UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DANNY MONTANA GUERRA, CDCR #C-23500,

Plaintiff,

vs.

G.J. JANDA, et al.,

Defendants.

CASE NO. 12-CV-2313-BEN (WVG)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

[ECF Doc. No. 20]

Danny Montana Guerra ("Plaintiff"), a prisoner currently incarcerated at Ironwood State Prison ("ISP"), is proceeding in pro se in this civil action, which he commenced with a Complaint first filed on September 18, 2012,[1] pursuant to 42 U.S.C. § 1983, while he was incarcerated at Calipatria State Prison ("CAL"). *See* Compl. (ECF Doc. No. 1).

I. Procedural History

On January 1, 2013, the Court granted Plaintiff leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a), but sua sponte dismissed his Complaint pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). (ECF Doc. No. 4). Specifically,

[1] While Plaintiff's original Complaint was received by the Clerk on September 21, 2012, it is considered "filed" as of September 18, 2012, the date he alleges to have placed it in the institutional mail at Calipatria State Prison. *See* Compl. (ECF Doc. No. 1) at 93; *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) ("*Houston* [*v. Lack*, 487 U.S. 266, 270-72 (1988)] mailbox rule applies to § 1983 suits filed by *pro se* prisoners.").

the Court found Plaintiff's pleading failed to comply with Federal Rule of Civil Procedure 8, contained claims of alleged wrongdoing dating back to 2001 and 2005 which were barred by the statute of limitations, and failed to state a claim for either retaliation or conspiracy. *See id.* at 4-7. Plaintiff was provided a opportunity to amend, however, and after requesting and receiving two separate extensions of time in which to file a response, (ECF Doc. Nos. 6-9), he filed his First Amended Complaint ("FAC") on February 22, 2013 (ECF Doc. No. 11).

The Court then screened Plaintiff's FAC pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See* Aug. 20, 2013 Order (ECF Doc. No. 12). Plaintiff's allegations that he was denied a clerical job in 2003 at CAL in violation of due process were dismissed for failing to state a claim, and his claims of retaliation against Defendants Moschetti and Dominguez were found to be time-barred. *Id.* at 3-4, 5. As to Plaintiff's retaliation claims against Defendants Anaya, Builteman, Janda, Duran, Criman, Nava, Miller, McShan, and McNair, however, the Court could not determine whether the claims were time-barred, as it could not "discern from the face" of Plaintiff's FAC when he "had reason to know" his claims against them had accrued, or whether he would be "entitled to tolling." *Id.* at 5-6. Therefore, the Court concluded Plaintiff's retaliation claims against Anaya, Builteman, Janda, Duran, Criman, Nava, Miller, McShan and McNair were "sufficiently pleaded to survive the sua sponte screening required by 28 U.S.C. § 1915(e)(2) and § 1915A(b)" and directed the U.S. Marshal to effect service of Plaintiff's FAC on his behalf pursuant to 28 U.S.C. § 1915(d) and Federal Rule of Civil Procedure 4(c)(3). *Id.* at 7-8.

II. Plaintiff's Allegations

In his FAC, Plaintiff alleges to have appeared at his annual unit classification committee ("UCC") hearing on February 23, 2010, where he requested to be "placed on clerical work status." *See* FAC (ECF Doc. No. 11) at 6; Pl.'s Ex. D, "CDC 128-G UCC Annual Review," (ECF Doc. No. 11-3) at 9. Defendants Nava and Miller, both members of Plaintiff's February 23, 2010 UCC, denied Plaintiff's request, however,

citing "pertinent information contained in [Plaintiff's] central file and based on . . . past disciplinary behavior" which "yielded his removal from his [previous] clerical assignment." Pl.'s Ex. D.

While Plaintiff's CDC 128-G dated February 23, 2010 does not further describe the disciplinary behavior relied upon to deny Plaintiff's request for a clerical work assignment, Plaintiff alleges Nava and Miller based their decision on "2003 disciplinary charges of theft" which they "knew were dismissed" and a "confidential memorandum dated May 2003 [and] authored by Defendant G.J. Janda which ordered (in part), that [Plaintiff] should be removed from his clerical position due to being a litigation menace towards [CAL] staff and the State of California." FAC (ECF Doc. No. 11) at 6-7. Plaintiff alleges Miller "ordered Nava to keep [Plaintiff] assigned as a porter (janitor)[,] stating if we can't stop his legal activities, we can at least slow him down," so that "he won't have resources readily available." *Id.* at 7.

Sometime in June 2010, Plaintiff alleges Nava became aware of the CDC 602 Inmate/Parolee appeal Plaintiff alleges to have filed challenging his February 23, 2010 UCC hearing, which Plaintiff identifies as Log. No. CAL-D-10-00989. FAC (ECF Doc. No. 11) at 8. Plaintiff claims Nava contacted Appeals Coordinator Edwards and "instructed him to cancel [the] appeal." *Id.* In addition, Plaintiff claims Defendant Nava "took [him] to a second annual classification committee" hearing on June 4, 2010, during which Plaintiff again requested "clerical reinstatement" to committee members McNair and McShan. *Id.* at 8-9. Plaintiff claims Nava "attempted to change [the] reasoning," behind the February 23, 2010 UCC decision not to clear him for consideration of clerical duty, and produced on a document authored by Defendant Moschetti attesting to "disciplinary charges dismissed [in] 2003" and Defendant Janda's "2003 litigation menace memorandum." *Id.* at 8. Plaintiff alleges that when Captain McNair asked to "see the 2003 charges," Nava admitted they had been dismissed, but argued his request for clerical reinstatement should continue to be denied because they had been dismissed on a "technicality," and because Plaintiff

"like[d]" going to court "against staff." *Id.* at 8-9. Plaintiff then claims Nava, McNair, and McShan "agreed to retaliated against [him]," and "authored a committee chrono" again denying his request to be reinstated on clerical duty. *Id.* at 9. Plaintiff alleges McNair told him "you'll never be a clerk as long as you're in prison" because he "beat the 115 on an appeal technicality," and that Defendant McShan "nodded in agreement," stating, "You're done as a clerk." *Id.*

Plaintiff alleges to have filed an CDC 602 Inmate/Parolee appeal regarding Miller and Nava's February 23, 2010 UCC decision, which he identifies in his FAC as being designated Log. No. "CAL-D-10-00989." FAC (ECF Doc. No. 11) at 8. Plaintiff also attaches an exhibit to his FAC which comprises two CDC 695 "Screening Forms" referring to CDC 602 Inmate Appeal Log. No. CAL-D-10-00989. *See* FAC, Pl.'s Ex. E, (ECF Doc. No. 11-3) at 11-12. Both these documents indicate CAL-D-10-00989 was "screened out" at the second level of administrative review. *Id.* First, on July 7, 2010, CAL-D-10-00989 was "returned" to Plaintiff as constituting "an abuse of the appeal process" pursuant to California Code of Regulations § 3084.4, insofar at it could not be "understood or [was] obscured by pointless verbiage or voluminous unrelated documentation" in violation of California Code of Regulations § 3084(c). Plaintiff was asked: "What exactly are you attempting to appeal?," directed to "address the specific request," and reminded he was "only allowed one (1) issue per appeal." *Id.* at 11. When Plaintiff apparently attempted to re-submit CAL-D-10-00989 on July 13, 2010, it was again "screened out" and "not accepted" on grounds that it "duplicate[d] a previous appeal upon which a decision has been rendered or [was] pending" pursuant to California Code of Regulations § 3084.3(c)(2). *Id.* at 12. This time, Plaintiff was told: "Do not resubmit this appeal." *Id.* "Fearing appeal sanctions," Plaintiff alleges to have "complied with the order." FAC (ECF Doc. No. 11) at 8. However, he does not identify, nor attach as exhibits to his FAC, which, if any, any of his other previously decided or pending CDC 602 inmate appeals Log No. CAL-D-10-00989 was determined to duplicate.

Plaintiff further claims that "during the appeals process" and "in approximately September 2010," during an *Olson* review of his Central or "C-File,"[2] he "reviewed (for the first time) an array of documents, which were never given to [him] prior to 2010," and which he claims were "purposely hidden" by staff, "misfiled," and made to look like appeal exhibits. FAC (ECF Doc. No. 11) at 10.

The documents specified by Plaintiff include the following:

1) a document authored by Defendant Janda, and dated in May 2003, which "orders prison staff Moschetti and Dominguez to remove . . . [Plaintiff] from his clerical position due to [his] being a litigation menace," *id.* at 10-11;

2) a document authored by Defendant Janda, dated June 2003, which "orders [CAL] staff to conceal/misfile adverse action documents related to [Plaintiff's] litigation activities to prevent further litigation by [him]." *id.* at 11;

3) a document authored by Defendants Anaya and Builteman, dated March 30, 2004, and denying him clerical status "based on [his] prior 2003 dismissed disciplinary charges and . . . prior legal activities,"*id.* at 10;

4) a document authored by Defendants Janda, Duran, and Criman, dated January 31, 2006, and denying him clerical status based on his "prior 2003 dismissed disciplinary charges and [his] prior legal activities against [California Department of Corrections and Rehabilitation (CDCR)] staff," *id.* at 10, 12-13; and

5) a document authored by Defendant Duran, dated February 1, 2006, and denying him clerical status based on his "2003 dismissed disciplinary charges of a forged medical chrono." *Id.* at 10.

Plaintiff alleges Defendants Moschetti and Dominguez followed Janda's written order, and in May or June 2003, "filed false disciplinary charges . . . designed to terminate" and "remove" Plaintiff from his clerk position. *Id.* at 11 (citing CDC 115 Rules Violation Report "RVR" Log. No. 06-03-D022); *see also* Pl.'s Ex. B (ECF Doc.

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[2] An *Olson* review is a review of a prisoner's central or medical files mandated by *In re Olson*, 37 Cal.App.3d 783, 112 Cal.Rptr. 579 (1st Dist. 1974).

No. 11-2). Plaintiff further alleges to have learned "by way of [the] hidden documents" described above, that Defendants Anaya and Builteman also denied him clerical status during a March 30, 2004 UCC hearing based on Janda's 2003 litigation menace memo and Moschetti's already dismissed 2003 disciplinary charges. *Id.* at 13.

On an unspecified date in 2005, Plaintiff re-applied for a clerical position, but was again denied "due to past disciplinary history." *Id.* (citing CDC 115 Log No. 06-03-D022 and 06-03-D022R). Plaintiff appealed, requested an *Olson* review, and requested that "false information/charges be removed" from his C-file. *Id.*; *see also* Pl.'s Ex. C, "CDC 602 Inmate/Parolee Log. No. CAL-D-05-1662," dated August 29, 2005, (ECF Doc. No. 11-2) at 15. This appeal was granted at the first formal level of review on October 28, 2005, when staff was ordered to remove "a memo dated August 12, 2005, authored by CCI L. Moschetti, which included information regarding a dismissed CDC 115 for having unauthorized supplies in [his] cell, . . . caus[ing] the loss of [his] clerk position," and to "generate a 128B documenting the dismissal of the CDC 115." *See* Pl.'s Ex. C (ECF Doc. No. 11-3) at 1-2. Plaintiff claims to have been "satisfied" with this response, and "believed the dismissed 2003 disciplinary charges" and Moschetti's memorandum were "removed from his file as promised." FAC (ECF Doc. No. 11-1) at 1.

He further asserts he was "unaware" of the continued existence and "secretive usage" of the dismissed CDC 115 RVR Log. No. 06-03-D022 and Moschetti's memorandum until Defendants Nava, Miller, McNair, McShan and Janda "used them against [him] in 2010 and 2011 respectively." *Id.*

Plaintiff concludes that Defendants Dominguez and Moschetti violated his right to due process and retaliated against him for exercising his First Amendment right to file a civil action and grievances by filing the initial "false" disciplinary charges against him in May or June 2003 which resulted in his being "terminated as a clerk," and which were ultimately dismissed via Plaintiff's CDC 602 Inmate/Parolee Appeal Log No. 06-03-D022R on January 27, 2004. *See* FAC (ECF Doc. No. 11-1) at 3-4; Pl.'s Ex. B

(ECF Doc. No. 11-2) at 5-13.[3] He further asserts that Defendants Nava, Miller, Janda, Duran, Criman, Anaya, Builteman, McNair, and McShan did the same by "maintaining" or continuing to rely on those "false" disciplinary charges in order to "block" his re-classification as a clerk during subsequent UCC hearings held in March 2004, January 2006, February 2010, and June 2010. *See* FAC (ECF Doc. No. 11) at 6-13, (ECF Doc. No. 11-1) at 4-5.

Plaintiff seeks declaratory relief and injunctive relief preventing CDCR and CAL personnel from retaliating against him, an order "reinstating [him] to his previous skill level I clerical status," placement on the "clerical worker hiring list," the "immediate expungement of the dismissed disciplinary charges, derogatory and false information, and any and all related documents making reference to . . . the dismissed disciplinary charges," and an order "allowing [him] physical inspection of [his] confidential, institutional, and [CDCR] records and archives to verify full compliance." *See* FAC (ECF Doc. No. 11-1) at 7-8. Plaintiff further seeks $100,000 in compensatory damages and $100,000 in punitive damages from each Defendant, as well costs, fees and "lost wages." *Id.* at 8-9.

III. Defendants' Motion

On November 12, 2013, Defendants Anaya, Builteman, Janda, Criman, Miller, McShan, and McNair filed a Motion to Dismiss Plaintiff's FAC pursuant to Federal Rules of Civil Procedure 12(b) and 12(b)(6) (ECF Doc. No. 20). Defendants Duran and Nava later filed Notices of Joinder (ECF Doc. Nos. 31, 45). In their Motion, Defendants argue that Plaintiff's claims against Janda require dismissal because they were not properly exhausted prior to suit as required by 42 U.S.C. § 1997e(a). *See* Mot. (ECF Doc. No. 20-1) at 5, 8-9. Defendants further argue Plaintiff's retaliation claims against Nava and Miller related to his February 23, 2010 UCC hearing are barred by the statute of limitations, *id.* at 10-13, as are the claims of retaliation against

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[3] Plaintiff's claims against Defendants Dominguez and Moschetti have already been dismissed pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See* Aug. 20,. 2013 Order (ECF Doc. No. 12) at 3-4, 5.

the remaining Defendants in counts two and three. *Id.* at 13. Finally, Defendants seek dismissal of Plaintiff's requests for injunctive relief arguing that they have been rendered moot by his transfer from CAL to ISP. *Id.* at 14-15.

IV. Notice of Defendants' Motion

Because Defendants moved to dismiss based in part on Plaintiff's alleged failure to exhaust, both Defendants and the Court provided him with the Notice then required by the Ninth Circuit's decisions in *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003) and *Woods v. Carey*, 684 F.3d 934, 938-40 (9th Cir. 2012). (ECF Doc. Nos. 20-2; 21). In *Wyatt*, the Ninth Circuit held that because "the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement," the proper pretrial motion for raising the issue was an "unenumerated Rule 12(b) motion, rather than a motion for summary judgment." 315 F.3d at 1119. And because such a motion permitted the court to "look beyond the pleadings and decide disputed issues of fact," *id.* at 1119-20 (citing *Ritza v. Int'l Longshoreman's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988) (per curiam)), a "procedure closely analogous to summary judgment–then the court must assure that [the plaintiff] has fair notice of his opportunity to develop a record." *Id.* at 1120 n.14. In *Woods*, the Ninth Circuit held that the "fair notice of the requirements needed to defeat a defendant's motion to dismiss for failure to exhaust administrative remedies," like the notice required to apprise incarcerated pro se litigants of the requirements needed to defeat summary judgment pursuant to *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988), and *Rand v. Rowland*, 154 F.3d 952, 953 (9th Cir. 1998) (en banc), must "be provided at the time of the defendant's motion[.]" *Woods*, 684 F.3d at 939.

In response to the Court's *Wyatt* Notice, Plaintiff filed a Motion for an Extension of Time (ECF Doc. No. 36), which the Court granted (ECF Doc. No. 37). Plaintiff ultimately filed his Opposition on February 14, 2014 (ECF Doc. No. 48). And on February 25, 2014, Defendants filed their Reply (ECF Doc. No. 51). Although this matter was originally referred to the Magistrate Judge, this Court has elected to resolve

the motion directly.

V. Intervening Case Law

On April 3, 2014, before the Court could consider and rule on Defendants' Motion, the Ninth Circuit decided *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc). *Albino* explicitly overrules *Wyatt*, *id.* at 1169, and "hold[s] that an unenumerated motion under Rule 12(b) is *not* the appropriate procedural device for pretrial determination of whether administrative remedies have been exhausted under the PLRA [Prison Litigation Reform Act]." *Id.* at 1168 (italics added). Thus, unless "a prisoner's failure to exhaust [is] clear from the face of the complaint," which is "rare because a plaintiff is not required to say anything about exhaustion in his complaint," *id.* at 1169, a "motion for summary judgment, as opposed to an unenumerated Rule 12(b) motion, to decide exhaustion," is the appropriate procedure provided by the Federal Rules. *Id.* at 1169, 1170. A Rule 56 motion is appropriate because "[i]n a typical PLRA case, [the] defendant will have to present probative evidence [. . .] to 'plead and prove' . . . that the prisoner has failed to exhaust available administrative remedies under § 1997e(a)." *Id.* at 1169 (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)). Defendants must seek summary judgment on the basis of non-exhaustion, therefore, because it "allow[s] resolution by the judge of disputed factual issues." *Id.* at 1170.

VI. Unenumerated 12(b) & Exhaustion

As noted above, Defendants move to dismiss Plaintiff's claims against Defendant Janda pursuant to Rule 12(b) based on his alleged failure to properly exhaust available administrative remedies prior to suit as is required by 42 U.S.C. § 1997e(a). Non-exhaustion is an affirmative defense which Defendants must "plead and prove." *Jones*, 549 U.S. at 204; *Albino*, 747 F.3d at 1170. Therefore, in support of dismissal, Defendants submitted the declarations of J. Zamora, the Acting Chief of the CDCR Office of Appeals, and B. Paul, CAL's current Chief Deputy Warden, which describe the CDCR's inmate appeals process and the levels of administrative review

existing at the times Plaintiff alleges his rights were violated. (ECF Doc. Nos. 20-3, 20-4). In support of their declarations, Zamora and Paul also attach a list of Plaintiff's Appeal History as recorded by the CDCR's Inmate/Parolee Appeals Tracking System dating back to 1995, *see* Zamora Decl. (ECF Doc. No. 20-3) Ex. A, at 8-10, Paul Decl. (ECF Doc. No. 20-4) Ex. A at 9-13, as well as and photocopies of appeal documents submitted by, and in response to, Plaintiff and his related allegations of retaliation by CAL officials dating back to February 23, 2010. *See* Zamora Decl. ¶ 8(a)-(f); Paul Decl. ¶ 6(a)-(h). Defendants ask the Court to consider the exhibits attached to Paul and Zamora's Declarations, and "look beyond the pleadings and decide disputed issues of fact" as to Plaintiff's purported failure to exhaust. *See* Mot. (ECF Doc. No. 20-1 at 4-5, 14-15) (quoting *Wyatt*, 315 F.3d at 1119-20).

While this procedure was authorized by the Ninth Circuit's decision in *Wyatt* at the time Defendants' Motion was filed, the Ninth Circuit's subsequent en banc decision in *Albino* explicitly prohibits this Court's consideration of "disputed questions of material fact relevant to exhaustion" by way of Rule 12, and requires they be decided by way of summary judgment instead. *Albino*, 747 F.3d at 1170-71. Accordingly, to the extent Defendants move to dismiss Plaintiff's claims against Defendant Janda based on Plaintiff's failure to exhaust, their Motion must be **DENIED**.

VII. Rule 12(b)(6)

Defendants Nava and Miller further seek dismissal of Plaintiff's FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that he fails to state a claim upon which relief can be granted because his claims against them–specifically those arising on or about February 23, 2010–are barred by the statute of limitations. *See* Mot. (ECF Doc. No. 20-1) at 10-13. All remaining Defendants seek dismissal of Plaintiff's earlier claims of retaliation against them pursuant to 12(b)(6) for the same reasons. *Id.* at 13.

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A. Standard of Review

A Rule 12(b)(6) dismissal may be based on either a "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff's complaint must provide a "short and plain statement of the claim showing that [he] is entitled to relief." *Id.* (citing FED. R .CIV. P. 8(a)(2) (alteration in original).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation") (cited approvingly in *Twombly*, 550 U.S. at 555). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citations omitted).

In analyzing a pleading, the Court sets conclusory factual allegations aside, accepts all non-conclusory factual allegations as true, and determines whether those non-conclusory factual allegations accepted as true state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 677–684; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (noting that the court need not accept conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true). And while "[t]he plausibility standard is not akin to a probability requirement," it does

"ask[] for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted). In determining plausibility, the Court is permitted "to draw on its judicial experience and common sense." *Id.* at 679 (citation omitted).

Nevertheless, claims asserted by pro se petitioners, "however inartfully pleaded," are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Thus, courts "continue to construe pro se filings liberally when evaluating them under *Iqbal*." *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (noting that courts "have an obligation where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.")).

Finally, when resolving a motion to dismiss for failure to state a claim, the court may not generally consider materials outside the pleadings, but it may consider exhibits which are attached. *See* FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Schneider v. Cal. Dep't of Corrs.*, 151 F.3d 1194, 1197 & n.1 (9th Cir. 1998).

B. Statute of Limitations

"A claim may be dismissed [for failing to state a claim] on the ground that it is barred by the applicable statute of limitations only when 'the running of the statute is apparent on the face of the complaint.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). "'A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.'" *Id.* (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)); *see also Hughes v. Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2)(B) of prisoner's time-barred complaint); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l*

Planning Agency, 216 F.3d 764, 788 (9th Cir. 2000) (court may raise the defense of statute of limitations *sua sponte*), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276-77 (9th Cir. 1993) (where the running of the statute of limitations is apparent on the face of a complaint, dismissal for failure to state a claim is proper).

Because section 1983 contains no specific statute of limitation, federal courts apply the forum state's statute of limitations for personal injury actions. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California's statute of limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1).

The law of the forum state also governs tolling. *Wallace v. Kato*, 549 U.S. 384, 394 (2007) (citing *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989);); *Jones*, 393 F.3d at 927 (noting that in actions where the federal court borrows the state statute of limitation, the federal court also borrows all applicable provisions for tolling the limitations period found in state law, except to the extent any of these laws is inconsistent with federal law).

Under California law, the statute of limitations for prisoners serving less than a life sentence is tolled for two years. CAL. CIV. PROC. CODE § 352.1(a); *Johnson v. California*, 207 F.3d 650, 654 (9th Cir. 2000), *overruled on other grounds*, 543 U.S. 499 (2005). Accordingly, the effective statute of limitations for most California prisoners is three years for claims accruing before January 1, 2003 (one year limitations period plus two years of statutory tolling), and four years for claims accruing thereafter (two year limitations period plus two years of statutory tolling). *Garcia v. Lunes*, No. CV 1-06-167, 2010 WL 1267128, at *2 (E.D. Cal. Mar. 30, 2010) (unpub.).

Unlike the length of the limitations period, however, "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to

state law." *Wallace*, 549 U.S. at 388. "Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation begins to run, when the wrongful act or omission results in damages." *Id.* at 391. (citation omitted). Put another way, "[u]nder federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Maldonado*, 370 F.3d at 955 (quoting *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)).

C. Timeliness of Plaintiff's Claims

Defendants Miller and Nava seek dismissal of Plaintiff's claims of retaliation related to his February 23, 2010 UCC hearing on the ground that they are barred by California's two-year statute of limitations. *See* Mot. (ECF Doc. No. 20-1) at 10. Nava and Miller contend Plaintiff's claims against them accrued on February 23, 2010–the date Plaintiff "kn[ew] or ha[d] reason to know" of the basis for his claims of injury due to their alleged acts retaliation, *id.* (citing *Maldonado*, 370 F.3d at 955). They argue that he did not file his original complaint until September 2010, after the 2-year limitations period expired. *Id.* at 12. Nava and Miller further claim that because Plaintiff "is serving a term of life without the possibility of parole–a straight life term–which does not entitle him to release before the end of his natural life," he is not entitled to the two extra years of statutory tolling permitted by California Code of Civil Procedure § 352.1. *Id.* at 11-12 (citing Pl.'s FAC [ECF Doc. No. 11-3] at 9, Pl.'s Ex. D).

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) based on a statute of limitations defense is only appropriate where the running of the statute of limitations is apparent "on the face of a complaint." *Von Saher*, 592 F.3d at 969. However, Rule 12(b)(6) also permits consideration of any matters of which judicial notice may be taken, and any exhibits attached to the complaint. *United States v. Ritchie,* 342 F.3d 903, 908 (9th Cir. 2003).

Here, Defendants Nava and Miller point to Plaintiff's Exhibit D (ECF Doc. No. 11-3), the CDC 128-G form issued on February 23, 2010, documenting the actions

taken at Plaintiff's UCC Annual Review hearing, to show that Plaintiff is an "LWOP" prisoner, sentenced to a life term without the possibility of parole, and therefore not entitled to the additional two years of statutory tolling provided by California Code of Civil Procedure § 352.1. *See* Mot. (ECF Doc. No. 20-1) at 11-12 (citing *Grasso v. McDonough Power Equip., Inc.* 264 Cal. App. 2d 597, 599 (1968)). Without statutory or equitable tolling, then, the limitations period for Plaintiff's claims of retaliation against Nava and Miller would have expired on February 23, 2012–two years from the date these claims accrued–and almost seven months before he initiated suit.

When a statute of limitations defense shows on the face of the complaint, the burden of alleging facts which would give rise to tolling falls upon the plaintiff. *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993). Here, while Plaintiff does not dispute he was sentenced to a life term without the possibility of parole (LWOP), he cites *Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) to argue he is nevertheless "allowed tolling." See Pl.'s Opp'n (ECF Doc. No. 48-1) at 104-05. *Martinez* however, concludes only that the plaintiff in that case was entitled to tolling because he was serving "a life sentence *with* the possibility of parole," which California courts had previously held was a "term less than for life" under California Code of Civil Procedure § 352(a)(3), which was amended by California Code of Civil Procedure § 352.1. See *Martinez*,137 F.3d at 1125-26 (italics added) (citations omitted). Because Plaintiff was sentenced to a life term without the possibility of parole, or a straight life term, however, section 352.1(a)'s plain language, which permits two years of tolling for persons who "at the time the cause of action accrued, [were] imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life," simply does not apply to him. *See, e.g.*, *Gonzalez v. Adams*, No. 1:09-cv-1284, 2013 WL 636730, at *6 (E.D. Cal. Feb. 20, 2013) (unpub.) (finding California prisoner sentenced to life without possibility of parole was not entitled to tolling under § 352.1).

Plaintiff also argues in his Opposition that he is entitled to equitable tolling for

the period during which he spent exhausting these claims. *See Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005) ("the applicable statute of limitations [in a § 1983 action] must be tolled while a prisoner completes the mandatory exhaustion process [required by 42 U.S.C. § 1997e(a)]."); Pl.'s Opp'n (ECF Doc. No. 48) at 2, (ECF Doc. No. 48-1) at 98.

In support, Plaintiff attaches to his Opposition copies of his CDC 602 Inmate/Parolee Appeals' activity dating back to 2004, and specifically includes duplicate copies of the two CDC Form 695s dated July 7, 2010 and July 13, 2010 "screening out" CDC 602 Log. No. CAL-D-00989, *id.*, Ex. F (ECF Doc. No. 48) at 40-45, the inmate appeal he also alleges in his FAC to have filed regarding Nava and Miller's actions. FAC (ECF Doc. No. 11) at 8 & Ex. E (ECF Doc. No. 11-3) at 11-12. Thus, while the Court may not consider these documents in order to decide whether Plaintiff has, in fact, "properly exhausted" his February 23, 2010 claim against Nava and Miller, *see Albino*, 747 F.3d at 1170-71, it may consider them for purposes of determining whether Plaintiff can show he is entitled to equitably toll the statute of limitations while they were pending. *See Brown*, 422 F.3d at 943.

The Court finds that Plaintiff's allegations and exhibits regarding CDC 602 Log. No. CAL-D-00989 demonstrate the statute of limitations as to his February 23, 2010 retaliation claims against Nava and Miller may be tolled from April 28, 2010, the date he submitted the appeal, *see* Pl.'s Opp'n (ECF Doc. No. 48) at 40, to July 13, 2010, the date it was "screened out" at the second level of administrative review and Plaintiff was directed not to resubmit it. *Id.* at 43; *see also* Pl.'s FAC. at 8 & Ex. E. However, these additional days are not sufficient to render Plaintiff's claims against Nava and Miller timely since the Court agrees they accrued on February 23, 2010, during his UCC hearing, when he appeared before the committee and "had reason to know" Nava and Miller were denying him clerical status based on his prior litigation activities. *See Wallace*, 549 U.S. at 391; *Maldonado*, 370 F.3d at 955.

Accordingly, the Court **GRANTS** Defendant Nava and Miller's Motion to Dismiss Plaintiff's February 23, 2010 retaliation claims against them as barred by the statute of limitations pursuant to Federal Rule of Civil Procedure 12(b)(6).

As to Plaintiff's retaliation claims against Defendants Nava, McNair, and McShan arising during his "second annual" UCC hearing, the Court finds these claims also accrued on the date of that hearing, June 4, 2010, because Plaintiff again appeared before the committee on that day and had reason to know at that time he was still being denied clerical work status based on his prior litigation activity. *See* FAC (ECF Doc. No. 11) at 8-9; *Wallace*, 549 U.S. at 391; *Maldonado*, 370 F.3d at 955. Therefore, the two-year statute of limitations on these claims expired on or about June 4, 2012, and they too are untimely, unless adequately tolled by Plaintiff's administrative appeals. *See Brown*, 422 F.3d at 943.

As to these claims, Plaintiff also provides copies of his inmate/parolee appeal records, including CDC 602 Inmate/Parolee Appeal Log No. CAL-D-10-02078. *See* Pl.'s Opp'n (ECF Doc. No. 48), Ex. D at 19-36. These documents show Plaintiff is entitled to equitably toll California's two-year statute of limitations from September 30, 2010–the date his CDC 602 was submitted, *id.* at 22, until September 22, 2011–the date his appeal was denied at the third or "Director's" level of review. *Id.* at 20. Thus, the limitations period commenced on June 4, 2010, and ran through September 30, 2010, a period of approximately four months, but was tolled for an additional twelve months (until September 22, 2011), at which point the limitations period resumed, expiring approximately twenty months later, sometime in May 2013. Because Plaintiff filed this action in September 2012, these claims are timely.

Accordingly, the Court **DENIES** Defendant Nava, McNair and McShan's Motion to Dismiss Plaintiff's June 4, 2010 retaliation claims against them on grounds of untimeliness pursuant to Federal Rule of Civil Procedure 12(b)(6).

As to the remainder of Plaintiff's retaliation claims against Defendants Janda, Anaya, Builteman, Criman, and Duran, all alleged to have also retaliated against

Plaintiff by denying him clerical status based on dismissed disciplinary charges and his "prior legal activities," *see* FAC (ECF Doc. No. 11) at 10-13, at various times in 2003, 2004, and 2006, the Court finds the face of Plaintiff's own pleading shows they are clearly barred by the statute of limitations. *Von Saher*, 592 F.3d at 969.

Plaintiff alleges he "reviewed for the first time" several documents allegedly issued by Janda, Builteman, Criman, and Duran which had been "hidden from [his] view" until he discovered them "during the appeals process and by *Olson* review in approximately 2010." *See* FAC (ECF Doc. No. 11) at 10. Plaintiff claims these documents show Janda, Anaya, Builteman, Criman, and Duran continued to rely on his dismissed 2003 disciplinary record and prior litigation activities in order to refuse his requests for clerical status in 2003, 2004, and 2006. *Id.* at 10-13. However, he also admits knowing the basis for the denial of his clerical duty requests in August 2005–more than five years before he claims to have first discovered these documents in 2010–when he claims to have once again "re-applied for a clerical position," was again denied, and filed an administrative appeal on grounds that "false information was in his central file" and specifically asked to have it removed. *Id.* at 13; *see also* Pl.'s Ex. C, CDC 602 Inmate/Parolee Appeal Log. No. CAL D-05-1662 (ECF Doc. 11-2) at 15, (ECF Doc. No. 11-3) at 1-7. Indeed, Plaintiff appears to have been aware in 2004, via another CDC 602 Inmate/Parolee Appeal Log No. CAL-04-00307, which he attaches to his Opposition, that while his Rules Violation Report Log No. 06-03-D022 "was removed from [his] Central file," his classification chronos would remain in his Central File because they "chronologically document[ed] classification actions." *See* Pl.'s Opp'n (ECF Doc. No. 48) at 58. Plaintiff was further advised sometime in 2004 that "[t]he informational memorandum dated August 12, 2003 [would] also remain, as it indicate[d] [Plaintiff's] abuse of his previous position as a clerk and misuse of state property and time." *Id.* Further, in response to his 2005 grievance, Plaintiff was informed that a 128B document would be added to his file "documenting the dismissal" of the earlier charges, but did not indicate that information about the 2003 charges

would be removed. FAC (ECF Doc. No. 11-3) at 2. Thus, these documents show that while Plaintiff was successful in having his C-file amended to remove any "impl[ication of] guilt," *id.*, it is clear from the face of Plaintiff's FAC and the exhibits he has attached, that he "kn[ew] or ha[d] reason to know" of the basis for his claims of injury due to Janda, Builteman, Anaya, Criman and Duran's alleged acts retaliation at least as early as 2005, if not before. *Maldonado*, 370 F.3d at 955. Plaintiff's claim to have first discovered in 2010 the basis for the repeated refusals to grant him clerical duty is not plausible given the contradictory allegations in his FAC and in the exhibits he himself provides. Therefore, these claims are clearly time-barred.

Accordingly, the Court **GRANTS** Defendant Janda, Anaya, Builteman, Criman, and Duran's Motion to Dismiss Plaintiff's 2003, 2004, and 2006 claims of retaliation against them as untimely pursuant to Federal Rule of Civil Procedure 12(b)(6).

VIII. Injunctive Relief

Finally, Defendants seek dismissal of Plaintiff's claims for injunctive relief as moot. *See* Mot. (ECF Doc. No. 20-1) at 14-15. As mootness pertains to a federal court's subject matter jurisdiction under Article III, the issue is properly raised in a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); FED. R. CIV. P. 12(b)(1). The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide. *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (citations omitted). Rule 12(b)(1) attacks on jurisdiction can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *White*, 227 F.3d at 1242).

Plaintiff's Complaint seeks injunctive relief preventing CDCR and CAL personnel from retaliating against him, an order "reinstating [him] to his previous skill level I clerical status," placement on the "clerical worker hiring list," the "immediate expungement of the dismissed disciplinary charges, derogatory and false information,

and any and all related documents making reference to . . . the dismissed disciplinary charges," and an order "allowing [him] physical inspection of [his] confidential, institutional, and [CDCR] records and archives to verify full compliance." *See* FAC (ECF Doc. No. 11-1) at 7-8.

Defendants, who are all alleged to be correctional officials at CAL, contend that because Plaintiff has been transferred from CAL to ISP since filing this action, they no longer have the power to provide Plaintiff the relief that he requests. Mot. (ECF Doc. No. 20-1) at 14. They point out that CDCR is not a party to this lawsuit, and that Defendants have no control over either Plaintiff or his central file. *Id.* at 14-15.

Because Plaintiff has been transferred from CAL to ISP since filing this action, the Court agrees his claims for injunctive relief against Defendants are moot. *See Johnson v. Moore*, 948 F.3d 517, 519 (9th Cir. 1991) (per curiam) (claims for injunctive relief relating to policies at correctional facility moot when prisoner was transferred and prisoner did not demonstrate a reasonable expectation of returning to the facility). Plaintiff has not demonstrated that an exception to the mootness doctrine applies. Further, although Plaintiff argues that he was promised relief, he does not dispute Defendants' contention that they do not have the power to give him the requested relief. Neither CDCR nor ISP officials are parties to this lawsuit. Any injunctive relief granted by this Court would therefore have no effect. Accordingly, the Motion to Dismiss the claims for injunctive relief is **GRANTED**.

IX. Conclusion and Order

Based on the foregoing, the Court **ORDERS** as follows:

1) Defendants' Motion to Dismiss Plaintiff's claims against Defendant Janda for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a) and Federal Rule of Civil Procedure 12(b) is **DENIED**;

2) Defendants' Motion to Dismiss Plaintiff's retaliation claims against Defendants Nava and Miller arising on or about February 23, 2010 as barred by the statute of limitations pursuant to Federal Rule of Civil Procedure 12(b)(6) is

GRANTED;

3) Defendants' Motion to Dismiss Plaintiff's retaliation claims against Defendants Nava, McShan, and McNair arising on or about June 4, 2010 as barred by the statute of limitations pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED**;

4) Defendants' Motion to Dismiss Plaintiff's retaliation claims against Defendants Janda, Anaya, Builteman, Criman, and Duran arising in 2003, 2004, and 2006 as barred by the statute of limitations pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED**; and

5) Defendants' Motion to Dismiss Plaintiff's claims for injunctive relief is **GRANTED**.

IT IS FURTHER ORDERED that because Plaintiff has already been provided an opportunity to amend his pleading in order to allege facts which might render his claims timely, further leave to amend those claims is **DENIED** as futile. *See Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013) ("dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment.") (citation omitted).

Accordingly, the Clerk is **DIRECTED** to terminate this action as to Defendants Janda, Anaya, Builteman, Criman, Duran, and Miller based on Plaintiff's failure to state a timely claim for relief against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

The remaining Defendants, Nava, McShan, and McNair, are hereby **ORDERED** to file a responsive pleading to Plaintiff's First Amended Complaint within 14 days of this Order pursuant to Federal Rule of Civil Procedure 12(a)(4)(A).

IT IS SO ORDERED.

Dated: July 24, 2014

HON. ROGER T. BENITEZ
United States District Judge