

1 A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled
2 to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare
3 recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
4 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
5 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated in the
6 deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Prisoners
7 proceeding pro se in civil rights actions are entitled to have their pleadings liberally construed and to
8 have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012)
9 (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible, which requires
10 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for
11 the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969
12 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not sufficient, and
13 “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying the plausibility
14 standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

15 II.

16 COMPLAINT ALLEGATIONS

17 Plaintiff names Associate Warden J. Jeeter, counselor B. McKinney, counsel Ms. Drake, and
18 lieutenant Mr. Philpott, as Defendants.

19 One of Plaintiff’s teeth has a filling that is loose and out of place. Plaintiff filed a medical form
20 requesting medical treatment. The dentist told Plaintiff that there was nothing that could be done until
21 he was transferred to another facility.

22 Plaintiff was programming in the mainline section of North Kern State Prison but was placed
23 back into the reception center by the counselors and Associate Warden J. Jeeter instead of remaining
24 in administrative segregation where he was entitled to a specific program consisting of telephone calls,
25 full canteen privileges, and contact family visitation. As a result of the failure to provide proper
26 programming, Plaintiff contemplated suicide, his marriage was ruined, and suffered emotional
27 damage.

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1 **III.**

2 **DISCUSSION**

3 **A. Exhaustion of Administrative Remedies**

4 Pursuant to the Prison Litigation Reform Act (PLRA) of 1996, “[n]o action shall be brought
5 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
6 confined in any jail, prison, or other correctional facility until such administrative remedies as are
7 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
8 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v.
9 Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief
10 sought by the prisoner and regardless of the relief offered by the process, Booth v. Churner, 532 U.S.
11 731, 741 (2001), and the exhaustion requirement applies to all suits relating to prison life, Porter v.
12 Nussle, 435 U.S. 516, 532 (2002).

13 Although the “failure to exhaust is an affirmative defense under the PLRA,” a prisoner’s
14 complaint may be subject to dismissal for failure to state a claim when an affirmative defense appears
15 on its face. Jones v. Bock, 549 U.S. at 202, 215; see also Albino v. Baca, 747 F.3d 1162, 1169 (9th
16 Cir. 2014) (en banc) (noting that where a prisoner’s failure to exhaust is clear from the fact of the
17 complaint, his complaint is subject to dismissal for failure to state a claim, even at the screening
18 stage); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to
19 nonexhaustion is a valid ground for dismissal[.]”), overruled on other grounds by Albino, 747 F.3d at
20 1166.

21 In California, a prison inmate satisfies the administrative exhaustion requirement by following
22 the procedures set forth in sections 3084.1 through 3084.8 of Title 15 of the California Code of
23 Regulations. An inmate “may appeal any policy, decision, action, condition, or omission by the
24 department or its staff that the inmate...can demonstrate as having a material adverse effect upon his
25 or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). The regulations require the
26 prisoner to proceed through all three levels of review. See Cal. Code Regs. tit. 15, § 3084.2(a). A
27 decision at the third level of review, known as the director’s level of review, is not appealable and
28 constitutes the third level of administrative review. Id.

1 On the complaint form, Plaintiff acknowledges that there is an inmate appeal process available
2 at the institution and he has filed an appeal regarding the facts contained in the complaint. (Compl. at
3 2.) However, Plaintiff indicates that the process is not complaint and states “[I]’m still waiting for a
4 response from Office of Appeals in Sacramento. I’ve been transferred to another prison.” (Id.)

5 Plaintiff’s failure to exhaust his administrative remedies prior to filing suit is clear from the
6 face of the complaint. Based on Plaintiff’s concession of nonexhaustion, this action must be dismissed
7 without prejudice. Jones, 549 U.S. at 211; McKinney, 311 F.3d at 1199-1201; see also City of
8 Oakland, Cal. v. Hotels.com LP, 572 F.3d 958, 962 (9th Cir. 2009) (“[F]ailure to exhaust the
9 administrative remedies is properly treated as a curable defect and should generally result in a
10 dismissal without prejudice.”); Albino, 747 F.3d at 1170 (“Exhaustion should be decided, if feasible,
11 before reaching the merits of a prisoner’s claim”); Rhodes v. Robinson, 621 F.3d 1002, 1004 (9th Cir.
12 2010) (the “exhaustion requirement does not allow a prisoner to file a complaint addressing non-
13 exhausted claims.”) (citing McKinney, 311 F.3d at 1199). Although the Court would typically grant
14 Plaintiff leave to amend in light of his pro se status, amendment is futile in this instance because the
15 failure to exhaust cannot be cured by the allegation of additional facts. See Lopez v. Smith, 203 F.3d
16 1122, 1127 (9th Cir. 2000); see also Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279 F.3d
17 817, 824 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal without
18 leave to amend).

19 **IV.**

20 **CONCLUSION**

21 Based on the foregoing, it is HEREBY ORDERED that Plaintiff’s action is dismissed, without
22 prejudice, for failure to exhaust the administrative remedies prior to filing suit. 42 U.S.C. § 1997e(a).

23
24 IT IS SO ORDERED.

25 Dated: August 8, 2017



26 UNITED STATES MAGISTRATE JUDGE