

1 proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.;
2 Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a
3 prerequisite to all prisoner suits about prison life, whether they involve general
4 circumstances or particular episodes, and whether they allege excessive force or
5 some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion requirement
6 requires "proper exhaustion" of available administrative remedies. Woodford v.
7 Ng, 548 U.S. 81, 93 (2006).

8 The California Department of Corrections and Rehabilitation (CDCR)
9 provides its inmates and parolees the right to appeal administratively "any
10 departmental decision, action, condition, or policy which they can demonstrate as
11 having an adverse effect upon their welfare." Cal. Code Regs. tit. 15,
12 § 3084.1(a). It also provides its inmates the right to file administrative appeals
13 alleging misconduct by correctional officers. See id. § 3084.1(e). In order to
14 exhaust available administrative remedies within this system, a prisoner must
15 submit his complaint on CDCR Form 602 and proceed through several levels of
16 appeal: (1) informal level grievance filed directly with any correctional staff
17 member, (2) first formal level appeal filed with one of the institution's appeal
18 coordinators, (3) second formal level appeal filed with the institution head or
19 designee, and (4) third formal level appeal filed with the CDCR director or
20 designee. Id. § 3084.5; Brodheim v. Cry, 584 F.3d 1262, 1264-65 (9th Cir.
21 2009). This satisfies the administrative remedies exhaustion requirement under
22 § 1997e(a). Barry v. Ratelle, 985 F. Supp. 1235, 1237-38 (S.D. Cal. 1997).

23 Nonexhaustion under § 1997e(a) is an affirmative defense which should
24 be brought by defendant(s) in an unenumerated motion to dismiss under Federal
25 Rule of Civil Procedure 12 (b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.
26 2003). But a complaint may be dismissed by the court for failure to exhaust if a
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1 prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.”
2 Id. at 1120. Here, plaintiff concedes he did not exhaust available administrative
3 remedies through the Director’s level of review before filing suit, but claims that
4 he need not do so because the damages he seeks are not “attainable” thru
5 CDCR’s administrative appeal process. Not so. The Supreme Court has made
6 clear that exhaustion is a prerequisite to suit even when the prisoner seeks relief
7 not available in grievance proceedings. See Booth, 532 U.S. at 741. Plaintiff did
8 not exhaust available administrative remedies before filing suit or present any
9 extraordinary circumstances which might compel that he be excused from doing
10 so. Cf. Booth, 532 U.S. at 741 n.6 (courts should not read “futility or other
11 exceptions” into § 1997e(a)).

12 Accordingly, the complaint is DISMISSED without prejudice to refiling
13 after exhausting CDCR’s administrative process. See McKinney v. Carey, 311
14 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be dismissed without
15 prejudice unless prisoner exhausted available administrative remedies before he
16 filed suit, even if prisoner fully exhausts while the suit is pending).

17 The clerk shall enter judgment in accordance with this order and close the
18 file.

19 SO ORDERED.

20 DATED: Aug. 8, 2013

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23 CHARLES R. BREYER
24 United States District Judge
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