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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DAVON ELIMU MCCOY,  
Plaintiff,  
v.  
DR. H. TATE, et al.,  
Defendants.

CASE NO. 1:15-cv-01428-MJS (PC)

**ORDER**

- (1) CONVERTING FINDINGS AND RECOMMENDATIONS TO ORDER;**
- (2) DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION;**
- (3) GRANTING DEFENDANTS' MOTION FOR EVIDENTIARY HEARING; AND**
- (4) SETTING EVIDENTIARY HEARING**

Date: July 7, 2017  
Time: 10:00 a.m., Courtroom 6 (MJS)

**(ECF Nos. 20, 27, 32, 33)**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. On February 28, 2017, the undersigned issued findings and recommendations to grant in part Defendants' motion

1 for summary judgment for Plaintiff's failure to exhaust his administrative remedies. (ECF  
2 Nos. 20, 27.) This action has since been reassigned to the undersigned pursuant to the  
3 consent of the parties. (ECF No. 31.) Accordingly, the findings and recommendations will  
4 be converted to an order.

5 In separate filings, the parties objected to the findings and recommendations.  
6 (ECF Nos 32, 33.) The undersigned construes these objections as motions for  
7 reconsideration.

8 **I. Procedural Background and Undisputed Facts**

9 The procedural background and undisputed facts set forth in the February 28,  
10 2017, findings and recommendations, herein converted to an order, are incorporated by  
11 reference. (ECF No. 27.)

12 **II. Legal Standards**

13 "A motion for reconsideration should not be granted, absent highly unusual  
14 circumstances, unless the ... court is presented with newly discovered evidence,  
15 committed clear error, or if there is an intervening change in the controlling law," Marlyn  
16 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).  
17 "A motion for reconsideration may not be used to raise arguments or present evidence  
18 for the first time when they could reasonably have been raised in earlier litigation." Id.  
19 Furthermore, "[a] party seeking reconsideration must show more than a disagreement  
20 with the Court's decision, and 'recapitulation ...' " of that which was already considered  
21 by the court in rendering its decision. U.S. v. Westlands Water Dist., 134 F. Supp. 2d  
22 1111, 1131 (E.D. Cal. 2001) (quoting Birmingham v. Sony Corp. of Am., Inc., 820 F.  
23 Supp. 834, 856 (D. N.J. 1992)). Similarly, Local Rule 230(j) requires that a party seeking  
24 reconsideration show that "new or different facts or circumstances are claimed to exist  
25 which did not exist or were not shown upon such prior motion, or what other grounds  
26 exist for the motion...."

1 **III. Discussion**

2 **A. Plaintiff's Motion for Reconsideration**

3 Plaintiff's motion seeks reconsideration of that portion of the February 28, 2017,  
4 Order finding that Plaintiff did not exhaust his administrative remedies as to his claim  
5 against Dr. Tate, a complaint premised on this Defendant's July 2012 discontinuation of  
6 Plaintiff's seizure and pain medication and withdrawal of a walking cane chrono. The  
7 Court held that Plaintiff failed to properly exhaust a July 2012 appeal addressing Dr.  
8 Tate's conduct, and Plaintiff's later attempt to reassert his claim against Dr. Tate in  
9 October 2012 was properly dismissed as untimely.

10 Plaintiff now repeats the arguments he made in his opposition to Defendants'  
11 motion, namely, that he did not exhaust his administrative remedies as to the July 2012  
12 appeal because Dr. Tate improperly canceled it beyond his authority and because the  
13 cancelation was based on the false assertion that Plaintiff refused to be interviewed.  
14 These arguments were previously found unpersuasive, and the Court sees no reason to  
15 revisit them.

16 Plaintiff also makes a related argument that he was prevented from resubmitting  
17 his appeal for further review in light of the cancelation. In support, Plaintiff cites to 15  
18 CCR § 3084.6(e), but that section states only that "Once cancelled, an appeal shall not  
19 be accepted *except pursuant to subsection 3084.6(a)(3) ....*" (Emphasis added.)  
20 Subsection 3084.6(a)(3) then provides that "At the discretion of the appeals coordinator  
21 or third level Appeals Chief, a cancelled appeal may later be accepted if a determination  
22 is made that cancellation was made in error or new information is received which makes  
23 the appeal eligible for further review." Indeed, the letter accompanying the canceled  
24 appeal at issue in this case stated: "If you wish to appeal this action you may do so by  
25 submitting a separate appeal, attaching these documents, and citing the reasons you  
26 believe the appeal should not be canceled. You must adhere to the 14-calendar day  
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1 limitation per CCR, Title 15, Section 3084.6(b)(3) when resubmitting.” Decl. of J. Long in  
2 Supp. Defs.’ Mot. Summ. J. Ex. B (ECF No. 20-3 at 15).

3 Since Plaintiff did not resubmit his appeal within the 14-day period raising any of  
4 the issues he raises here concerning the propriety of the cancelation, the Court again  
5 finds that he failed to exhaust his administrative remedies as to Dr. Tate.

6 Accordingly, Plaintiff’s motion for reconsideration will be denied.

7 **B. Defendants’ Motion for Reconsideration**

8 Defendants seek reconsideration of that portion of the February 28, 2017, Order  
9 finding that there is a dispute of material fact preventing the entry of summary judgment  
10 on Defendants’ claim that Plaintiff failed to exhaust his administrative remedies related to  
11 the October 16, 2012 conduct of Defendants Lenker, Twitty, Holland, and Lundy (“the  
12 Correctional Officer Defendants”).

13 In the October 2012 appeal, Plaintiff raised claims concerning the conduct of the  
14 Correctional Officer Defendants. Since this appeal has an institutional receipt date of  
15 July 18, 2013, the question before the Court was whether Plaintiff submitted a timely  
16 appeal on October 30, 2012, and California Correctional Institution (“CCI”) staff simply  
17 failed to respond to it, or whether—as Defendants claimed—Plaintiff falsified the date on  
18 the appeal before submitting it for the first time in July 2013.

19 In finding the existence of a genuine dispute of material fact, the undersigned  
20 relied on two CDCR 22 forms (titled “Inmate/Parolee Request for Interview, Item or  
21 Service”) that Plaintiff claims he submitted in January 27, 2013, and June 30, 2013. Both  
22 forms questioned why CCI staff was not responding to the October 2012 appeal, and  
23 each included a signature of CCI staff members who purportedly received the forms on  
24 the dates that Plaintiff submitted them. These forms were found sufficient to preclude  
25 summary judgment because they appeared to show that Plaintiff’s attempt to exhaust his  
26 administrative remedies was thwarted by non-responsive CCI staff.

1 Defendants now move for reconsideration of the authenticity of the CDCR 22  
2 forms, arguing that the forms unequivocally demonstrate that the dates and CCI staff  
3 signatures are falsified. In support, Defendants point out that the forms provide two  
4 methods of delivery to CCI staff: "SENT THROUGH MAIL" and "DELIVERED TO  
5 STAFF." See Long Decl. in Supp. Defs.' Mot. Summ. J. Ex. A (ECF No. 20-3 at 10-11).  
6 In the event an inmate chooses to send the form through the mail, the form specifically  
7 provides **\*\* NO RECEIPT WILL BE PROVIDED IF REQUEST IS MAILED \*\***. See id.  
8 (emphasis in original). If the form is delivered to a staff member, then the receiving staff  
9 member is to print his or her name, date and sign it, and give the inmate the Goldenrod  
10 copy of the form. See id.

11 Of the two CDCR 22 forms at issue here, Plaintiff wrote on the first form that he  
12 mailed it on "1/27/13" to "The Appeal Coordinator." See Pl.'s Opp'n to Defs.' Mot. Summ.  
13 J. Ex. H (ECF No. 24 at 153). Plaintiff wrote on the second form that he mailed it on  
14 "6/30/13" to "Inmate Appeals Office." See id. (ECF No. 24 at 154). Curiously, each of the  
15 forms includes a CCI staff member's name in the "RECEIVED BY" section and is dated  
16 the same day that Plaintiff mailed them: the January 27, 2013, form is signed on that  
17 date by an "M. Olson," and the June 30, 2013, form, which is not signed, notes that it  
18 was received by a "Francisco" on that date. In addition, the January 27, 2013, form  
19 indicates that it was forwarded to another staff member, but fails to identify this person in  
20 the section headed "IF FORWARDED – TO WHOM."

21 In their motion, Defendants highlight that the mailed forms reflect receipt by CCI  
22 staff even after the forms explicitly state that receipts will not be provided to mailed  
23 requests. They also highlight that the signatures are dated the same day that Plaintiff  
24 mailed the forms, suggesting an improbable one-day processing time for outgoing *and*  
25 incoming mail. Defendants also focus on the July 18, 2013, institutional receipt date on  
26 each of the forms, asserting that there is no evidence that Plaintiff submitted the forms  
27 on an earlier date. And lastly, they contend that even if the Court concludes that the  
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1 forms are not fabricated, Plaintiff has not explained why he waited three months before  
2 submitting his first CDCR 22 form and then another five months before submitting the  
3 second CDCR 22 form, all while actively submitting inmate appeals concerning other  
4 issues during the same time period. In the event the undersigned finds that a dispute of  
5 material fact remains, Defendants request an evidentiary hearing.

6 In his opposition to Defendants' motion for summary judgment, Plaintiff argued  
7 only that all of his documentary evidence is authentic, Pl.'s Decl. ¶ 5 (ECF No. 24 at 23),  
8 and that he was diligent in pursuing his October 2012 appeal, as evidenced by the  
9 CDCR 22 forms, but was ultimately unable to exhaust due to CCI staff's non-  
10 responsiveness. Plaintiff has not addressed the discrepancies in the CDCR 22 forms  
11 identified by the Defendants, which was first highlighted in their Rely brief and now  
12 presented in their pending motion for reconsideration. An evidentiary hearing will  
13 therefore be held for the purpose of hearing testimony from Plaintiff and receiving any  
14 additional evidence on the question of the authenticity of these forms.

15 **IV. Conclusion**

16 Accordingly, IT IS HEREBY ORDERED that:

17 1. The Clerk of Court shall convert the February 28, 2017, findings and  
18 recommendations (ECF No. 27) to an Order;

19 2. Plaintiff's motion for reconsideration (ECF No. 33) is DENIED;

20 3. The Court reserves ruling on Defendants' motion for reconsideration (ECF No.  
21 32) pending an evidentiary hearing to decide the disputed issues of fact relating to the  
22 exhaustion of Plaintiff's claims against the Correctional Officer Defendants. These  
23 Defendants need not file a responsive pleading or motion until after the Court rules on  
24 their motion for reconsideration;

25 4. An evidentiary hearing will be held on July 7, 2017, at 10:00 a.m., in  
26 Courtroom 6, Seventh Floor of the United States District Court in Fresno, California. The  
27 hearing will commence and be completed that day, and will be limited to the issue of  
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1 whether Plaintiff is excused from the Prison Litigation Reform Act's exhaustion  
2 requirement because administrative remedies were "effectively unavailable."

3 More specifically, the parties should be prepared to present evidence as to the  
4 following:

- 5 • Whether and when Plaintiff submitted the CDCR 22 forms;
- 6 • Whether and when CCI staff Members "M. Olson" and "Francisco"  
7 received the CDCR 22 forms;
- 8 • Whether Plaintiff timely submitted the October 30, 2012, appeal;
- 9 • Whether prison officials failed to respond to or otherwise process Plaintiff's  
10 CDCR 22 forms; and
- 11 • Whether prison officials failed to respond to or otherwise process Plaintiff's  
12 October 2012 appeal. May 5, 2014 appeal.

13 In preparation for the hearing, it is HEREBY ORDERED that, no later than June 7,  
14 2017, the parties shall confer regarding the witnesses to be called and evidence to be  
15 presented at the hearing. No later than June 16, 2017, defense counsel shall file a  
16 statement setting forth the witnesses to be called and documents to be presented at the  
17 hearing. Defense counsel shall also provide a courtesy physical and electronic copy of  
18 all exhibits to be used at the hearing to Judge Seng's chambers no later than June 16,  
19 2017. Electronic copies can be mailed to [mjsorders@caed.uscourts.gov](mailto:mjsorders@caed.uscourts.gov).

20  
21 IT IS SO ORDERED.

22  
23 Dated: March 29, 2017

/s/ Michael J. Seng  
24 UNITED STATES MAGISTRATE JUDGE