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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY J. SEVERSON,

Plaintiff,

v.

F. IGBINOSA, et al.,

Defendants.

CASE NO. 1:10-cv-02217-AWI-GBC (PC)

ORDER TO SHOW CAUSE AS TO WHY  
THIS ACTION SHOULD NOT BE  
DISMISSED, WITHOUT PREJUDICE, FOR  
PLAINTIFF’S CONCESSION OF FAILURE TO  
EXHAUST ADMINISTRATIVE REMEDIES

Docs. 16, 30, 38

\_\_\_\_\_ / TWENTY-ONE DAY DEADLINE

**I. Procedural History**

On November 30, 2010, Plaintiff Timothy L. Severson (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. Doc. 1. On January 4, 2011, Plaintiff received a partial grant on one of his inmate appeals. Am. Compl. at 2 & 34, Doc. 30; Mot. Stay at 1, Doc. 16. On January 24, 2011, Plaintiff filed a “motion to stay pending exhaustion.” Mot. Stay at 1, Doc. 16. In Plaintiff’s motion to stay, Plaintiff requested this Court to stay proceedings, pending exhaustion of his inmate appeal. *Id.* at 1-2.

On March 7, 2011 and March 10, 2011, Plaintiff submitted an appeal to second level review, stating he was unsatisfied with the responses. Am. Compl. at 34 & 37, Doc. 30. On March 21, 2011, Plaintiff filed a First Amended Complaint, alleging Eighth Amendment deliberate indifference to serious medical need. Doc. 30. In Plaintiff’s amended complaint, he admits that he did not exhaust his administrative remedies, but he contends that his appeals are being intentionally delayed. *Id.* at 2.

1 On March 20, 2012, the Court issued Findings and Recommendations, recommending  
2 dismissal of this action, without prejudice, for failure to exhaust administrative remedies. Doc. 38.  
3 Plaintiff has not filed any objections to the findings and recommendations.

## 4 II. Failure to Exhaust Administrative Remedies

### 5 A. Legal Standard

6 Pursuant to the Prison Litigation Reform Act of 1995 (“PLRA”), “[n]o action shall be  
7 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
8 prisoner confined in any jail, prison, or other correctional facility until such administrative remedies  
9 as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s exhaustion requirement is  
10 therefore mandatory, and no longer left to the discretion of the district court. *Woodford v. Ngo*, 548  
11 U.S. 81, 85 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)). The PLRA’s exhaustion  
12 requirement requires “proper exhaustion” of administrative remedies. *Ngo*, 548 U.S. at 93. This  
13 means “[p]risoners must now exhaust all ‘available’ remedies,” *id.* at 85, in “compliance with an  
14 agency’s deadlines and other critical procedural rules.” *Id.* at 90–91. The requirement cannot be  
15 satisfied “by filing an untimely or otherwise procedurally defective administrative grievance or  
16 appeal.” *Id.* Further, the remedies “available” need not meet federal standards, nor need they be  
17 “plain, speedy and effective.” *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739-40  
18 & n.5.

19 It is the prison’s requirements, and not the PLRA, that define the boundaries of proper  
20 exhaustion. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The California Department of Corrections and  
21 Rehabilitation (“CDCR”) provides inmates the right to file administrative appeals alleging  
22 misconduct by correctional officers or “any departmental decision, action, condition, or policy which  
23 they can demonstrate as having an adverse effect upon their welfare.” *See* Cal. Code Regs. tit. 15,  
24 §§ 3084.1(a) & (e). In order to exhaust all available administrative remedies within this system, a  
25 prisoner must submit his complaint as an inmate appeal on a 602 form, within fifteen<sup>1</sup> working days  
26 from the date the administrative decision or action being complained of, and proceed through several  
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28 <sup>1</sup> As of July 2011, inmates have thirty calendar days to file appeals. § 3084.8(b).

1 levels of appeal: (1) informal level grievance filed directly with any correctional staff member; (2)  
2 first formal level appeal filed with one of the institution’s appeal coordinators; (3) second formal  
3 level appeal filed with the institution head or designee; and (4) third formal level appeal filed with  
4 the CDCR director or designee. *Id.* at §§ 3084.5 & 3084.6(c); *Brodheim v. Cry*, 584 F.3d 1262,  
5 1264–65 (9th Cir. 2009); *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). *See Ngo v.*  
6 *Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008) (*Ngo II*) (finding claims unexhausted where filed  
7 more than fifteen working days after deadline).

8 A prisoner’s concession to non-exhaustion is valid grounds for dismissal so long as no  
9 exception to exhaustion applies. 42 U.S.C. § 1997e(a); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th  
10 Cir. 2003). The Court may review exhibits attached to the complaint that may contradict Plaintiff’s  
11 assertions in the complaint. *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000); *Durning v. First*  
12 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). In deciding . . . failure to exhaust administrative  
13 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, 315  
14 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative  
15 remedies, the proper remedy is dismissal without prejudice. *Id.*

### 16 **III. Analysis**

17 A prisoner’s concession to non-exhaustion is valid grounds for dismissal so long as no  
18 exception to exhaustion applies. 42 U.S.C. § 1997e(a); *Wyatt*, 315 F.3d at 1120. The Court notes that  
19 on January 24, 2011, Plaintiff filed a “motion to stay pending exhaustion.” Mot. Stay at 1, Doc. 16.  
20 In Plaintiff’s motion to stay, Plaintiff requested this Court to stay proceedings, pending exhaustion  
21 of his inmate appeal. *Id.* at 1-2. Thus, Plaintiff conceded non-exhaustion prior to the filing of this  
22 complaint. “[A] district court must dismiss a case without prejudice ‘when there is no pre-suit  
23 exhaustion,’ even if there is exhaustion while suit is pending.” *Lira v. Herrera*, 427 F.3d 1164, 1170  
24 (9th Cir. 2005), *cert. denied*, 549 U.S. 1204 (2007) (quoting *McKinney v. Carey*, 311 F.3d 1198,  
25 1200 (9th Cir. 2002) (*per curiam*)).

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1 **IV. Conclusion**

2 Based on the foregoing, it is HEREBY ORDERED that within **twenty-one (21) days** of the  
3 service of this order, Plaintiff SHALL SHOW CAUSE as to why this action should not be dismissed,  
4 without prejudice, for Plaintiff's concession of failure to exhaust administrative remedies, pursuant  
5 to 42 U.S.C. § 1997e(a).  
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8 IT IS SO ORDERED.

9 Dated: July 18, 2012

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12 UNITED STATES MAGISTRATE JUDGE  
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