



1 On February 8, 2017, Plaintiff filed a “Motion for Leave to Exhaust All State  
2 Remedies.” (ECF No. 9.) Therein, Plaintiff concedes he has not exhausted  
3 administrative remedies and appears to seek a stay of the action pending exhaustion.

4 Pursuant to the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be brought  
5 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
6 a prisoner confined in any jail, prison, or other correctional facility until such  
7 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).  
8 Prisoners are required to exhaust the available administrative remedies prior to filing  
9 suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198,  
10 1199-1201 (9th Cir. 2002). Because exhaustion must precede the filing of the complaint,  
11 compliance with § 1997e(a) is not achieved by exhausting administrative remedies while  
12 the lawsuit is pending. See McKinney, 311 F.3d at 1199.

13 “[I]nmates are not required to specially plead or demonstrate exhaustion in their  
14 complaints.” Jones, 549 U.S. at 216. However, “in those rare cases where a failure to  
15 exhaust is clear from the face of the complaint,” dismissal for failure to state a claim is  
16 appropriate, even at the screening stage. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir.  
17 2014). See also Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (stating that “[a]  
18 prisoner’s concession to nonexhaustion is a valid ground for dismissal”), overruled on  
19 other grounds by Albino, 747 F.3d at 1166; Sorce v. Garikpaetiti, 2014 WL 2506213  
20 (S.D. Cal. June 2, 2014) (relying on Albino and dismissing the complaint on screening  
21 because “it is clear from the face of [plaintiff’s] pleading that he has conceded that he  
22 failed to exhaust all available administrative remedies . . . before he commenced this  
23 action”).

24 Here, Plaintiff concedes that he did not exhaust administrative remedies. In such  
25 circumstances, dismissal is warranted. See McKinney, 311 F.3d at 1199; Albino, 747  
26 F.3d at 1169. To the extent Plaintiff’s motion for leave to exhaust requests a stay of the  
27 proceedings, it should be denied.

1 Plaintiff did not respond to the Court's order requiring him to consent to or decline  
2 Magistrate Judge jurisdiction. Accordingly, the Clerk's Office is HEREBY DIRECTED to  
3 randomly assign this matter to a District Judge pursuant to Local Rule 120(e).

4 Furthermore, it is HEREBY RECOMMENDED that:

- 5 1. Plaintiff's motion for leave to exhaust (ECF No. 9) be DENIED; and
- 6 2. The action be dismissed without prejudice for failure to exhaust  
7 administrative remedies.

8 The findings and recommendations will be submitted to the United States District  
9 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).  
10 Within fourteen (14) days after being served with the findings and recommendations, the  
11 parties may file written objections with the Court. The document should be captioned  
12 "Objections to Magistrate Judge's Findings and Recommendations." A party may  
13 respond to another party's objections by filing a response within fourteen (14) days after  
14 being served with a copy of that party's objections. The parties are advised that failure to  
15 file objections within the specified time may result in the waiver of rights on appeal.  
16 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
17 F.2d 1391, 1394 (9th Cir. 1991)).

18  
19 IT IS SO ORDERED.

20 Dated: February 21, 2017

/s/ Michael J. Seng  
21 UNITED STATES MAGISTRATE JUDGE