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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LENIN GARCIA,

 Plaintiff,

 v.

E. MORENO, et al.,

 Defendants.

No. 1:18-cv-00014-DAD-SAB (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
ACTION WITHOUT PREJUDICE FOR
FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

(Doc. No. 53)

Plaintiff Lenin Garcia is a state prisoner appearing *pro se* in this civil rights action brought pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. This action currently proceeds on plaintiff’s claims for failure to protect, excessive use of force, retaliation, and failure to decontaminate his cell brought against various defendants (collectively, defendants), each of whom is alleged to have been a correctional officer at the relevant time at California State Prison, Corcoran (“Corcoran”). (Doc. Nos. 1 at 2–3; 11 at 1; 53 at 1.)

On August 6, 2018, defendants filed a motion for summary judgment. (Doc. No. 32.) Therein, defendants argued that plaintiff failed to exhaust his administrative remedies prior to filing suit with respect to the claims he is asserting in this action. (*Id.*) The assigned magistrate judge issued findings and recommendations on November 1, 2018, recommending that

1 defendants' motion for summary judgment be denied without prejudice. (Doc. No. 39.) Those
2 findings and recommendations noted that

3 [w]hether due to some inadvertent loss of the grievance form, or for
4 some other reason, Plaintiff contends that his grievance was not acted
5 upon by prison officials, and he was thereby prevented from fully
6 exhausting the grievance. Thus, at this juncture, the determination
7 of whether Plaintiff properly submitted a November 11, 2016 appeal
8 turns on the relative credibility of the parties which cannot be
determined by way of motion for summary judgment. Based on the
evidence submitted by Plaintiff there is a genuine issue of material
fact as to whether the circumstances rendered the administrative
remedies effectively unavailable to him.

9 (*Id.* at 12.) On April 4, 2019, the undersigned adopted the November 1, 2018 findings and
10 recommendations, denied defendants' motion for summary judgment, and granted defendants'
11 motion for an evidentiary hearing related to plaintiff's exhaustion of the claims he is asserting in
12 this action pursuant to *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). (Doc. No. 46.)

13 On May 15, 2019, the *Albino* evidentiary hearing was held before the magistrate judge.
14 (Doc. No. 52.) Plaintiff Garcia appeared at the hearing *pro se*. (*Id.*) Some of plaintiff's exhibits
15 were admitted into evidence. (*Id.*) Other than his own, plaintiff did not present any other
16 testimony at the hearing. (*Id.*) Defendants presented testimony from various witnesses who
17 either are or were Corcoran staff member, some of whom work or worked for the Office of
18 Appeals at Corcoran. (*Id.*; *see also* Doc. No. 53 at 7–10.)

19 Based on the evidence presented at the *Albino* hearing, the magistrate judge concluded
20 that plaintiff did not exhaust his administrative remedies prior to filing suit as is required. (Doc.
21 No. 53.) Accordingly, on January 29, 2020, the magistrate judge issued the pending findings and
22 recommendations, recommending dismissal of this action due to plaintiff's failure to exhaust his
23 administrative remedies with respect to his claims. (*Id.*) After requesting and receiving an
24 extension of time to do so (Doc. Nos. 55, 57), plaintiff filed his objections to the pending findings
25 and recommendations on March 16, 2020. (Doc. No. 58.) After requesting and receiving an
26 extension of time to file a response to plaintiff's objections (Doc. Nos. 61, 62), defendants filed
27 their response on April 29, 2020. (Doc. No. 63.)

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1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this court has conducted a
2 *de novo* review of this case. Having carefully reviewed the entire file, including plaintiff's
3 objections, the transcript of the *Albino* hearing, each of the exhibits that was admitted into
4 evidence at that hearing, and plaintiff's unauthorized sur-reply,¹ the undersigned concludes that
5 the magistrate judge's recommendation that this action be dismissed without prejudice due to
6 plaintiff's failure to exhaust his administrative remedies to be supported by the record.²

7 Plaintiff asserts three objections to the pending findings and recommendations. First, he
8 argues that he was prejudiced by the magistrate judge's denial of his request to introduce certain
9 exhibits into evidence at the *Albino* hearing. (Doc. No. 58 at 1.) Second, he contends that he was
10 prejudiced by the magistrate judge's denial of his request for a free copy of a transcript of the
11 evidentiary hearing. (*Id.*) Finally, he argues that the evidence presented at the *Albino* hearing, as
12 well as evidence he unsuccessfully attempted to present, establishes that Corcoran staff prevented
13 him from exhausting his administrative remedies. (*Id.* at 4–26.)

14 The court finds that the magistrate judge properly excluded from evidence various letters
15 plaintiff sent and received as well as the declarations of other inmates at Corcoran because most
16 of the excluded exhibits contained hearsay statements from non-testifying declarants, while others
17 violated the best evidence rule or were not relevant to resolution of the issue now before the

18 ¹ On May 8, 2020, plaintiff filed an unauthorized sur-reply to defendants' response to his
19 objections. (Doc. No. 64.) On May 14, 2020, defendants moved to strike that unauthorized sur-
20 reply. (Doc. No. 65.) The court will deny defendants' motion to strike. In light of the Ninth
21 Circuit's liberal standards for review of *pro se* filings, the court has considered plaintiff Garcia's
22 unauthorized sur-reply. *See Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766-JSW,
2017 WL 4581926, at *5 (N.D. Cal. Sept. 13, 2017).

23 ² The undersigned does not adopt the finding that the evidence presented at the evidentiary
24 hearing failed to establish that plaintiff submitted an inmate grievance on November 8 or 11,
25 2016. (*See* Doc. No. 53 at 11.) The undersigned has reviewed the evidentiary record and finds
26 that plaintiff did file inmate appeals on both November 7 and 8, 2016, that those inmate appeals
27 appear to relate to the claims plaintiff is asserting in this action and that those inmate appeals
28 were rejected by prison officials. (*See* Exs. K, F.) Nevertheless, the undersigned agrees with the
magistrate judge that the evidence presented at the *Albino* hearing establishes that plaintiff failed
to exhaust his administrative remedies with respect to the claims he is asserting in this action.
Accordingly, the court will adopt the magistrate judge's recommendation that this action be
dismissed without prejudice due to plaintiff's failure to exhaust his administrative remedies prior
to filing suit.

1 court. (See Doc. No. 60 at 11–12, 16, 19–20, 23–24, 32–35, 106–08, 174–75, 188–91, 200, 205–
2 06); see also Fed. R. Evid. 801 (defining “hearsay” as a statement that “the declarant does not
3 make while testifying at the . . . hearing” and one that “a party offers in evidence to prove the
4 truth of the matter asserted in the statement”); Fed. R. Evid. 1002 (Best Evidence Rule); Fed. R.
5 Evid. 401 (Test for Relevant Evidence). Moreover, the court notes that the April 23, 2019 order
6 setting the evidentiary hearing informed plaintiff of his right to present witnesses, including
7 incarcerated witnesses, as well as the procedure by which he was to obtain the attendance of
8 incarcerated witnesses at that hearing, and plaintiff was further informed of his obligation to be
9 prepared to submit exhibits in proper form at the hearing. (Doc. No. 47.) Plaintiff, however, did
10 not move for the attendance of any incarcerated witness, nor did he present any persuasive
11 argument at the evidentiary hearing as to why any of the exhibits that were excluded from
12 evidence on hearsay grounds should have been admitted. Accordingly, plaintiff’s objection that
13 he was prejudiced by the magistrate judge’s evidentiary rulings is without merit.

14 Next, the court finds that the magistrate judge’s denial of plaintiff’s request for a free copy
15 of the evidentiary hearing transcript did not prejudice plaintiff. As an initial matter, the court
16 notes that this “objection” does not dispute the magistrate judge’s finding that the evidence failed
17 to support plaintiff’s claim that he has exhausted his administrative remedies. Setting that aside,
18 the magistrate judge correctly found that plaintiff was not entitled to a free hearing transcript.
19 (See Doc. No. 57.) Plaintiff is not proceeding *in forma pauperis* in this action and has not cited
20 any authority in support of his position that he is entitled to such a transcript on demand in this
21 civil action in any event.

22 Finally, with respect to plaintiff’s primary objection—that the evidence in this case
23 establishes that Corcoran prison officials prevented him from exhausting his administrative
24 remedies—the court finds that plaintiff merely disagrees with the magistrate judge’s findings and
25 does not meaningfully dispute them. Plaintiff continues to contend, as he did prior to and during
26 the evidentiary hearing, that he never received any of the correspondences from the appeals’
27 office regarding the inmate appeals he filed in November 2016 and December 2016 relevant to
28 this action. (See generally Doc. Nos. 33, 58, 60.) However, plaintiff’s version of events is belied

1 by the evidence presented at the *Albino* hearing, which the magistrate judge accurately
2 summarized in the pending findings and recommendations. (*See* Doc. No. 53 at 6–10; *see also*
3 Doc. No. 60 at 92, 109, 173; Exs. K, F, N, P, J.) Other than expressing his own theories about
4 what he believes may have happened with his inmate appeals, plaintiff has offered no *evidence* or
5 *corroboration* for his claim that he never received the responses to his inmate appeals or that his
6 inmate appeals were never processed, despite the magistrate judge having held an *Albino* hearing
7 and provided plaintiff ample opportunity to prepare for and present evidence at that evidentiary
8 hearing.³ *See Jackson v. Baca*, No. 12-cv-10393-JLS-JEM, 2018 WL 1916307, at *6 (C.D. Cal.
9 Feb. 13, 2018), (“[V]ague assertion[s]’ that prison officials did not process an inmate’s appeals,
10 or ‘stopp[ed] them from being processed,’ are insufficient to create a genuine factual dispute
11 regarding the availability of a remedy.”), *report and recommendation adopted*, No. 12-cv-10393-
12 JLS-JEM, 2018 WL 1918497 (C.D. Cal. Apr. 18, 2018). The court therefore does not find
13 plaintiff’s many disagreements with the pending findings and recommendations to be persuasive
14 objections thereto.

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17 ³ Even assuming for argument’s sake that plaintiff did not receive any of the responses to the
18 inmate appeals he filed in November and December of 2016 as he contends, plaintiff’s own
19 exhibit demonstrates that he was aware, prior to his filing of this action in December of 2017, that
20 he had failed to fully exhaust his administrative remedies with respect to the claims he is asserting
21 here. Plaintiff’s Exhibit 8, admitted into evidence at the *Albino* hearing, includes yet another
22 response to an inmate appeal plaintiff filed on February 12, 2017, Log Number CSPC-2-17-
23 00759. (Ex. 8.) In that inmate appeal, plaintiff had complained that the appeals coordinators
24 were not processing his inmate appeals, including the inmate appeals that relate to his claims
25 presented in this action. (*Id.*) The appeals coordinator responded by letter dated February 15,
26 2017, informing plaintiff that his February 12, 2017 inmate appeal was cancelled because he is
27 “not allowed to appeal the processing of an appeal only it’s [sic] cancellation.” (*Id.*) Thus, even
28 if the court accepts plaintiff’s claim that he did not receive any of the responses related to the
inmate appeals he filed in November and December of 2016, he does not dispute that he did
receive the February 15, 2017 letter, which he has now moved into evidence. By at least
February 15, 2017, plaintiff was therefore on notice that his inmate appeals had been or were
being processed. He was therefore obligated to exhaust those inmate appeals that he filed related
to his claims in this action through the highest level of administrative appeal. He did not do so,
but prematurely filed the pending lawsuit instead. *See Sansone v. Thomas*, No. 1:13-cv-01942-
DAD-EPG (PC), 2016 WL 7159285, at *2 (E.D. Cal. Dec. 7, 2016) (“Prisoners are required to
exhaust the available administrative remedies prior to filing suit.”), *report and recommendation*
adopted, No. 1:13-cv-01942-DAD-EPG, (Doc. No. 89) (E.D. Cal. Feb. 14, 2017).

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For the reasons set forth above,

1. The recommendation issued on January 29, 2020 (Doc. No. 53) is adopted;
2. Defendants’ motion to strike plaintiff’s unauthorized sur-reply (Doc. No. 65) is denied;
3. Based on the evidence presented at the May 15, 2019 *Albino* evidentiary hearing, the court finds that plaintiff failed to exhaust his administrative remedies prior to filing this action as required;
4. This case is dismissed without prejudice due to plaintiff’s failure to exhaust his administrative remedies; and
5. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: October 29, 2020


UNITED STATES DISTRICT JUDGE