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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DERWIN BUTLER, SR.,  
Plaintiff,  
v.  
ESCAMILLA, et al.,  
Defendants.

Case No. 1:17-cv-00623-MJS (HC)

**ORDER DISMISSING COMPLAINT FOR  
FAILURE TO EXHAUST ADMINISTRATIVE  
REMEDIES**

**CLERK TO TERMINATE MOTIONS AND  
CLOSE CASE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in a civil rights action brought pursuant to 42 U.S.C. § 1983. He has consented to Magistrate Judge jurisdiction. (ECF No. 4.) No other parties have appeared in the action. His second amended complaint is before the Court for screening.

On September 12, 2017, the Court ordered Plaintiff to show cause why the action should not be dismissed for failure to exhaust administrative remedies, in light of the following statement in the “Exhaustion of Administrative Remedies” portion of the form complaint: “First level response, bypass. Accepted at the second level of review granted in part. Third level still waiting on response.” (ECF No. 19 (quoting ECF No. 17).) On

1 September 21, 2017, Plaintiff responded by submitting a copy of a July 24, 2017 letter  
2 from the CDCR Office of Appeals, which states that a third level appeal submitted by  
3 Plaintiff was rejected. (ECF No. 20.)

4 **I. Legal Standard**

5 Pursuant to the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be  
6 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal  
7 law, by a prisoner confined in any jail, prison, or other correctional facility until such  
8 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).  
9 Therefore, prisoners are required to exhaust all available administrative remedies prior to  
10 filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007). This requirement is mandatory  
11 regardless of the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001).  
12 Because exhaustion must precede the filing of the complaint, compliance with  
13 § 1997e(a) is not achieved by exhausting administrative remedies while the lawsuit is  
14 pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).

15 A prison inmate in California satisfies the administrative exhaustion requirement  
16 by following the procedures set forth in §§ 3084.1-3084.8 of Title 15 of the California  
17 Code of Regulations. In California, inmates “may appeal any policy, decision, action,  
18 condition, or omission by the department or its staff that the inmate . . . can demonstrate  
19 as having a material adverse effect upon his or her health, safety, or welfare.” Cal Code  
20 Regs. tit. 15, § 3084.1(a). The inmate must submit their appeal on the proper form, and  
21 is required to identify the staff member(s) involved as well as describing their  
22 involvement in the issue. See Cal. Code Regs. tit. 15, § 3084.2(a). These regulations  
23 require the prisoner to proceed through three levels of appeal. See Cal. Code Regs. tit.  
24 15, §§ 3084.1(b), 3084.2, 3084.7. A decision at the third formal level, which is also  
25 referred to as the director’s level, is not appealable and concludes a prisoner’s  
26 departmental administrative remedy. See id.

1 “[I]nmates are not required to specially plead or demonstrate exhaustion in their  
2 complaints.” Jones, 549 U.S. at 216. The PLRA’s exhaustion requirement is not  
3 jurisdictional; it creates an affirmative defense that defendants must plead and prove. Id.  
4 However, “in those rare cases where a failure to exhaust is clear from the face of the  
5 complaint,” dismissal for failure to state a claim is appropriate, even at the screening  
6 stage. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014). See also Wyatt v. Terhune,  
7 315 F.3d 1108, 1120 (9th Cir. 2003) (stating that “[a] prisoner’s concession to  
8 nonexhaustion is a valid ground for dismissal”), overruled on other grounds by Albino,  
9 747 F.3d at 1166; Sorce v. Garikpaetiti, No. 14-cv-0327 BEN (JMA), 2014 WL 2506213,  
10 at \*2 (S.D. Cal. June 2, 2014) (relying on Albino and dismissing the complaint on  
11 screening because “it is clear from the face of [plaintiff’s] pleading that he has conceded  
12 that he failed to exhaust all available administrative remedies . . . before he commenced  
13 this action”) (emphasis in original).

## 14 **II. Discussion**

15 The face of Plaintiff’s complaint makes clear that Plaintiff had not completed the  
16 administrative appeal process at the time of filing his second amended complaint. (ECF  
17 No. 17.) The letter presented by Plaintiff in his response to the order to show cause  
18 further demonstrates that Plaintiff had not exhausted the administrative remedies  
19 available to him. (ECF No. 20.) Rather, that letter, dated after the second amended  
20 complaint was filed, shows that such remedies remained available. Again, Plaintiff may  
21 not exhaust remedies while the suit is pending. Lira v. Herrera, 427 F.3d 1164, 1170-71  
22 (9th Cir. 2005); 42 U.S.C. § 1997e(a). The action therefore must be dismissed.

## 23 **III. Conclusion and Order**

24 Based on the foregoing, it is HEREBY ORDERED that:

- 25 1. The second amended complaint is dismissed without prejudice for failure to  
26 exhaust administrative remedies;

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2. The Clerk of Court is directed to terminate any pending motions and close this case.

IT IS SO ORDERED.

Dated: September 25, 2017

*1st Michael J. Seng*  
UNITED STATES MAGISTRATE JUDGE