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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 GUILLERMO TRUJILLO CRUZ,
12 Plaintiff,
13 v.
14 JEFFREYS; RIOS; RAMOS,
15 Defendants.

Case No.: 15-CV-2826 JLS (PCL)

**AMENDED ORDER (1)
OVERRULING PLAINTIFF'S
OBJECTIONS; (2) ADOPTING
REPORT AND
RECOMMENDATION; (3)
GRANTING MOTION TO DISMISS;
AND (4) DENYING PLAINTIFF'S
MOTION TO AMEND**

(ECF Nos. 47, 49, 50, 52)

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20 Presently before the Court¹ is Magistrate Judge Peter C. Lewis's Report and
21 Recommendation, ("R&R," ECF No. 50), advising that the Court grant Defendants
22 Jeffries, Rios, and Ramos's Motion to Dismiss, ("MTD," ECF No. 47). Also before the
23 Court is Plaintiff's Objections to the R&R, ("R&R Objs.," ECF No. 52); Defendants did
24 not file a reply in opposition to Plaintiff's Objections. After considering the parties'
25 arguments and the law, the Court **OVERRULES** Plaintiff's Objections, **ADOPTS** the
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28 ¹ The Court issues this Amended Order correcting its Order issued on March 7, 2018, (ECF No. 53). The only changes to the order can be found in the Conclusion section on page eight.

1 R&R in its entirety, and **GRANTS** Defendants’ Motion to Dismiss. Additionally, Plaintiff
2 filed a motion to amend his complaint, (ECF No. 49), which the Court **DENIES**.

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4 **BACKGROUND**

5 Judge Lewis’s R&R contains a thorough and accurate recitation of the factual and
6 procedural histories underlying the instant Motion to Dismiss. (*See* R&R 2–4.)² This
7 Order incorporates by reference the background as set forth therein.

8 **LEGAL STANDARD**

9 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
10 court’s duties regarding a magistrate judge’s report and recommendation. The district court
11 “shall make a de novo determination of those portions of the report . . . to which objection
12 is made,” and “may accept, reject, or modify, in whole or in part, the findings or
13 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c); *see also*
14 *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely
15 objection, however, “the Court need only satisfy itself that there is no clear error on the
16 face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory
17 committee’s note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

18 **ANALYSIS**

19 **I. Summary of the R&R Conclusions**

20 On December 15, 2015 Plaintiff filed a Complaint against Defendants, correctional
21 officers at R.J. Donovan Correctional Facility (“RJDCF”) for alleged violations of his civil
22 rights. (“Compl.,” ECF No. 1.) Plaintiff alleges violations of 42 U.S.C. § 1983 and accuses
23 the moving Defendants of violating his First, Eighth, and Fourteenth Amendment rights.
24 Plaintiff alleges that he submitted grievances against Defendants in early July and they
25 retaliated against him by reporting Plaintiff to the Mental Health Services Delivery System

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27 ² Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each
28 page.

1 and failing to protect him when, on July 13, 2010, he was targeted for assault by other
2 prisoners in retaliation for filing the grievances. (*See* Compl. 3.) On December 22, 2016,
3 Defendants filed a motion to dismiss arguing that (1) Plaintiff’s allegations were barred by
4 the statute of limitations, and (2) Plaintiff failed to allege facts sufficient to state a claim.
5 (ECF No. 33.) Defendants did not raise an exhaustion of administrative remedies defense.
6 Plaintiff filed a motion to amend his Complaint, which this Court granted and, therefore,
7 denied as moot Defendants’ motion to dismiss. (ECF No. 45.)

8 On July 10, 2017, Plaintiff filed his First Amended Complaint, alleging generally
9 the same facts, but included documentation of his administrative remedies for the purpose
10 of tolling the statute of limitations. (First Am. Compl. (“FAC”), ECF No. 46.) Defendants
11 filed the present Motion to Dismiss arguing that Plaintiff’s claims remain barred by the
12 statute of limitations and argue that Plaintiff did not exhaust his administrative remedies
13 prior to filing his case. (MTD 6–10.)

14 Judge Lewis concluded that it was not clear, from the face of Plaintiff’s FAC,
15 whether Plaintiff claims would be subject to equitable tolling of the statute of limitations.
16 Judge Lewis noted that Plaintiff’s claims would be tolled while he pursued administrative
17 remedies, but exact timing of the tolling was not readily apparent from the FAC. (R&R 7–
18 8.) Thus, Judge Lewis recommends denying Defendants’ motion as to the statute of
19 limitations. (*Id.* at 8.)

20 Judge Lewis then found Plaintiff had not exhausted his administrative remedies prior
21 to filing his lawsuit. (*Id.* at 8–9.) Plaintiff included documentation in his FAC that he
22 finally exhausted his administrative remedies on June 6, 2017, after he filed his lawsuit.
23 (*Id.* at 8 (citing FAC 4).) Because of Plaintiff’s failure to exhaust his remedies prior to
24 filing this lawsuit, Judge Lewis recommends dismissing Plaintiff’s suit without prejudice
25 so that he may refile once his administrative remedies are exhausted. (*Id.* at 9.)

26 **II. Summary of Plaintiff’s Objections**

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1 Plaintiff objects to Judge Lewis’s finding that Plaintiff failed to exhaust his
2 administrative remedies. (R&R Objs. 2.) He also objects to Judge Lewis’s finding that
3 Plaintiff’s claim was barred by the statute of limitations. (*Id.*)

4 Plaintiff states that from July 1 to July 9, 2010 he submitted Form “602 grievance
5 complaints” regarding the Defendants’ alleged actions against him. (*Id.*) He alleges that
6 the appeal coordinator at RJDCF failed to log the complaint, which he alleges was
7 negligent and was “with holding [sic] of information and tampering with evidence.” (*Id.*)
8 Plaintiff goes on to state that, after his initial grievance was filed, he was on parole from
9 RJDCF and his original Form 602 was never forwarded to him when he was on parole.
10 (*See id.* at 2–3.) He claims that he then filed additional administrative grievances
11 “regarding the lost or delay of [the] original 602 grievance to track down the original 602
12 complaint.” (*Id.* at 3.) Plaintiff admits that the office of appeals coordinator screened out
13 his appeal as untimely on June 29, 2016, which was finally exhausted on June 6, 2017.

14 **III. Court’s Analysis**

15 The Court will review, *de novo*, each part of Judge Lewis’s R&R to which Plaintiff
16 objects.

17 First, Plaintiff objects to the fact that Judge Lewis found that his claim was barred
18 by the statute of limitations. Judge Lewis came to the opposite conclusion: he could not
19 ascertain whether Plaintiff’s claim was subject to tolling and recommends the Court deny
20 Defendants’ motion on statute of limitation grounds. The Court agrees with Judge Lewis’s
21 conclusion. Accordingly, the Court **OVERRULES** Plaintiff’s first Objection and
22 **DENIES IN PART** Defendants’ Motion to Dismiss as to statute of limitations.

23 Second, Plaintiff objects to Judge Lewis’s finding that Plaintiff failed to exhaust his
24 administrative remedies before filing his lawsuit. (*Id.* at 2.) The Court briefly reviews
25 Plaintiff’s FAC and its exhibits. Plaintiff pursued two administrative appeals while in
26 prison. The first appeal, labeled Log No. RJD-X-16-2243 (the “2243 Appeal”), concerned
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1 the July 2010³ events that Plaintiff alleges violated his constitutional rights. (FAC 16.)
2 Plaintiff alleges he initially filed the 2243 Appeal in the aftermath of the incidents. (*Id.* at
3 4.) On May 1, 2016, Plaintiff resubmitted the 2243 Appeal, claiming that the original July
4 2010 grievance was either lost or destroyed. (*Id.* at 15.) On June 7, 2016, the RJDCF
5 appeals coordinator cancelled the 2243 Appeal because it was outside the time limits for
6 submitting an administrative appeal. (*Id.* at 18 (citing Cal. Code Reg. § 3084.6(c)(4)).) On
7 June 29, 2016, Plaintiff initiated a second administrative action, labeled as Log No. RJD-
8 X-16-3158⁴ (the “3158 Appeal”), to appeal the cancellation of the 2243 Appeal. (*Id.* at 9.)
9 On March 8, 2017, the RJDCF appeals coordinator denied the 3158 Appeal at the second
10 level. (*Id.* at 15.) On June 6, 2017, RJDCF office of appeals denied the 3158 Appeal at
11 the third level. (*Id.* at 7.)

12 The Prison Litigation Reform Act (“PLRA”) requires prisoners to exhaust all
13 available administrative remedies before filing a § 1983 action in federal court. *See* 42
14 U.S.C. § 1997e(a). “The obligation to exhaust ‘available’ remedies persists as long as *some*
15 remedy remains ‘available.’ Once that is no longer the case, then there are no ‘remedies ...
16 available,’ and the prisoner need not further pursue the grievance.” *Brown v. Valoff*, 422
17 F.3d 926, 935 (9th Cir.2005) (quoting *Booth v. Churner*, 532 U.S. 731, 739–41 (2001)).

18 The Ninth Circuit has held that “defendants have the burden of raising and proving
19 the absence of exhaustion.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003)
20 *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir.) (en banc),
21 *cert. denied sub nom.*, *Scott v. Albino*, 135 S. Ct. 403 (2014). This burden requires
22 defendants to demonstrate that the inmate has failed to pursue some avenue of “available”
23 administrative relief. *Brown*, 422 F.3d at 936–37. Because “failure to exhaust is an
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25 ³ The appeal log Plaintiff submitted with his FAC state that the incident occurred in July 2011, not July
26 2010. (FAC 16.) This discrepancy does not affect the Court’s analysis of Plaintiff’s administrative
27 exhaustion.

28 ⁴ Plaintiff filed this second appeal from Kern Valley State Prison and therefore the second appeal has a
second log number, KVSP-O-16-02114. (FAC 9.) The documents reference both log numbers, but the
Court will refer to the second appeal as the 3158 Appeal.

1 affirmative defense under the PLRA, and . . . inmates are not required to specially plead or
2 demonstrate exhaustion in their complaints,” the defendant in a typical PLRA case will
3 have to present probative evidence that the prisoner has failed to exhaust available
4 administrative remedies under § 1997e(a). If in the rare case a prisoner’s failure to exhaust
5 is clear from the face of the complaint, a “defendant may successfully move to dismiss
6 under Rule 12(b)(6) for failure to state a claim.” *Albino*, 747 F.3d at 1169. However, in
7 the vast majority of cases, a motion for summary judgment under Rule 56 is the appropriate
8 avenue for deciding exhaustion issues. *Id.* Although “disputed factual questions relevant
9 to exhaustion should be decided at the very beginning of the litigation,” the plaintiff should
10 be afforded the post-answer discovery process when appropriate after a defendant has pled
11 the affirmative defense of failure to exhaust administrative remedies. *Id.* at 1171.
12 Although a motion to dismiss is not the appropriate method for deciding disputed factual
13 questions relevant to exhaustion, “[e]xhaustion should be decided, if feasible, before
14 reaching the merits of a prisoner’s claim. If discovery is appropriate, the district court may
15 in its discretion limit discovery to evidence concerning exhaustion, leaving until later—if
16 it becomes necessary—discovery directed to the merits of the suit.” *Id.* at 1170 (citing
17 *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)).

18 Here, Plaintiff concedes, on the face of his FAC, that he had not exhausted his
19 administrative remedies until June 6, 2017—almost a year and half after he filed his federal
20 court litigation. *See Albino*, 747 F.3d at 1169; *Wyatt*, 315 F.3d at 1120 (“A prisoner’s
21 concession to nonexhaustion is a valid ground for dismissal”), *overruled on other*
22 *grounds by Albino*, 747 F.3d at 1166. The “exhaustion requirement does not allow a
23 prisoner to file a complaint addressing non-exhausted claims.” *Rhodes v. Robinson*, 621
24 F.3d 1002, 1004 (9th Cir. 2010) (citing *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.
25 2002)). From the documentation attached to his FAC, both Plaintiff’s 2243 Appeal
26 (cancelled June 7, 2016) and his 3158 Appeal (exhausted June 6, 2017) were adjudicated
27 after Plaintiff filed his Complaint on December 15, 2015. While exhaustion determinations
28 are typically appropriate for the summary judgment stage, the exhibits attached to the FAC

1 allow the Court to determine that Plaintiff had not exhausted his administrative remedies
2 prior to filing the present lawsuit. Moreover, Plaintiff conceded in his Objections to Judge
3 Lewis’s R&R that his administrative remedies were not complete until June 6, 2017. (R&R
4 Obj. 3.) Thus, the PLRA barred Plaintiff from filing suit, unless an exception applies.

5 The PLRA “does not require exhaustion when circumstances render administrative
6 remedies ‘effectively unavailable.’” *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir.
7 2017) (quoting *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010)). The Supreme
8 Court has articulated three circumstances where an administrative remedy is effectively
9 unavailable despite being officially available: (1) when the administrative procedure
10 “operates as a simple dead end” because officers are “unable or consistently unwilling to
11 provide any relief to aggrieved inmates”; (2) when the administrative scheme is “so opaque
12 that it becomes, practically speaking, incapable of use” because “no ordinary prisoner can
13 discern or navigate it”; and (3) when prison administrators “thwart inmates from taking
14 advantage of a grievance process through machination, misrepresentation, or intimidation.”
15 *Id.* (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1859–60 (2016)).

16 Plaintiff has not explicitly argued his administrative remedies remained effectively
17 unavailable. However, construing his filings liberally, the Court examines whether his
18 “lost” 602 grievance, allegedly filed in 2010, could be construed as making his
19 administrative remedies effectively unavailable. Plaintiff claims he filed his initial Form
20 602 grievance within the applicable time limits, *see* Cal. Code Reg. § 3084.8, and he “never
21 received a response on the original 602 grievance complaint.” (FAC 4.)

22 However, by his own actions, Plaintiff demonstrates that his administrative remedies
23 were available to him. Plaintiff filed two separate administrative appeals—one was
24 cancelled for failing to adhere to the applicable time limits and the second was fully
25 exhausted (after filing this litigation). Moreover, the first appeal was an attempt to locate
26 the lost grievance. It appears that, once he restarted the appeals process in 2016, Plaintiff
27 took reasonable and appropriate steps to exhaust his administrative claims. Yet, those steps
28 demonstrate that the administrative remedy process was available to him and that he

1 utilized that process not once but twice. Thus, Plaintiff filed his federal litigation before
2 exhausting all his administrative remedies. Because Defendants have raised the exhaustion
3 affirmative defense and Plaintiff has not demonstrated that his administrative remedies
4 were effectively unavailable, the PLRA's command is mandatory: Plaintiff could not and
5 cannot file his action until his administrative remedies are exhausted.

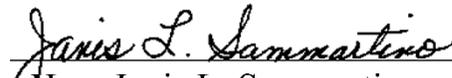
6 Accordingly, the Court **ADOPTS** Judge Lewis's R&R in its entirety and **GRANTS**
7 Defendants' Motion to Dismiss, (ECF No. 47).

8 **CONCLUSION**

9 For the reasons stated above, the Court (1) **OVERRULES** Plaintiff's Objections,
10 (2) **ADOPTS** Judge Lewis's R&R in its entirety, (ECF No. 50), and (3) **GRANTS**
11 Defendants' Motion to Dismiss, (ECF No. 47). Plaintiff has also filed what appears to be
12 a motion for leave to amend his complaint, (ECF No. 49). Because Plaintiff had not
13 exhausted his remedies prior to filing this case, further amendment would be futile. The
14 Court will dismiss Plaintiff's claim without prejudice so that he may exhaust any remaining
15 administrative remedies and seek redress in the future accordingly. If Plaintiff wishes to
16 pursue further federal litigation, he will need to file a new complaint after he exhausts all
17 remedies. Thus, the Court **DENIES** Plaintiff's Motion to Amend, (ECF No. 49),
18 **DISMISSES WITHOUT PREJUDICE** Plaintiff's First Amended Complaint. This
19 Order concludes litigation in this matter. The Clerk **SHALL** close the file.

20 **IT IS SO ORDERED.**

21 Dated: March 7, 2018

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23 Hon. Janis L. Sammartino
24 United States District Judge
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