No. 20-17519

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIKEB SADDOZAI,

Plaintiff-Appellant,

v.

RON DAVIS, Warden of San Quentin Prison, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 5:18-cv-05558-BLF
Hon. Beth Labson Freeman, *District Judge*

APPELLANT'S OPENING BRIEF

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INTRODUCTION

For over a decade, this Court's precedent has made clear that the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") is assessed as of the time the operative complaint is filed. In 2010, this Court explained that it is a "general rule of pleading" that an "[amended or supplemental complaint] completely supercedes any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant." *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010). In 2014, this Court confirmed an amended or supplemental pleading becomes the operative complaint for a court's exhaustion analysis, holding that "for purposes of the exhaustion requirement, the date of the [amended complaint] filing is the proper yardstick." *Cano v. Taylor*, 739 F.3d 1214, 1220 (9th Cir. 2014). And three years later, in 2017, this Court again held that "[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure." *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017).

Under that simple rule, Shikeb Saddozai's case should not have been dismissed. Mr. Saddozai was brutally attacked and beaten by other prisoners. Rather than coming to Mr. Saddozai's assistance, Defendant Clawson, a correctional officer, shot him in the lower back and buttocks, immobilizing him and allowing those prisoners to further brutalize him. Mr. Saddozai was then strip-searched and

placed in solitary confinement with no medical care after the attack. Proceeding *pro se*, Mr. Saddozai filed suit against Defendant Clawson and other correctional officials. After dismissing his first few attempts, the district court finally accepted Mr. Saddozai's Third Amended Complaint for review. Per this Circuit's rule—and the ordinary operation of Federal Rule of Civil Procedure 15, which governs amended and supplemental pleadings—that pleading became the operative complaint, superseding all of Mr. Saddozai's prior complaints. And it is undisputed that by the time he filed that Third Amended Complaint, Mr. Saddozai had exhausted his administrative remedies, as required by the PLRA. But the district court nonetheless dismissed his complaint for failing to exhaust because it determined he had not exhausted his remedies before filing his first, since-superseded and now-obsolete, complaint.

That was error. Under this Court's precedent, incarcerated plaintiffs are required to exhaust the administrative remedies available to them before filing their *operative* complaint in federal court. The operative complaint may be a plaintiff's original complaint, filed at the outset of the litigation, or it may be an amended or supplemental pleading, permitted under the Federal Rules to cure some sort of defect. Mr. Saddozai had exhausted his administrative remedies well before he filed the Third Amended Complaint, the operative complaint in this case. The decision of

the district court to dismiss Mr. Saddozai's action on the basis of non-exhaustion should therefore be reversed.

JURISDICTIONAL STATEMENT

Mr. Saddozai filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of California. The district court had jurisdiction over Mr. Saddozai's claims under 28 U.S.C. §§ 1331 and 1343. The district court dismissed the case against Defendant Clawson on December 2, 2020. ER-15.[1] Mr. Saddozai timely noticed this appeal on December 28, 2020. ER-148. *See* Fed. R. App. P. 4(a)(1)(A). This court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Where an incarcerated plaintiff has fully exhausted his administrative remedies in accordance with the PLRA by the time the operative complaint is filed, may a district court dismiss the case for failure to exhaust?

2. Even if Mr. Saddozai's original complaint were (incorrectly) deemed to be the operative complaint for the purposes of exhaustion, did the district court still err in dismissing plaintiff's claims for failure to exhaust where plaintiff alleged

[1] The court also *sua sponte* dismissed the case against other defendants without leave to amend and directed the clerk to terminate them from the action. *See* ER-15.

prison officials obstructed the grievance process such that it was effectively "unavailable" to him prior to filing the original complaint?

STATEMENT OF THE CASE

I. Statutory Background

The PLRA's exhaustion provision requires that a prisoner exhaust "such administrative remedies as are available" to them in the jail or prison in which they are confined before bringing an action involving prison conditions. 42 U.S.C. § 1997e(a). Under § 1997e(a), exhaustion of all "available" remedies is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

A prisoner is not required to affirmatively plead exhaustion in their complaint. Exhaustion is an affirmative defense under the PLRA and the Federal Rules of Civil Procedure, something a defendant must plead and prove. *Jones v. Bock*, 549 U.S. 199, 211-16 (2007); *see also Akhtar v. Mesa*, 698 F.3d 1202, 1210 (9th Cir. 2012). An exhaustion defense is most appropriately litigated through a motion for summary judgment. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc). Only "in those rare cases where a failure to exhaust is clear from the face of the complaint" may a defendant "successfully move to dismiss under Rule 12(b)(6) for failure to state a claim." *Id.*

By the terms of the PLRA, a prisoner must exhaust only those administrative remedies that are "available" to them. 42 U.S.C. § 1997e(a). A prison's grievance process is "unavailable" where, for instance, (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). When a court determines a process was functionally unavailable to a prisoner, exhaustion is no longer required. *Id. See also Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010).

II. Factual Background

Taking the allegations contained in Mr. Saddozai's complaint as true, as is required at this stage, *see Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (per curiam), the facts of this case are as follows:

While incarcerated at San Quentin State Prison ("SQSP"), Mr. Saddozai was removed from protective custody and placed in general population housing with no protection on or around August 3, 2018, after filing a complaint with the prison regarding unsanitary housing conditions. ER-138-39. It was later determined that this move from protective custody to general population housing was in error. ER-128.

On or about August 14, 2018, less than two weeks after he was erroneously removed from protective custody, Mr. Saddozai was "beaten and battered" by four prisoners while waiting for his cell door to be unlocked after returning from his evening meal. ER-106. Mr. Saddozai attempted to protect himself during the attack by shielding his face and head with his arms. *Id.* While the prisoners were beating Mr. Saddozai, Defendant Clawson, a correctional officer at SQSP, shot his block gun, which was loaded with "40mm direct impact round[s]," ER-79, in the direction of the fight without issuing a warning. *Id.* The bullets from Defendant Clawson's weapon struck Mr. Saddozai instead of his assailants. *Id.* The shooting did not put an end to the attack; in fact, the assailants continued to batter Mr. Saddozai, who at that point was immobilized and incapable of defending himself after having been struck by Defendant's bullets. *Id.*

After being beaten and shot, Mr. Saddozai was removed from the housing unit in handcuffs that were closed so tightly they cut off his circulation. ER-107. He was then taken to an examination room, where he was forced to strip naked in the presence of non-medical prison personnel. *Id.* Because of the attack and subsequent shooting, Mr. Saddozai was bleeding and in severe pain. *Id.* However, his request for immediate medical assistance, including for some form of pain relief, was denied. *Id.*

After the August 2018 incident, Mr. Saddozai was removed from the housing unit and transferred to "Carson," the disciplinary housing unit—also known as administrative segregation, solitary confinement, or "the hole." *Id*. No hearing was held prior to this transfer, and Mr. Saddozai knew of no disciplinary violation that would have necessitated his transfer to solitary confinement. *Id.* While being held in solitary confinement, in a cell whose walls, toilet, sink, and mattress were covered in urine, ER-75, ER-78, Mr. Saddozai's requests for complaint and medical forms to follow up on the incident were repeatedly denied, ER-75. He was also denied medical care and basic hygiene essentials, which exacerbated his injuries and led to painful rashes and infections. ER-75, ER-142.

As a result of the attack, shooting, and transportation from the scene in too-tight handcuffs, Mr. Saddozai now suffers from nerve damage and loss of sensation, and experiences difficulties when trying to use the toilet, sit down, or lie down. ER-113; *see also* ER-94 (documenting "cellulitis and abscess of lower extremity"; "traumatic ecchymosis of buttock"; "dyslipidemia"; "neuropathy of right hand"; "LTBI (latent tuberculosis infection)" as injuries). In addition to his physical injuries, he also now suffers from "extreme mental distress, humiliation, embarrassment, extreme shock and nervousness," for which he has undergone and continues to receive psychiatric care, "causing interference with life activities for his

life time." ER-70; *See also* ER-91-94 ("Mental Health Referral Chrono" documenting anxiety and depression after the attack).

III. Procedural Background

A. Mr. Saddozai's Complaints

Mr. Saddozai, proceeding *pro se*, filed a complaint on September 11, 2018, raising claims under the First, Sixth, Eighth, and Fourteenth Amendments, and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ §§ 2000cc-2000cc-5, against Defendants Clawson, Warden Ron Davis, and five other SQSP correctional officers. ER-137-38. The district court screened his case under 28 U.S.C. § 1915A(a), dismissing it with leave to amend because the claims were not sufficiently related to each other. ER-133.

Mr. Saddozai filed his First Amended Complaint on February 19, 2019, which was again dismissed because the claims were insufficiently related to one another. ER-121; ER-117-19. The court at this stage acknowledged that the second amended complaint Plaintiff filed next would "supersede[] all previous complaints, which are treated thereafter as non-existent." ER-120.

Mr. Saddozai's Second Amended Complaint, filed on August 15, 2019, only raised claims against Defendant Clawson. ER-110. In it, he alleged violations of his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights in connection with the August 2018 attack. ER-111-15.

Although the court found that Mr. Saddozai's Second Amended Complaint "stated a cognizable claim for failure to protect under the Eighth Amendment," Plaintiff exercised, and the district court approved of, his right to supplement his complaint "as a matter of course." ER-99. Therefore, the district court declared, Plaintiff's Third Amended Complaint, filed on March 6, 2020, was the "operative complaint." ER-100.

On March 6, 2020, Mr. Saddozai filed his Third Amended Complaint. At that point, Mr. Saddozai had completely exhausted his administrative remedies, *see infra*, at 9-11. As relevant here, Mr. Saddozai's Third Amended Complaint raised a failure to protect claim against Defendant Clawson alleging that his use of force against Mr. Saddozai during the August 2018 attack violated the Eighth Amendment. Third Amended Complaint, Dkt. No. 29 at 2.

B. Exhaustion

Before he filed his Third Amended complaint, Mr. Saddozai fully exhausted his administrative remedies. *See* ER-104. But along the way, he was met with pushback and interference from SQSP officials.

To pursue his claims against Defendant Clawson, the California Department of Corrections and Rehabilitation ("CDCR") required that Mr. Saddozai submit a "CDCR Form 602" describing his allegations. ER-10-11 (citing Cal. Code Regs. tit. 15, §3084.7). Before he could file that form, Mr. Saddozai had a meeting with the

warden on August 23, 2018, well before he filed his original complaint. Mr. Saddozai presented his claims regarding the attack to the warden and was told they had been rejected. Amended Complaint, ER-122, ER-127.

Having been told his claims had been rejected – by the highest official in the prison, no less – Mr. Saddozai believed that he was not required to go through the "CDCR Form 602" process before filing suit. He came to court, filing his first *pro se* complaint on September 11, 2018. *See* ER-136. But despite having been told his claims were rejected, Mr. Saddozai decided to persist with the grievance process. He filed a Form 602 grievance a few days after the meeting with the warden. ER-74-75. This attempt and the next one were rejected by the prison on procedural grounds. ER-84-85. The prison finally allowed Mr. Saddozai to file his first-level grievance in October 2018. *See* ER-81-83. Prison officials then tried to dissuade Mr. Saddozai from continuing with the grievance process to the second and third levels. They refused to give him specifics about the disposition of his first-level grievance, told him that he was not actually allowed to file grievances seeking he specified relief, and "completely misrepresented the operation of the CDCR 602 appeal process." *See* ER-47-48; ER-63-64. Prison officials even withheld the second-level review forms from him so that he could not continue the administrative review process. ER-108.

Finally, in November 2018, Mr. Saddozai was able to complete the administrative review process.[2] ER-104. That was before he filed his First and Second Amended Complaints and over a year before he filed his Third Amended Complaint.

C. The District Court Grants Defendant Clawson's Motion to Dismiss Mr. Saddozai's Third Amended Complaint

After Mr. Saddozai filed his Third Amended Complaint, Defendant Clawson moved to dismiss the claims against him for failure to exhaust. *See* Dkt. No. 32; Dkt. No. 44.

In ruling on that motion, the district court, as an initial matter, correctly determined that the Third Amended Complaint was "the operative complaint in this action." ER-4.

After reviewing the Third Amended Complaint, the district court also concluded—correctly—that Mr. Saddozai had exhausted his claims after the filing of his Original Complaint, but well before the filing of his Third Amended Complaint. ER-12-14. As the district court stated, Defendant did not dispute this.

[2] The "CDCR Form 602" grievance process ordinarily has three levels of review. In Mr. Saddozai's case, prison officials indicated that, "due to time constraints," he should not proceed to the third level. ER-77. Instead, prison officials said that the response to his second-level appeal was "adopted as the Third Level Response and serve[d] as the Department's decision in full." *Id.*

ER-13 ("It is also not disputed that Plaintiff exhausted administrative remedies on November 6, 2018, when the second level of appeal issued its decision.").

The district court acknowledged that this Court in *Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010), held that exhaustion is assessed at the time of the operative complaint, even where that complaint is not the original complaint but an amended complaint. ER-13. But it characterized that holding as a "limited exception," erroneously concluding that it only applied to "newly added claims"—that is, claims that were not included in the original complaint. *Id.*

The district court also erroneously rejected Mr. Saddozai's argument that no administrative remedies were "available" to him because the prison administration thwarted his attempts to file a grievance. ER-14. The court determined that Mr. Saddozai had "failed to show that there was something in his particular case that made existing and generally available administrative remedies unavailable to him," construing Mr. Saddozai's allegations of obstruction on the part of the prison as evidence of his own failure to comply with the grievance policies. ER-14-15.

Relying on its incorrect view that exhaustion should be measured as of the filing of the initial complaint, the court therefore dismissed the case because it concluded that "Plaintiff did not exhaust…*before* he filed this action[.]" ER-14.

SUMMARY OF THE ARGUMENT

I. Because Mr. Saddozai exhausted his administrative remedies well before he filed his Third Amended Complaint (the operative complaint in this case), that complaint should not have been dismissed by the district court for failure to exhaust.

A. According to the law of this Court, "[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure." *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017). Mr. Saddozai's Third Amended Complaint is the operative complaint. *See id.* at 934 ("*Rhodes* [, 621 F.3d at 1005] reminds that a supplemental complaint 'completely super[s]edes any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant.'"). Therefore, Mr. Saddozai's Third Amended Complaint is the only pleading that matters for a court's exhaustion analysis. Mr. Saddozai fully exhausted his administrative remedies over a year before he filed his Third Amended Complaint, the operative complaint in this case. The district court nevertheless granted Defendant Clawson's motion to dismiss for failure to exhaust because the court found Mr. Saddozai had not exhausted his administrative remedies prior to filing his Original Complaint. That decision was contrary to the law of this Court, which has thrice confirmed that exhaustion is assessed at the time of the operative complaint. *See Jackson*, 870 F.3d 928, *Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014); *Rhodes*, 621 F.3d 1002.

B. That rule is in line with this Court's and the Supreme Court's precedent regarding a plaintiff's use of amendment and supplementation to ameliorate a pleading defect. Both have consistently held that, pursuant to Federal Rule of Civil Procedure 15 and its statutory analogs, courts should look to an amended or supplemental complaint when doing otherwise would result in dismissing a case on a procedural technicality. *See, e.g.*, *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036 (9th Cir. 2015); *Security Ins. Co. of New Haven, Conn. v. U.S. for Use of Haydis*, 338 F.2d 444 (9th Cir. 1964).

C. Furthermore, nothing in the text or purpose of the PLRA suggests that it was intended to alter the ordinary operation of Rule 15. In fact, the text of the PLRA confirms that Congress contemplated that a case would not necessarily be dismissed simply because of a failure to exhaust. Because the Supreme Court has admonished courts not to read extraneous requirements into the PLRA where there are none to read, the PLRA should not be read to overrule Rule 15. And the purpose of the PLRA—"to reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002),—is not served, but frustrated, by requiring that a district court dismiss an action and a prisoner file a second, separate-but-identical action where a failure to exhaust administrative remedies before filing is easily curable.

II. Second, even if the district court's determination that Mr. Saddozai's original complaint was the operative pleading for its exhaustion analysis was correct, it nevertheless erred in dismissing Mr. Saddozai's case, because Mr. Saddozai has adequately alleged that SQSP's administrative procedures were not "available" to him, and, at this stage, his allegations regarding obstruction must be accepted as true. A motion to dismiss for failure to exhaust is appropriate only "in those rare cases where a failure to exhaust is clear from the face of the complaint." *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). Because it is far from clear from the face of his pleadings that the grievance process was "available" to Mr. Saddozai as required by § 1997e(a), it was error to dismiss this action. Mr. Saddozai affirmatively detailed in his complaint that his efforts to comply with the prison's administrative review process were obstructed. Accepting as true Mr. Saddozai's allegations that the SQSP warden and other prison officials misled him about the grievance process, the grievance process at SQSP was not "available" to Mr. Saddozai, and so he was not required to exhaust that remedy. *See Ross v. Blake*, 578 U.S. 1174 (2016). Those allegations of interference were more than enough to put this case outside that "rare" class of cases for which a failure to exhaust is clear on the face of the complaint.

STANDARD OF REVIEW

This Court reviews a "district court's legal conclusions in its dismissal of a case for failure to exhaust administrative remedies *de novo*." *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009) (citing *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009)).

ARGUMENT

I. The District Court Erred In Dismissing Mr. Saddozai's Claims For Failure To Exhaust Because He Had Exhausted His Administrative Remedies Before Filing The Operative Complaint.

The district court correctly found—and no one disputes—that Mr. Saddozai fully exhausted his administrative remedies prior to filing his Third Amended Complaint, which is the operative pleading in this case. Both this Court's precedent and Federal Rule of Civil Procedure 15 dictate that where a prisoner files an amended or supplemental pleading, the operative complaint for a court's exhaustion analysis is that amended or supplemental complaint.[3] And nothing in the PLRA

[3] Mr. Saddozai's Third Amended Complaint is both an amended complaint pursuant to Federal Rule of Civil Procedure 15(a) and a supplemental complaint within the meaning of Federal Rule of Civil Procedure 15(d). It is an amended complaint because it raised claims arising out of factual circumstances alleged in his original complaint but not introduced there. *See* Rule 15(a). It is also a supplemental complaint because it incorporated an "event that happened after the date of the pleading to be supplemented," Rule 15(d)—to wit, exhaustion. There is no legal difference between the two kinds of pleadings and they are widely regarded as interchangeable. *See* 6A WRIGHT & MILLER, FED. PRAC. & PROC. § 1504 (3d ed.) ("Parties and courts occasionally confuse supplemental pleadings with amended

itself contradicts this Court's precedent on its relation to Rule 15. Therefore, the district court's decision should be reversed as contrary to this Court's precedent and the ordinary rules of pleading.

A. Binding Ninth Circuit Precedent Makes Clear That A Litigant Need Only Exhaust By The Time The Operative Complaint Is Filed.

Over the past decade, this Circuit has carefully constructed an approach to the exhaustion provision of the PLRA that reflects the ordinary practices of federal civil litigation. In three cases at the intersection of the exhaustion provision and the Federal Rules, this Court has affirmed that exhaustion is assessed at the time the operative complaint in a case is filed, even if that pleading is not the first complaint that a plaintiff files. Under this Court's cases, then, the dispositive question is whether a plaintiff has exhausted their claims by the time the operative complaint is filed. Here, the answer to that question is "yes." Because—as the district court correctly found—Mr. Saddozai had exhausted his administrative remedies by the

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pleadings and mislabeling is common. These misnomers are not of any significance, however, and they do not prevent the court from considering a motion to amend or supplement under the proper portion of Rule 15."). Indeed, this Court has treated the two interchangeably in the PLRA exhaustion context. *Compare Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010) (supplemental complaint) *with Cano v. Taylor*, 739 F.3d 1214 (9th Cir. 2014) (applying *Rhodes* to case about amended complaint), *and Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017) (same). For the sake of consistency with the district court's terminology, this brief refers to the operative complaint in Mr. Saddozai's case as his "amended complaint."

time he filed his Third Amended Complaint, the district court erred in dismissing his case for failure to exhaust.

Start with *Rhodes v. Robinson*, 621 F.3d 1002 (9th Cir. 2010). There, plaintiff amended his complaint to include claims based on conduct that had occurred after he had filed his original complaint—claims he had exhausted prior to including them in his amended complaint. *Id.* at 1003-04. Defendants argued that plaintiff was required to exhaust the newly-added claims prior to filing his original complaint. This Court disagreed and held that defendants' argument contravened "the general rule of pleading that the [second amended complaint] completely supercedes any earlier complaint, rendering the original complaint non-existent." *Id.* at 1005. This Court explained that "'[t]he filing of the amended complaint was the functional equivalent of filing a new complaint . . . and it was only at that time that it became necessary to have exhausted all of the administrative remedies.'" *Id.* at 1005-06. In other words, because an amended complaint is "the functional equivalent of filing a new complaint," whether a plaintiff has exhausted administrative remedies is assessed based on the operative complaint, which was, in that case, the supplemental complaint that had functionally overridden the original.

This Court applied that same rule to a "slightly different factual situation" in *Cano v. Taylor*. 739 F.3d 1214, 1220 (9th Cir. 2014). In *Cano*, plaintiff had not exhausted all of his claims by the time he filed his original complaint, but had done

so by the time he filed an amended complaint. In *Cano*, unlike in *Rhodes*, plaintiff could have asserted his claims in his original complaint, as they arose from conduct that predated the filing of the original complaint, but he did not do so until he amended his complaint. This Court held that "claims that arose as a cause of action prior to the filing of the initial complaint may be added to a complaint via an amendment, as long as they are administratively exhausted prior to the amendment." *Id*. As the *Cano* court explained, *Rhodes* stood for the proposition that an amended complaint supersedes the original complaint such that "for purposes of the exhaustion requirement, the date of the [amended complaint's] filing is the proper yardstick." *Id.*

Applying *Cano*'s "yardstick" to the case of a former prisoner released during the pendency of his administrative appeal, this Circuit's decision in *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), further confirmed that the critical question under the PLRA is whether a plaintiff has exhausted their claims by the time the operative complaint is filed. In *Jackson*, plaintiff first filed his original complaint in district court while incarcerated and before he had exhausted. *Id.* at 931-32. Upon his release, he amended his complaint twice, adding no new claims and reflecting no additional changes other than his release from prison. *Id.* at 932. This Court had to decide which of plaintiff's complaints was the operative pleading for the purpose of analyzing exhaustion—the original complaint, filed while Jackson was incarcerated

and before he had exhausted; or the amended complaint, filed once he was released from prison, at which point the PLRA's exhaustion requirement no longer applied. This decision would determine whether his claims would survive dismissal. This Court found that Jackson's "amended complaint, filed when he was no longer a prisoner, obviate[d] an exhaustion defense[,]" *id.* at 934, and held that "[e]xhaustion requirements apply based on when a plaintiff files the operative complaint, in accordance with the Federal Rules of Civil Procedure," *id.* at 935 (citing *Jones v. Bock*, 549 U.S. 199, 212 (2007)). The Court in *Jackson* once again underscored that the only pleading relevant to a court's exhaustion analysis is the operative pleading under Rule 15.

Although *Rhodes*, *Cano*, and *Jackson* each arose in different procedural postures, each reached a uniform conclusion: that the PLRA requires a plaintiff to exhaust by the time the operative pleading is filed, and not at some earlier time.

Under these controlling cases, Mr. Saddozai's case should not have been dismissed for failure to exhaust. Neither the district court nor Defendant contest that Mr. Saddozai had exhausted his administrative remedies before he filed his Third Amended Complaint. ER-13 ("It is also not disputed that Plaintiff exhausted administrative remedies on November 6, 2018, when the second level of appeal issued its decision."). Applying this Circuit's rule, when Mr. Saddozai supplemented his complaint and filed the Third Amended Complaint, that pleading "completely

supercede[d] any earlier complaint" and "render[ed] the original complaint non-existent." *Rhodes*, 621 F.3d at 1005. Because, under this Circuit's cases, the PLRA only requires that a plaintiff exhaust by the time the operative pleading is filed, Mr. Saddozai's complaint should not have been dismissed.

In dismissing this case for failure to exhaust, the district court erroneously assessed exhaustion as of the time Mr. Saddozai filed his original complaint. The district court relied on language from *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002) (per curiam) and *Vaden v. Summerhill*, 449 F.3d 1047 (9th Cir. 2006), both of which affirmed the dismissal of claims that were not exhausted prior to the filing of the plaintiff's first complaint. But neither case concerned an amended pleading, and therefore neither case has any bearing on this Court's rule that exhaustion is assessed as of the time of the operative pleading is filed. As this Court explained in *Rhodes*, "[b]oth *McKinney* and *Vaden* must be read and applied in the larger context of the pleading framework established by the Federal Rules of Civil Procedure." That context makes clear that, "[a]s a general rule, when a plaintiff files an amended complaint, '[t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent.'" *Rhodes*, 621 F.3d at 1005 (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967)).

Although the district court acknowledged *Rhodes*, it mischaracterized that holding as a "limited exception" that applies only to "new" claims—that is, claims

that arose after filing the original complaint. ER-12. But the district court didn't provide any reason why *Rhodes* should be read in such a limited way. And that narrow view of *Rhodes* is at odds with *Rhodes* itself and with other decisions of this Court. *Rhodes* announced "a general rule of pleading" that extended far beyond the factual circumstances of that particular case: an amended pleading "completely supercedes any earlier complaint, rendering the original complaint nonexistent and, thus, its filing date irrelevant." *Rhodes*, 621 F.3d at 1005. Therefore, "'[t]he filing of the amended complaint was the functional equivalent of filing a new complaint . . . and it was only at that time that it became necessary to have exhausted all of the administrative remedies.'" *Id.* at 1006 (quoting *Barnes v. Briley*, 420 F.3d 673 (7th Cir.2005); *see also Cano*, 739 F.3d at 1220 (applying *Rhodes* despite acknowledging that it was a "slightly different factual scenario").

Rhodes made clear that the entire amended *complaint* "[c]ompletely supersedes" all prior pleadings. It did not turn on a claim-by-claim assessment of which claims were newly added.

The district court's interpretation of *Rhodes*—that exhaustion is assessed at the time of a superseding operative complaint only when the amended complaint contains "newly added claims"—is also directly contrary to the result in *Jackson*. In that case, the amended pleadings involved *no* new claims. Nevertheless, the Court

there found that the final amended pleading, containing no new claims, was the operative pleading for exhaustion purposes.

Because this Court's cases require that exhaustion be determined at the time the operative complaint is filed regardless of when specific claims arose or were exhausted, and because Mr. Saddozai's Third Amended Complaint was filed after exhausting all claims, that complaint should not have been dismissed for failure to exhaust.[4]

B. Cases Interpreting Rule 15 In Other Contexts Make Clear That Mr. Saddozai's Amended Pleading Superseded All Prior Pleadings.

As this Court and the Supreme Court have repeatedly held, Federal Rule of Civil Procedure 15 is designed to allow litigants to cure all manner of pleading defects by amending or supplementing the defective pleading. The very purpose of Rule 15 is to give unskilled litigants the chance to save their claims from dismissal on technical grounds. As a result, Rule 15 ordinarily requires courts to look at

[4] This Court's decisions in *Rhodes*, *Cano*, and *Jackson* are consistent with decisions from the Third Circuit. *See Garrett v. Wexford Health*, 938 F.3d 69, 82 (3d Cir. 2019) ("It has long been the rule then that where a party's status determines a statute's applicability, it is his status at the time of the amendment and not at the time of the original filing that determines whether a statutory precondition to suit has been satisfied."), *cert. denied*, 140 S. Ct. 1611 (2020); *Korb v. Haystings*, No. 19-2826, 2021 WL 2328220, at *2-3 (3d Cir. June 8, 2021) (unpublished) (accepting that a prisoner may supplement their complaint to reflect post-filing exhaustion); *Boone v. Nose*, 530 F. App'x 112, 113 n.1 (3d Cir. 2013) (per curiam) (finding that a plaintiff may supplement their complaint with newly-exhausted and -accrued claims).

whichever pleading will save a case from dismissal on a technical ground. This Court has continually recognized that the PLRA's exhaustion requirement is no exception to this Rule. Once the district court permitted Mr. Saddozai to supplement his original pleading, it should have looked to that pleading in assessing the exhaustion requirement, rather than dismissing the case and requiring him to refile it under a different timestamp.

Federal Rule of Civil Procedure 15 allows a party to amend or supplement a pleading after it's been filed. At its core, the purpose of Rule 15 is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6 WRIGHT, MILLER & KANE, FED. PRAC. & PROC. § 1471 (3d ed.). *See also William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981) (explaining Rule 15's purpose is "to promote as complete an adjudication of the dispute between the parties").

That purpose is reflected in each of the subsections of Rule 15. For instance, Rule 15(d) expressly provides that "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d). In other words, Rule 15(d) by its own terms permits precisely what occurred

in this case—filing a supplemental pleading to reflect a change in circumstances that eliminated a defect present in the original pleading.[5]

Because the purpose of Rule 15 is to avoid dismissing a case on a procedural technicality, this Court and the Supreme Court have concluded in a variety of contexts that a court should look only at whichever complaint facilitates resolution on the merits, even where that complaint adds no new claims. To take just four examples:

- In *U.S. for Use of Atkins v. Reiten*, a statute allowed plaintiff, who had provided services to the government, to sue the United States if he had not been paid after 90 days. 313 F.2d 673, 674-75 (9th Cir. 1963). Plaintiff originally filed the complaint less than 90 days after he'd provided services, but filed a supplemental complaint after 90 days had passed. This Court allowed the case to go forward because the supplemental complaint—the operative complaint—was filed after 90 days had elapsed. *Id.* The Court reasoned that, "To require appellant to commence a new and separate action

[5] Rule 15's purpose of avoiding dismissals on technical grounds is reflected throughout each of its other subsections as well. Rule 15(a), for instance, requires that a court permit amendment before trial "when justice so requires"; Rule 15(b) encourages courts to "freely permit" amendment even during trial "when doing so will aid in presenting the merits"; and Rule 14(c) codifies the doctrine of relation-back, which allows a court to reach the merits of a case that would otherwise be barred by a procedural statute-of-limitations defense, *see, e.g.*, *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550 (2010).

in these circumstances would have been to insist upon an empty formalism." *Id.* at 675; *see also Sec. Ins. Co. of New Haven, Conn. v. U.S. for Use of Haydis*, 338 F.2d 444, 446 (9th Cir. 1964) ("Nothing but the most compelling authority, emanating from the Supreme Court of the United States itself, would induce us to stay on this legal merry-go-round" requiring dismissal of an action brought prematurely rather than granting leave to amend or supplement).[6]

- In *Security Ins. Co. of New Haven*, plaintiff filed their complaint before the statutory waiting period had elapsed and then filed a supplemental complaint after the one-year statute of limitations period had expired. The original complaint thus had a prematurity problem, whereas the amended complaint

[6] Other circuits also look to the amended or supplemental complaint as the operative complaint in such circumstances. *See, e.g.*, *T Mobile Ne. LLC v. City of Wilmington, Delaware*, 913 F.3d 311, 328 (3d Cir. 2019) (allowing supplemental pleading to cure a "an untimely initial complaint"); *Feldman v. L. Enf't Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014) ("[C]onstru[ing] the present complaint as a supplemental pleading under Rule 15(d), thereby curing the [prematurity] defect which otherwise would have deprived the district court of jurisdiction."); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir. 1988) ("Even when the District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure the defect by alleging the subsequent fact which eliminates the jurisdictional bar."); *Mires v. United States*, 466 F.3d 1208, 1211-12 (10th Cir. 2006) (holding that a litigant in a tax refund suit could cure jurisdictional defects of prematurity and failing to pay the amount owed under the challenged tax assessment "by paying the outstanding taxes, seeking administrative relief from the IRS, and amending his complaint (with the government's consent and district court's permission) to allege satisfaction of the jurisdictional prerequisites").

had a statute of limitations problem. This Court looked to the original complaint for statute of limitations purposes, but looked to the amended complaint to avoid the statutory waiting period problem. 338 F.2d at 449. Affirming the judgment entered against defendants, the Court recognized that the "remedial purpose of Rule 15" enabled it to look at whichever complaint allowed it to avoid dismissing the case on procedural grounds, even where that was a different complaint for each of the procedural grounds. *Id.*

- In *Northstar Financial Advisors Inc.*, this Court considered a case where the plaintiff, because it owned no shares in a mutual fund, lacked Article III standing at the time it filed the initial complaint. 777 F.3d at 1043. It later acquired the shares necessary to confer standing and filed a supplemental complaint. *Id.* This Court confirmed that standing was assessed at the time of filing the supplemental complaint. *Id.* at 1043-44 ("[T]he proper focus in determining jurisdiction are the facts existing at the time the complaint *under consideration* was filed." (internal citations omitted)). A contrary result, the Court reasoned, would be "hypertechnical" and "difficult…to accept." *Id.* at 1047.
- In *Mathews v. Diaz*, the Supreme Court considered a statute that required exhaustion of administrative remedies prior to challenging the denial of various medical benefits in federal court. One of the plaintiffs in that case had

not completed the exhaustion process before filing his complaint, exhausting only after the government moved to dismiss for failure to exhaust. *See* 426 U.S. 67, 69-73 (1976). The Supreme Court held that a supplemental complaint could remedy the exhaustion defect, reasoning that "the statutory purpose [of 28 U.S.C. § 1653, a statute concerning judicial procedure similar to the text and purpose of Rule 15] of avoiding needless sacrifice to defective pleading applies equally to this case." 426 U.S. at 75 & n.9. *See also Foman v. Davis*, 371 U.S. 178, 181 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities" [as a defect that can be easily cured through amendment]).

In each of these cases, defendants argued that the case should be dismissed because the plaintiff had not complied with a statutory prerequisite at the time of filing the original complaint. And in each case, this Court or the Supreme Court rejected that argument, finding that the statutory prerequisite should be assessed at the time of filing the supplemental complaint—rather than at the time the original complaint was filed—and allowing the plaintiff to amend to avoid dismissal. And in each case, the relevant court did so even though no new claims were added. [7]

[7] Several other circuits and the Supreme Court have similarly relied on a reading of Rule 15 that emphasizes addressing procedural defects via amendment rather than

dismissal. *See, e.g.*, *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 n. 4 (2020) (holding that amending a complaint does not count as a strike because of the curative purpose of Rule 15(a)); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U.S. 570, 574-76 (1913) (holding that plaintiff's amended pleading, changing none of the facts of the original pleading and, "in effect merely indicat[ing] the capacity in which the plaintiff was to prosecute the action" was permissible under a statutory analog to Rule 15); *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 6 (1st Cir. 2015) (allowing relator to cure the subject matter jurisdiction defect in their False Claims Act complaint through supplementation under Rule 15(d), reasoning that "this case is analogous to the cases in which a jurisdictional prerequisite (such as an exhaustion requirement) is satisfied only after suit is commenced" and that "[u]nder the circumstances, it would be a pointless formality to let the dismissal of the second amended complaint stand—and doing so would needlessly expose the relator to the vagaries of filing a new action"); *W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (allowing an amended pleading to "cure a purported factual mistake" and withdrawn judicial admissions because "[t]he amended complaint 'supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading'"); *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002) (agreeing with this and other circuits that "the filing of a supplemental pleading is an appropriate mechanism for curing numerous possible defects in a complaint" and finding that Plaintiffs' supplemental complaint could cure Eleventh Amendment sovereign immunity defect); *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589, 591 (6th Cir. 2013) (holding that "[a]n amended complaint supersedes an earlier complaint for all purposes" and finding that the "master complaint" filed in a multidistrict case to consolidate various cases was the operative pleading governing the court's jurisdictional analysis on appeal because it superseded "any prior individual complaints"); *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 n.1, 640-641 (7th Cir. 2004) (determining that plaintiff's claims were not time-barred under the ADEA or ADA by drawing the relevant dates for the "unlawful employment practice" solely from the facts alleged in the amended complaint and affirming that "[i]t is axiomatic that an amended complaint supersedes an original complaint and renders the original complaint void"); *Jones v. Am. State Bank*, 857 F.2d 494, 499 (8th Cir. 1988) (holding that "the failure to obtain a right-to-sue letter prior to the commencement of a suit[,]" a "condition precedent" to filing a federal Title VII action "is a curable

The same must be true here. The district court permitted Mr. Saddozai to supplement his complaint under Rule 15(d). And when it did, Mr. Saddozai's Third Amended Complaint—and the facts it incorporated—became the operative complaint for the district court's exhaustion analysis. The way this Court and the Supreme Court have interpreted Rule 15 allows for no other result.

C. Nothing In The PLRA's Exhaustion Requirement Supersedes The Ordinary Operation Of The Federal Rules.

The Supreme Court has explained that unless the PLRA explicitly announces it is abrogating the normal operation of the Federal Rules, a court should not assume it is doing so. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) (explaining that "when Congress meant [for the PLRA] to depart from the usual procedural requirements, it did so expressly"); *see also Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) ("The Court in *Jones* cautioned that we should not alter the ordinary procedural practices and rules in order to serve the policy aims of the PLRA."). As this Court has recognized, nothing in the text, nor the purpose, nor the statutory history of the PLRA, abrogate the normal operation of Rule 15. *Rhodes*, 621 F.3d at 1005. Therefore, where an amended or supplemental pleading is filed, that is the operative pleading from which exhaustion must be assessed.

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defect" via amendment or supplementation); *Martin v. Cent. States Emblems, Inc.*, 150 F. App'x 852, 855 & n.3 (10th Cir. 2005) (recognizing that a plaintiff may cure the defect of failing to file a right-to-sue letter under Title VII by filing a supplemental complaint).

The exhaustion provision of the PLRA states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). In *Jones v. Bock*, the Supreme Court considered whether, under this provision, exhaustion must be pled in a complaint or whether it is an affirmative defense. The Sixth Circuit held that the "no action shall be brought" clause of the exhaustion provision made clear that exhaustion was a pleading requirement. The Court disagreed.[8] *Jones*, 549 U.S. at 212. Pointing out that the PLRA "is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense[,]" the Court reasoned that "[t]his is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense." *Id.*

The Court went on to hold that a court cannot impose stricter requirements than those delineated in the text of the statute by Congress. *See Jones*, 549 U.S. at 220-21. Where there is no directive from Congress, therefore, "[t]here is … no reason to suppose that the normal pleading rules have to be altered to facilitate judicial screening of complaints specifically for failure to exhaust. *Id.* at 214.

[8] In fact, in addressing the same clause as it applied to a separate question raised in that case, the Court in *Jones* concluded that this language is merely "boilerplate" statutory phrasing. *Id.* at 219-21.

Just as the PLRA was silent as to the questions discussed in *Jones*, it is also silent on the question of amending or supplementing a pleading after exhausting. This Court has confirmed that nothing in the exhaustion provision calls for the abrogation of Rule 15. *See, e.g.*, *Jackson*, 870 F.3d at 934 ("*Jones* therefore forecloses any argument that the statutory reference to an 'action' precludes [the plaintiff] from curing a deficiency in his claim by amendment. [The plaintiff] can cure deficiencies through later filings, regardless of when he filed the original 'action.'"); *Cano*, 739 F.3d at 1220 ("Moreover, a district court's discretion to allow the addition of a new claim in an amended complaint should not be curtailed where it is not required by law or statute. Nothing in the PLRA . . . bars the use of the [amended pleading]."). [9] Under *Jones*, then, the normal operation of Rule 15—which

[9] Several circuit courts have found that language in other statutes similar to the "no action shall be brought" clause of the PLRA's exhaustion provision does not override the ordinary operation of Rule 15. *See, e.g.*, *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 366 (5th Cir. 2004) ("The notion that the supplemental pleading cures the technical defect, notwithstanding the clear language of [the statute that "no action for infringement . . . shall be instituted until"], is consistent with the principle that technicalities should not prevent litigants from having their cases heard on the merits."), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990) (same); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir. 1988) (finding that the "[n]o civil action may be commenced" clause of a statute did not preclude plaintiff from curing a prematurity defect through filing a supplemental complaint).

requires looking to whichever complaint facilitates resolution on the merits—applies to a PLRA exhaustion defense.

Even more telling than the silence of 1997e(a) is the text of a neighboring provision, 1997e(c)(2). That section says that "the court may dismiss" certain claims "without first requiring the exhaustion of administrative remedies" when they are "frivolous, malicious, [or] fails to state a claim." 42 U.S.C. § 1997e(c)(2). The permissive "may" stands in contrast to the use of the word "shall" in the immediately preceding subsection. *See* 42 U.S.C. § 1997e(c)(1). Its use makes clear that where a plaintiff has not exhausted remedies, the district court is allowed to dismiss the claim—but it does not have to. It may instead "requir[e] the exhaustion of administrative remedies" rather than "dismiss[ing] the underlying claim." Section 1997e(c)(2), in other words, contemplates a situation similar to Mr. Saddozai's—where a plaintiff has not exhausted administrative remedies—and makes clear that the district court is not *required* to dismiss the claim in such a circumstance. Congress thus contemplated that district courts would allow litigants to cure exhaustion defects, rather than dismissing the claim—presumably by amending the complaint under Rule 15—and endorsed that practice.

D. The Ordinary Operation Of Federal Rule Of Civil Procedure 15 Furthers the Purposes of The PLRA's Exhaustion Requirement.

Nor does allowing Rule 15 to operate as it normally does undermine the purpose of the PLRA. "Congress enacted the Prison Litigation Reform Act . . . in

1996 in the wake of a sharp rise in prisoner litigation in the federal courts. The PLRA contains a variety of provisions designed to bring this litigation under control." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citation omitted).

The most important goal of the PLRA, reducing the quantity of prisoner litigation, is not served by the district court's rule, which would require a court to dismiss cases that are fully exhausted at the time the operative pleading is filed, and require litigants to file entirely new actions. As there is no question he has fully exhausted his claims at this point, Mr. Saddozai could refile his case tomorrow (assuming no statute of limitations problem). However, "[s]uch a requirement would promote the precise inefficiency the PLRA was designed to avoid—requiring courts to docket, assign and process two cases where one would do." *Lira v. Herrera*, 427 F.3d 1164, 1174 (9th Cir. 2005).

On top of creating more work for the district court, turning Mr. Saddozai's one case into two would work an additional hardship on him and prisoners like him. Such prisoners would have to pay two full filing fees to file the exact same complaint in the hopes of receiving relief for his injuries. Even prisoners who, like Mr. Saddozai, proceed *in forma pauperis* because they have no assets or income, must still eventually pay a full filing fee. *See* 28 U.S.C. § 1915(b)(1). Reading the exhaustion requirement to mandate this empty formalism and unfair result is at odds with the goals of the Federal Rules of Civil Procedure.

Congress intended for the Act not only to reduce the quantity of prisoner litigation, but also to improve its quality. "[F]or cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). As the administrative record in Mr. Saddozai's case is now complete, the contours of the controversy are clear before discovery has even begun.

Lastly, the exhaustion provision is also meant to filter out "frivolous" cases from meritorious ones. *Porter*, 534 U.S. at 524-25. In exercising its discretion to accept an amended complaint, a district court necessarily concludes that the complaint is not frivolous. If a district court feels as though a prisoner is somehow abusing the opportunity to supplement their complaint, they are free to exercise their discretion to decline granting leave to do so. *See Jackson*, 870 F.3d at 936 ("A district court, however, need not give leave to amend a complaint where a plaintiff appears to be gaming the courts"). But here, the district court exercised its discretion to accept Mr. Saddozai's supplemental pleading, at least implicitly concluding that it was what "justice so require[d]". Fed. R. Civ. P. 15(a)(2). In doing so, the district court concluded that Mr. Saddozai's supplemental complaint thus isn't one of those frivolous cases the PLRA's exhaustion requirement was designed to weed out.

Because Mr. Saddozai exhausted all available administrative remedies sixteen months prior to filing his Third Amended Complaint, the purpose of the exhaustion

requirement has been fully satisfied. At the time the Third Amended Complaint was filed, the prison's administration had been given ample opportunity to consider and resolve the issues raised by Mr. Saddozai. Dismissing the operative complaint for failure to exhaust therefore serves no purpose.

* * * * *

The precedent of this Court and the Supreme Court, ordinary practice under Rule 15, and the text and purpose of the PLRA make clear that a case cannot be dismissed for failure to exhaust where administrative remedies have been exhausted by the time the operative amended or supplemental complaint is filed. Because there is no dispute that Mr. Saddozai exhausted his administrative remedies well before he filed the operative complaint, the Court should not depart from these well-established principles in this case.

II. A Motion To Dismiss For Failure To Exhaust Cannot Be Granted Where, As Here, Failure To Exhaust Is Not Clear From The Face Of The Complaint.

Even if the district court's decision to assess exhaustion from the time the original complaint was filed was correct, the inquiry should not end there. Mr. Saddozai's complaint cannot be dismissed for a second, independent reason: A motion to dismiss for failure to exhaust is an "appropriate procedural device" only in "those rare cases where a failure to exhaust is clear from the face of the complaint." *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). This is not one of

those rare cases. "An inmate is required to exhaust only *available* remedies." *Albino*, 747 F.3d at 1171 (emphasis in original). And Mr. Saddozai has alleged that the "Form 602" grievance process was not "available" to him. 42 U.S.C. § 1997e(a).

A prison's grievance process *un*available where, for example, it is "so opaque that it becomes, practically speaking, incapable of use[,]" or, as another example, "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). Taking the facts in his complaint as true, as is required, Mr. Saddozai alleges the grievance process at SQSP was thwarted in three different ways: First, Mr. Saddozai presented his claims to the prison's warden at a meeting on August 23, 2018, and was told by the warden that they were being dismissed. ER-122, 127. Second, Mr. Saddozai received misinformation from the first-level reviewer regarding the steps of the prison's grievance process, in what he perceived as an attempt to "prevent [him] from complaining." ER-60; *see also* ER-58. And third, he was repeatedly denied the grievance forms he needed to pursue his claims. ER-108; ER-74. Each of these allegations clearly give rise to an inference his efforts to comply with the prison's procedures were "thwart[ed]."

First, Mr. Saddozai was informed—by none other than the warden of SQSP—that his claims related to the August 2018 attack had been rejected. ER-122, ER-127. When a prisoner has been "reliably informed by an administrator that no remedies

are available[,]" they "need not press on to exhaust further levels of review." *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). *See also Ross*, 578 U.S. at 1860 & n. 3 (citing with approval the Seventh Circuit's recognition in *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011) that remedies are not available where "prison officials misled [a prisoner] into thinking that . . . he had done all he needed to initiate the grievance process"); *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010); *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009).

In *Nunez v. Duncan*, for example, this Court found that an administrative remedy was not "available" to the plaintiff because the warden of the prison gave him incorrect information about the grievance process. *Nunez*, 592 F.3d at 1225-1226. So, too, here: Mr. Saddozai was informed by the warden that his case had been dismissed. ER-122, ER-127. Any rational prisoner would have construed this as the final word on the matter. However, despite meeting with the warden and understanding after that meeting that his claims had been formally dismissed, Mr. Saddozai continued with the administrative review process by filing a CDCR Form 602. *See* ER-104.

Second, at the first level of review, Mr. Saddozai alleged, a prison administrator provided him with patently false misinformation about SQSP's grievance process when they "completely misrepresented" the CDCR's grievance appeal process to him. ER-60. When a prisoner is given misleading information

about the availability of a prison's administrative review process by a prison official, this Court considers that process unavailable to them. *See, e.g.*, *Williams v. Paramo*, 775 F.3d 1182, 1192 (9th Cir. 2015); *Marella*, 568 F.3d at 1027; *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005).

In *Marella v. Terhune*, plaintiff's grievance was rejected as untimely. 568 F.3d at 1026. The grievance form denying plaintiff's complaint as untimely stated that plaintiff could only appeal the denial "if the reason for the denial was inaccurate." *Id.* This Court held that the district court erred in dismissing plaintiff's complaint for failure to exhaust because he had been reliably informed (by the prison's grievance form) that the appeals process was unavailable to him. *Id.* at 1027. As in *Marella*, because Mr. Saddozai was given misinformation about the appeals process, it was unavailable to him, and he "was not required to exhaust further levels of review." *Id.* (internal quotation marks omitted).

Third, Mr. Saddozai alleged that he was repeatedly denied the forms he needed to continue with the grievance process. ER-108; ER-74. *Marella* holds that denying a prisoner grievance forms renders the process unavailable. *See Marella*, 568 F.3d at 1027 (remanding to the district court for further consideration on whether plaintiff had timely "access to the necessary forms").

True, Mr. Saddozai eventually managed to exhaust all of the prison's remedies despite the many roadblocks he faced. But that does not mean those remedies were

"available." In *Marella*, for instance, the plaintiff went on to appeal the denial of his grievance even though he had been told he could not do so. *Marella*, 568 F.3d at 1026. This Court held that the appeals process was nonetheless unavailable. *Id.* at 1027; *see also Brown*, 422 F.3d at 935 n. 10 (although "it may be advisable for an inmate to appeal every issue to the highest level to avoid any question as to whether the administrative process has been adequately exhausted," it "does not alter our conclusion" that they need not do so when such remedies are unavailable). The same is true here. Because of the warden's misinformation, the misinformation of the first-level reviewer, and the denial of access to grievance appeal forms, administrative remedies were unavailable to Mr. Saddozai. That he ultimately managed to exhaust anyhow does not change that conclusion.

Dismissing the case at this stage was therefore wholly inappropriate. It was not "clear from the face" of Mr. Saddozai's complaint that he had not complied with the PLRA's exhaustion requirement. Rather, the allegations in his complaint plausibly allege that the prison's administrative remedies were not "available" to him. Simply because he was eventually able to exhaust despite several instances of obstruction does not mean those remedies were available to him. As such, it was erroneous to grant Defendant Clawson's motion to dismiss for failure to exhaust.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand the case for consideration of the merits of Mr. Saddozai's claims.

Date: August 27, 2021

Respectfully Submitted,

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STATEMENT OF RELATED CASES

There are no cases related to this one pending before this Court.

Date: August 27, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,019 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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