UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Basem Abdulla Attum v. Xavier Becerra

Case No. 2:22-cv-04044-ODW (JCx), Document 23 (C.D. Cal. Mar. 8, 2023) · No. 2:22-cv-04044-ODW (JCx) · Decided March 8, 2023

SUMMARY

The United States District Court for the Central District of California denied Defendant Xavier Becerra's Rule 12(b)(1) motion to dismiss claims concerning the denial of Basem Abdulla Attum's Medicare supplier enrollment and placement on the Medicare Preclusion List. The court held that the claims arose under the Medicare Act and that Attum had not fully exhausted the administrative appeals process, but it judicially waived the exhaustion requirement because the claims were collateral, irreparable harm was alleged, and further exhaustion would be futile.

OPINION

Basem Abdulla Attum v. Xavier Becerra
PER CURIAM.
Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 1 of 12 Page ID #:274 O 1 2 3 4 5 6 7 8 United States District Court 9 Central District of California 10 11 BASEM ABDULLA ATTUM, M.D., Case № 2:22-cv-04044-ODW (JCx) 12 Plaintiff,
ORDER DENYING
13 v.
MOTION TO DISMISS [18]
14 XAVIER BECERRA,
15 Defendant. 16
17 I. INTRODUCTION
18 On June 13, 2022, Plaintiff Basem Abdulla Attum, M.D., filed this action 19 against the Secretary of the United States Department of Health and Human Services 20 ("HHS"), Xavier Becerra. (Compl., ECF No. 1.) Attum is a physician who seeks 21 relief following the denial of his enrollment application to participate as a supplier in 22 the Medicare Program and placement on the Medicare Program's Preclusion List. 23 (First Am. Compl. ("FAC"), ECF No. 13.) Becerra now moves to dismiss the First 24 Amended Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(1). (Mot. 25 Dismiss ("Mot." or "Motion"), ECF No. 18.) For the following reasons, the Court 26 DENIES the Motion.1 27 28 1 Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. Case 2:22-cv-04044-ODW-JC Document 23

II. BACKGROUND

Attum is a licensed physician specializing in orthopedic surgery. (FAC ¶ 2.) On August 17, 2015, Attum entered a guilty plea in Kentucky state court for one count of insurance fraud, one count of identity theft, and three counts of obtaining a controlled substance by fraud or deceit. (Id. ¶ 26.) The court granted Attum's request to participate in a two-year Pretrial Diversion Program. (Id. ¶ 27.) Attum completed the terms of the Pretrial Diversion Program, and the court dismissed the criminal action against Attum with prejudice. (Id. ¶ 29.) On January 2, 2018, the court granted Attum's petition to expunge his criminal record. (Id. ¶ 30.) On March 18, 2021, Attum applied to enroll as a supplier—i.e., a physician providing services—in the Medicare Program. (Id. ¶¶ 20, 31.) On the application, Attum disclosed his guilty plea in Kentucky, as well as the subsequent dismissal of the criminal action and expungement of his criminal record. (Id.) On April 5, 2021, the Centers for Medicare & Medicaid Services ("CMS") denied Attum's enrollment application pursuant to 42 C.F.R. § 424.530(a)(3)[2] on the basis that Attum had, within the past 10 years, been convicted of a felony that was detrimental to the best interest of the Medicare Program. (Id. ¶ 32.) CMS also placed Attum on the Preclusion List, which is a list comprised of suppliers who may not be reimbursed under Medicare plans for items or services that they provide or prescriptions that they write. (See id.; see also Mot. 3.) On June 8, 2021, Attum submitted a request for reconsideration of the denial of his enrollment and placement on the Preclusion List. (FAC ¶ 33.) On August 11, 2021, CMS issued a reconsideration decision upholding the denial of Attum's enrollment, as well as his placement on the Preclusion List. (Id. ¶ 34.)

[2] Pursuant to 42 C.F.R § 424.530(a)(3), CMS may deny a supplier's enrollment in the Medicare Program if the supplier was, within the preceding 10 years, convicted of a felony offense that CMS determines to be detrimental to the best interests of the Medicare program and its beneficiaries. Such offenses include financial crimes, such as insurance fraud, "for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions," and "[a]ny felonies that would result in mandatory exclusion under section 1128(a) of the Act." Id.

While the administrative proceedings were pending, Attum sought to vacate his August 17, 2015 guilty plea on the basis that he would not have pleaded guilty had he known that his plea and Pretrial Diversion could, despite subsequent dismissal and expungement, result in his exclusion from the Medicare Program. (Id. ¶ 35.) On October 25, 2021, the Kentucky state court issued an order in Attum's criminal case, retroactively setting aside and withdrawing Attum's guilty plea. (Id. ¶ 36; FAC Ex. 5 ("Kentucky State Court Order"), ECF No. 13-5 (ordering that "[Attum] shall not be deemed to have entered a guilty plea at any time in connection with this case").[3]) On August 24, 2021, Attum submitted a request for a hearing before an Administrative Law Judge ("ALJ") to

contest CMS's denial of his enrollment in the 11 Medicare Program and placement on the Preclusion List. (FAC ¶ 39.) On
12 February 10, 2022, the ALJ affirmed CMS's decision.4 (Id. ¶ 41; FAC Ex. 6 ("ALJ
13 Decision"), ECF No. 13-6.) Among other things, the ALJ concluded that, "regardless 14 of the state court's disposition of [Attum's] criminal case, the record shows that 15 [Attum] was convicted within the meaning of 42 C.F.R. § 424.530(a)(3) and 16 42 C.F.R. § 1001.2[5], by virtue of the state court's acceptance of his guilty plea and 17 granting his participation in the pretrial diversion program." (FAC ¶ 42; ALJ
18 Decision 10.)
19 20 3 The Court may consider Attum's exhibits to the First Amended Complaint. See United States v. 21 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may . . . consider certain materials—documents 22 attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting [a] motion to dismiss into a motion for summary judgment."). 23 4 Becerra requests that the Court take judicial notice of a February 10, 2022 letter from the Director, Civil Remedies Division, Departmental Appeals Board of HHS, to Attum's counsel of record, which 24 enclosed the ALJ Decision and a copy of the applicable appellate review guidelines. (Def.'s Req 25 Judicial Notice, ECF No. 18-1.) The Court does not rely on this letter in resolving the Motion and, accordingly, denies as moot Becerra's request. 26 5 42 C.F.R. § 1001.2 defines "convicted" to include, among other things, (1) "[a] judgment of conviction . . . against an individual . . . by a . . . State . . . court regardless of whether . . . "[t]he 27 judgment of conviction or other record relating to the criminal conduct has been expunged or 28 otherwise removed;" and (2) "participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld." 3 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 4 of 12 Page ID #:277 1 On September 1, 2022, Attum brought this case, in which Attum asserts three 2 causes of action. (See Compl.; FAC ¶¶ 52–69.) First, Attum seeks declaratory and 3 injunctive relief for violation of his substantive due process rights. (FAC ¶¶ 52–57.) 4 Attum alleges that Becerra arbitrarily and unreasonably interfered with Attum's 5 chosen profession by denying Attum's enrollment application and placing Attum on 6 the Preclusion List on the basis of policies that define Attum as a convicted person. 7 (Id.) Second, Attum seeks a declaratory judgment declaring that HHS's policy of 8 defining a person as convicted, irrespective of state laws, is invalid and violates state 9 sovereignty under the Tenth Amendment. (Id. ¶¶ 58–64.) Third, Attum seeks a writ of 10 mandamus ordering Becerra to review Attum's enrollment application and placement 11 on the Preclusion List consistent with the Court's judgment. (Id. ¶¶ 65–69.) 12 Becerra now moves to dismiss the First Amended Complaint on the basis that 13 the Court lacks subject matter jurisdiction. (Mot.) The Motion is fully briefed. 14 (Opp'n, ECF No. 20; Reply, ECF No. 21.)
15 III. LEGAL STANDARD
16 Pursuant to Rule 12(b)(1), a party may move to dismiss based on a court's lack 17 of subject

matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). "A Rule 12(b)(1) 18 jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 19 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "accepts the truth of the 20 plaintiff's allegations but asserts that they are insufficient on their face to invoke 21 federal jurisdiction." Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014) 22 (internal quotation marks omitted). Conversely, a factual attack "contests the truth of 23 the plaintiff's factual allegations, usually by introducing evidence outside the 24 pleadings." Id. The party attempting to invoke a court's jurisdiction bears the burden 25 of proof for establishing jurisdiction. See Sopcak v. N. Mountain Helicopter Serv., 26 52 F.3d 817, 818 (9th Cir. 1995). 27 28 4 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 5 of 12 Page ID #:278

1 IV. DISCUSSION

2 Becerra argues that Attum's claims arise under the Medicare Act and should be 3 dismissed for lack of subject jurisdiction because Attum failed to exhaust the Act's 4 administrative appeals process. (Mot. 10–13.) 5 "Judicial review of claims arising under the Medicare Act is available only after 6 the Secretary [of HHS] renders a 'final decision' on the claim."6 Heckler v. Ringer, 7 466 U.S. 602, 605 (1984). The Supreme Court applies two tests to determine whether 8 claims arise under the Medicare Act. Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 9 1112 (9th Cir. 2003). "First, claims that are 'inextricably intertwined' with a Medicare 10 benefits determination may arise under Medicare." Id. (quoting Ringer, 466 U.S. 11 at 614). "Second, claims in which both the standing and the substantive basis for the 12 presentation of the claims is the Medicare Act may arise under Medicare." Id. 13 (quoting Ringer, 466 U.S. at 615). "'[A]ll aspects' of any [claim arising under the 14 Medicare Act] must be 'channeled' through the administrative process" before 15 obtaining review in federal court. Shalala v. Ill. Council on Long Term Care, Inc., 16 529 U.S. 1, 12 (2000) (quoting Ringer, 466 U.S. at 614–15). This channeling 17 requirement "applies to 'virtually all legal attacks,' whether procedural or substantive, 18 constitutional or non-constitutional, future or present, legal or fact-specific." Arriva 19 Med. LLC v. U.S. Dep't of Health & Human Servs., 239 F. Supp. 3d 266, 278 (D.D.C. 20 2017) (quoting Ill. Council, 529 U.S. at 13–14). 21 A. Claims Arising Under the Medicare Act 22 Attum argues that his claims do not arise under the Medicare Act because (1) he 23 does not seek to recover on a claim for benefits; and (2) the standing and substantive 24 basis for his claims derive from the Constitution. (Opp'n 10–13.) 25 6 A party "after any final decision of the [Secretary of HHS] made after a hearing . . . may obtain a 26 review of such decision" in federal district court. See 42 U.S.C. § 405(g); see also 42 U.S.C. § 1395ff(b)(1)(A) (incorporating 42 U.S.C. § 405(g) to the Medicare Act). "No findings of fact or 27 decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except 28 as herein provided." See 42 U.S.C. § 405(h); see also 42 U.S.C. § 1395ii (incorporating 42 U.S.C. § 405(h) to the Medicare Act). 5 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 6 of 12 Page ID #:279 1 Because Attum does not seek a benefits determination, the Court considers 2 whether Attum's claims satisfy the second test for determining whether claims arise 3 under the Medicare Act—whether both the

standing and the substantive basis for the 4 presentation of the claims is the Medicare Act. Kaiser, 347 F.3d at 1112. This inquiry 5 considers a claim's essence, and "not whether [the claim] lends itself to a 'substantive' 6 rather than a 'procedural' label." Ringer, 466 U.S. at 615, 624. Accordingly, the 7 Supreme Court has determined that actions challenging the constitutionality of 8 policies under the Medicare Act and seeking declaratory and injunctive relief may 9 constitute claims arising under the Medicare Act, despite the fact that such claims "do 10 not, on their face, appear to claim specific Medicare benefits or reimbursements." See 11 Kaiser, 347 F.3d at 1112 (collecting cases); see also Ringer, 466 U.S. at 615 ("It is of 12 no importance that respondents . . . sought only declaratory and injunctive relief and 13 not an actual award of benefits as well."); Ill. Council, 529 U.S. at 14 (explaining that 14 claims for benefits and claims of program eligibility arise under the Medicare Act and 15 "may all similarly dispute agency policy determinations, or may all similarly involve 16 the application, interpretation, or constitutionality of interrelated regulations or 17 statutory provisions"). 18 Here, the essence of Attum's claim is that Becerra unconstitutionally denied 19 Attum's application for enrollment in the Medicare Program and placed Attum on the 20 Preclusion List. Although stated as a constitutional challenge, in substance, Attum 21 challenges HHS's policy that a plea agreement, subsequently vacated by a state court, 22 may nonetheless constitute a conviction upon which HHS may deny a prospective 23 supplier's enrollment in the Medicare Program. The standing and substantive basis 24 for Attum's claims is the Medicare Act because Attum's claims hinge on HHS's 25 policies in applying the Medicare Act and processing applications for enrollment. 26 Accordingly, the Court finds that Attum's claims arise under the Medicare Act. 27 28 6 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 7 of 12 Page ID #:280 1 B. Exhaustion of Administrative Remedies 2 Because Attum's claims arise under the Medicare Act, Attum must exhaust his 3 administrative remedies before seeking review in federal court, unless an exception or 4 judicial waiver applies. See Ill. Council, 529 U.S. at 12, 19 (discussing exception to 5 administrative exhaustion requirement); see also Johnson v. Shalala, 2 F.3d 918, 921 6 (9th Cir. 1993) (providing three-part test "to determine whether a particular case 7 merits judicial waiver of the exhaustion requirement"). 8 Becerra argues that Attum fails to allege that he exhausted his administrative 9 remedies under the Medicare Act. (Mot. 12–13.) Specifically, Becerra argues that 10 Attum fails to allege that he sought review of the ALJ Decision by the Departmental 11 Appeals Board, which constitutes the third and final level of the administrative 12 appeals process under the Medicare Act. (Id. at 4–9, 12–13); see also 42 C.F.R. 13 § 498.80 (providing that prospective provider who is dissatisfied with ALJ's decision 14 may request review by the Departmental Appeals Board). 15 Throughout the First Amended Complaint, Attum characterizes the ALJ 16 Decision as a decision from the Departmental Appeals Board. (See e.g., FAC ¶¶ 11, 17 41.) However, the decision to which Attum refers is a decision from ALJ Tannisha D. 18 Bell. (Id.; see also ALJ Decision.) Attum fails to allege that he took the next step in 19 the administrative appeals process by seeking review of the ALJ Decision from the 20 Departmental Appeals Board. (See ALJ Decision; see

generally FAC.) Moreover, 21 Attum does not oppose Becerra's argument that he failed to exhaust his administrative 22 remedies before filing this case and, thus, Attum concedes this point. (See Opp'n 13– 23 18 (arguing Attum is entitled to judicial waiver or should be excused from exhaustion 24 requirements)); see also Star Fabrics, Inc. v. Ross Stores, Inc., No. 17-cv-5877-PA 25 (PLAx), 2017 WL 10439691, at *3 (C.D. Cal. Nov. 20, 2017) ("Where a party fails to 26 oppose arguments made in a motion, a court may find that the party has conceded 27 those arguments . . . ."). 28 7 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 8 of 12 Page ID #:281 1 Accordingly, the Court finds that Attum failed to exhaust his administrative 2 remedies before filing this case. 3 C. Waiver of Exhaustion Requirement 4 Nevertheless, Attum argues that he is entitled to judicial waiver of the 5 exhaustion requirement. (Opp'n 13–19.) 6 The Medicare Act's exhaustion requirement consists of two requirements: 7 (1) "a nonwaivable requirement that a 'claim for benefits shall have been presented to 8 the Secretary,'" and (2) "a waivable requirement that the administrative remedies 9 prescribed by the Secretary be pursued fully by the claimant." Ringer, 466 U.S. 10 at 617 (citations omitted). 11 1. Presentment 12 Attum argues that he satisfied the presentment requirement when he requested 13 reconsideration of the CMS decision and a hearing with the ALJ. (Opp'n 13–14.) 14 Although Attum concedes that he "did not express his arguments as constitutional 15 violations," he did present his claim that HHS lacked legal authority to deny his 16 enrollment and to place him on the Preclusion List based upon a guilty plea that was 17 subsequently set aside by the Kentucky state court. (Id.) 18 In Mathews v. Eldridge, 424 U.S. 319, 329 (1976), Eldridge brought an action 19 following the termination of his disability benefits in which he challenged the 20 constitutional validity of the administrative procedures established by the Secretary of 21 Health, Education and Welfare for assessing whether there is a continuing disability. 22 The Court held that Eldridge satisfied the presentment requirement when he 23 "specifically presented the claim that his benefits should not be terminated because he 24 was still disabled," even though he had not raised his constitutional claim at the 25 administrative level. Id. Interpreting Eldridge, the Ninth Circuit explained that 26 Eldridge satisfied the presentment requirement because his constitutional claim had 27 "direct bearing" on the decision that Eldridge questioned at the administrative level— 28 his termination of benefits. See Haro v. Sebelius, 747 F.3d 1099, 1113 (9th Cir. 2014) 8 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 9 of 12 Page ID #:282 1 (interpreting Eldridge, 424 U.S. at 329). The same is true here. Although Attum did 2 not argue during the administrative appeals process that Becerra violated his 3 constitutional rights, Attum specifically presented the claim that his enrollment should 4 not be denied and that he should not be placed on the Preclusion List on the basis of 5 his plea agreement. (Opp'n 13–14.) Attum's constitutional claim —in sum, that it is 6 unconstitutional to define a prospective supplier as having a conviction on the basis of 7 a plea agreement that a state court subsequently withdrew—bears directly on the 8 decision that Attum questioned at the administrative level. See Haro, 747 F.3d 9 at 1113. Accordingly, the Court finds that Attum satisfies the presentment 10 requirement. 11 2. Full

Pursuit of Administrative Remedies 12 The Court next considers whether Attum fully pursued the administrative 13 remedies prescribed by HHS. See Ringer, 466 U.S. at 617. To satisfy this 14 requirement, "[t]he claim must be (1) collateral to a substantive claim of entitlement 15 (collaterality), (2) colorable in its showing that denial of relief will cause irreparable 16 harm (irreparability), and (3) one whose resolution would not serve the purposes of 17 exhaustion (futility)." Johnson, 2 F.3d at 921. 18 a. Collaterality 19 As to the first element, Attum asserts that his claims are collateral because they 20 amount to a constitutional attack on policies under the Medicare Program and would 21 not be determinative of whether he qualifies for enrollment as a Medicare supplier. 22 (Opp'n 14–15.) 23 "Whether the Secretary has published a challenged policy . . . does not 24 determine whether the plaintiff's claim is collateral." Johnson, 2 F.3d at 921. Rather, 25 "[a] plantiff's claim is collateral if it is not essentially a claim for benefits" and "is not 26 bound up with the merits so closely that [the court's] decision would constitute 27 interference with agency process." Id. at 921–22 (internal quotation marks omitted; 28 alteration in original). Here, rather than challenging the specific decision that HHS 9 Case 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 10 of 12 Page ID #:283 1 made concerning Attum's enrollment application, Attum challenges the constitutional 2 validity of HHS's policy to systematically define convictions to include those that a 3 state court has withdrawn. In considering whether this policy is constitutional, the 4 Court would not need to analyze the merits of Attum's particular case. Moreover, a 5 decision from the Court on this issue would not automatically entitle Attum or other 6 similarly situated prospective suppliers to enrollment in the Medicare Program. See 7 id. (holding claim was collateral where court's order would require HHS to 8 readjudicate claims denied under policy, resulting in some claimants receiving 9 benefits that were once denied and others seeing no change at all). Attum's "attack is 10 essentially to the policy itself, not to its application to [him], nor to the ultimate 11 substantive determination of [his enrollment]." See id. at 922. Therefore, Attum's 12 claims are collateral to his claim of entitlement. 13 b. Irreparability 14 A plaintiff must raise "at least a colorable claim" that exhaustion will cause 15 irreparable injury. Id. The Ninth Circuit has held that "a 'colorable' showing of 16 irreparable injury is one that is not 'wholly insubstantial, immaterial, or frivolous.'" 17 Id. (quoting Briggs v. Sullivan, 886 F.2d 1132, 1140 (9th Cir. 1989)). "Irreparable 18 harm for the purposes of waiver of exhaustion is present where 'back payments cannot 19 erase either the experience or the entire effect of' the purported injury." Davis v. 20 Astrue, 513 F. Supp. 2d 1137, 1146 (N.D. Cal. 2007) (quoting Kildare v. Saenz, 21 325 F.3d 1078, 1083 (9th Cir. 2003)). 22 Here, Attum argues that requiring administrative exhaustion before judicial 23 review would cause irreparable harm to him in his ability to find work, receive 24 hospital privileges, and obtain board certifications. (Opp'n 15–16; see also FAC ¶ 46 25 (alleging enrollment denial and inclusion on Preclusion List prevent Attum "from 26 opening his own practice and joining a hospital or private practice group," "obtaining 27 hospital privileges," and "obtaining a board certification from the American Board of 28 Orthopedic Surgery").) 10 Case 2:22-cv-04044-ODW-JC Document 23

Filed 03/08/23 Page 11 of 12 Page ID #:284 1 The Court finds that Attum raises a colorable claim that requiring 2 administrative exhaustion will cause irreparable harm that cannot be compensated by 3 back payments, including his inability to work, obtain certifications, and practice 4 medicine. See Koerpel v. Heckler, 797 F.2d 858, 862 (10th Cir. 1986) (holding 5 doctor's "reputation could be irreparably damaged in a way that could not be 6 remedied by subsequent administrative appeals"); Johnson, 2 F.3d at 922 (holding 7 sufficient allegations of irreparable harm due to economic loss and destruction of 8 claim); see also Kildare, 325 F.3d at 1083 (holding sufficient allegations of 9 irreparable harm due to economic hardship, including subsistence on food stamps, 10 lack of medical insurance, and homelessness). 11 c. Futility 12 Futility is established if the exhaustion of administrative remedies "would not 13 serve the policies underlying exhaustion." Cassim v. Bowen, 824 F.2d 791, 795 14 (9th Cir. 1987). "In most cases, the exhaustion requirement allows the agency to 15 compile a detailed factual record and apply agency expertise in administering its own 16 regulations," allowing the agency to "correct its own errors through administrative 17 review." Johnson, 2 F.3d at 922. "However, when the agency applies a 'systemwide 18 policy' . . . nothing is gained 'from permitting the compilation of a detailed factual 19 record, or from agency expertise.'" Id. (quoting Bowen v. City of New York, 476 U.S. 20 467, 485 (1986)); see also Briggs, 886 F.2d at 1140 (holding futility established 21 because detailed record would not "assist a court in determining the merits of 22 appellants' straightforward statutory and constitutional challenge"). 23 Here, because Attum alleges that HHS's established policy and regulatory 24 definition of conviction violates the Constitution, a detailed administrative record 25 regarding the facts of Attum's underlying application for enrollment would not assist 26 the Court in assessing the merits of Attum's claims. Accordingly, Attum satisfies the 27 futility requirement. 28 11 Cas@ 2:22-cv-04044-ODW-JC Document 23 Filed 03/08/23 Page 12 o0f12 Page ID #:285 1 Because Attum satisfies the requirements for judicial waiver of the exhaustion 2 || requirement, Attum's claims may proceed in this Court despite his failure to exhaust 3 || the administrative appeals process.'

4 Vv. CONCLUSION

5 For the reasons discussed above, the Court DENIES Defendant's Motion to 6 || Dismiss. (ECF No. 18.) 8 IT IS SO ORDERED.

10 March 8, 2023 □□

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3 OTIS D. WRIGHT, IT

14 UNITED STATES DISTRICT JUDGE

15 16 17 18 19 20 21 22 23 24 25 26 27 28 || 7 Having found that Attum is entitled to judicial waiver of the exhaustion requirement, the Court does not reach Attum's alternative jurisdictional arguments. (See Opp'n 17-19.) 12