

1 allegations. See ECF No. 7. The court noted in pertinent part, id. at 4-5:

2 It is evident from both the face of the complaint and attached exhibits
3 that plaintiff failed to exhaust his administrative remedies before
4 commencing this action. Plaintiff's failure to exhaust his
5 administrative remedies requires dismissal of this action without
6 prejudice unless, in an amended complaint, plaintiff makes a
7 plausible prima facie showing that administrative remedies were
8 effectively unavailable to exhaust his claims in this action.

9 Plaintiff's FAC (ECF No. 12) expounds upon his factual allegations and provides "yes"
10 answers to the form questions concerning whether plaintiff exhausted his administrative
11 remedies. However, plaintiff thereafter filed exhibits demonstrating that he exhausted his
12 administrative remedies on the allegations set forth in this action after he filed both his complaint
13 and FAC. See ECF No. 13. Plaintiff submitted his initial administrative appeal on January 18,
14 2016. Id. at 6. The relevant final Third Level Review Decision was issued January 5, 2017. Id.
15 at 2-3.

16 Exhaustion of plaintiff's appeal at the Third Level demonstrates that administrative
17 remedies were effectively available to him throughout the relevant period. Therefore, plaintiff's
18 failure to exhaust his administrative remedies before commencing this action does not come
19 within any of the limited exceptions recognized by the Supreme Court in Ross, supra, 136 S. Ct.
20 1850. See discussion, ECF No. 7 at 5. As a result, this action must be dismissed without
21 prejudice to plaintiff filing an entirely new action that accurately reflects the pre-filing exhaustion
22 of his administrative remedies.

23 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court is directed to randomly
24 assign a district judge to this action; and


25 IT IS HEREBY RECOMMENDED that this action be dismissed without prejudice.

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
28 days after being served with these findings and recommendations, plaintiff may file written
objections with the court. Such document should be captioned "Objections to Magistrate Judge's
Findings and Recommendations." Plaintiff is advised that failure to file objections within the

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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 DATED: May 23, 2019

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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