

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TOY TERRELL SMITH,

Case No. 1:16-cv-01924-LJO-JDP

Plaintiff,

**FINDINGS AND RECOMMENDATIONS
TO GRANT PLAINTIFF'S MOTION TO
DISMISS DEFENDANT J. ACEBEDO**

J. TORRES, *et al.*,

ECF No. 52

Defendants.

FINDINGS AND RECOMMENDATIONS TO DENY DEFENDANT J. ACEBEDO'S MOTION FOR SUMMARY JUDGMENT AS MOOT

ECF No. 39

14-DAY DEADLINE

Plaintiff is a state prisoner proceeding without counsel and *in forma pauperis* in this civil rights action brought under 42 U.S.C. § 1983. On July 20, 2018, defendant J. Acebedo moved for summary judgment. ECF No. 39. On November 5, 2018, plaintiff filed a motion to withdraw claims against defendant J. Acebedo. ECF No. 52. Plaintiff indicates that he does not intend to file an opposition to the pending motion for summary judgment on the issue of exhaustion of administrative remedies because J. Acebedo’s arguments are “well founded and true.” *Id.*

Where a motion for summary judgment has been served and a stipulation of dismissal has not been filed, plaintiff may request dismissal by court order. *See* Fed. R. Civ. P. 41(a). The court may issue a dismissal order on terms it considers proper. *See* Fed. R. Civ. P. 41(a)(2). Here, plaintiff requests dismissal of claims against J. Acebedo because he failed to

1 properly exhaust his claims against J. Acebedo. *See* ECF No. 52. When a plaintiff has failed to
2 exhaust as required by 42 U.S.C. § 1997e(a), the proper remedy is dismissal without prejudice.
3 *See Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005). Accordingly, we will recommend
4 that the claims against defendant J. Acebedo be dismissed from this case without prejudice. If
5 this recommendation is adopted, the pending motion for summary judgment filed solely by J.
6 Acebedo should be denied as moot.

7 Accordingly, it is recommended that:

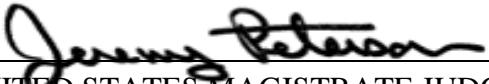
- 8 1. Plaintiff's motion to dismiss claims against J. Acebedo be granted. ECF No. 52.
- 9 2. The claims against defendant J. Acebedo be dismissed without prejudice.
- 10 3. Defendant J. Acebedo's motion for summary judgment be denied as moot.

11 ECF No. 39.

12 These findings and recommendations are submitted to the U.S. district judge presiding
13 over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within 14 days of the
14 service of the findings and recommendations, the parties may file written objections to the
15 findings and recommendations with the court and serve a copy on all parties. That document
16 must be captioned "Objections to Magistrate Judge's Findings and Recommendations." The
17 presiding district judge will then review the findings and recommendations under 28 U.S.C.
18 § 636(b)(1)(C). The parties' failure to file objections within the specified time may waive their
19 rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

20 IT IS SO ORDERED.
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22 Dated: November 20, 2018
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24 UNITED STATES MAGISTRATE JUDGE
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