judgment.") In deciding a motion to dismiss for failure to
19 exhaust administrative remedies, the Court may look beyond the pleadings and
20 decide disputed issues of fact. *Wyatt*, 315 F.3d at 1119-1120.

21 A defendant has the burden of raising and proving an inmate's failure to
22 exhaust non-judicial remedies. *Wyatt*, 315 F.3d at 1119. If the Court concludes

1 that the inmate has not exhausted non-judicial remedies, it may dismiss the
2 inmate's claim without prejudice. *Id.* at 1120.

3 **B. Plaintiff Has Failed to Exhaust Administrative Remedies.**

4 The PLRA provides that “[n]o action shall be brought with respect to
5 prison conditions under [42 U.S.C. §1983], or any other Federal law, by a
6 prisoner confined in any jail, prison, or other correctional facility until such
7 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
8 The PLRA's exhaustion requirement applies to “all inmate lawsuits about prison
9 life, whether they involve general circumstances or particular episodes, and
10 whether they allege excessive force or some other wrong.” *Porter v. Nussle*,
11 534 U.S. 516, 532, 122 S.Ct. 983, 992, 152 L.Ed.2d 12 (2002). “[A]n inmate
12 must exhaust [available remedies] irrespective of the forms of relief sought and
13 offered through administrative avenues.” *Booth v. Churner*, 532 U.S. 731, 741
14 n. 6, 121 S.Ct. 1819, 1825, 149 L.Ed.2d 958 (2001). To fully exhaust a Sec.
15 1983 claim, an inmate must pursue his grievance to the highest administrative
16 level available to him. *Neese v. Arpaio*, 397 F.Supp.2d 1178, 1180 (D.Ariz.
17 2005). Exhaustion must occur prior to filing suit. *McKinney v. Carey*, 311 F.3d
18 1198, 1199-1201 (9th Cir. 2002).

19 MCSO records indicate that Plaintiff filed three grievances during his
20 period of incarceration. Ex. 1 at ¶13. None of those grievances allege
21 inadequate outdoor recreational opportunities. *Id.* By choosing not to file a
22 grievance about that issue, Plaintiff has failed to exhaust his administrative

1 remedies as required by the PLRA. *Id.* at ¶14.

2 Plaintiff admits that he did not exhaust his administrative remedies for that
3 allegations. Complaint at 6, ¶5(b), (c). “A prisoner’s concession to
4 nonexhaustion is a valid ground for dismissal, so long as no exception to
5 exhaustion applies.” *Wyatt*, 315 F.3d at 1120.

6 However, Plaintiff asserts that the “jail commander stated this was not a
7 grievable issue.” Complaint at 6, ¶5(d). The MCSO inmate grievance procedure
8 does not restrict the type of grievance that an inmate may submit for evaluation
9 and resolution. Ex. 1 at ¶9; Ex. 1(A) at ¶¶1(C), 2. Moreover, between January
10 1, 2006 and April 30, 2006, inmates filed 27 grievances at the Towers Unit
11 alleging inadequate outdoor recreational opportunities. Ex. 1 at ¶11.

12 When an inmate seeks to excuse his failure to file a grievance, he raises
13 the question of whether in fact he had any administrative remedies available to
14 him. The test for deciding that question is an objective one: whether “a similarly
15 situated individual of ordinary firmness” would have deemed the remedies
16 available. *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004); see also
17 *Jones v. Smith*, 266 F.3d 399, 399 (6th Cir. 2001) (dismissal for failure to
18 exhaust was appropriate because inmate did not allege that the officer who
19 refused to provide the grievance form was the only source for those forms or
20 that inmate made other attempts to obtain a form or file a grievance without a
21 form); and *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (Sec. 1997e(a)
22 does not permit a court to consider inmate’s subjective beliefs in determining

1 whether administrative remedies are “available.”). In this case, a similarly
2 situated individual of ordinary firmness would have deemed the remedies
3 available for Plaintiff’s allegations about overcrowded and unsanitary living
4 conditions and denial of outdoor recreation for inmates in protective custody.

5 Therefore, Defendant urges the Court to dismiss this action, pursuant to
6 Rule 12(b), Federal Rules of Civil Procedure, because Plaintiff has failed to
7 exhaust his administrative remedies as required by the PLRA, 42 U.S.C.
8 §1997e(a).

9 **III. CONCLUSION**

10 For the reasons stated above, Defendant Arpaio respectfully asks this
11 Court to dismiss Plaintiff Mathews’ Complaint with prejudice.

12 RESPECTFULLY SUBMITTED this 15th day of September 2006.

13 ANDREW P. THOMAS
14 MARICOPA COUNTY ATTORNEY

15 BY: s/ Stephen A. Wolf
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20 ORIGINAL of the foregoing E-FILED
21 this 15th day of September 2006

22 and copies MAILED this
18th day of September 2006 to:

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