

1 I. BACKGROUND

2 Serving a twenty-year sentence, Plaintiff is currently incarcerated at Pelican
3 Bay State Prison. (Doc. 46, at 1.) At the times relevant to this action, Plaintiff was
4 incarcerated at R.J. Donovan Correctional Facility (RJD) in San Diego, California.
5 (Id.) Defendants Jeffries, Rios, and Ramos are correctional officers stationed at RJD.
6 (Id.)

7 A. Allegations in Plaintiff’s Complaint

8 In his original Complaint, Plaintiff alleged that in July 2010, he filed an inmate
9 grievance alleging that certain unnamed male and female officers had failed to log into
10 the E.R.M.S. System. (Doc. 1, at 3.) Plaintiff alleges that Defendants Jeffries and Rios
11 reported him to the Mental Health Services Delivery System because he was hearing
12 things and filing false 602 grievances. (Doc. 1, at 3.)

13 Plaintiff next alleges that on July 13, 2010, he was targeted for assault while on
14 the prison recreation yard. (Doc. 1, at 3.) Plaintiff alleges that he “was unlawfully
15 subjected to be targeted [in] an assault in retaliation for filing 602 grievances . . .”
16 (Doc. 1, at 3.) Plaintiff alleges he was hit and punched in the face, causing bruising to
17 his eye socket, a gash on his cheek bone, and bruising to his rib cage. (Id.) Plaintiff
18 attaches to the Complaint his Rules Violation Report, which documents the incident.
19 (Doc. 1, at 7.) The Rules Violation Report shows that Plaintiff was convicted of
20 fighting with two other inmates. (Doc. 1, at 8.) The Report includes Plaintiff’s
21 statement that he was not involved in the fight but was over by the handball court,
22 minding his own business. (Id.)

23 Plaintiff claims that he filed a 602 grievance form with the prison regarding the
24 July 13, 2010 incident on the prison yard in which Plaintiff was convicted of fighting
25 with two other inmates. (Doc. 1, at 4, 17.) Plaintiff also claims to have submitted a
26 602 form purportedly filed on July 5, 2010 in which Plaintiff states that Defendant
27 Jeffries called him a “punk” for filing 602 forms and claims that Jeffries “tried to get
28 him to fight with other inmates.” (Doc. 36, at 11.) Plaintiff also purportedly described

1 in writing that Defendant Rios “instigate[d]” him to start a fight with other inmates on
2 July 1, 2010 for “reporting employee sexual misconduct on correctional females.”
3 (Doc. 36, at 12.) Plaintiff states that prison officials did not respond to his grievance
4 forms. (Doc. 1, at 4.) Plaintiff also states that on March 26, 2011 he filed a
5 government claim form to obtain compensation damages for injuries and the pain he
6 suffered. (Doc. 1, at 3.)

7 Plaintiff’s complaint, containing claims against Defendants Rios, Jeffries, and
8 Ramos for retaliation under the First Amendment, failure to protect under the Eighth
9 Amendment, and violation of due process under the Fourteenth Amendment, was filed
10 on December 15, 2015. (Doc. 1.) Plaintiff signed his complaint on December 9, 2015,
11 but the envelope in which it was mailed was signed by a correctional officer on
12 December 8, 2015 and shows a postage date of December 10, 2015. (Doc. 1, at 6, 19,
13 20.)

14 B. Allegations in Plaintiff’s First Amended Complaint

15 In his First Amended Complaint, Plaintiff initially alleges that Defendants
16 retaliated against him on July 9, 2010 and through July 13, 2010. (Doc. 46, at 2.)
17 Plaintiff then alleges that in July 2011, Defendants Jeffries and Rios stopped by his
18 cell, swore at him, and claims that Plaintiff had made false allegations against them in
19 prison grievances. (Doc. 46, at 3.) Plaintiff alleges that Jeffries and Rios then walked
20 down the tier questioning other inmates, ordered the inmates to assault him, and
21 offered a reward for assaulting him. (Id.)

22 Plaintiff alleges that Jeffries referred Plaintiff to mental health services “to
23 cover up his illegal verbal threats towards Plaintiff.” (Id.) Plaintiff alleges that this
24 occurred “later in the week” but also alleges that it occurred on July 8, 2010. (Id.)
25 Plaintiff alleges that “two days later,” “on July 13, 2011,” Plaintiff was assaulted on
26 Jeffries, Rios and Ramos’s orders. (Id.) Plaintiff alleges he suffered a black eye, a
27 gash to the right cheek, and bruises to his rib cage. (Id. at 4.) Plaintiff has increased
28 his demand for damages to \$50,000 per Defendant, but he continues to claim \$60,000

1 in punitive damages. (Id. at 5.)

2 Plaintiff alleges in his First Amended Complaint that he filed a prison appeal on
3 July 9, 2010, but never received a response from the appeals coordinator at RJD.
4 (Doc. 46, at 4.) Plaintiff alleges that it took him five years to finally finish exhausting
5 his appeal, completing the process at the third level of review on June 6, 2017, more
6 than a year after filing his original Complaint. (Id.) Plaintiff has attached an appeal
7 dated May 1, 2016, in which he alleges that Defendants Jeffries and Rios set him up to
8 be attacked. (Id. at 13-14.) This appeal was screened out as untimely. (Id. at 18.)
9 Plaintiff then appealed the screened-out appeal on June 29, 2016. (Id. at 9.) This
10 appeal was accepted and denied at the third level of review on June 6, 2017. (Id. at 7.)

11 II. STANDARD OF REVIEW

12 A motion to dismiss a complaint under Federal Rules of Civil Procedure
13 12(b)(6) tests the legal sufficiency of plaintiff's claims. Navarro v. Block, 250 F.3d
14 729, 732 (9th Cir. 2001). The Court must assume the truth of the facts presented in
15 Plaintiff's complaint and construe inferences from them in the light most favorable to
16 the nonmoving party when reviewing a motion to dismiss under Rule 12(b)(6).
17 Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, a court need not accept as true
18 allegations that contradict matters properly subject to judicial notice or by exhibit. See
19 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 1987). "Nor is the court
20 required to accept as true allegations that are merely conclusory, unwarranted
21 deductions of fact, or unreasonable inferences." Id.

22 A motion to dismiss may be based on the running of the statute of limitations
23 period if the running of the statute is apparent on the face of the complaint. See Jablon
24 v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). Section 1983 claims are
25 governed by the forum state's statute of limitations for personal injury actions, and the
26 days start to accrue when the plaintiff knows or should know of the injury that is the
27 basis of the claim. Douglas v. Noelle, 567 F.3d 1103, 1109 (9th Cir. 2009). The
28 applicable statute of limitations under California law is two years. Cal. Civ. Proc.

1 Code section 335.1; see Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004).
2 Additionally, California law tolls the statute of limitations for up to two years based
3 on the disability of imprisonment for inmates serving less than life terms. Cal. Civ.
4 Proc. Code section 352.1; Jones, 393 F.3d at 927. The effective statute of limitations
5 for an action by a prisoner under 42 U.S.C. section 1983 is therefore up to four years
6 notwithstanding the fact that “[t]he applicable statute of limitations is tolled when a
7 prisoner completes the mandatory exhaustion process.” Brown v. Valoff, 422 F.3d
8 926, 943 (9th Cir. 2005).

9 To ensure further fairness, California law also provides for equitable tolling to
10 extend the statute of limitations under certain circumstances. Jones, 393 F.3d at 928.
11 “[T]hree conditions must be met to toll the statute of limitations: (1) defendant must
12 have had a timely notice of the claim; (2) defendant must not be prejudiced by being
13 required to defend the otherwise barred claim; and (3) plaintiff’s conduct must have
14 been reasonable and in good faith.” Bacon v. City of Los Angeles, 843 F.2d 372, 374
15 (9th Cir. 1988). The effect of equitable tolling is that the limitations period stops
16 running during a tolling event and begins to run again only when the tolling event has
17 concluded. See Lantzy v. Centex Homes, 31 Cal. 4th 363, 370 (2003). The tolled
18 interval is tacked onto the end of the limitations period, thus extending the deadline
19 for suit by the entire length of time during which the tolling event previously
20 occurred. See id. at 370-71. Application of the equitable tolling doctrine requires a
21 balancing of the injustice to the plaintiff occasioned by the bar of his claims against
22 the effect upon the important public interest or policy expressed by the limitations
23 statute. See id. at 371. A federal court must determine on a motion to dismiss
24 “whether the complaint liberally construed in light of our ‘notice pleading’ system,
25 adequately alleges facts showing the potential applicability of the equitable tolling
26 doctrine.” Cervantes v. City of San Diego, 5 F.3d 1273, 1277 (9th Cir. 1993).
27 However, the question of whether the doctrine of equitable tolling applies normally
28 requires reference to matter outside the pleadings and is not generally amenable to

1 resolution on a Rule 12(b)(6) motion to dismiss. Id. at 1276. Only in instances where
2 there are facts evident from the face of the complaint that support the conclusion that
3 the plaintiff could not prevail, as a matter of law, on the equitable tolling issue will a
4 court rule on the statute of limitations defense on a 12(b)(6) motion. Id.

5 Moreover, the Prison Litigation Reform Act (“PLRA”) requires prisoners to
6 exhaust all available administrative remedies before filing a § 1983 action in federal
7 court. See 42 U.S.C. § 1997e(a). “The obligation to exhaust ‘available’ remedies
8 persists as long as *some* remedy remains ‘available.’ Once that is no longer the case,
9 then there are no ‘remedies ... available,’ and the prisoner need not further pursue the
10 grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (quoting Booth v.
11 Churner, 532 U.S. 731, 739-41 (2001)). The Ninth Circuit has held that “defendants
12 have the burden of raising and proving the absence of exhaustion.” Wyatt v. Terhune,
13 315 F.3d 1108, 1119 (9th Cir. 2003) (overruled on other grounds). This burden
14 requires defendants to demonstrate that the inmate has failed to pursue some avenue of
15 “available” administrative relief. Brown, 422 F.3d at 936-37. Because “failure to
16 exhaust is an affirmative defense under the PLRA, and ... inmates are not required to
17 specially plead or demonstrate exhaustion in their complaints,” the defendant in a
18 typical PLRA case will have to present probative evidence that the prisoner has failed
19 to exhaust available administrative remedies under § 1997e(a). If in the rare case a
20 prisoner’s failure to exhaust is clear from the face of the complaint, a “defendant may
21 successfully move to dismiss under Rule 12(b)(6) for failure to state a claim.” Albino
22 v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014).

23 Finally, if a complaint is found to fail to state a claim or is statutorily barred, the
24 court should grant leave to amend unless it determines that the pleading could not
25 possibly be cured by the allegations of other facts. See Doe v. United States, 58 F.3d
26 494, 497 (9th Cir. 1995).

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1 III. DISCUSSION

2 Defendants argue in their motion to dismiss that Plaintiff’s claims are barred by
3 the statute of limitations. (Doc. 47, at 2.) Defendants also argue that Plaintiff failed to
4 plead facts that would equitably toll the statute of limitations. (Id.) Furthermore,
5 Defendants argue that Plaintiff’s case is premature because Plaintiff did not finally
6 exhaust his remedies until 2016 or 2017, after he filed suit. (Id. at 9.)

7 A. Statute of limitations

8 Defendants argue that Plaintiff’s section 1983 claims against them should be
9 dismissed for being time-barred by section 335.1 of California’s Code of Civil
10 Procedure, which sets a two-year statute of limitations period for personal injury
11 claims. (Doc. 47.) California law tolls the statute of limitations for up to two years
12 based on the disability of imprisonment for inmates serving terms less than life terms.
13 Cal. Civ. Proc. Code § 352.1; Jones, 393 F.3d at 927. As Plaintiff, who is not serving
14 a life term, filed his complaint on December 15, 2015 on actions that occurred in July
15 of 2010 and July of 2011, Plaintiff’s claims, which should have been filed by July
16 2015 at the latest, are therefore time barred, unless another type of tolling applies.

17 On Defendant’s motion to dismiss, however, the Court cannot rule on the
18 factual question of the applicability of tolling at this time because it is not clear from
19 the face of Plaintiff’s First Amended Complaint that Plaintiff could not prevail, as a
20 matter of law, on the statute of limitations issue. Plaintiff has presented conflicting
21 evidence as to the reasons for the delay in exhausting his remedies through the third
22 level of administrative review at RJD prison. Plaintiff has alleged that he filed a prison
23 appeal on July 9, 2010 but never received a response from the appeals coordinator at
24 RJD. (Doc. 46, at 4.) Plaintiff attaches an appeal dated May 1, 2016, in which he
25 alleges that Defendant Jeffries and Rios set him up to be attacked. (Doc. 46, at 13-14.)
26 This appeal shows that it was screened out as untimely. (Doc. 46, at 18.) Plaintiff then
27 states that he allegedly appealed this screened-out appeal on June 29, 2016. (Doc. 46,
28 at 9.) This appeal shows that it was finally accepted at the third level of review but it

1 was denied on June 6, 2017. (Doc. 46, at 7.) The third level appeal decision notes that
2 it was “appellant’s position that [his appeal] was cancelled in error.” (Doc. 46, at 8.)
3 But the decision states that no relief can be granted to appellant after a review of the
4 facts presented. (Doc. 46, at 8.)

5 Under this factual scenario, the Court finds that it is not clear on the face of
6 Plaintiff’s First Amended Complaint the extent to which the statute of limitations
7 period should be tolled while Plaintiff exhausted his administrative remedies and how
8 much equitable tolling should be afforded to Plaintiff based on the level of effort he
9 made at the administrative level of review to resolve his claims. Thus, the Court
10 recommends denying Defendants’ motion to dismiss Plaintiff’s amended complaint on
11 statute of limitations grounds.

12 B. Timing of Exhaustion

13 A prison inmate must exhaust his administrative remedies before filing a
14 lawsuit. 42 U.S.C. 1997e(a); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).
15 In McKinney, the Ninth Circuit held “that § 1997e(a) requires exhaustion before the
16 filing of a complaint and that a prisoner does not comply with this requirement by
17 exhausting available remedies during the course of litigation.” Id. at 1199. Similarly,
18 in Vaden v. Summerhill, 449 F.3d 1047 (9th Cir. 2006), the Ninth Circuit held that a
19 prisoner “may initiate litigation in federal court only after the administrative process
20 ends and leaves his grievances unredressed.” Id. at 1151. Moreover, Defendants may
21 successfully raise the affirmative defense of failure to timely exhaust administrative
22 remedies on a motion to dismiss if Plaintiff’s failure to exhaust is clear on the face of
23 the complaint. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014).

24 In this case, Plaintiff has alleged that it took him five years to finally finish
25 exhausting his administrative remedies. (Doc. 46, at 7.) Plaintiff has also provided
26 proof in his First Amended Complaint that he finally exhausted his administrative
27 remedies on his claims on June 6, 2017, after he filed this lawsuit. (Doc. 46, at 4.) The
28 third level appeal decision states that Plaintiff’s issues “were appropriately reviewed

1 and evaluated by administrative staff.” (Doc. 46, at 8.) The third level review also
2 notes that Plaintiff was “unable to explain the delay in requesting the outcome of an
3 appeal which the appellant contends was submitted in the year 2011.” (Doc. 46, at 8.)
4 For these reasons, the appeal states that relief can not be afforded to Plaintiff at the
5 third level of review. (Doc. 46, at 8.)

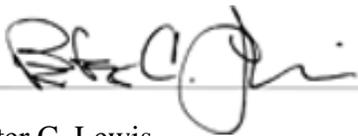
6 Based on this evidence included in Plaintiff’s First Amended Complaint, it is
7 clear to the Court that Plaintiff did not file the director’s level of appeal until after he
8 filed this lawsuit. Thus, Plaintiff’s filing of this action before the director’s level
9 appeal was filed and denied was improper. See King v. CDC, 2007 WL 2265106, at
10 *1 (E.D. Cal. August 6, 2007). Accordingly, it is recommended that Defendants’
11 motion to dismiss be granted on exhaustion grounds.

12 IV. CONCLUSION

13 As it is clear from the face of Plaintiff’s First Amended Complaint that he did
14 not exhaust his administrative remedies until after he filed this action, Plaintiff’s
15 lawsuit should be dismissed without leave to amend because there is no way for
16 Plaintiff to cure the timing issue with the instant lawsuit. Nevertheless, his case should
17 be dismissed without prejudice as to any future lawsuit that Plaintiff may file in the
18 future.

19 Any written objections to this Report and Recommendation must be filed with
20 the Court and a copy served on all parties on or before October 31, 2017. The
21 document should be captioned “Objections to Report and Recommendation.” The
22 parties are advised that failure to file objections within the specified time may waive
23 the right to raise those objections on appeal of this Court’s order. Martinez v. Ylst,
24 951 F.2d 1153, 1156 (9th Cir. 1991).

25 DATED: October 13, 2017

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Peter C. Lewis

28 United States District Court