

1 administrative remedies.”). If the agency denies an administrative claim, suit must be filed within
2 six months of the date of mailing of such denial. 28 U.S.C. § 2401(b).

3 Significantly, exhaustion of administrative remedies cannot be waived. Brady v. United
4 States, 211 F.3d 499, 503 (9th Cir. 2000) see also Vacek v. United States Postal Service, 447 F.3d
5 1248, 1250 (9th Cir. 2006) (“the exhaustion requirement . . . must be interpreted strictly.”).
6 However, the statute of limitations is subject to equitable tolling in certain circumstances. See
7 United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1638 (2015) (FTCA’s time bars are
8 nonjurisdictional and subject to equitable tolling.”).

9 II. Discussion

10 In his complaint, Plaintiff alleges that he submitted an administrative claim to the United
11 States Department of Justice, Federal Bureau of Prisons, Western Regional Office on June 12,
12 2018, and received notification on September 13, 2018, indicating that his claim under the FTCA
13 was denied. (ECF No. 1 at 2.) Plaintiff also alleges that he submitted a second administrative
14 claim to the United States Department of Justice, Federal Bureau of Prisons, Western Regional
15 Office on August 4, 2018, and received notification that his claim was denied on August 9, 2018.
16 (Id.) Based on these allegations, an action needed to be initiated with a district court on
17 Plaintiff’s second claim no later than February 9, 2019, and no later than March 13, 2019, on his
18 first claim. Plaintiff did not file the complaint in this action until May 28, 2019, well after
19 expiration of the 6-month filing deadline for either claim. (ECF No. 1.)

20 The Supreme Court of the United States determined that a statute of limitations is subject
21 to tolling on equitable grounds. Wong, 135 S. Ct. at 1632. However, the equitable tolling
22 doctrine is “to be applied sparingly.” Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113
23 (2002). A party seeking equitable tolling “bears a heavy burden to show that she is entitled to
24 equitable tolling, ‘lest the exceptions swallow the rule[.]’” Rudin v. Myles, 781 F.3d 1043, 1055
25 (9th Cir. 2014) (quoting Bills v. Clark, 628 F.3d 1092, 1097 (9th Cir. 2010)).

26 The Supreme Court determined “a litigant is entitled to equitable tolling of a statute of
27 limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights
28 diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely

1 filing.” Menominee Indian Tribe of Wisconsin v. United States, 136 S. Ct. 750, 755 (2016)
2 (citation omitted). The first element “covers those affairs within the litigant’s control,” and
3 prevents tolling “when a litigant was responsible for [his] *own* delay.” Id. at 756. Thus, the
4 Court must determine “whether the plaintiff was ‘without any fault’ in pursuing his claim.” Kwai
5 Fun Wong v. Beebe, 732 F.3d 1030, 1052 (9th Cir. 2013), aff’d Wong, 135 S. Ct. at 1630. The
6 second element requires the party to show “some extraordinary circumstance stood in [his] way
7 and prevented timely filing” of the action. Menominee Indian Tribe, 136 S. Ct. at 755 (citation
8 omitted).

9 In his complaint, Plaintiff does not address the fact that this action was filed after the six-
10 month deadline, nor does he include any allegations regarding his efforts to pursue his rights prior
11 to filing the complaint. However, the Court acknowledges that at the same time he filed this
12 action, Plaintiff filed a motion for an extension of time to file his complaint. (ECF No. 4.)
13 Plaintiff requests that his untimely filing of this action be excused because he was transferred
14 from the United States Penitentiary, Atwater to the United States Penitentiary, Victorville on
15 October 16, 2018, where he remained until at least November 2, 2018. (Id. at 2.) Thereafter, he
16 was transferred to United States Penitentiary, Lewisburg, arriving there on November 5, 2018.
17 (Id.)

18 Upon Plaintiff’s arrival at United State Penitentiary, Lewisburg, he began requesting his
19 personal legal materials so that he could obtain informational documents containing dates, times,
20 names, medical records, reports and receipts from the administrative claims. Plaintiff continued
21 to request his legal materials in November 2018, and throughout January, February and March
22 2019. (Id. at 2-7.) Plaintiff claims that without access to his legal materials, it was both
23 impossible to meet the filing deadlines or to request an extension of time. (Id. at 8.) Attached to
24 Plaintiff’s papers is a memorandum, purportedly from B. Shade, Case Manager at the United
25 States Penitentiary, Lewisburg, dated April 23, 2019. The letter indicates that “[d]ue to
26 significant inmate movement, USP Lewisburg is experiencing delays in receiving inmate property
27 from other institutions and securing, inspecting and issuing it to incoming inmates.” (Id. at 10.)
28 The memorandum further states that Plaintiff received his legal property on April 10, 2019, and

1 that “[t]his delay may have caused issues with him meeting a legal deadline.” (Id.) Additionally,
2 the memorandum contains contact information for Case Manager Shade if needed to “confirm the
3 delay in receiving [] legal property.” (Id.)

4 The Court has considered Plaintiff’s complaint and accompanying papers. However, on
5 the facts presented, the Court finds, as other courts have concluded in the past when confronted
6 with similar equitable tolling claims, that Plaintiff’s ultimate transfer to United States
7 Penitentiary, Lewisburg, did not constitute a circumstance where Plaintiff in some extraordinary
8 way was prevented from asserting his rights, warranting equitable tolling of the statute of
9 limitations. See, e.g., Cruz v. United States, 522 Fed. App’x 635, 638 (11th Cir. 2013) (finding no
10 equitable tolling where prisoner generally alleged that he could not meet the two-year filing
11 deadline because he was transferred between prisons, did not immediately have access to the
12 video of his shooting, and originally obtained bad legal advice from a fellow inmate; court
13 concluded that all of these circumstances were within prisoner’s control or reasonably avoidable
14 with due diligence); Galindo v. U.S. Dep’t of Justice, 153 Fed. App’x 333, 334 (5th Cir. 2005)
15 (concluding equitable tolling did not apply where prisoner admitted he was aware of the
16 limitations period and could have, but did not, file a pro se complaint to preserve his claims and
17 dismissing prisoner’s FTCA claim); Reyes v. United States, No. 3:13-CV-974, 2014 WL
18 2094337, at *5 (M.D. Pa. May 20, 2014).

19 Plaintiff admits that he began drafting his complaint after receiving his claim denials in
20 August and early September 2018, and before his initial transfer away from the United States
21 Penitentiary, Atwater in October 2018. Plaintiff does not explain why he was unable to complete
22 his draft prior to transfer. It is clear from the face of the complaint that the notices regarding the
23 disposition of Plaintiff’s administrative tort claims were sent to him at his place of confinement
24 and that he was aware of the need to act within six months of the denial of his claims. Plaintiff’s
25 transfer did not impede his receipt of the notice and the duty to file a complaint. In short,
26 Plaintiff’s ability to assert his rights were within his control or otherwise reasonably avoidable
27 with his diligence.

28 Further, Plaintiff’s assertion that he could not file a complaint after his transfer without the

1 benefit of his legal papers is unpersuasive. Plaintiff does not adequately explain why or how he
2 was unable to remember the factual allegations supporting his complaint, i.e., what happened,
3 when it happened, and who was involved, without his legal materials. There also is nothing
4 before the Court to demonstrate that Plaintiff was impeded by prison officials from filing a *pro se*
5 complaint encompassing his claims or was somehow prevented from seeking relief before the
6 statutory deadline. As indicated in Plaintiff's papers and his complaint, he was well aware of the
7 six-month deadline to assert his rights. Based on the facts presented, the Court finds that
8 equitable tolling of the statute of limitations is inappropriate here and this action is now time-
9 barred.

10 **III. Conclusion and Recommendation**

11 Based on the foregoing, the Court HEREBY RECOMMENDS that this action be
12 dismissed as time barred under the Federal Tort Claims Act.

13 These Findings and Recommendation will be submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
15 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
16 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
17 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
18 specified time may result in the waiver of the "right to challenge the magistrate's factual
19 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
20 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21
22 IT IS SO ORDERED.

23 Dated: December 6, 2019

24 /s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE
26
27
28