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2 **UNITED STATES DISTRICT COURT**  
3 **EASTERN DISTRICT OF CALIFORNIA**  
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5 JAMES W. MILLNER, ) Case No.: 1:13-cv-02029-AWI-SAB (PC)  
6 Plaintiff, )  
7 v. ) ORDER ADOPTING FINDINGS AND  
8 MARTIN BITER, et al., ) RECOMMENDATIONS, GRANTING  
9 Defendants. ) DEFENDANTS' MOTION TO STRIKE  
 ) PLAINTIFF'S SURREPLY, AND DENYING  
 ) MOTION FOR SUMMARY JUDGMENT  
 ) SUBJECT TO AN EVIDENTIARY HEARING  
10 ) (Doc. Nos. 70, 73, 89, 108, 110)

11 Plaintiff James W. Millner is appearing pro se in this civil rights action pursuant to 42 U.S.C. §  
12 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §  
13 636(b)(1)(B) and Local Rule 302. On January 11, 2016, the Magistrate Judge filed a Findings and  
14 Recommendations ("F&R") which were served on the parties and which contained notice to the  
15 parties that any objections were to be filed within thirty days. Defendants filed objections on January  
16 28, 2016, and Plaintiff filed a response on February 29, 2016.<sup>1</sup> See Doc. Nos. 109, 111.

17 Defendants object that there is no authority for the proposition that an inmate's mental and  
18 physical condition, without more, can render administrative remedies effectively unavailable.  
19 Moreover, even if such an exception exists, it should not apply in this case because Plaintiff did not  
20 file a late-appeal.<sup>2</sup> Although Plaintiff declares that he filed a late appeal that somehow "disappeared,"  
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23 <sup>1</sup> Inasmuch as Plaintiff filed a response to Defendants' objections to the Findings and Recommendation on February 29,  
24 2016, Plaintiff's motion to stay the recommendation, filed February 8, 2016, shall be denied as moot. (ECF No. 110.)

25 <sup>2</sup> Defendant also objects that the F&R incorrectly found that Plaintiff was confined to a medical health crisis bed and was  
26 on suicide watch between August 5 and August 13, 2013. Defendant is correct that Plaintiff was not confined to a medical  
27 crisis bed or on suicide watch between August 5 and August 13. See Doc. No. 76 at p.4; Doc. No. 94 at p.4. However, it  
28 is not clear to the Court that the F&R found that Plaintiff was in the medical crisis bed or on suicide watch from August 5  
forward. As part of the F&R's recitation of facts and the parties' contentions, the F&R recites Defendants' position that  
Plaintiff was not in a medical crisis bed or on suicide watch from August 5 forward, and then describes Plaintiff's  
response. See Doc. No. 108 at pp.9-10. The Court will not view the F&R as finding that Plaintiff was in a medical crisis  
bed or on suicide watch after August 5, 2013.

1 he submits only a self-serving declaration and did not attach a copy of the allegedly cancelled appeal.  
2 Further, there is no evidence that he appealed the improper cancelling of his grievance.

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de*  
4 *novo* review of this case. Having reviewed the record, the Court is not convinced by Defendants'  
5 objections.

6 First, Defendants appear to be correct that the Ninth Circuit has not addressed the issue of  
7 whether an inmate's physical or mental condition may render an administrative remedy "effectively  
8 unavailable." However, Defendants are incorrect that there is no authority for this proposition. A  
9 number of courts, including courts within the Ninth Circuit, have recognized that an administrative  
10 remedy can be "effectively unavailable" when: "(1) an inmate's untimely filing of a grievance is  
11 because of a physical injury, and (2) the grievance system rejects the inmate's subsequent attempt to  
12 exhaust his remedies based on the untimely filing of the grievance." Days v. Johnson, 322 F.3d 863,  
13 868 (5th Cir. 2003); see also, e.g., Braswell v. Corrections Corp. of Am., 419 Fed. Appx. 622, 625 (6th  
14 Cir. 2011); Ollison v. Vargo, 2012 U.S. Dist. LEXIS 156750, \*4-\*6 (D. Or. Nov. 1, 2012); Michalek  
15 v. Lunsford, 2012 U.S. Dist. LEXIS 56975, \*10-\*11 (E.D. Ark. Apr. 5, 2012); Jenkins v. Federal Bur.  
16 of Prisons, 2011 U.S. Dist. LEXIS 220926, \*14-\*15 (D. S.C. Sept. 26, 2011); Williams v. Hayman,  
17 657 F.Supp.2d 488, 496 (D. N.J. 2008); Baker v. Schriro, 2008 U.S. Dist. LEXIS 19892, \*14 (D. Ariz.  
18 Mar. 4, 2008); Machalis v. Taylor, 2008 U.S. Dist. LEXIS 5652, \*7 (E.D. Cal. Jan. 24, 2008);  
19 Holcomb v. Director of Corr., 2006 U.S. Dist. LEXIS 85683, \*19-\*20 (N.D. Cal. Nov. 14, 2006);  
20 Gabby v. Meyer, 390 F.Supp.2d 801, 804 (E.D. Wis. 2005). Thus, an inmate's physical or mental  
21 condition can render administrative remedies "effectively unavailable." See id.

22 Second, there is evidence that Plaintiff did attempt to file a late appeal after he had recovered  
23 from his injuries. Plaintiff has indicated that he submitted a late appeal, he did not receive a response,  
24 an appeals coordinator said that the appeal was not on file and no copies of the appeal were available,  
25 and that someone in the appeals office told him his issue was "untimely." See Doc. No. 74 at p.8 &  
26 Ex. A. This implicates the second requirement of *Days* – a complaint rejected as untimely. It also  
27 implicates the principle that improper screening of an administrative complaint may render  
28 administrative remedies "effectively unavailable." See Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th

1 Cir. 2010). Defendants’ argument that Plaintiff failed to appeal the improper “cancelling of the  
2 appeal” is not persuasive because there was no “cancelling” or formal rejection. Plaintiff has indicated  
3 that he was told that no appeal was on file, which would mean that there was no formal decision or  
4 cancellation of the appeal.

5 In sum, the F&R correctly found that Plaintiff has presented sufficient evidence to raise a  
6 genuine disputed issue of material fact as to whether administrative remedies were “effectively  
7 unavailable.” Defendants’ objections are overruled, and the Court will adopt the F&R in full.

8 Additionally, with respect to Plaintiff’s motion for summary judgment (which addressed the  
9 merits of his underlying claims), the Court granted Defendants’ request to stay briefing until the  
10 Defendants’ motion relating to exhaustion had been resolved. The issue of exhaustion cannot be  
11 resolved without an evidentiary hearing, as recognized by the F&R. Because further proceedings are  
12 necessary, the Court finds that the most advisable course is to deny Plaintiff’s summary judgment  
13 motion without prejudice. If the exhaustion issue is resolved in Plaintiff’s favor, he may re-notice his  
14 summary judgment motion, and a new briefing schedule will be entered at that time.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. The F&R, filed on January 11, 2016, (Doc. No. 108) is ADOPTED in full;
- 17 2. Defendants’ motion to strike Plaintiff’s sur-reply (Doc. No. 89) is GRANTED;
- 18 3. Defendants’ motion for summary judgment (Doc. No. 70) is DENIED;
- 19 4. Plaintiff’s cross-motion for summary judgment (Doc. No. 73) is DENIED without  
20 prejudice to re-noticing after the issue of exhaustion is resolved;
- 21 5. Plaintiff’s motion to stay the F&R (Doc. No. 110) is DENIED; and
- 22 5. This matter is referred to the Magistrate Judge for the purpose of setting and conducting  
23 an evidentiary hearing on the issue of exhaustion.

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25 IT IS SO ORDERED.

26 Dated: March 8, 2016

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28 SENIOR DISTRICT JUDGE

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