

1 therefore mandatory, and no longer left to the discretion of the district court. *Woodford v. Ngo*, 548
2 U.S. 81, 85 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)). The PLRA’s exhaustion
3 requirement requires “proper exhaustion” of administrative remedies. *Ngo*, 548 U.S. at 93. This
4 means “[p]risoners must now exhaust all ‘available’ remedies,” *id.* at 85, in “compliance with an
5 agency’s deadlines and other critical procedural rules.” *Id.* at 90–91. The requirement cannot be
6 satisfied “by filing an untimely or otherwise procedurally defective administrative grievance or
7 appeal.” *Id.* Further, the remedies “available” need not meet federal standards, nor need they be
8 “plain, speedy and effective.” *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739-40
9 & n.5.

10 It is the prison’s requirements, and not the PLRA, that define the boundaries of proper
11 exhaustion. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The California Department of Corrections and
12 Rehabilitation (“CDCR”) provides inmates the right to file administrative appeals alleging
13 misconduct by correctional officers or “any departmental decision, action, condition, or policy which
14 they can demonstrate as having an adverse effect upon their welfare.” *See* Cal. Code Regs. tit. 15,
15 §§ 3084.1(a) & (e). In order to exhaust all available administrative remedies within this system, a
16 prisoner must submit his complaint as an inmate appeal on a 602 form, within fifteen¹ working days
17 from the date the administrative decision or action being complained of, and proceed through several
18 levels of appeal: (1) informal level grievance filed directly with any correctional staff member; (2)
19 first formal level appeal filed with one of the institution’s appeal coordinators; (3) second formal
20 level appeal filed with the institution head or designee; and (4) third formal level appeal filed with
21 the CDCR director or designee. *Id.* at §§ 3084.5 & 3084.6(c); *Brodheim v. Cry*, 584 F.3d 1262,
22 1264–65 (9th Cir. 2009); *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). *See Ngo v.*
23 *Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008) (*Ngo II*) (finding claims unexhausted where filed
24 more than fifteen working days after deadline).

25 A prisoner’s concession to non-exhaustion is valid grounds for dismissal so long as no
26 exception to exhaustion applies. 42 U.S.C. § 1997e(a); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th
27

28 ¹ As of July 2011, inmates have thirty calendar days to file appeals. § 3084.8(b).

1 Cir. 2003). The Court may review exhibits attached to the complaint that may contradict Plaintiff's
2 assertions in the complaint. *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000); *Durning v. First*
3 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). In deciding . . . failure to exhaust administrative
4 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*, 315
5 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative
6 remedies, the proper remedy is dismissal without prejudice. *Id.*

7 **B. Analysis**

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*, 315 F.3d at 1120. As stated above,
10 In Plaintiff's complaint, he concedes non-exhaustion, stating his inmate appeal was still at the first
11 level of review; that he wishes to file his complaint concurrently while exhausting; and that he
12 cannot exhaust because the institution will not agree to a money settlement. *See* Compl. at 6, Doc.
13 1. "[A] district court must dismiss a case without prejudice 'when there is no pre-suit exhaustion,'
14 even if there is exhaustion while suit is pending." *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir.
15 2005), *cert. denied*, 549 U.S. 1204 (2007) (quoting *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th
16 Cir. 2002) (per curiam)).

17 Plaintiff alleges that he is exempt from the requirements of exhaustion because he would be
18 unable to obtain money damages through the prison grievance system. *See* Compl. at 6, Doc. 1.
19 However, exhaustion is a prerequisite to suit even if the relief sought by an inmate, notably money
20 damages, is not available in the administrative process. *Porter*, 534 U.S. at 524; *Griffin v. Arpaio*,
21 557 F.3d 1117, 1119 (9th Cir. 2009).

22 In *Ngo*, the Supreme Court held that "full and proper exhaustion of administrative remedies
23 is necessary, which means using all steps that the agency holds out, and doing so properly (so that
24 the agency addresses the issues on the merits)." *See Ngo*, 548 U.S. 81, 84, 90, 94. "Proper exhaustion
25 demands compliance with an agency's deadlines and other critical procedural rules because no
26 adjudicative system can function effectively without imposing some orderly structure on the course
27 of its proceedings." *Id.* at 91, 103. While the Supreme Court recognized that this may be harsh and
28 will prevent certain prisoner cases from proceeding, the "centerpiece of the PLRA's effort to reduce

1 the quantity . . . of prisoner suits is an ‘invigorated’ exhaustion provision, § 1997e(a).” *Id.* at 84 &
2 103. “Exhaustion is no longer left to the discretion of the district court, but is mandatory.” *Id.* at 85.
3 Plaintiff concedes that he failed to exhaust all his mandatory administrative remedies against
4 defendants prior to initiating this action, which requires mandatory dismissal, in accordance with §
5 1997e(a) and *Ngo*.

6 **III. Conclusion**

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

11 IT IS SO ORDERED.

12 Dated: September 18, 2012

13 
14 _____
15 UNITED STATES MAGISTRATE JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28