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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES C. JAMES,

Plaintiff,

No. CIV S-11-1527 GEB EFB P

vs.

FAGAN,

Defendant.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis, and a notice of exhausting his administrative remedies. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

**I. Request to Proceed In Forma Pauperis**

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. No. 4. His application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

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1 **II. Screening Order**

2 Pursuant to 28 U.S.C. § 1915A, the court shall review “a complaint in a civil action in  
3 which a prisoner seeks redress from a governmental entity or officer or employee of a  
4 governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify cognizable  
5 claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous,  
6 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief  
7 from a defendant who is immune from such relief.” *Id.* § 1915A(b).

8 The court has reviewed plaintiff’s June 6, 2011 complaint pursuant to 28 U.S.C. §  
9 1915A, as well as plaintiff’s August 8, 2011 notice of exhausting his administrative remedies.  
10 Because plaintiff concedes that he did not exhaust his administrative remedies prior to  
11 commencing this action, the action must be dismissed. *See Wyatt v. Terhune*, 315 F.3d 1108,  
12 1120 (9th Cir. 2003) (stating that a prisoner’s concession to nonexhaustion is a valid ground for  
13 dismissal of an action).

14 The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e was amended to provide  
15 that “[n]o action shall be brought with respect to prison conditions under section 1983 of this  
16 title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional  
17 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).  
18 This requirement is mandatory and unequivocal. *Booth v. Churner*, 532 U.S. 731, 741 (2001);  
19 *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (“Congress could have written a statute  
20 making exhaustion a precondition to judgment, but it did not. The actual statute makes  
21 exhaustion a precondition to *suit*.”). A prisoner seeking leave to proceed in forma pauperis in an  
22 action challenging the conditions of his confinement brings an action for purposes of 42 U.S.C.  
23 § 1997e when he submits his complaint to the court. *Vaden v. Summerhill*, 449 F.3d 1047, 1050  
24 (9th Cir. 2006). Therefore, a prisoner must exhaust available administrative remedies before  
25 filing any papers in federal court and is not entitled to a stay of judicial proceedings in order to  
26 exhaust. *Id.* at 1051; *McKinney*, 311 F.3d 1198. *See also Rhodes v. Robinson*, 621 F.3d 1002, at

1 \*6, 13 (9th Cir. 2010) (clarifying that the rule of *Vaden* and *McKinney* does not apply to new  
2 claims raised in a supplemental complaint regarding conduct that occurred after the initial  
3 complaint was filed).

4 California prisoners may appeal “any policy, decision, action, condition, or omission”  
5 that the inmate can demonstrate “as having an adverse effect upon his or her welfare.” Cal. Code  
6 Regs. tit. 15, § 3084.1(a). The grievance process, as defined by California regulations, has three  
7 levels of review to address an inmate’s claims, subject to certain exceptions. *See* Cal. Code  
8 Regs. tit. 15, § 3084.7. Administrative remedies generally are exhausted once a plaintiff has  
9 received a “Director’s Level Decision,” or third level review, with respect to his issues or claims.  
10 Cal. Code Regs. tit. 15, § 3084.1(b).

11 Here, plaintiff checked the box on his form complaint indicating that the administrative  
12 exhaustion process had been completed, but also included a note that “CDCR refused to  
13 complete [the] process.” Dckt. No. 1 (Complaint) § II. Plaintiff elaborates with the allegation  
14 that he submitted an administrative appeal to the final level of review, but that it was returned to  
15 him on the grounds that it was missing documentation. *Id.* (Pl.’s Decl.) ¶ 11. He alleges that he  
16 has done everything in his power to complete the exhaustion process, *id.* ¶ 12, but on August 8,  
17 2011, he filed a document titled “Notice Re Exhaustion of Administrative Remedy.” That  
18 document indicates that he received a response from the final level of review on July 11, 2011,  
19 after plaintiff had commenced this action. Dckt. No. 7. Plaintiff explains that he protested the  
20 rejection of his earlier filed appeal at the final level review based on the missing documentation,  
21 and that officials then took action at the final level of review. *Id.* Based on this record, it is  
22 apparent that plaintiff did not exhaust his available administrative remedies prior to filing suit.  
23 Consequently, this action must be dismissed. *See Wyatt*, 315 F.3d at 1120.

24 As plaintiff alleges his administrative remedies are now exhausted, he may promptly file  
25 a new action alleging the same claims raised in this action. Plaintiff is hereby informed that if he  
26 decides to file a new action, he should not include this case number on the new complaint. In

1 addition, the new complaint should be accompanied by a properly completed, updated  
2 application to proceed in forma pauperis.

3 **III. Conclusion**

4 Accordingly, IT IS HEREBY ORDERED that:

5 1. Plaintiff's request to proceed in forma pauperis is granted.

6 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in  
7 accordance with the notice to the Director of the California Department of Corrections and  
8 Rehabilitation filed concurrently herewith.

9 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without  
10 prejudice for failure to exhaust administrative remedies prior to filing suit.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
13 after being served with these findings and recommendations, any party may file written  
14 objections with the court and serve a copy on all parties. Such a document should be captioned  
15 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
16 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
17 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: January 3, 2012.

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20 EDMUND F. BRENNAN  
21 UNITED STATES MAGISTRATE JUDGE  
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