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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

WILLIE L. HARRIS,

11-cv-01912-LJO-GBC (PC)

Plaintiff,

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSAL OF ACTION  
WITHOUT PREJUDICE FOR FAILURE TO  
EXHAUST ADMINISTRATIVE REMEDIES

v.

J. ROSCELLI, et al.,

(Doc. 1; Doc. 9)

Defendants.

FIFTEEN DAY DEADLINE

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**I. Factual and Procedural Background**

Willie L. Harris (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. On November 17, 2011, Plaintiff filed his original complaint. Doc. 1. On page two of the form complaint, Plaintiff states that he has not completed exhaustion of administrative remedies due to the fact that it is still pending. Doc. 1 at 2. On April 18, 2012, Plaintiff filed an amended complaint in which he indicates that he has finally exhausted administrative remedies and that he administrative appeal was denied at the final level. Doc. 9 at 2. On September 18, 2012, the Court issued an order to show cause which gave Plaintiff thirty days to respond as to why the action should not be dismissed for failure to exhaust administrative remedies. Doc. 19. Plaintiff has failed to file a timely response to the order to show cause.

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1           **II. Exhaustion Requirement**

2           Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with  
3 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
4 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
5 available are exhausted." 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
6 administrative remedies prior to filing suit. *Jones v. Bock*, 127 S.Ct. 910, 918-19 (2007); *McKinney*  
7 *v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). The Court must dismiss a case without  
8 prejudice even when there is exhaustion while the suit is pending. *Lira v. Herrera*, 427 F.3d 1164,  
9 1170 (9th Cir. 2005).

10           Exhaustion is required regardless of the relief sought by the prisoner. *Booth v. Churner*, 532  
11 U.S. 731, 741, 121 S.Ct. 1819 (2001). A prisoner must "must use all steps the prison holds out,  
12 enabling the prison to reach the merits of the issue." *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir.  
13 2009); *see also Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). A prisoner's concession to  
14 non-exhaustion is valid grounds for dismissal so long as no exception to exhaustion applies. 42  
15 U.S.C. § 1997e(a); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003).

16           The Court takes judicial notice of the fact that the California Department of Corrections and  
17 Rehabilitation has an administrative grievance system for prisoner complaints. Cal. Code Regs., tit.  
18 15 § 3084.1 (2011). The process is initiated by submitting a CDC Form 602. *Id.* at § 3084.2. Three  
19 levels of appeal are involved, including the first formal level, second formal level, and third formal  
20 level, also known as the "Director's Level." *Id.* at § 3084.7. Appeals must be submitted within thirty  
21 calendar days of the event being appealed, and the process is initiated by submission of the appeal  
22 to the informal level, or in some circumstances, the first formal level. *Id.* at §§ 3084.8.

23           In order to satisfy section 1997e(a), California state prisoners are required to use the available  
24 process to exhaust their claims prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378,  
25 2383 (2006); *McKinney*, 311 F.3d at 1199-1201. "[E]xhaustion is mandatory under the PLRA and  
26 . . . unexhausted claims cannot be brought in court." *Jones*, 127 S.Ct. at 918-19 (citing *Porter*, 435  
27 U.S. at 524). "All 'available' remedies must now be exhausted; those remedies need not meet  
28 federal standards, nor must they be 'plain, speedy, and effective.'" *Porter*, 534 U.S. at 524 (quoting

1 *Booth*, 532 U.S. at 739 n.5).

2 It is clear that Plaintiff prematurely filed this action prior to the exhaustion of his  
3 administrative remedies. The Court must dismiss a case without prejudice even when there is  
4 exhaustion while the suit is pending. *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005). Because  
5 it is clear from the face of Plaintiff's complaint that he has not yet exhausted, this action should be  
6 dismissed. 42 U.S.C. § 1997e(a); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) ("A  
7 prisoner's concession to nonexhaustion is a valid grounds for dismissal . . .").

8 **III. Conclusion and Recommendation**

9 Based on the foregoing, the Court HEREBY RECOMMENDS: That this action be  
10 dismissed without prejudice for failure to exhaust administrative remedies.

11  
12 These findings and recommendations will be submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
14 fifteen (15) days after being served with these findings and recommendations, Plaintiff may file  
15 written objections with the Court. The document should be captioned "Objections to Magistrate  
16 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections  
17 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
18 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19  
20 IT IS SO ORDERED.

21 Dated: November 9, 2012

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UNITED STATES MAGISTRATE JUDGE