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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Riki Rashaad Muhammad,
10 Plaintiff,

No. CV 11-1890-PHX-SMM (LOA)

11 vs.

ORDER

12 Arizona Department of Corrections, et
13 al.,
14 Defendants.
15

16 Before the Court is Defendant Barbara Ams' Motion for Judgment on the
17 Pleadings pursuant to Federal Rule of Civil Procedure 12(c) (Doc. 67); Plaintiff Riki
18 Rashaad Muhammad opposes (Doc. 72).

19 The Court will deny Ams' motion.

20 **I. Background**

21 Muhammad initiated this civil rights action under 42 U.S.C. § 1983 in September
22 2011 (Doc. 1). In July 2012, he filed his Second Amended Complaint, in which he set
23 forth various constitutional claims against Arizona Department of Corrections (ADC)
24 officials (Doc. 25). In Count VII of his Second Amended Complaint, Muhammad
25 alleged that Ams knew of and disregarded an excessive risk to his safety thereby
26 exposing him to a substantial risk of harm in violation of the Eighth Amendment (*id.* at
27 29-30). According to Muhammad, Ams provided another inmate a page from
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1 Muhammad's pre-sentence report that contained confidential information about his
2 involvement in the death of a child (*id.*).

3 Ams now moves for judgment on the pleadings under Rule 12(c) on the ground
4 that Muhammad failed to exhaust administrative remedies as required under the Prison
5 Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (Doc. 67).

6 **II. Governing Standard**

7 Prisoners are required to exhaust "available" administrative remedies before
8 bringing any action under § 1983 or other federal law. *See* 42 U.S.C. § 1997e(a); *Vaden*
9 *v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*, 422 F.3d 926, 934-
10 35 (9th Cir. 2005). Exhaustion of administrative remedies is an affirmative defense that,
11 in most cases, must be raised by summary judgment. *Jones v. Bock*, 549 U.S. 199, 204,
12 216 (2007); *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014), overruling *Wyatt v.*
13 *Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). The Ninth Circuit has held that "in
14 those rare cases where a failure to exhaust is clear from the face of the complaint, a
15 defendant may successfully move to dismiss under Rule 12(b)(6) for failure to state a
16 claim." *Albino*, 747 F.3d at 1169.

17 Thus, Rule 12(b)(6), not Rule 12(c), is the proper vehicle for Ams' motion. But
18 the Court evaluates a Rule 12(c) motion for judgment on the pleadings under the same
19 standard as a Rule 12(b)(6) motion to dismiss. *Dworkin v. Hustler Magazine Inc.*, 867
20 F.2d 1188, 1192 (9th Cir. 1989).

21 To survive a motion to dismiss, a complaint "must contain sufficient factual
22 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*
23 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
24 570 (2007)). All factual allegations set forth in the complaint are taken as true and
25 construed in the light most favorable to the plaintiff. *Lee v. City of L.A.*, 250 F.3d 668,
26 679 (9th Cir. 2001) (citation omitted). A complaint may be dismissed for failure to state
27 a claim only "if it appears beyond doubt that the plaintiff can prove no set of facts in
28 support of his claim which would entitle him to relief." *Silvia v. Di Vittorio*, 658 F.3d

1 1090, 1101 (9th Cir. 2011). Where the plaintiff is a pro se prisoner, the court must
2 “construe the pleadings liberally and [] afford the petitioner the benefit of any doubt.”
3 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

4 **III. Discussion**

5 In her motion, Ams erroneously states that Mohammad’s First Amended
6 Complaint is the operative complaint (Doc. 67 at 1, citing Doc. 9). Ams cites
7 Muhammad’s statement in his First Amended Complaint that “[a]dministrative remedies
8 not sought due to fear of retaliation” (*id.* at 2, citing Doc. 9 at 18). She also cites
9 statements within Muhammad’s original Complaint explaining why he feared retaliation
10 for using the grievance system (*id.*, citing Doc. 1 at 11). Relying on these statements,
11 Ams argues that Muhammad’s claimed fear of retaliation is “meritless on its face”
12 because the ADC provides a grievance procedure and that, since the PLRA mandates
13 exhaustion of administrative remedies, Muhammad’s concession that he did not exhaust
14 warrants dismissal of the claim against her (*id.* at 3-4).

15 The operative complaint is the Second Amended Complaint (Doc. 25). The
16 original Complaint and First Amended Complaint are treated as nonexistent, and the
17 Court will not consider allegations set forth in those pleadings. *See Ferdik v. Bonzelet*,
18 963 F.2d 1258, 1262 (9th Cir. 1992). Because Ams does not cite to the proper pleading,
19 her motions fails.

20 Nonetheless, because Muhammad states in his Second Amended Complaint that
21 he did not seek administrative remedies for his claim against Ams due to fear of
22 retaliation, the Court will address Ams’ argument (Doc. 25 at 30).

23 As noted, the PLRA exhaustion provision requires proper exhaustion of only
24 “available” administrative remedies. *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir.
25 2010). Exhaustion is not required when circumstances render administrative remedies
26 otherwise “effectively unavailable.” *Id.* (quoting *Nunez v. Duncan*, 591 F.3d 1217, 1226
27 (9th Cir. 2010). The Ninth Circuit has cited favorably to cases holding that threats or
28 retaliation can render administrative remedies effectively unavailable and excuse the

1 PLRA exhaustion requirement. *See Sapp*, 623 F.3d at 823 (citing *Turner v. Burnside*,
2 541 F.3d 1077, 1085 (11th Cir. 2008), *Macias v. Zenk*, 495 F.3d 37, 45 (2d Cir. 2007),
3 and *Kaba v. Stepp*, 458 F.3d 678, 685-86 (7th Cir. 2006)); *see also Nunez*, 591 F.3d at
4 1224.

5 Because fear of retaliation has been recognized as a ground for finding
6 administrative remedies unavailable, Muhammad's claim that he feared retaliation is not
7 meritless on its face. Further, when construing Muhammad's allegation in his favor and
8 affording him the benefit of any doubt, the fear of retaliation he experienced could have
9 deterred a reasonable inmate from lodging a grievance; in which case, it might constitute
10 an exception to the exhaustion requirement. *See Walker v. Cal. Dep't of Corr.*, No. 2:09-
11 cv-0569 WBS KJN, 2014 WL 268525, at *8 (E.D.Cal. Jan. 22, 2014) (finding that threats
12 of retaliation chilled the plaintiff's ability to pursue a grievance and rendered
13 administrative remedies unavailable; "the perceived threat by [defendant prison officials]
14 was 'one that would deter a reasonable inmate of ordinary firmness and fortitude from
15 lodging a [new] grievance'" (citing *Turner*, 541 F.3d at 1085).

16 Under the Rule 12(b)(6) standard, the Court does not consider the additional
17 factual allegations in Mohammad's response, nor does it consider the unsupported
18 assertions in Ams' reply. *See Van Buskirk v. Cable News Network*, 284 F.3d 977, 980
19 (9th Cir. 2002) (generally, a court may look only at the face of the complaint when
20 deciding a motion to dismiss); *see also United States v. Ritchie*, 342 F.3d 903, 907 (9th
21 Cir. 2003) (on Rule 12(b)(6) motion, court may consider documents attached to
22 pleadings, documents incorporated by reference into a complaint, or matters of judicial
23 notice without converting the motion into one for summary judgment). When
24 considering only the statements in Muhammad's Second Amended Complaint, the Court
25 cannot conclude that he failed to exhaust because it is possible that administrative
26 remedies were rendered unavailable. Consequently, this is not one of "those rare cases"
27 where the failure to exhaust is clear from the face of the complaint, and Ams' motion will
28 be denied. *Albino*, 747 F.3d at 1169.

