1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 BERLAN LYNELL DICEY, No. 2:15-cv-00927 TLN CKD P 12 Plaintiff. 13 v. **ORDER** C. RAYNER, et al., 14 15 Defendants. 16 17 Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 18 19 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. 20 On April 11, 2016, the magistrate judge filed findings and recommendations herein which 21 were served on all parties and which contained notice to all parties that any objections to the 22 findings and recommendations were to be filed within fourteen days. Defendants have filed objections to the findings and recommendations.¹ 23 24 ¹ Defendants represent that the attached mail log (ECF No. 15) shows all of Plaintiff's incoming and 25 outgoing legal mail from January 1, 2015, through May 1, 2015, which does not include a mailing to this Court until February 20, 2015. However, these exhibits do not establish the judicially noticeable fact that Plaintiff did not 26 attempt to file a complaint on January 22, 2015 (ECF No. 1 at 81). Defendants also argue equitable tolling does not apply because, assuming the truth of Plaintiff's allegations, the instant complaint would be filed in the same forum as 27 a previously filed complaint. Martell v. Antelope Valley Hosp. Med. Ctr., 67 Cal. App. 4th 978, 985 (1998). However, the issue is whether Plaintiff attempted to file a complaint, which for some reason did not occur. It appears 28 there was no previously filed complaint. 1

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis. Accordingly, IT IS HEREBY ORDERED that: 1. The findings and recommendations filed April 11, 2016 are adopted in full; 2. Defendants' motion to dismiss (ECF No. 14) is denied; and 3. Defendants Hasty and Rayner shall file their answer within 14 days. Dated: May 25, 2016 Troy L. Nunley United States District Judge