



1           On December 15, 2017, Defendants Enenmoh, Jimenez, and Wu filed a motion for  
2 summary judgment pursuant to Federal Rule of Civil Procedure 56, arguing Plaintiff has failed to  
3 exhaust his administrative remedies.<sup>1</sup> Fed. R. Civ. P. 56(c), Albino v. Baca, 747 F.3d 1162, 1166  
4 (9th Cir. 2014) (en banc), cert. denied, 135 S. Ct. 403 (2014). (ECF No. 246.) That motion was  
5 joined by Defendant McGuinness on December 18, 2017. (ECF No. 251.)

6           On January 2, 2018, Plaintiff filed an opposition to Defendant McGuinness' joinder in the  
7 motion as untimely.<sup>2</sup> (ECF No. 256.) On January 3, 2018, Plaintiff filed his opposition to the  
8 motion for summary judgment. (ECF No. 258.) Defendant McGuinness filed a reply on January  
9 16, 2018.<sup>3</sup> (ECF No. 261.) No other replies were filed, and the motion for summary judgment is  
10 deemed submitted. Local Rule 230(l).

11           On June 8, 2018, during the pendency of the motion for summary judgment for failure to  
12 exhaust administrative remedies, Defendants filed a joint motion to modify the scheduling order  
13 and vacate the existing discovery and non-exhaustion dispositive motion deadlines. (ECF No.  
14 268.) The Court granted the request on June 13, 2018, finding that a response from Plaintiff was  
15 unnecessary. (ECF No. 269.)

16           On June 20, 2018, Plaintiff filed his opposition to Defendants' motion. (ECF No. 270.)  
17 On June 28, 2018, Plaintiff filed an opposition to the Court's order granting the motion to modify  
18 the scheduling order, as well as a renewed motion seeking leave to file a sixth amended  
19 complaint. (ECF No. 271.) No opposition or response was filed by any Defendant, and  
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21 <sup>1</sup> Concurrent with this motion, Plaintiff was provided with notice of the requirements for opposing a motion for  
22 summary judgment. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th  
Cir. 1988); Klinge v. Eikenberry, 849 F.2d 409, 411–12 (9th Cir. 1988). (ECF No. 246-2.)

23 <sup>2</sup> Despite Plaintiff's objection to Defendant McGuinness' joinder, Plaintiff has identified no prejudice by the timing  
24 of the joinder, which was filed the next business day after the motion for summary judgment. In addition, Plaintiff  
25 did not request an extension of time to file his opposition to the motion for summary judgment, which was mailed  
one day after his opposition to Defendant McGuinness' joinder. On these facts, the Court cannot find that the joinder  
was untimely such that it prejudiced Plaintiff, and Defendant McGuinness will be permitted to join in the motion.

26 <sup>3</sup> The Court would be within its discretion to strike Defendant McGuinness' reply as untimely. See Leong v. Potter,  
27 347 F.3d 1117, 1125 (9th Cir. 2003) (district court did not abuse discretion by striking a late-filed supplemental  
28 brief). Nonetheless, given that no party objected to the filing on the grounds of timeliness, the Court exercises its  
discretion in favor of Defendant McGuinness and has considered the reply in making these findings and  
recommendations. See Lutz v. Delano Union Sch. Dist., 2009 WL 2525760, \*3 n. 2 (E.D. Cal. Aug. 7, 2009) (“A  
district court has discretion to consider an untimely opposition brief.”) (citations omitted).

1 Plaintiff's filings are deemed submitted. Local Rule 230(l).

2 **II. Plaintiff's Opposition to Modification of the Scheduling Order and Renewed Motion**  
3 **to File Sixth Amended Complaint**

4 In his opposition and motion to amend, Plaintiff raises arguments previously addressed by  
5 the Court. Specifically, Plaintiff contends that the granting of Defendants' motion before Plaintiff  
6 had the opportunity to be heard demonstrates an "appearance of unfairness," and on that basis  
7 renews his motion seeking leave to file a sixth amended complaint. (ECF No. 271.) Plaintiff  
8 generally reiterates his argument that his original motion to file a sixth amended complaint, filed  
9 September 25, 2017, was timely presented, and was inappropriately denied on the basis that it  
10 would cause significant prejudice and undue delay. Plaintiff argues that since that time,  
11 Defendants have repeatedly requested extensions of time and otherwise delayed this action, over  
12 Plaintiff's objections. (Id.)

13 As explained in the Court's November 7, 2017 order denying Plaintiff's motion to amend,  
14 leave to amend was denied because Plaintiff's proposed amended complaint sought to revive  
15 claims and defendants previously dismissed by the Court, and further amendment would be futile.  
16 (ECF No. 235.) As Plaintiff has presented no new information in his motion that would change  
17 the Court's determination that further amendment at this late date would be futile, the motion is  
18 denied.

19 **III. Legal Standard**

20 **A. Statutory Exhaustion Requirement**

21 Section 1997e(a) of the Prison Litigation Reform Act of 1995 provides that "[n]o action  
22 shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal  
23 law, by a prisoner confined in any jail, prison, or other correctional facility until such  
24 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

25 Prisoners are required to exhaust the available administrative remedies prior to filing suit.  
26 Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199–1201 (9th  
27 Cir. 2002) (per curiam). If, however, a plaintiff files an amended complaint adding new claims,  
28 the plaintiff may proceed on the new claims if those claims were fully exhausted before tendering

1 the amended complaint for filing. Rhodes v. Robinson, 621 F.3d 1002 (9th Cir. 2010). As long  
2 as those new claims are fully exhausted at the time the amended complaint is filed, it does not  
3 matter whether the new claims arose before or after the date on which the initial complaint was  
4 filed; the claims can proceed as long as they are new claims that were not alleged in the initial  
5 complaint, and are fully exhausted prior to the filing of the amended complaint. See Cano v.  
6 Taylor, 739 F.3d 1214, 1220–21 (9th Cir. 2014) (allowing amended complaint to proceed on new  
7 claims that arose prior to the date on which the initial complaint was filed); Akhtar v. Mesa, 698  
8 F.3d 1202, 1210 (9th Cir. 2012) (allowing amended complaint alleging new claims that arose  
9 after the initial complaint was filed).

10 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the  
11 relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and the exhaustion  
12 requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 534 U.S. 516, 532  
13 (2002).

14 The failure to exhaust is an affirmative defense, and the defendants bear the burden of  
15 raising and proving the absence of exhaustion. Jones v. Bock, 549 U.S. 199, 216 (2007); Albino,  
16 747 F.3d at 1166. “In the rare event that a failure to exhaust is clear on the face of the complaint,  
17 a defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise,  
18 the defendants must produce evidence proving the failure to exhaust, and they are entitled to  
19 summary judgment under Rule 56 only if the undisputed evidence, viewed in the light most  
20 favorable to the plaintiff, shows he failed to exhaust. Id.

21 Defendants must first prove that there was an available administrative remedy and that  
22 Plaintiff did not exhaust that available remedy. Williams v. Paramo, 775 F.3d 1182, 1191 (9th  
23 Cir. 2015) (citing Albino, 747 F.3d at 1172) (quotation marks omitted). The burden then shifts to  
24 Plaintiff to show something in his particular case made the existing and generally available  
25 administrative remedies effectively unavailable to him. Williams, 775 F.3d at 1191 (citing  
26 Albino, 747 F.3d at 1172) (quotation marks omitted). The ultimate burden of proof on the issue  
27 of exhaustion remains with Defendants. Id. (quotation marks omitted).

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1           **B. Summary Judgment Standard**

2           Any party may move for summary judgment, and the Court shall grant summary judgment  
3 if the movant shows that there is no genuine dispute as to any material fact and the movant is  
4 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino,  
5 747 F.3d at 1166; Wash. Mut. Inc. v. United States, 636 F.3d 1207, 1216 (9th Cir. 2011). Each  
6 party’s position, whether it be that a fact is disputed or undisputed, must be supported by  
7 (1) citing to particular parts of materials in the record, including but not limited to depositions,  
8 documents, declarations, or discovery; or (2) showing that the materials cited do not establish the  
9 presence or absence of a genuine dispute or that the opposing party cannot produce admissible  
10 evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may  
11 consider other materials in the record not cited to by the parties, although it is not required to do  
12 so. Fed. R. Civ. P. 56(c)(3); Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir.  
13 2001); accord Simmons v. Navajo Cty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

14           The defendants bear the burden of proof in moving for summary judgment for failure to  
15 exhaust, Albino, 747 F.3d at 1166, and they must “prove that there was an available  
16 administrative remedy, and that the prisoner did not exhaust that available remedy,” id. at 1172.  
17 If the defendants carry their burden, the burden of production shifts to the plaintiff “to come  
18 forward with evidence showing that there is something in his particular case that made the  
19 existing and generally available administrative remedies effectively unavailable to him.” Id. “If  
20 undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust,  
21 a defendant is entitled to summary judgment under Rule 56.” Id. at 1166. However, “[i]f  
22 material facts are disputed, summary judgment should be denied, and the district judge rather than  
23 a jury should determine the facts.” Id.

24           **III. Discussion**

25           **A. Summary of CDCR’s Administrative Review Process**

26           The California Department of Corrections and Rehabilitation (“CDCR”) has an  
27 administrative grievance system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1.  
28 Pursuant to this system, an inmate may appeal “any policy, decision, action, condition, or

1 omission by the department or its staff that the inmate . . . can demonstrate as having a material  
2 adverse effect upon his . . . health, safety, or welfare.” Id. at § 3084.1(a).

3 The process is initiated by submitting a CDCR Form 602, Inmate/Parolee Appeal. Id. at  
4 § 3084.2(a). In the appeal form, prisoners must list all staff members involved and describe their  
5 involvement in the issue. Id. at § 3084.2(a)(3). If the inmate does not have the requested  
6 identifying information about the staff member, he must provide any other available information  
7 that would assist the appeals coordinator in making a reasonable attempt to identify the staff  
8 member in question. Id.

9 Three levels of review are involved—a first level review, a second level review and a  
10 third level review. Id. at §§ 3084.5(c)–(e), 3084.7. Bypassing a level of review may result in  
11 rejection of the appeal. Id. at § 3084.6(b)(15). Under the PLRA, a prisoner has exhausted his  
12 administrative remedies when he receives a decision at the third level. See Barry v. Ratelle, 985  
13 F. Supp. 1235, 1237–38 (S.D. Cal. 1997).

#### 14 **B. Summary of Plaintiff’s Allegations**

15 Plaintiff was housed at the California Substance Abuse Treatment Facility (“CSATF”)  
16 from 2000 to 2012. While there, he was diagnosed with Open Angle Glaucoma (“OAG”) and  
17 placed on a treatment program. Plaintiff asserts that OAG is a serious medical condition that, if  
18 left undiagnosed and treated, would lead to blindness. Plaintiff further alleges that Defendants  
19 Wu, Jimenez, and Enenmoh are not eye specialists or equipped to handle Plaintiff’s OAG, so they  
20 repeatedly required and requested services from eye specialists. Defendants allegedly denied or  
21 delayed the necessary treatment for Plaintiff on a regular basis, without consulting specialists or  
22 documenting the reasons for their alleged deviations from standard procedure.

23 From October 19, 2000, to February 7, 2006, Plaintiff states that the pressure in his left  
24 eye degenerated from a stable pressure of 17 to a critical 38. He lost his eyesight on September  
25 15, 2006. He subsequently had several eye surgeries, but on April 28, 2010, he was diagnosed  
26 with “uncontrolled glaucoma,” which required further surgery. On May 4, 2010, Plaintiff’s eye  
27 pressure rose to 50,<sup>4</sup> which required emergency surgery that was delayed.

28 <sup>4</sup> Whether Plaintiff is still referring to his left eye at this point is unclear.

1 Plaintiff alleges that all Defendants had access to his medical file, were aware of his OAG,  
2 and were involved in providing treatment. Despite their knowledge of his medical needs, they  
3 allegedly denied and delayed his medical treatment on a repeated basis for long periods of time,  
4 the end result being permanent damage to his left eye and severe damage to his right eye, both of  
5 which are irreparable.

6 On August 25, 2004, the pressure in Plaintiff's eyes had risen to 32 in his left eye and 22  
7 in his right eye. The contract optometrist referred Plaintiff to an ophthalmologist, but Defendant  
8 Wu allegedly did not process the Request for Services, despite knowledge of the rise in pressure.

9 On December 21, 2004, without consultation from an ophthalmologist, Defendant Wu  
10 reduced Plaintiff's prescribed OAG medication, Timilol, from original strength of .5% to .25%.  
11 Plaintiff contends that the pressure in his eyes had not dropped to a safe level to justify such a  
12 change. Since June of 2000, Plaintiff had been receiving Timilol at .5% strength. All succeeding  
13 PCP's followed Defendant Wu's lead and continued to prescribe the lower dosage until  
14 September 15, 2006, when Plaintiff lost vision in his left eye. The attending ophthalmologist  
15 raised the strength of Timilol from .25% back to the original .5%.

16 On February 11, 2005, Plaintiff requested to see an eye specialist because his eye  
17 condition was worsening.

18 On March 9, 2005, Defendant Wu submitted a physician Request for Services for an  
19 ophthalmologist. The first request was denied, and it is unclear whether a second request was  
20 submitted.

21 On May 23, 2005, Plaintiff requested renewal of his Glaucoma medication, which was  
22 scheduled to expire on June 7, 2005. Plaintiff again requested renewal on June 8 and July 12,  
23 2005, but the medication was not renewed until August 12, 2005.

24 On July 12, 2005, Plaintiff submitted another refill request and spoke with Defendant  
25 Jimenez. Plaintiff informed Defendant Jimenez that he suffered from glaucoma, the pressure in  
26 his left eye had been steadily increasing, he suffered pain from the pressure and he feared going  
27 blind. Defendant Jimenez assured Plaintiff that he would personally handle the refill request.  
28 This assurance was given again on July 14 and July 18, 2005, but Plaintiff's glaucoma medication

1 was not refilled.

2 On July 21, 2005, Plaintiff submitted an inmate grievance complaining about not  
3 receiving his glaucoma medication.

4 On August 5, 2005, Plaintiff was informed, via the appeal responses, that his medication  
5 would not be renewed without a physician's order, and it was suggested that he visit the clinic's  
6 sick call window.

7 On August 11, 2005, Plaintiff submitted another grievance noting that he was informed at  
8 the sick call window that, if he wanted his medication renewed, he would have to submit a sick  
9 call or refill request, which Plaintiff had been doing for months. Additionally, Plaintiff was told  
10 that the medical staff was too busy to see him unless it was an emergency.

11 On August 12, 2005, Plaintiff's medication was renewed. Plaintiff alleges that Defendant  
12 McGuinness was aware of this two-month delay, and that her response to Plaintiff's appeal  
13 expressed indifference to Plaintiff's worsening eye conditions.

14 On January 27, 2006, Plaintiff informed medical staff that he had not seen a physician or  
15 primary care provider for six months. He was not scheduled to see a primary care provider until  
16 March 27, 2006.

17 Plaintiff went two months without his prescribed glaucoma medications, and had to file a  
18 grievance to receive a prescription. Plaintiff alleges that Defendant McGuinness was aware of the  
19 two-month delay, and that her response to the grievance expressed indifference to the violation of  
20 inmate medical services policies and procedures.

21 On May 22, 2006, after going without his prescribed glaucoma medication for over two  
22 months, Plaintiff submitted a medical Request for Services, seeking emergency treatment because  
23 of extreme pain and loss of vision in his left eye.

24 On May 25, 2006, Dr. Salmi submitted an urgent Request for Services for an  
25 ophthalmology consultation. Defendant McGuinness approved the request on May 30, 2006, but  
26 failed to ensure that Plaintiff was scheduled or seen by the specialist within the fourteen-day limit  
27 prescribed by policies and procedures. Defendant McGuinness received notice of this violation  
28 by June 21, 2006. Plaintiff was seen three and one-half months later.



1 On June 21, 2006, Defendant McGuinness responded to Plaintiff's grievance of February  
2 28, 2006. At the second level review, Defendant McGuinness admitted that an urgent Request for  
3 Services was submitted on May 25, 2006. Defendant McGuinness allegedly was fully aware that  
4 Plaintiff's rights were being violated for failure to comply with policies and procedures, and she  
5 made no effort to correct the violations.

6 On July 21 and 27, and again on August 18, 2006, Plaintiff was seen by Dr. Salmi. Dr.  
7 Salmi noted that Plaintiff had not been seen by the ophthalmologist for glaucoma, and that he had  
8 left messages for the request to be processed. Plaintiff alleges that Defendant McGuinness failed  
9 to ensure that Plaintiff was scheduled to be seen within fourteen days.

10 On September 10, 2006, Plaintiff alerted medical staff of approximately 80% vision loss  
11 in his left eye and severe pain. Five days later, Plaintiff was taken for an emergency consultation  
12 with Dr. Yaplee. After examining Plaintiff, Dr. Yaplee informed Plaintiff that he had severe  
13 nerve damage and loss of vision caused by increased pressure build-up in his left eye. Dr. Yaplee  
14 prescribed medications at an increased strength: Timilol at .5% and Xalatan at .5%. Dr. Yaplee  
15 also recommended a laser procedure within one month to repair the nerve damage in Plaintiff's  
16 left eye.

17 On October 3, 2006, Dr. Salmi submitted a Request for Services to comply with the  
18 recommended laser procedure.

19 On July 31, 2007, Plaintiff states he was compelled to submit a grievance to accomplish  
20 the laser surgery.

21 On April 4, 2008, Defendant Enenmoh responded to Plaintiff's July 31, 2007 grievance,  
22 stating that there was no documentation from Dr. Yaplee or any other doctor recommending the  
23 laser surgery. Plaintiff alleges that Defendant Enenmoh was familiar with Plaintiff's health  
24 record, which held copies of Dr. Yaplee's recommendations, but that Defendant Enenmoh  
25 expressed indifference to Plaintiff's medical needs, resulting in delayed treatment and increased  
26 pain and suffering.

27 On January 8, 2008, Plaintiff states he was again compelled to submit a grievance because  
28 he had not been receiving his prescribed OAG medication in a timely manner, going for months

1 without it. The grievance was granted and procedures for issuing medications were renewed.  
2 Plaintiff states that it took him over eighty days to get his medication, and that he had to utilize  
3 the inmate grievance procedure to do so, which allegedly violates procedures for issuing  
4 medication. Plaintiff states that these medications had been prescribed eight years earlier, but  
5 alleges that Defendants Jimenez and Wu had not been following procedures for issuing  
6 medications.

7 On January 27, 2008, Plaintiff submitted a grievance regarding the substitution of his  
8 originally prescribed Xalatan for a less effective concentration of Timilol; that his OAG refill  
9 orders were delayed for months; and that medical staff was responding with indifference to his  
10 medical condition. The first response to his grievance took seven months, while the second level  
11 review took six months to respond. Defendant Enenmoh reviewed the allegations and concluded  
12 that no procedures had been violated. Plaintiff alleges that Defendant Enenmoh denied any  
13 wrongdoing because he was implicated in this matter.

14 On July 9, 2010, Plaintiff's OAG medication was still being delayed or denied. Plaintiff  
15 states that the prescription renewals had been promised to be automatic since January of 2008.

16 On September 15, 2011, Plaintiff states he was still not being scheduled for regular  
17 ninety-day visits with the specialist, as required by procedures. Plaintiff further states that  
18 Defendant Enenmoh was the chief medical officer at the time, and alleges that it was his  
19 responsibility to track all specialist referrals, to do a quarterly review of the specialty referral  
20 tracking log, and to ensure that consultations are completed within the required timeframes.

21 As of the filing of this amended complaint, Plaintiff continues to receive treatment for his  
22 OAG.

23 Plaintiff asserts causes of action for deliberate indifference to serious medical needs in  
24 violation of the Eighth Amendment, a state law cause of action for intentional infliction of  
25 emotional distress, and discusses the continuing violations doctrine. Plaintiff seeks compensatory,  
26 punitive, and exemplary damages.

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1           **C. Defendants' Statement of Facts (DSF)<sup>5</sup>**

2                   **1. Background**

- 3           1. Plaintiff Anthony Craig Huckabee is a state prisoner who was housed at California  
4           Substance Abuse Treatment Facility (CSATF) from 2000 through 2012. (ECF No. 193  
5           ¶ 1, Fifth Amended Complaint.)
- 6           2. At the time the allegations in the complaint arose, all Defendants worked at CSATF,  
7           where Dr. Enenmoh was the Chief Medical Officer, Dr. Wu was a primary care physician,  
8           and Jimenez was a Registered Nurse. (ECF No. 193 ¶¶ 3–4.)
- 9           3. Plaintiff initiated this lawsuit on April 28, 2009, and he amended his complaint on July  
10           27, 2010, August 21, 2012, August 14, 2014, July 20, 2015, and May 2, 2016. (ECF Nos.  
11           1, 15, 33, 165, 183, and 193.) He proceeds on his fifth amended complaint. (ECF No.  
12           193.)
- 13           4. While he was housed at CSATF, Plaintiff was diagnosed with Open Angle Glaucoma  
14           (OAG). (ECF No. 193 ¶ 1.)
- 15           5. OAG is a serious medical condition that can lead to blindness, and treatment is focused on  
16           stabilizing eye pressure through the use of prescription eye drops. (ECF No. 193 ¶ 1.)
- 17           6. After screening the fifth amended complaint, the Court found that Plaintiff stated  
18           potentially cognizable claims against Dr. Wu, RN Jimenez, RN Jeffreys, and Dr.  
19           Enenmoh for Eighth Amendment deliberate indifference to his serious medical needs.  
20           (ECF No. 195 p. 15; ECF No. 199 p. 3.)

21                   **2. Allegations Presented in Plaintiff's Fifth Amended Complaint**  
22                   **Regarding Plaintiff's Appeal History and Defendants Dr. Wu, RN**  
23                   **Jimenez, and Dr. Enenmoh**

24                   **a. Dr. Wu**

- 25           7. On August 25, 2004, a contract optometrist referred Plaintiff to an ophthalmologist  
26           because of rising pressure in Plaintiff's eyes, but Dr. Wu did not process the request.  
27           (ECF No. 193 ¶ 8.)

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28           <sup>5</sup> ECF Nos. 246-3; 248–250; 251.

1 8. On December 21, 2004, Dr. Wu reduced the strength of Plaintiff's prescription Timilol  
2 eye drops from .5% to .25% without consulting a specialist, even though Plaintiff's eye  
3 pressure had not dropped to a level that would safely justify the reduction in strength.

4 (ECF No. 193 ¶ 8.)

5 9. On March 9, 2005, Dr. Wu submitted a request for Plaintiff to see an ophthalmologist, but  
6 the request was denied and Plaintiff was not scheduled to see an eye specialist. (ECF No.  
7 193 ¶ 9.)

8 **b. RN Jimenez and Appeal Log No. SATF-E-05-3102**

9 10. On July 12, 2005, Plaintiff submitted a request for renewal of his prescription eye  
10 medication to an unspecified person. (ECF No. 193 ¶¶ 10, 12.)

11 11. Later that day, Plaintiff spoke with Nurse Jimenez. (ECF No. 193 ¶¶ 10, 12.) During the  
12 conversation, Plaintiff informed him that he suffered from OAG, the pressure in his left  
13 eye had been steadily increasing, he was in pain, and he feared going blind. (ECF No. 193  
14 ¶ 12.) Nurse Jimenez assured Plaintiff he would personally handle the refill request. (*Id.*)

15 12. Nurse Jimenez made the same promise on July 14, and July 18, 2005. (ECF No. 193  
16 ¶ 12.)

17 13. On July 21, 2005, Plaintiff submitted Appeal Log No. SATF-E-05-3102. (ECF No. 193  
18 ¶ 13.); Hood Decl., Ex. B<sup>6</sup> [SATF-E-05-3102].)

19 14. In the appeal, Plaintiff complained that Nurse Jimenez failed to fulfill promises made to  
20 Plaintiff on July 11, 14, and 18, 2005, that he would personally ensure Plaintiff's eye drop  
21 medication prescription was renewed. (ECF No. 193 ¶ 13; Hood Decl., Ex. B.)

22 15. The appeal was partially granted at the informal level of review on August 5, 2005, where  
23 Plaintiff was informed that his prescription medication could only be renewed with a  
24 physician's order. (ECF No. 193 ¶ 13; Hood Decl., Ex. B.)

25 16. The appeal was granted at the first formal level of review on August 15, 2005, because  
26 Plaintiff's prescription had been renewed on August 12, 2005. (ECF No. 193 ¶¶ 10, 14;

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<sup>6</sup> In their motion, Defendants cite to Hood Decl., Ex. A. However, the appeal at issue is included as Exhibit B to the Hood Declaration. The Court has corrected this oversight throughout the Statement of Facts.

1 Hood Decl., Ex. B.)

2 17. In his appeal to both the first and second level of review, Plaintiff raised a new issue by  
3 complaining that the delay in renewing his prescription eye medication caused him  
4 damage, and he requested delay in resolving the appeal until he could undergo an eye  
5 examination. (Hood Decl., Ex. B.)

6 18. The appeal was granted at the second level of review, in that Plaintiff's medication had  
7 already been renewed. (Hood Decl., Ex. B.)

8 19. However, the second level appeal response informed Plaintiff that he could not add to the  
9 "Actions Requested" in the original appeal. (Hood Decl., Ex. B.)

10 20. Plaintiff was further informed in the second level appeal response that he could submit the  
11 appeal for a third level review if he desired. (Hood Decl., Ex. B.)

12 21. Plaintiff did not pursue this appeal through the third level of review. (Hood Decl., Ex. B;  
13 Voong Decl., Ex. A [Pl. IATS III Appeal History].)

14 **c. Appeal Log No. SATF-E-06-01218**

15 22. On February 28, 2006, Plaintiff filed Appeal Log No. SATF-06-01218. (ECF No. 193  
16 ¶ 17; Voong Decl., Ex. O [Appeal Log No. SATF-E-06-01218].)

17 23. In the appeal, Plaintiff complained that dismissed Defendant Dr. Nguyen failed to fully  
18 evaluate his medical ailments during an examination on February 8, 2006. (ECF No. 193  
19 ¶¶ 16–17; Voong Decl., Ex. O.)

20 24. Plaintiff did not complain in this appeal about actions taken by any of the other  
21 Defendants. (Voong Decl., Ex. O.)

22 25. Plaintiff exhausted this appeal at the third level of review on September 18, 2006. (Voong  
23 Decl., Ex. O.)

24 **d. Dr. Enenmoh and Appeal Log No. SATF-E-07-03515**

25 26. On July 31, 2007, Plaintiff submitted Appeal Log No. SATF-E-07-03515, requesting that  
26 he be scheduled for tests recommended by his doctors, including laser surgery to treat his  
27 glaucoma. (ECF No. 193 ¶ 26; Hood Decl., Ex. C<sup>7</sup> [Appeal Log No. SATF-E-07-03515].)

28 <sup>7</sup> In their motion, Defendants cite to Hood Decl., Ex. B. However, the appeal at issue is included as Exhibit C to the

1 27. The appeal was partially granted by a non-party at the first level of review with respect to  
2 Plaintiff's request for glaucoma treatment, but denied as to his request for laser surgery  
3 because there was no documented evidence that it had been recommended or ordered by  
4 any doctor. (Hood Decl., Ex. C.)

5 28. Dr. Enenmoh responded to Plaintiff's appeal at the second level of review on April 4,  
6 2008, where he also denied Plaintiff's request for laser surgery because there was no  
7 documented evidence that it had been recommended or ordered by any doctor. (ECF No.  
8 193 ¶ 26; Hood Decl., Ex. C.)

9 29. Plaintiff did not appeal Dr. Enenmoh's denial of his request for laser surgery in SATF-07-  
10 03515, or otherwise submit this appeal for a third level review. (Voong Decl., Ex. A;  
11 Lewis Decl., Ex. A [Pl. HCARTS Health Care Appeal History].)

12 30. Plaintiff did not specifically complain in this appeal about actions taken by any of the  
13 Defendants. (Hood Decl., Ex. C.)

14 **e. Appeal Log No. SATF-E-08-01648**

15 31. On January 8, 2008, Plaintiff submitted Appeal Log No. SATF-E-08-01648, in which he  
16 complained that he had been requesting renewal of his prescription medication since  
17 October 2007, without success. (ECF No. 193 ¶ 27; Hood Decl., Ex. D<sup>8</sup> [Appeal Log No.  
18 SATF-E-08-01648].)

19 32. Plaintiff did not specifically complain in this appeal about actions taken by any of the  
20 Defendants. (Hood Decl., Ex. D.)

21 33. The appeal was granted at the informal level of review on March 18, 2008, noting that  
22 Plaintiff's medications had already been renewed on March 8, 2008. (ECF No. 193 ¶ 28;  
23 Hood Decl., Ex. D.)

24 34. The appeal was granted at the first level of review for the same reason. (Hood Decl. Ex.  
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26 Hood Declaration. The Court has corrected this oversight throughout the Statement of Facts.

27 <sup>8</sup> In their motion, Defendants cite to Hood Decl., Ex. C. However, the appeal at issue is not included as an exhibit to  
28 the Hood Declaration in the docketed version of the declaration. Nevertheless, as the appeal is included as Exhibit D  
to the courtesy copy of the Hood Declaration sent to the Court, the Court refers to the exhibit accordingly. The  
consideration of this exhibit has not altered the Court's findings and recommendations on this matter.

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D.)

35. Plaintiff did not submit SATF-08-01658 for any further levels of review. (Hood Decl., Ex. D; Voong Decl., Ex. A; Lewis Decl., Ex. A.)

**f. Dr. Enenmoh and Appeal Log No. SATF-M-08-02566**

36. On January 27, 2008, Plaintiff submitted Appeal Log No. SATF-M-08-02566, in which he complained that he had been prescribed Timilol eye drops, rather than Xalatan, and that his prescription renewals were being delayed. (ECF No. 193 ¶ 28; Lewis Decl., Ex. D [Appeal Log No. SATF-M-08-02566].)

37. The appeal was screened out multiple times for procedural deficiencies before it was accepted for an informal level review and partially granted on April 10, 2008, in that Plaintiff was examined by a physician and instructed to follow proper policies and procedures to obtain prescription refills or renewals. (Lewis Decl., Ex. D.)

38. Plaintiff appealed SATF-08-02566 to the first formal level of review, where it was partially granted on December 8, 2008, in that Plaintiff's claims were investigated, it was determined that staff did not violate policy, and Plaintiff had begun to receive Xalatan. (Lewis Decl., Ex. D.)

39. Dr. Enenmoh partially granted Plaintiff's appeal at the second level of review on January 23, 2009, in that an investigation was conducted and it was determined that staff did not violate policy. (ECF No. 193 ¶ 28; Lewis Decl., Ex. D.)

40. Plaintiff appealed to the third level of review, complaining that medical staff decided he should not get formulary medications prescribed to him by eye specialists to keep the pressure in his eyes low. (Lewis Decl., Ex. D.)

41. Plaintiff's appeal was denied at the third level of review on January 22, 2010, nearly nine months after Plaintiff initiated this lawsuit, because a review of his Unit Health Record showed Plaintiff had been receiving medically necessary treatments and medications. (Lewis Decl., Ex. D.)

42. Plaintiff did not specifically complaint in this appeal about actions taken by any of the Defendants. (Lewis Decl., Ex. D.)

1 **g. Further Allegations in the Complaint Against Dr. Enenmoh**

2 43. On October 30, 2008, a non-party doctor submitted an urgent request for services. (ECF  
3 No. 193 ¶ 25.)

4 44. Dr. Enenmoh approved the urgent request the following day. (ECF No. 193 ¶ 25.)

5 45. Plaintiff received laser surgery on his eyes fourteen days later, on November 14, 2008.  
6 (ECF No. 193 ¶ 25.)

7 46. On May 4, 2010, an urgent request for services was submitted, but disregarded by Dr.  
8 Enenmoh, and so Plaintiff was not seen until eight days later, on May 12, 2010. (ECF No.  
9 193 ¶ 31.)

10 47. As of September 15, 2011, Dr. Enenmoh was responsible for tracking all specialist  
11 referrals, but Plaintiff was not being scheduled for regular ninety-day appointments with a  
12 specialist, as required by applicable policies and procedures. (ECF No. 193 ¶ 33.)

13 **3. Inmate Appeals Not Discussed in Plaintiff's Fifth Amended Complaint**

14 **a. Third Level Appeals Processed by OOA**

15 48. OOA's records show that Plaintiff has exhausted twenty appeals at the third level of  
16 review arising from CSATF. (Voong Decl. ¶ 7, Exs. A-U.)

17 49. Of those twenty appeals, eighteen are unrelated to any of Plaintiff's claims in the instant  
18 lawsuit. (Voong Decl., Ex. B-N, P, Q.)

19 50. Of those twenty appeals, only two related to medical treatment Plaintiff received while at  
20 SATF, Appeal Log Nos. SATF-E-06-01218, discussed above and concerning allegations  
21 only against dismissed Defendant Dr. Nguyen, and SATF-E-04-01964. (Voong Decl.,  
22 Exs. O, R.)

23 **i. Appeal Log No. SATF-E-04-01964**

24 51. On April 14, 2004, before any of the allegations in Plaintiff's fifth amended complaint  
25 arose, Plaintiff filed Appeal Log No. SATF-04-01964, which he ultimately exhausted at  
26 the third level of review on October 15, 2004. (Voong Decl., Ex. R [Appeal Log No.  
27 SATF-E-04-01964].)

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1 52. In the appeal, Plaintiff complained about swelling to his testicles. Plaintiff further [sic]  
2 Dr. Wu treated him like he didn't care and that Dr. Wu did "not speak understandable  
3 English language." (Voong Decl., Ex. R.)

4 53. Plaintiff raised allegations concerning his eye care for the first time at subsequent levels of  
5 review, but all of the allegations predate and do not concern the specific allegations  
6 Plaintiff raised in the fifth amended complaint against Dr. Wu. (Voong Decl., Ex. R.)

7 54. Plaintiff did not specifically complain in this appeal about actions taken by any of the  
8 other Defendants.

9 **b. Third Level Appeals Processed by HCCAB**

10 55. HCCAB's records show that Plaintiff exhausted three health care appeals arising from  
11 CSATF. (Lewis Decl. ¶ 7, Exs. A–D.)

12 56. One of those appeals, Appeal Log No. SATF-08-02566, is mentioned in Plaintiff's  
13 complaint and discussed above. (Lewis Decl., Ex. D.)

14 57. Plaintiff does not mention the other two appeals, Appeal Log Nos. SATF HC 11053961 or  
15 SATF HC 10001124, in his complaint.

16 **i. Appeal Log No. SATF HC 11053961**

17 58. On November 17, 2011, over two-and-one-half years after initiating this lawsuit, Plaintiff  
18 filed Appeal Log No. SATF HC 11053961. (Lewis Decl. Ex. B [Appeal Log No. SATF  
19 HC 11053961].)

20 59. In the appeal, Plaintiff complained that a non-party doctor performed unnecessary and  
21 unsuccessful surgeries on his eyes solely to make money from the State. (Lewis Decl.,  
22 Ex. B.)

23 60. Plaintiff did not specifically complain in this appeal about actions taken by any of the  
24 Defendants.

25 61. Plaintiff pursued this appeal through the third level of review, where it was denied on June  
26 14, 2012, over three years after this lawsuit was filed. (Lewis Decl., Ex. B.)

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1 administrative appeals at the second level of review, one on April 4, 2008, in which Plaintiff  
2 requested laser surgery, and one on January 23, 2009, in which he complained about issues with  
3 his prescription eye drops. (DSF 25, 27, 35, 38.) Plaintiff also claims that Dr. Enenmoh  
4 approved an urgent request for services on October 31, 2008, and Plaintiff received the surgery  
5 fourteen days later. (DSF 42–44.) Plaintiff further claims that Dr. Enenmoh disregarded a May  
6 4, 2010 urgent request for services, and Plaintiff was not seen until eight days later. (DSF 45.)  
7 And, Plaintiff claims that as of September 15, 2011, Dr. Enenmoh was responsible for tracking all  
8 specialist referrals, but Plaintiff was not being scheduled for regular ninety-day appointments  
9 with a specialist. (DSF 46.)

10 With respect to Defendant McGuinness, Plaintiff alleges that Dr. McGuinness was aware  
11 of the delay in his glaucoma medication in May 2005 and February 2006, Dr. McGuinness was  
12 aware of the delay of Plaintiff seeing a specialist in May 2006; and Dr. McGuinness failed to  
13 ensure that Plaintiff was seen by Dr. Salmi within fourteen days in July and August 2006. (DSF  
14 66.)

15 Defendants contend that Plaintiff was required to exhaust all claims against all Defendants  
16 *before* April 28, 2009, when he initiated this lawsuit. Defendants have provided twenty-three  
17 administrative appeals exhausted by Plaintiff between 2000 and 2012, when Plaintiff was housed  
18 at CSATF. Defendants argue that Plaintiff did not fully exhaust any appeal regarding the claims  
19 at issue in this suit, and that none of the appeals that Plaintiff did exhaust complained about any  
20 of te specific allegations against Defendants presented in the fifth amended complaint.  
21 Furthermore, Defendants emphasize that many of the appeals were not fully exhausted until well  
22 after the filing of the original complaint.

### 23 Plaintiff's Opposition

24 In opposition, Plaintiff argues that he was not required to list all of his 602 inmate appeals  
25 in the complaint in order to demonstrate that he exhausted all grievance procedures. Plaintiff  
26 notes that throughout the administrative grievance process, the Department of Corrections  
27 affirmed that monetary damages are beyond the scope of the appeal process, and therefore argues  
28 that his requests for monetary damages should be deemed denied before he filed his complaint in

1 this action, due to the unavailability of the relief requested.

2 Plaintiff also discusses the continuing violations doctrine, and argues that Defendants  
3 would have him file five to ten lawsuits based on the same violations, due to the length of time  
4 between submission of administrative appeals and the receipt of a final denial.

5 Defendant McGuinness' Reply

6 In reply, Defendant McGuinness argues that Plaintiff does not dispute that the inmate  
7 appeals presented do not serve to exhaust Plaintiff's administrative remedies, because none of the  
8 exhausted appeals relate to this lawsuit. Defendant McGuinness further contends that Plaintiff's  
9 general arguments that monetary damages are beyond the scope of the appeal process, or that he  
10 suffers a continuing violation, cannot excuse Plaintiff from the exhaustion requirement. Finally,  
11 Defendant McGuinness argues that Plaintiff is unable to point to any grievance where there is a  
12 specific connection to the allegations against Dr. McGuinness, or show that the institution was on  
13 notice or had an opportunity to resolve the issue.

14 **2. Specificity of Grievances**

15 Defendants argue throughout their motion that Plaintiff's administrative grievances did  
16 not fully exhaust the claims at issue in this suit because Plaintiff did not specifically complain in  
17 his appeals about actions taken by any of the remaining Defendants, (DSF 24, 30, 32, 42, 54, 60,  
18 64), or because the appeals are unrelated to the allegations against Defendants in the fifth  
19 amended complaint, (ECF No. 251, p. 2).

20 However, pursuant to CDCR's applicable regulations, Plaintiff was not required to list all  
21 staff members involved and expressly describe their involvement until the regulations were  
22 changed on January 28, 2011. (ECF No. 246-1, p. 15.) Further, as noted by Defendant  
23 McGuinness, Plaintiff's failure to specifically name each specific defendant is not fatal to the  
24 exhaustion process. (ECF No. 261, p. 4.) Rather, a grievance "suffices if it alerts the prison to  
25 the nature of the wrong for which redress is sought." Sapp v. Kimbrell, 623 F.3d 813, 824 (9th  
26 Cir. 2010) (quoting Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009)). The grievance  
27 process is only required to "alert prison officials to a problem, not to provide personal notice to a  
28 particular official that he may be sued." Jones, 549 U.S. at 219 (citations omitted).

1           Upon review of the administrative grievances submitted by Plaintiff, two relate to the  
2 allegations at issue. In Appeal Log No. SATF-M-08-02566, Plaintiff states that since his intake  
3 into CDC in 1998, he had been prescribed Xalatan eye drops to treat his glaucoma. Upon his  
4 transfer to SATF, Plaintiff was given the weaker Timilol eye drops, and at a reduced .25%  
5 solution. Further, Plaintiff alleges that there have been “dozens of occasions” when he could not  
6 get his eye drops refilled or renewed, sometimes for months at a time, and that he is again  
7 experiencing a hardship in trying to renew and refill his meds. (Lewis Decl., Ex. D.; ECF No.  
8 249, pp. 51–52.) This appeal was submitted on January 27, 2008. Though the allegations do not  
9 identify any individual defendant by name, as noted above, Plaintiff was not required to do so  
10 under the CDCR regulations at that time. Where a prison’s grievance process does not  
11 specifically require a prisoner to identify offending prison staff in an inmate appeal, the failure to  
12 do so will not be seen as a *per se* failure to exhaust a claim against a defendant who was not  
13 named in the prison grievance process. Jones, 549 U.S. at 200–01. The Court finds that this  
14 grievance, which was denied at the third level of review on January 22, 2010, was sufficient to  
15 place the institution on notice of Plaintiff’s continuing difficulties renewing and refilling his eye  
16 drop medications, and his complaint about the reduction in the strength of his prescription.

17           In Appeal Log No. SATF HC 10001124, which was filed on October 27, 2009, Plaintiff  
18 similarly complains that his eye drop medications for his glaucoma were not being timely refilled,  
19 and he was running out of his medications between refills. (Lewis Decl., Ex. C.; ECF No. 249, p.  
20 42.) The Court finds that this grievance, which was denied at the third level of review on May 4,  
21 2010, was also sufficient to place the institution on notice of Plaintiff’s continuing difficulties  
22 renewing and refilling his eye drop medications.

23           The Court did not find any other fully exhausted grievances discussing the other  
24 allegations raised in the fifth amended complaint, specifically, denials of requests for an  
25 ophthalmology referral, denials of requests for laser surgery, failure to ensure Plaintiff was timely  
26 seen by specialists, or any Defendant’s response to a particular grievance. Thus, the Court finds  
27 that Plaintiff has failed to exhaust his administrative grievances with respect to these other claims.

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1 Remaining are Plaintiff's claims that: Defendant Wu reduced the strength of Plaintiff's  
2 prescription eye drops on December 21, 2004; Defendant Jimenez promised to personally ensure  
3 Plaintiff's eye drops were renewed on July 12, 14, and 18, 2005, but the prescription was not  
4 renewed until August 12, 2005; and Defendant McGuinness was aware of the delay in Plaintiff's  
5 glaucoma medication in May 2005 and February 2006. There are no claims remaining against  
6 Defendant Enenmoh.

### 7 3. Timing of Grievances

8 Defendants next contend that because Plaintiff is required to exhaust available  
9 administrative remedies prior to filing suit, Plaintiff must have fully exhausted all appeals *before*  
10 the filing of the original complaint. However, Defendants have overlooked the exception which  
11 permits a plaintiff to proceed on new claims raised in an amended complaint, if those new claims  
12 were fully exhausted before the amended complaint was filed. Even if the new claims arose  
13 before the date the initial complaint was filed, the claims can proceed so long as they were not  
14 alleged in the initial complaint, and are fully exhausted prior to the filing of the amended  
15 complaint. See Cano, 739 F.3d at 1220–21; Akhtar, 698 F.3d 1210.

16 In determining whether Plaintiff fully exhausted his administrative remedies, the Court  
17 looks to whether the claims were *first* raised in an amended complaint filed after Plaintiff fully  
18 exhausted his appeal. As discussed above, the applicable appeals are SATF-M-08-02566, which  
19 was exhausted on January 22, 2010, and SATF HC 10001124, which was exhausted on May 4,  
20 2010.

21 The original complaint in this action was filed on April 28, 2009. Plaintiff named as  
22 defendants Does employed as Chief Medical Officers, Medical Staff, and Pharmacy Staff at  
23 CSATF. (ECF No. 1.) Plaintiff did not identify a single defendant by name, and none of the  
24 current Defendants were identified in the original complaint. In screening the complaint, the  
25 Court found that Plaintiff had made no allegations linking specific actions or omissions by  
26 specific Defendants to a deprivation of Plaintiff's rights, and therefore failed to state any  
27 cognizable claims. (ECF No. 12.) Given this lack of specificity, the Court finds that none of the  
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1 remaining claims at issue in this action were first raised in the original complaint.<sup>9</sup>

2 Plaintiff thereafter filed five amended complaints, four of which were screened by the  
3 Court. All of the amended complaints were filed after Plaintiff had fully exhausted Appeal Log  
4 Nos. SATF-M-08-02566 and SATF HC 10001124. (See ECF No. 15, filed July 27, 2010; ECF  
5 No. 33, filed August 21, 2012; ECF No. 165, filed August 14, 2014; ECF No. 183, filed July 20,  
6 2015; ECF No. 193, filed May 2, 2016.) Thus, the Court finds that Plaintiff first raised his claims  
7 against Defendants Wu, Jimenez, and McGuinness regarding the renewal, refill, and reduction in  
8 strength of his eye drops after fully exhausting the relevant appeals. Therefore, Defendants are  
9 not entitled to summary judgment based on the failure to exhaust administrative remedies for  
10 these claims.

#### 11 **IV. Recommendation**

12 Accordingly, IT IS HEREBY RECOMMENDED that:

- 13 1. Defendants' motion for summary judgment, (ECF No. 246), be GRANTED IN PART and  
14 DENIED IN PART, as set forth above;
- 15 2. Plaintiff's claims against Defendants Wu, Jimenez, Enenmoh, and McGuinness related to  
16 denials of requests for an ophthalmology referral, denials of requests for laser surgery,  
17 failure to ensure Plaintiff was timely seen by specialists, or any Defendant's response to  
18 any of Plaintiff's submitted grievances, be DISMISSED;
- 19 3. Defendant Enenmoh be DISMISSED from this action;
- 20 4. This action proceed on Plaintiff's claims that:
  - 21 a. Defendant Wu reduced the strength of Plaintiff's prescription eye drops on  
22 December 21, 2004;
  - 23 b. Defendant Jimenez assured Plaintiff that he would personally handle Plaintiff's  
24 refill request for his eye drops on July 12, 14, and 18, 2005, but the medication  
25 was not refilled; and

26  
27 <sup>9</sup> Although Plaintiff was not required to identify each Defendant by name in his administrative grievances to put the  
28 institution on notice of the problem, at the pleading stage, greater specificity is required to meet the linkage  
requirement under 42 U.S.C. § 1983. See *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423  
U.S. 362 (1976).

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c. Defendant McGuinness was aware of the delay in Plaintiff’s glaucoma medication in May 2005 and February 2006.

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

IT IS SO ORDERED.

Dated: August 30, 2018

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE