

2 The genesis of Plaintiff's complaint lies in a physical altercation with a correctional
3 officer at the MDC. Docket # 1-2. There, the morning of April 11, 2007, after being surprised
4 hiding a cell phone, Plaintiff allegedly assaulted an officer to preclude the phone's forfeiture.
5 Id. The same day, Plaintiff received copy of an incident report, and two months later, he
6 appeared before a Discipline Hearing Officer to defend against the report's allegations. Id.² The
7 hearing report recounted the incident as follows:

8 [The officer] was conducting rounds and entered your cell. He observed you
9 were still sleeping and gave you an order to get up, get dress [sic] and make
10 your bed. According to the reporting officer, when you got up, he observed
11 a silver object which he recognized as a cellular phone next to your left leg.
12 You tried to cover [it] with your lower left arm. The reporting officer
13 ordered you to give him the object and you refused by telling him to give
14 you a break, that the phone was not yours. At that time, the reporting officer
15 activated his body alarm. You ran toward him and assaulted him in the face
16 with your right fist. The reporting officer had to use immediate force in an
17 attempt to control you. You continued your assault, the cellular phone fell
18 on the floor and out of the cell. You stopped your assault on the reporting
19 officer, picked up the phone and ran toward cell 232.

20 Docket # 1-2, at p. 8.³

21 At the hearing, Plaintiff admitted possession of the cell phone and denied attacking the
22 officer. Id. Plaintiff, however, was unable to explain the officer's injuries, which, according to
23 a medical assessment, included contusions on his left arm and hematomas on the face and neck.
24 Id. As a result, some of Plaintiff's prisoner privileges were temporarily postponed. Id. Plaintiff

25 ² Before the hearing, Plaintiff waived his right to assistance by a staff representative. Id.

26 ³ Plaintiff's lackluster explanation for running to another cell was that he wanted to get his sneakers. Id.

2 then launched a series of unsuccessful appeals to the BOP, and on April 17, 2009, he filed this
3 suit. Id.⁴

4 Defendants eventually moved to dismiss the case, arguing, first, that Plaintiff's service
5 of summons was defective and thus that the Court lacks *in personam* jurisdiction. Docket # 22.
6 A second motion to dismiss was filed six days later; this one, arguing that Plaintiff's claims are
7 time-barred. Docket # 28.

8 Plaintiff opposed both motions. Regarding the first one, Plaintiff argues that (i) the
9 purported defects had been cured; (ii) Defendant had suffered no prejudice; and (iii) Plaintiff
10 "would be severely prejudiced by a dismissal of the complaint due to the nature of the
11 procedural complexities involved." Docket # 29, p. 2. With leave of Court, Plaintiff filed a
12 certificate of service showing that, in fact, prior deficiencies have been cured. Docket # 32.
13 Therefore, because the Court is satisfied that in this case procedural defects were cured without
14 prejudice to Defendants, their first motion to dismiss is **DENIED** without further discussion.
15 As to Defendants' second motion, Plaintiff states that Defendants' statute of limitation argument
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19 ⁴ Plaintiff's appeals were never adjudicated on the merits, as it seems that all failed to comply
20 with procedural requirements. Id. In fact, a cursory review of the exhibits Plaintiff attached to his
21 complaint raise serious questions about whether he exhausted administrative remedies, which was a
22 prerequisite for the filing of this suit. See Woodford v. Ngo, 548 U.S. 81, 88 (2006) (holding, at the
23 summary judgment juncture, that federal prisoners must successfully complete the administrative review
24 process in accordance with the applicable procedural rules before filing suit in federal courts).
25 Defendants, however, failed to raise this issue, and the Court may not do so *sua sponte* here. See
26 Casanova v. Dubois, 289 F.3d 142, 147 (1st Cir. 2002) (holding that exhaustion of administrative
remedies is not a jurisdictional requirement in federal prisoner cases); Wyatt v. Terhune, 315 F.3d 1108
(9th Cir. 2003) (holding that failure to exhaust is an affirmative defense in federal prisoner cases), cert.
denied, 540 U.S. 810; Richarson v. Goord, 347 F.3d 431, 434 (2d Cir. 2003) (same); Ali v. District of
Columbia, 278 F.3d 1, 5-6 (D.C.Cir. 2002) (same); Perez v. Wis. Dep't Corr., 182 F.3d 532, 535-36
(7th Cir. 1999) (same); Wright v. Morris, 111 F.3d 414, 521 (6th Cir. 1997) (same).

2 fails because the administrative claims filed with the BOP tolled the statutory period. Docket
3 # 34.⁵

4 The Court granted Defendants leave to reply. Docket # 37. This time at bat, Defendants
5 argue that Plaintiff incorrectly premised his claims on Bivens v. Six Unknown Named Agents
6 of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which exclusively applies to suits brought
7 against federal officers in their individual rather than official capacity. Id.⁶ Defendants therefore
8 state that Plaintiff's suit must be dismissed for failure to state a claim upon which relief can be
9 granted because it was brought against federal officers in their official capacity only. Id.
10 Moreover, Defendants also restate that Plaintiff's claims are time-barred, arguing that his
11 administrative claims were not against Defendants, which is a procedural hurdle necessary for
12 tolling to occur. Id.

13 **Standard of Review**

14 In a motion to dismiss for failure to state a claim upon which relief can be granted, courts
15 construe the complaint in the light most favorable to the plaintiff, take as true plaintiff's well-
16 pleaded allegations, and draw all reasonable inferences in plaintiff's favor. Parker v. Hurley,
17 514 F.3d 87, 90 (1st Cir. 2008). Nonetheless, "the Supreme Court has recently held that to
18 survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief.'"

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20 ⁵As a complaint exhibit, Plaintiff annexed a copy of a rejection notice dated February 26, 2008
21 and included an undated hand written note stating that he had received the document on May 9, 2008.
22 Docket #1-2, at p. 29. Because the Court dismisses the case for other reasons, it need not determine
23 whether Plaintiff's handwritten note validly tolled the statute of limitations from February 2008 to May
24 2008, which otherwise would be relevant since Plaintiff filed his complaint in April 2009.

25 ⁶ In Bivens, the United States Supreme Court established that federal constitutional violations
26 by federal agents may give rise to claims for damages in federal courts against the individual officials,
despite the absence of any statute conferring such right. See Carlson v. Green, 446 U.S. 14, 18 (1980).

2 Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92 (1st Cir. 2007), citing Bell Atl. Corp. v.
3 Twombly, 550 U.S. 544 (2007). In other words, dismissal is justified when on the face of the
4 complaint it is clear that plaintiff has failed to set forth an actionable claim. Chute v. Walker,
5 281 F.3d 314, 319 (1st Cir. 2002).

6 **Applicable Law and Analysis**

7 As Defendants correctly point out, “[i]t is well settled that a *Bivens* action will not lie
8 against an agency of the federal government.” Ruiz-Rivera v. Riley, 209 F.3d 24, 28 (1st Cir.
9 2000). Neither is a Bivens action proper against federal employees sued in their official
10 capacity. Id. Sovereign immunity bar these type of suits, F.D.I.C. v. Meyer, 510 U.S. 471, 484-
11 85 (1994), and Courts dismiss them routinely. See e.g., Perez-Olivo v. Gonzalez, 384 F.Supp
12 2d 536, 543 (D.P.R. 2005) (“inasmuch as a *Bivens* action cannot be prosecuted against the
13 United States and its agencies because of sovereign immunity, any claims included in the
14 complaints against the defendants in their official capacities must be and are hereby dismissed
15 with prejudice.”) (internal quotation omitted).

16 In this case, Defendants are the MDC, the BOP, and the MDC’s Warden; the first two,
17 agencies of the United States, and the third, a federal official. Sovereign immunity therefore
18 bars Plaintiff’s claims against them. Furthermore, Plaintiff’s complaint is devoid of allegations
19 against the MDC’s Warden in his individual capacity, although such allegations were possible
20 under Bivens. The Court, however, notes that the MDC’s Warden had nothing to do with the
21 BOP’s administrative proceedings which Plaintiff seeks redress for. Accordingly, on its face,
22 Plaintiff’s complaint clearly fails to state a claim upon which relief can be granted and must be
23 dismissed with prejudice.⁷

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25 ⁷ The Court leaves undecided Defendants’ arguments regarding the statute of limitation but
26 notes that such an affirmative defense, if with merit, also would have prompted the case’s dismissal.
See e.g., Blackstone Relaty LLC v. F.D.I.C., 244 F.3d 193, 197 (1st Cir. 2001).

2 **Conclusion**

3 For the forgoing reasons, Plaintiff's claims against Defendants are **DISMISSED with**
4 **prejudice.**

5 **IT IS SO ORDERED.**

6 In San Juan, Puerto Rico, this 2nd day of November 2010.

7 *s/ Salvador E. Casellas*
8 Salvador E. Casellas
U.S. Senior District Judge

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