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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

BALWINDER SINGH TUNG,

CASE NO. 1:08-cv-00457-AWI-GBC (PC)

Plaintiff,

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING GRANTING  
DEFENDANTS’ MOTION TO DISMISS AND  
DISMISSING ACTION, WITHOUT  
PREJUDICE, FOR FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES

v.

JAMES HARTLEY, et al.,

Doc. 36

Defendants.

/ OBJECTIONS DUE WITHIN THIRTY DAYS

**Findings and Recommendations**

**I. Procedural History**

On March 31, 2008, Plaintiff Balwinder Singh Tung (“Plaintiff”), a state prisoner proceeding in forma pauperis and represented by retained counsel, Marc E. Grossman, Esq., filed this civil rights action pursuant to 42 U.S.C. § 1983. On March 3, 2011, the Court adopted findings and recommendations that Plaintiff’s third amended complaint proceed on his cognizable claims against Defendants Governor Schwarzenegger and Secretary Cate of the California Department of Corrections and Rehabilitation (“Defendants”) for Eighth Amendment deliberate indifference to health and cruel and unusual punishment, due to Defendants’ policy of housing prisoners in buildings that exceeded 100 percent of their design capacity, and that this resulted in “dirty air” that caused him to have pneumonia and other lung diseases and problems. Docs. 27 & 29.

1 On April 14, 2011, the Court issued a second informational order, advising Plaintiff that  
2 Defendants may file an unenumerated 12(b) motion to dismiss for failure to exhaust administrative  
3 remedies and how Plaintiff must oppose the motion in order to avoid dismissal, pursuant to *Wyatt*  
4 *v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (citing *Ritza v. Int'l Longshoremen's &*  
5 *Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1998) (per curiam)). Doc. 32. On October 12,  
6 2011, Defendants filed a motion to dismiss for failure to exhaust administrative remedies. Doc. 36.  
7 On December 8, 2011, Plaintiff filed an opposition to Defendants' motion to dismiss. Doc. 42. On  
8 December 13, 2011, Defendants filed a reply to Plaintiff's opposition. Doc. 43.

## 9 II. Motion to Dismiss for Failure to Exhaust Administrative Remedies

### 10 A. Legal Standard

11 Pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall be  
12 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
13 prisoner confined in any jail, prison, or other correctional facility until such administrative remedies  
14 as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement is  
15 therefore mandatory, and no longer left to the discretion of the district court. *Woodford v. Ngo*, 548  
16 U.S. 81, 85 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)). The PLRA's exhaustion  
17 requirement requires "proper exhaustion" of administrative remedies. *Ngo*, 548 U.S. at 93. This  
18 means "[p]risoners must now exhaust all 'available' remedies," *id.* at 85, in "compliance with an  
19 agency's deadlines and other critical procedural rules." *Id.* at 90–91. The requirement cannot be  
20 satisfied "by filing an untimely or otherwise procedurally defective administrative grievance or  
21 appeal." *Id.* Further, the remedies "available" need not meet federal standards, nor need they be  
22 "plain, speedy and effective." *Porter v. Nussle*, 435 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739-40  
23 & n.5.

24 It is the prison's requirements, and not the PLRA, that define the boundaries of proper  
25 exhaustion. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The California Department of Corrections and  
26 Rehabilitation ("CDCR") provides inmates the right to file administrative appeals alleging  
27 misconduct by correctional officers or "any departmental decision, action, condition, or policy which  
28 they can demonstrate as having an adverse effect upon their welfare." *See* Cal. Code Regs. tit. 15,

1 §§ 3084.1(a) & (e). In order to exhaust all available administrative remedies within this system, a  
2 prisoner must submit his complaint as an inmate appeal on a 602 form, within fifteen<sup>1</sup> working days  
3 from the date the administrative decision or action being complained of, and proceed through several  
4 levels of appeal: (1) informal level grievance filed directly with any correctional staff member; (2)  
5 first formal level appeal filed with one of the institution's appeal coordinators; (3) second formal  
6 level appeal filed with the institution head or designee; and (4) third formal level appeal filed with  
7 the CDCR director or designee. *Id.* at §§ 3084.5 & 3084.6(c); *Brodheim v. Cry*, 584 F.3d 1262,  
8 1264–65 (9th Cir. 2009); *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). *See Ngo v.*  
9 *Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008) (*Ngo II*) (finding claims unexhausted where filed  
10 more than fifteen working days after deadline).

11 Non-exhaustion under § 1997e(a) is an affirmative defense, which should be brought by the  
12 defendants in an unenumerated motion to dismiss under Federal Rule of Civil Procedure 12(b).  
13 *Jones*, 549 U.S. at 216; *Wyatt*, 315 F.3d at 1119. In deciding a motion to dismiss for failure to  
14 exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed  
15 issues of fact. *Wyatt*, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to  
16 exhaust administrative remedies, the proper remedy is dismissal without prejudice. *Id.*

## 17 **B. Analysis**

18 Plaintiff did not file a grievance regarding his allegations that prison overcrowding caused  
19 him to have pneumonia and other lung diseases and problems. *See* 3d Am. Compl. at 2, Doc. 26; 2d  
20 Am. Compl. at 2, Doc. 24; Compl. at 2, Doc. 1. Plaintiff alleges that he is exempt from the  
21 requirements of exhaustion because he would be unable to obtain money damages through the prison  
22 grievance system. *See id.*; *see also* Pl. Opp'n at 3, Doc. 42.

23 Exhaustion is a prerequisite to suit even if the relief sought by an inmate, notably money  
24 damages, is not available in the administrative process. *Porter*, 534 U.S. at 524; *Griffin v. Arpaio*,  
25 557 F.3d 1117, 1119 (9th Cir. 2009). However, in addition to damages, Plaintiff also seeks an  
26 injunction ordering that he be placed in a single cell or bunk, as a remedy for the harm to his health  
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28 <sup>1</sup> As of July 2011, inmates have thirty calendar days to file appeals. § 3084.8(b).

1 caused by being housed in a cell or dorm with other inmates. Pl. Opp’n at 4, Doc. 42.

2 In Plaintiff’s opposition, he contends that he did submit inmate appeals and attached copies  
3 of inmate appeals in support of his argument. *See* Pl. Opp’n, Doc. 42. However, the inmate appeals  
4 Plaintiff attached refer to complaints regarding his diabetic needs and property loss claims. *See id.*  
5 None of these appeals involve a complaint that Defendants subjected Plaintiff to prison  
6 overcrowding, which caused him to have pneumonia and other lung diseases and problems.

7 For purposes of the PLRA’s exhaustion requirement, “a grievance suffices if it alerts the  
8 prison to the nature of the wrong for which redress is sought.” *Griffin*, 557 F.3d at 1120. Ultimately,  
9 a grievance must “provide enough information . . . to allow prison officials to take appropriate  
10 responsive measures.” *Id.* at 1121. Plaintiff’s appeals regarding his diabetic needs and property loss  
11 claims did not alert the prison officials of the pending claims in this civil action, pursuant to *Griffin*  
12 and the PLRA.

13 In *Ngo*, the Supreme Court held that full and “proper exhaustion of administrative remedies  
14 is necessary.” *Id.* at 84. While the Supreme Court recognized that this may be harsh, it noted that pro  
15 se prisoners who litigate in federal court will likewise be “forced to comply with numerous  
16 unforgiving deadlines and other procedural requirements.” *Id.* at 103. The Supreme Court recognized  
17 that this will prevent certain prisoner cases from proceeding, but notes that a “centerpiece of the  
18 PLRA’s effort to reduce the quantity . . . of prisoner suits is an ‘invigorated’ exhaustion provision,  
19 § 1997e(a).” *Id.* at 84 & 103. “Exhaustion is no longer left to the discretion of the district court, but  
20 is mandatory.” *Id.* at 85.

21 There is no record before this Court that Plaintiff filed a grievance with respect to his  
22 allegations that prison overcrowding caused him to have pneumonia and other lung diseases and  
23 problems. Thus, Plaintiff failed to exhaust all his mandatory administrative remedies against  
24 Defendants prior to initiating this action, which requires mandatory dismissal, in accordance with  
25 § 1997e(a) and *Ngo*.

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1 **III. Conclusion and Recommendation**

2 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 3 1. Defendants motion to dismiss, filed October 12, 2011, is GRANTED;
- 4 2. This action is DISMISSED, without prejudice, for Plaintiff’s failure to exhaust
- 5 administrative remedies, pursuant to 42 U.S.C. § 1997e(a); and
- 6 3. The Clerk of the Court is directed to close the case.

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8 These Findings and Recommendations will be submitted to the United States District Judge

9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days**

10 after being served with these Findings and Recommendations, the parties may file written objections

11 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and

12 Recommendations.” The parties are advised that failure to file objections within the specified time

13 may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th

14 Cir. 1991).

15 IT IS SO ORDERED.

16 Dated: March 7, 2012

17   
18 UNITED STATES MAGISTRATE JUDGE