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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TRISTAIN CROWDER,  
Plaintiff,  
v.  
A. CASTILLO, et al.,  
Defendants.

Case No. 1:16-cv-00851-DAD-MJS (PC)

**FINDINGS AND RECOMMENDATION  
TO DISMISS ACTION WITHOUT  
PREJUDICE AT PLAINTIFF'S REQUEST  
(ECF NO. 35)**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. The action proceeds on Plaintiff's Eighth Amendment claims against defendants Castillo, Gonzalez, Ibarra and Diaz.

On July 10, 2017, Defendants filed a motion for summary judgment on the ground Plaintiff failed to exhaust administrative remedies. (ECF No. 31.) Plaintiff did not respond to that motion, but instead, on September 1, 2017, filed a request to "withdraw" his first amended complaint. (ECF No. 35.) He states therein that he does not wish to pursue the matter further due to his lack of legal knowledge and inability to procure counsel. Defendants did not respond to this submission and the time for doing so has passed.

A plaintiff may voluntarily dismiss an action without a court order by either (1) filing a notice of dismissal before the opposing party serves either an answer or a

1 motion for summary judgment; or (2) filing a stipulation of dismissal signed by all parties  
2 who have appeared. Fed. R. Civ. P. 41(a)(1)(A). Neither circumstance is applicable  
3 here. Accordingly, this action may be dismissed at Plaintiff's request only by court order,  
4 on terms that the court considers proper. Fed. R. Civ. P. 41(a)(2).

5 Here, the Court concludes dismissal without prejudice is proper. Defendants  
6 have not objected to the request, nor would they have any apparent basis to do so.  
7 They have filed a motion for summary judgment on exhaustion grounds. If they prevail  
8 on that motion, the action would be dismissed without prejudice. See McKinney v.  
9 Carey, 311 F.3d 1198, 1200–1201 (9th Cir.2002). The same result is achieved by  
10 granting Plaintiff's request.

11 Accordingly, it is HEREBY RECOMMENDED that the action be dismissed  
12 without prejudice at Plaintiff's request pursuant to Federal Rule of Civil Procedure  
13 41(a)(2).

14 The findings and recommendation are submitted to the United States District  
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
16 **fourteen** (14) days after being served with the findings and recommendation, any party  
17 may file written objections with the Court and serve a copy on all parties. Such a  
18 document should be captioned "Objections to Magistrate Judge's Findings and  
19 Recommendation." Any reply to the objections shall be served and filed within fourteen  
20 (14) days after service of the objections. The parties are advised that failure to file  
21 objections within the specified time may result in the waiver of rights on appeal.  
22 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
23 F.2d 1391, 1394 (9th Cir. 1991)).

24  
25 IT IS SO ORDERED.

26  
27 Dated: September 23, 2017

1s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE