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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 RICHARD LORENZO MARTINEZ,

12 Plaintiff,

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 Defendants.
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Case No. 1:14-cv-01393-LJO-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSING ACTION
FOR FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

(ECF Nos. 10, 13)

OBJECTIONS DUE WITHIN TWENTY-
ONE DAYS

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18 On October 30, 2014, Plaintiff Richard Lorenzo Martinez, a state prisoner, proceeding
19 pro se filed a complaint. On October 30, 2014, Plaintiff filed an amended complaint which
20 indicated that he had not exhausted his administrative remedies. On November 3, 2014, the
21 undersigned issued an order to show cause why this action should not be dismissed for failure to
22 exhaust administrative remedies. On November 25, 2014, Plaintiff filed a motion for an
23 extension of time to respond to the order to show cause. In the motion, Plaintiff states that his
24 appeal is at the third level of review and he seeks an additional thirty days to receive back the
25 third level appeal response.

26 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
27 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
28 confined in any jail, prison, or other correctional facility until such administrative remedies as

1 are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is
2 required regardless of the relief sought by the prisoner. Booth v. Churner, 532 U.S. 731, 741
3 (2001). Proper exhaustion is required so “a prisoner must complete the administrative review
4 process in accordance with the applicable rules, including deadlines, as a precondition to
5 bringing suit in federal court.” Ngo v. Woodford, 539 F.3d 1108, 1109 (9th Cir. 2008) (quoting
6 Woodford v. Ngo, 126 S. Ct. 2378, 2384 (2006)).

7 The Court takes judicial notice of the fact that the California Department of Corrections
8 and Rehabilitation has an administrative grievance system for prisoner complaints. Cal. Code
9 Regs., tit. 15 § 3084.1. The process is initiated by submitting a CDC Form 602. Id. at §
10 3084.2(a). Three levels of appeal are involved; the first level, second level, and third level. Id.
11 at §§ 3084.2, 3084.7. Appeals must be submitted within thirty calendar days of the event being
12 appealed, and the process is initiated by submission of the appeal to the appeals coordinator. Id.
13 at § 3084.8(b). Once the third level review is complete, the inmate has exhausted his
14 administrative remedies. Id. at § 3084.1(b)

15 In order to satisfy section 1997e(a), California state prisoners are required to use the
16 available process to exhaust their claims prior to filing suit. Woodford v. Ngo, 548 U.S. 81
17 (2006). “[E]xhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be
18 brought in court.” Jones v. Bock, 127 S. Ct. 910, 918-19 (2007) (citing Porter v. Nussle, 435
19 U.S. 516, 524 (2002)). “All ‘available’ remedies must now be exhausted; those remedies need
20 not meet federal standards, nor must they be ‘plain, speedy, and effective.’” Porter, 534 U.S. at
21 524 (quoting Booth, 532 U.S. at 739 n.5).

22 There is no exception to the exhaustion requirement for imminent harm. If the court
23 concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is
24 dismissal without prejudice, even where there has been exhaustion while the suit is pending.
25 Lira v. Herrera, 427 F.3d 1164, 1171 (9th Cir. 2005). Because it is clear from the face of
26 Plaintiff’s complaint and his response to the order to show cause that he has not yet exhausted
27 the administrative grievance procedure, this action must be dismissed. 42 U.S.C. § 1997e(a);
28 Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to

1 nonexhaustion is a valid grounds for dismissal . . .”).

2 Plaintiff filed this action on September 8, 2014, prior to exhausting his administrative
3 remedies. Based on the foregoing, IT IS HEREBY RECOMMENDED that this action be
4 dismissed without prejudice for Plaintiff’s failure to exhaust administrative remedies.

5 These findings and recommendations are submitted to the district judge assigned to this
6 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within twenty-
7 one (21) days of service of this recommendation, Plaintiff may file written objections to these
8 findings and recommendations with the Court. Such a document should be captioned
9 “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge will
10 review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. §
11 636(b)(1)(C). Plaintiff is advised that failure to file objections within the specified time may
12 result in the waiver of rights on appeal. Wilkerson v. Wheeler, ___ F.3d ___, ___, No. 11-17911,
13 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391,
14 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: December 5, 2014

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19 UNITED STATES MAGISTRATE JUDGE
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