

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Serrano v. Rudas

Serrano · No. 1:22-cv-00950-KES-CDB · Decided May 22, 2025

SUMMARY

The document contains findings and recommendations in a 42 U.S.C. § 1983 action brought by Andres Masqueda Serrano against correctional medical provider Robert Rudas. It recommends granting Rudas’s partial motion for summary judgment on the ground that Serrano failed to exhaust administrative remedies for medical-deliberate-indifference claims beyond the alleged discontinuation of pain medication.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	May 22, 2025
DOCKET	1:22-cv-00950-KES-CDB
DISPOSITION	dismissed
PROCEDURAL POSTURE	Defendant moved for partial summary judgment, arguing that Plaintiff failed to exhaust administrative remedies for his Eighth Amendment deliberate-indifference claim concerning allegedly inadequate medical care. The magistrate judge issued findings and recommendations recommending that the motion be granted and that the unexhausted portion of the claim be dismissed without prejudice.
STANDARD OF REVIEW	Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. On exhaustion, the defendant bears the ultimate burden of proving failure to exhaust; the evidence is viewed in the light most favorable to the prisoner, and the burden shifts to the prisoner to produce evidence showing that available remedies were effectively unavailable.
PRECEDENTIAL VALUE	nonprecedential

TOPICS

summary judgment

exhaustion of remedies

prisoners rights

section 1983

civil procedure

PRACTICE AREAS

civil procedure

civil rights

prisoner litigation

administrative exhaustion

health law

QUESTIONS PRESENTED

1. Whether Plaintiff exhausted available administrative remedies for his Eighth Amendment deliberate-indifference claim that Defendant Rudas failed to provide adequate medical care apart from discontinuing morphine.
2. Whether the undisputed grievance record established Defendant's entitlement to partial summary judgment on that unexhausted claim.
3. Whether Plaintiff demonstrated that the administrative grievance process was effectively unavailable to him.

HOLDINGS

1. Plaintiff's grievance did not exhaust his claim that Defendant Rudas failed to provide adequate medical care unrelated to the discontinuation of pain medication because it concerned the discontinuation of morphine and did not provide sufficient notice of the separate factual basis for the broader inadequate-treatment claim.
2. Defendant established the existence of an available administrative remedy and Plaintiff's failure to exhaust the inadequate-medical-care claim, shifting the burden of production to Plaintiff.
3. Plaintiff failed to produce evidence showing that the available administrative grievance process was effectively unavailable.

KEY QUOTATIONS

“Exhaustion of administrative remedies is mandatory and “unexhausted claims cannot be brought in court.”” (§ IV.B)

“Thus, the undersigned finds that MCSP HC18002563 failed to alert the prison to the nature of the wrong for which redress is sought and provide sufficient information “to allow prison officials to take appropriate responsive measures” with respect to whether Defendant Rudas failed to provide medical treatment in violation of Plaintiff’s Eighth Amendment rights.” (§ VIII.A.1)

“Plaintiffs claim against Defendant Rudas alleging a violation of the Eighth Amendment for deliberate indifference to Plaintiffs serious medical needs based on the allegation that Defendant Rudas failed to provide adequate medical care be DISMISSED without prejudice.” (§ IX)

FACTUAL BACKGROUND

Plaintiff, a California prisoner, alleged severe chronic right-knee pain and claimed that Defendant Rudas refused to provide adequate medical treatment or helpful pain medication in 2018. Plaintiff's September 9, 2018 grievance primarily challenged Rudas's discontinuation of morphine and received institutional- and

headquarters-level responses. The grievance was filed before several of the later treatment encounters with Rudas that formed part of Plaintiff's broader inadequate-medical-care allegations.

PROCEDURAL HISTORY

Plaintiff filed this pro se prisoner civil-rights action under 42 U.S.C. § 1983. Defendant Rudas filed a partial motion for summary judgment based on failure to exhaust. After Plaintiff opposed the motion following an order to show cause and an extension of time, the Court struck Plaintiff's sur-reply and considered the motion, opposition, reply, grievance records, and verified pleadings. The magistrate judge recommended granting partial summary judgment and dismissing without prejudice the inadequate-medical-care portion of the claim, subject to review by the assigned district judge after objections.

DISPOSITION

dismissed

CASES CITED

- Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)
- Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255 (1986)
- T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987)
- Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987)
- Jones v. Bock, 549 U.S. 199, 204, 211, 216 (2007)
- Woodford v. Ngo, 548 U.S. 81, 85-86, 88, 93 (2006)
- Porter v. Nussle, 534 U.S. 516, 532 (2002)
- Booth v. Churner, 532 U.S. 731, 741 (2001)
- Albino v. Baca, 747 F.3d 1162, 1166, 1168-69, 1170-72 (9th Cir. 2014)
- Ross v. Blake, 578 U.S. 632, 642-44 (2016)
- Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003)
- Griffin v. Arpaio, 557 F.3d 1117, 1120-21 (9th Cir. 2009)
- Sapp v. Kimbrell, 623 F.3d 813, 818 (9th Cir. 2010)
- Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010)
- O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062 (9th Cir. 2007)
- Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1061 (9th Cir. 2011)
- Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996)
- Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc)
- Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004)
- Williams v. Thompson, No. 1:19-cv-00330-AWI-CDB, 2023 WL 2823388, at *1 (E.D. Cal. Apr. 7, 2023)
- Patkins v. Ferguson, No. 18-cv-05139-EMC, 2020 WL 978649, at *7 (N.D. Cal. Feb. 28, 2020)

- Ethridge v. Rodriguez, No. 1:12-cv-2088 AWI SAB PC, 2015 WL 13237012, at *7 (E.D. Cal. Nov. 13, 2015)
- Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)

OPINION

(PC) Serrano v. Rudas

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 EASTERN DISTRICT OF CALIFORNIA

10 11 ANDRES MASQUEDA SERRANO, Case No.: 1:22-cv-00950-KES-CDB 12 Plaintiff,

FINDINGS AND RECOMMENDATIONS

TO GRANT DEFENDANT’S PARTIAL

13 v. MOTION FOR SUMMARY JUDGMENT

14 ROBERT RUDAS, et al., (Doc. 39)

15 Defendants. 14-DAY OBJECTION PERIOD

16 17 18 Plaintiff Andres Masqueda Serrano is proceeding pro se and in forma pauperis in this
civil 19 rights action pursuant to 42 U.S.C. § 1983.

20 I. INTRODUCTION

21 On November 19, 2024, Defendant Rudas filed a timely partial motion for summary 22
judgment alleging Plaintiff failed to exhaust his administrative remedies. (Doc. 39.) When 23
Plaintiff failed to file a response to Defendant’s motion, the Court issued its Order to Show Cause
24 (OSC) in Writing Why Sanctions Should Not Be Imposed for Plaintiff’s Failure to File an 25
Opposition or Statement of Non-Opposition on December 18, 2024. (Doc. 42.) Following an 26
extension of time, Plaintiff filed an opposition on February 6, 2025. (Doc. 47.) On February 18, 27
2025, Defendant filed a reply. (Doc. 48-2.) 1 On March 14, 2025, Plaintiff filed a document titled
“Reply Opposition to Defendant 2 Motion for Summary Judgment Based on Failure to Exhaust
Administrative Remedies.” (Doc. 3 49.) On March 27, 2025, Defendant moved ex parte to strike
Plaintiff’s filing as a sur-reply. (Doc. 4 50.) This Court issued its Order Granting Defendant’s Ex
Parte Application to Strike Plaintiff’s 5 Sur-reply on March 31, 2025. (Doc. 51.) It found the
following concerning Plaintiff’s sur-reply: 6 (1) any sur-reply would be untimely; (2) Defendant
did not submit new evidence in reply; (3) 7 Plaintiff did not assert a relevant judicial opinion was
issued after briefing; and (4) there was no 8 good cause to permit a sur-reply. (Id. at 4.) Thus,
Plaintiff’s sur-reply filed March 14, 2025, was 9 stricken. (Id. at 5.)

10 II. PLAINTIFF’S ALLEGATIONS

11 Plaintiff states that in 2008 “Dr. Bozic performed a hinged TKA” negligently, leading to his
severe pain in 2009 and a corrective 12 surgery on his right leg. (Doc. 1 at 3.) He asserts the
“femoral component was grossly loose and was removed.” (Id.) 13 Plaintiff contends that while he
was incarcerated at Mule Creek State 14 Prison in 2018, he submitted health care request forms

advising Defendant Rudas he was in severe pain. (Doc. 1 at 3.) On June 12, 15 2018, Plaintiff was seen by orthopedic surgeon Casey who found Plaintiff was unable to bear weight on his right leg, noting “concern 16 for hardware malfunction.” (Id. at 3-4.) The surgeon requested an orthopedic surgery consultation for further evaluation “and guidance 17 in management, including possible surgical intervention.” (Id. at 4.) Plaintiff asserts that on June 15, 2018, he reported to “Dr. Matharu” 18 that he was unable to sleep and could not perform his daily activities. (Id.) They discussed Dr. Casey’s findings and Dr. Matharu advised 19 Plaintiff he would prescribe pain medication. (Id.) When the prescription for pain medication expired, Plaintiff alleges he sent 20 another health care request to Defendant Rudas on August 13, 2018. (Id.) Plaintiff then learned that although Rudas had never examined 21 Plaintiff, Rudas discontinued the prescription. (Id.) On October 15, 2018, after many health care requests, Plaintiff was seen by 22 Defendant Rudas. (Id.) Plaintiff advised Rudas of his severe pain, inability to sleep, swelling, and inability to complete his daily 23 activities. (Id. at 4-5.) He requested pain medication. (Id. at 5.) During an examination of his knee, Plaintiff advised Rudas he had 24 fallen in the shower and that “most of the time” he cannot get to chow hall to eat. (Id.) Plaintiff advised Rudas that if he did not receive 25 “helpful medical treatment” or “helpful medication,” he intended to file a grievance or appeal against Defendant Rudas. (Id.) Plaintiff 26 asserts Rudas then asked him to leave. (Id.) Plaintiff contends Rudas knowingly and willingly denied him “helpful medical treatment.” 27 (Id.) 1 again and advised him of his severe pain and that “the creams and other medication” were not helpful. (Doc. 1 at 5.) Plaintiff advised 2 Rudas that his leg was “swollen bad,” that he could not sleep and could not complete his daily activities. (Id.) Plaintiff also advised 3 Rudas the previous pain medication had been helping and asked why it had been discontinued. (Id.) He contends Rudas told him he would 4 not prescribe morphine for Plaintiff’s pain. (Id.) When Plaintiff stated to Rudas he was in “severe chronic pain” and repeated his 5 request for helpful pain medication or medical treatment, Rudas told Plaintiff they were finished and refused to prescribe pain medication 6 or additional treatment. (Id. at 5-6.) 7 On November 7, 2018, Plaintiff was again seen by Defendant Rudas. (Doc. 1 at 6.) He advised Rudas the medication Rudas ordered “did 8 not work.” (Id.) Plaintiff contends despite seeing that his leg was swollen, Rudas refused to prescribe any helpful pain medication or 9 medical treatment. (Id.) 10 On December 3, 2018, when Plaintiff “could not walk at all,” he was taken to the clinic and seen by Defendant Rudas. (Doc. 1 at 6.) 11 Plaintiff’s leg was swollen, and he was in severe pain. (Id.) Plaintiff contends Rudas “only wanted to know why [Plaintiff] did not go to 12 [his] medical appointment[s].” (Id.) Plaintiff advised Rudas he was in too much pain. (Id.) He contends Rudas knew he was in severe 13 pain and “may even lose his leg,” but continued to refuse to provide any helpful medical treatment or pain medication. (Id. at 6-7.) 14 15 (See Doc. 17 at 3-5.)1

16 III. SUMMARY OF THE PARTIES’ POSITIONS

17 Defendant’s Summary Judgment Motion re Exhaustion 18 Defendant Rudas contends Plaintiff did not properly exhaust available administrative 19 remedies regarding his claim that Rudas

failed to provide adequate medical treatment for his 20 knee. Rudas asserts Plaintiff's grievance "did not identify any claim, separate and apart from his 21 claim that Dr. Rudas discontinued his pain medication." Thus, Rudas asks this Court to grant 22 partial summary judgment and to enter judgment in his favor "on any medical-deliberate- 23 indifference claims beyond Serrano's claim that Dr. Rudas discontinued his pain medication." 24 Plaintiff's Opposition 25 After largely repeating the allegations in his complaint, Plaintiff contends "for many 26 months Plaintiff has been in severe pain unable to get any helpful pain medication or medical 27 1 The facts pertaining to previously named defendant Ana De La Sierra have been omitted as that individual was 1 treatment," referring to his exhibit number 1. Plaintiff asserts the exhibit will show Rudas knew 2 he was in severe pain and "may even lose his leg" and still refused to provide "any helpful 3 treatment or pain medication." Plaintiff argues Defendant "is using a new law that was not even 4 in the" California Code of Regulations concerning the grievance procedures applicable to his 5 claims, that he "was in complete compliance" with the 2018 regulations and exhausted "all 6 available remedies." Plaintiff argues Rudas was deliberately indifferent to his serious medical 7 needs and asks the Court to deny summary judgment. Exhibit number 1 is comprised of the 8 following documents: (1) partial Progress Note dated September 18, 2018 (pages 1 & 2 of 3); (2) 9 Final Report dated June 12, 2018; (3) Chronic Pain Provider-Patient Agreement/Informed 10 Consent for Opioid Pain Medication form dated June 15, 2018; (4) Health Care Services 11 Headquarters' Level Response dated March 13, 2019, concerning MCSP HC 18002563; (4) 12 Health Care Grievance form dated September 9, 2018, assigned MCSP HC 18002563; (5) Health 13 Care Services Institutional Level Response dated November 9, 2018, concerning MCSP HC 14 18002563; (6) duplicate of partial Progress Note dated September 18, 2018 (pages 1 & 2 of 3); 15 (7) Orders concerning Patient Care dated November 7, 2018; (8) Orders concerning Patient Care 16 dated November 20, 2018; and (9) Orders concerning Patient Care dated December 3, 2018. 17 Exhibit two is comprised of eleven copied pages from Title 15, Article 8, sections 3084 through 18 3085. 19 Defendant's Reply 20 Defendant Rudas contends Plaintiff's challenges concerning four of Defendant's 21 undisputed facts do not rise to the level of genuinely disputed issues of material fact. Rudas 22 maintains Plaintiff's relevant grievance did not put the prison on notice that Rudas allegedly 23 failed to provide appropriate medical treatment resulting in Plaintiff's further harm and that 24 Plaintiff fails to present evidence to the contrary. Further, Rudas contends Plaintiff's argument 25 that "Mule Creek and CCHCS waived the defense of failure to exhaust by responding to his 26 grievance is wrong," and that at all relevant times "across all amendments ... inmates were 27 required to include the issue and any related set of issues, and include all facts known to them 1 partial summary judgment. Next, Rudas argues Plaintiff's dispute concerning "SDF 2" does not 2 raise a genuine dispute of material fact. Further, Rudas contends Plaintiff's disputes "SDF 3 and 3 4" do not demonstrate an application of "the incorrect section of the Code of Regulations to 4 Claim Two" because inmates have always been "required to legibly, or clearly and coherently 5 document all information known and available to the grievant regarding the issue

or set of 6 issues.” Rudas maintains Plaintiff frequently used the grievance process prior to filing his 7 complaint and that Plaintiff’s argument concerning 2020 amendments to the grievance procedure 8 are not relevant to his 2018 grievance. Lastly, Rudas contends this Court should disregard 9 Plaintiff’s additional facts and arguments concerning the merits of his claims.

10 IV. APPLICABLE LEGAL STANDARDS

11 A. Summary Judgment 12 Summary judgment is appropriate when it is demonstrated that there “is no genuine 13 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. 14 Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by 15 “citing to particular parts of materials in the record, including depositions, documents, 16 electronically stored information, affidavits or declarations, stipulations (including those made for 17 purposes of the motion only), admissions, interrogatory answers, or other materials...” Fed. R. 18 Civ. P. 56(c)(1)(A). 19 Summary judgment should be entered, after adequate time for discovery and upon motion, 20 against a party who fails to make a showing sufficient to establish the existence of an element 21 essential to that party's case, and on which that party will bear the burden of proof at trial. See 22 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an 23 essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Id.* 24 If the moving party meets its initial responsibility, the burden then shifts to the opposing party to 25 establish that a genuine issue as to any material fact actually does exist. See *Matsushita Elec. 26 Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the 27 existence of this factual dispute, the opposing party may not rely upon the allegations or denials 1 and/or admissible discovery material, in support of its contention that the dispute exists or shows 2 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed. 3 R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the 4 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the 5 governing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., 6 Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Further, the opposing 7 party must also demonstrate that the dispute is genuine, i.e., the evidence is such that a reasonable 8 jury could return a verdict for the nonmoving party. See *Wool v. Tandem Computers, Inc.*, 818 9 F.2d 1433, 1436 (9th Cir. 1987). In the endeavor to establish the existence of a factual dispute, 10 the opposing party need not establish a material issue of fact conclusively in its favor. It is 11 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the 12 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the 13 “purpose of summary judgment is to ‘pierce the pleadings and to assess the proof in order to see 14 whether there is a genuine need for trial.’” *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 15 56(e) advisory committee's note on 1963 amendments). 16 In resolving the summary judgment motion, the evidence of the opposing party is to be 17 believed. See *Anderson*, 477 U.S. at 255. All reasonable inferences that may be drawn from the 18 facts placed before the court must be

drawn in favor of the opposing party. See *Matsushita*, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

B. Exhaustion of Administrative Remedies

The PLRA provides that "[n]o action shall be brought with respect to prison conditions in any other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion of administrative remedies is mandatory and "unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). Inmates are required to "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court." *Woodford v. Ngo*, 548 U.S. 81, 88, 93 (2006). The exhaustion requirement applies to all inmate suits relating to prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), regardless of the relief sought by the prisoner or offered by the administrative process, *Booth v. Churner*, 532 U.S. 731, 741 (2001). The failure to exhaust administrative remedies is an affirmative defense, which the defendant must plead and prove. *Jones*, 549 U.S. at 204, 216. The defendant bears the burden of producing evidence that proves a failure to exhaust; summary judgment is appropriate only if the undisputed evidence, viewed in the light most favorable to the plaintiff, shows the plaintiff failed to exhaust. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014).

On a motion for summary judgment, the defendant must prove (1) the existence of an available administrative remedy and (2) that the plaintiff failed to exhaust that remedy. *Id.* at 1172 (citation omitted). If the defendant meets this burden, the plaintiff then "has the burden of production. That is, the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him." *Id.* (citation omitted). "However, ... the ultimate burden of proof remains with the defendant." *Id.*

An inmate "need not exhaust unavailable [remedies]." *Ross v. Blake*, 578 U.S. 632, 642 (2016). An administrative remedy is unavailable "when (despite what regulations or guidance materials may promise) it operates as a simple dead end with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; or when "an administrative scheme [is] so opaque that it becomes, practically speaking, incapable of use, [i.e.,] some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate [the mechanism]"; or "when machination, misrepresentation, or intimidation." *Id.* at 643-44.

When the district court concludes that the prisoner has not exhausted administrative remedies on a claim, "the proper remedy is dismissal

of the claim without prejudice.” *Wyatt v. 4 Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (citation omitted), overruled on other grounds by *5 Albino*, 747 F.3d at 1168-69. 6 “If a motion for summary judgment is denied, disputed factual questions relevant to 7 exhaustion should be decided by the judge.” *Albino*, 747 F.3d at 1170. If the court finds that 8 remedies were not available, the prisoner exhausted available remedies, or the failure to exhaust 9 available remedies should be excused, the case proceeds to the merits. *Id.* at 1171. 10 C. CDCR Grievance Process 11 The California Department of Corrections and Rehabilitation (CDCR) has an 12 administrative grievance system for prisoners to appeal a policy, decision, action, condition, or 13 omission by the department or staff if it has an adverse effect on prisoner health, safety, or 14 welfare. Cal. Code Regs. tit. 15, §§ 3084.1(a) (2018), 3999.226(a). Compliance with 42 U.S.C. 15 section 1997e(a) requires California-state prisoners to use CDCR’s grievance process to exhaust 16 their claims prior to filing suit in court. See *Sapp v. Kimbrell*, 623 F.3d 813, 818 (9th Cir. 2010); 17 see also *Woodford*, 548 U.S. at 85-86. Administrative appeals are generally subject to two to 18 three levels of review before the remedy is deemed exhausted. Cal. Code Regs. tit. 15, §§ 19 3084.1(b) (2018), 3084.7(d)(3) (2018), 3999.226(g), 3999.230(h); see also *Sapp*, 623 F.3d at 818.

20 V. EVIDENTIARY MATTERS

21 Plaintiff was served with the following Rand2 warning: 22 Please Take Notice that the defendant has made a motion for summary judgment by which he seeks to have a portion of your case 23 dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 24 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted 25 when there is no genuine issue of material fact—that is, if there is no real dispute about any fact that would affect the result of your case, 26 the party who asked for summary judgment is entitled to judgment as a matter of law, which may end a portion of your case. When a 27 2 *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc). 1 party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you 2 cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to 3 interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant’s declarations 4 and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, 5 summary judgment, if appropriate, may be entered against you. If summary judgment is granted, a portion of your case will be 6 dismissed and there will be no trial on that portion. *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998). 7 8 (Doc. 39-3 at 2.) The notice did not include language concerning this Court’s Local Rule 260, that 9 provides as follows: 10 Any party opposing a motion for summary judgment or summary adjudication shall reproduce the itemized facts in the Statement of 11 Undisputed Facts and admit those facts that are undisputed and deny those that are disputed, including with each denial a citation to the 12 particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied

upon in 13 support of that denial. The opposing party may also file a concise "Statement of Disputed Facts," and the source thereof in the record, 14 of all additional material facts as to which there is a genuine issue precluding summary judgment or adjudication. The opposing party 15 shall be responsible for the filing of all evidentiary documents cited in the opposing papers. See L.R. 133(j). If a need for discovery is 16 asserted as a basis for denial of the motion, the party opposing the motion shall provide a specification of the particular facts on which 17 discovery is to be had or the issues on which discovery is necessary. 18 Local Rule 260(b). 19 Nevertheless, where Plaintiff's verified complaint or evidence submitted in support of any 20 opposition to Defendant's motion for summary judgment call into dispute Defendant's proffered 21 facts, the Court considered the complaint and any evidence. *Jones v. Blanas*, 393 F.3d 918, 923 22 (9th Cir. 2004) (the court considers as evidence those parts of the verified complaint based on 23 plaintiff's personal knowledge).

24 VI. DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

25 1. Plaintiff Andres Serrano is in the custody of the California Department of Corrections 26 and Rehabilitation (CDCR). Serrano is presently an inmate at California Medical 27 Facility. In 2018, Serrano was an inmate at Mule Creek State Prison (Mule Creek).

2. Serrano filed his Complaint on July 28, 2022, alleging that Defendant R. Rudas, M.D.

1 failed to address pain in his knee resulting from prior surgeries, and failed to provide 2 appropriate medical care resulting in the amputation of his leg. 3 3. The health care grievance process for prisons is codified in California Code of 4 Regulations, title 15, sections 3999.225, et seq. Health care grievances are subject to 5 two levels of review, an institutional level of review, and a headquarters level of 6 review. After the headquarters disposition a health care grievance is deemed 7 exhausted. 8 4. Health care grievances are tracked and maintained in an electronic database known as 9 the Health Care Appeals and Risk Tracking System (HCARTS). HCARTS is kept as a 10 regularly conducted activity and the computer entries are made at or near the time of 11 the occurrence by the employee who is processing the health care grievance. 12 5. Before September 1, 2017, health care appeals were governed by sections §§ 3084 - 13 3086 of Title 15 of the California Code of Regulations, which govern the inmate 14 appeal process. Under that process, health care appeals were subject to three levels of 15 review before administrative remedies were deemed exhausted. Cal. Code Regs. tit. 16 15, § 3084.7(d)(3) (2016). Exceptions to this process are set forth in section § 3084.9 17 of Title 15. 18 6. New procedures related to grievances were officially enacted as regulations under Cal. 19 Code Regs. tit. 15, § 3087 on September 1, 2017. However, in 2019, the health care 20 grievances section was changed without regulatory effect and can now be found at

21 Title 15, §§ 3999.225 – 3999.237 of the California Code of Regulations. Under these

22 regulations, inmates may grieve complaints regarding health care policies, decisions, 23 actions, conditions, or omissions using a CDCR 602 HC form within 30 calendar days 24 of: the action or decision being grieved; or initial knowledge of the action or decision 25 being grieved.

Cal. Code Regs. tit. 15, §§ 3999.226, 3999.227(a), 3999.227(b)(1)-(2) 26 (2019). Such complaints are now called health care “grievances” and are subject to 27 two levels of review, an institutional level of review and a headquarters level of 1 subject to a headquarters’ disposition before administrative remedies are deemed 2 exhausted. Cal. Code Regs. tit. 15, § 3999.226(g) (2019). The grievant shall document 3 clearly and coherently all information known and available to the grievant regarding 4 the issue. Cal. Code Regs. tit. 15, § 3999.227(g) (2019). The grievant shall include any 5 involved staff member’s last name, first initial, title or position, and the date and 6 description of their involvement. Cal. Code Regs. tit. 15, § 3999.227(g)(1) (2019). If 7 the grievant does not have information to identify involved staff member(s), the 8 grievant shall provide any other available information that may assist in processing the 9 health care grievance. Cal. Code Regs. tit. 15, § 3999.227(g)(2) (2019). 10 7. On September 9, 2018, Serrano submitted grievance MCSP HC18002563 (Grievance) 11 asserting that he was being denied morphine for chronic pain. He stated in pertinent 12 part: [¶] “At that time Dr. K. Matharu put me on a pain management treatment which 13 was (1) one 15 mg IR morphine twice a day. He then had me sign a (CDCR 7474) 14 (See Attachment). On (8-13-18) my pain meds ran out. I put in a renewal order CDCR 15 7362 Form as I did the month prior (7-14-18). This time my pain meds were 16 discontinued by Dr. R. Rudas. I then put in a CDCR 7362 form on 8-1618 (see 17 attachment). I was seen by (RN A. Kourtnee). RN Kourtnee evaluated me and seen 18 Dr. K. Matharu ‘Notes’ on (6-15-18) via computer she said she would ask Dr. R. 19 Rudas to renew my pain meds. When she returned RN A. Kourtnee told me Dr. R. 20 Rudas said quote ‘he would not renew my pain medication, that theres a new sheriff in 21 town.’” 22 8. Serrano was sent the Institutional Level Response to the Grievance on November 9, 23 2018, in which he was advised: [¶] “You had a CDCR 7362 Health Care Services 24 Request For (7362) RN appointment on August 20, 2018, requesting the medication, 25 Morphine be renewed. The primary care provider (PCP) was consulted and stated 26 opiates are not indicated for chronic pain. You were educated to continue Naproxen 27 for pain. RN Martinez contacted your PCP and inquired fi there was anything else that 1 and your PCP responded that you would be scheduled to be seen to consider Cymbalta 2 (NON-NARCOT1C) treatment.” 3 9. Serrano was sent the Headquarters Level Response on March 13, 2019, stating No 4 Intervention. The Headquarters Level Response advised: [¶] “Your most recent 5 primary care provider evaluation for issues related to this grievance was on February 6 19, 2019; the provider noted a history of chronic right knee pain post failed knee 7 replacement surgeries. An examination was completed, noting a referral for an 8 orthopedic surgery consultation was submitted. There is no documentation to support 9 the primary care provider determined morphine was medically indicated at that time. 10 Records indicate you have a primary care provider appointment currently pending 11 scheduling to review the orthopedic surgery consultation referral. Your current 12 medication profile indicates orders for cholecalciferol and acetaminophen for pain.” 13 10. At the request of defense counsel, CCHCS reviewed the HCARTS database for 14 grievances submitted by Serrano between 2015 and July 28, 2022. Serrano submitted 15 the

listed grievances and received dispositions as follows. 16 a. MCSP HC 15046508 (Exhibit C) was received at the institutional level on

17 April 6, 2015. The plaintiff's stated issues included: chrono issues (cell
18 feeding; device issues (brace); and chrono issues (all chronos updated). This 19 grievance was accepted for processing. The plaintiff was issued an Institutional 20 Level Response dated May 13, 2015, and it was granted in part. A second level 21 decision was issued on July 10, 2015, and the appeal was granted in part. The 22 grievance was received for headquarters level review on August 7, 2015, and 23 the plaintiff was issued a Headquarters Level Response dated October 15, 24 2015, denying the grievance. 25 b. MCSP HC 16048321 (Exhibit D) was received at the institutional level on

26 March 5, 2016. Serrano's stated issues included: disagreement with treatment
27 (primary care provider [none identified]) and chrono issues (cell feeding). [¶] 1 an M.R.I. for my possible meniscus tear. My concern is the floors are wet in 2 the chow hall & I have a chrono from I.C.C. Stating my chrono is not carrying 3 tray but not walking on wet floors. Clearly stated I want my cell feed back and 4 for it to be permanant [sic] to avoid further issue. Note as well I was given this 5 chrono on 3/11/16. This is what my 602 is about." [¶] Plaintiff attached an 6 accommodation chrono for housing on lower tier and a lower bunk issued by 7 Clinician G. Pettersen on July 2, 2015, which expired on October 2, 2015, and 8 a permanent accommodation chrono for lower bunk, lower tier housing, an 9 inmate attendant/assistance, transport vehicle with left, extra time for meals, 10 lifting restrictions and no rooftop work issued by Clinician Wesley Vaughn on

11 March 11, 2016 with no expiration. [¶] This grievance was accepted for
12 processing. The plaintiff was issued a First Level Response dated May 4, 2016, 13 and it was granted in part. A second level decision was issued on June 22, 14 2016, and the appeal was denied. 15 c. MCSP HC 16049319 (Exhibit E) was received at the institutional level on

16 August 29, 2016. Serrano's stated issues included: medication (Med Renewal).
17 This grievance was accepted for processing. The plaintiff was issued a First 18 Level Response dated October 7, 2016, denying the grievance. 19 d. MCSP HC 17000356 (Exhibit F) was received at the institutional level on

20 October 24, 2017. Serrano's stated issues included: Referral (orthopedics) and
21 Medical Device (orthopedic Shoe/Supports). This grievance was accepted for 22 processing. The plaintiff was issued an Institutional Level Response dated
23 January 2, 2018, with a disposition of No Intervention.

24 e. MCSP HC 17050791 (Exhibit G) was received at the institutional level on

25 March 21, 2017. Serrano's stated issues included: Disagreement with
26 Treatment (Primary Care Provider) [Vaughn] and Medication (Lotion/Cream). 27 This grievance was accepted for processing. The plaintiff was issued an 1 in part. A second level decision was issued on June 22, 2017, denying the 2 grievance. 3 (Doc. 39-2 [hereafter UDF].)

4 VII. RELEVANT GRIEVANCE: MCSP HC 180025633

5 Plaintiff's relevant health care grievance was signed and dated September 9, 2018, and 6 assigned log number MCSP HC 18002563. It reads as follows:

7 On 2-26-18 Dr. K. Matharu requested an orthopedic surgery
consultation. On 6-12-18 I was seen by Dr. John Casey at San 8 Joaquin Hosp. His examination
finding (see attachment) show my R TKA w/multiple revision, function decline, loosening, and
severe 9 atrophy with more severe pain since last seen by Dr. Casey on 4-12- 16 (see attachment).
I was seen again by Dr. Matharu on 6-15-18. 10 We discussed Dr. Casey's findings and at that time
Dr. Matharu put me on a pain management treatment which was (1) one 15 mg IR 11 morphine
twice a day. He then had me sign a CDCR 7474 (see attachment). On 8-13-18 my pain meds ran
out. I put in renewal order 12 CDCR 7362 form as I did the month prior (7-14-18). This time my
pain meds were discontinued by Dr. R. Rudas. I then put in a CDCR 13 7362 form on 8-16-18 (see
attachment). I was seen by RN A. Kourtnee. RN Kourtnee evaluated me and seen Dr. Matharu
"Notes" 14 on 6-15-18 via computer. She said she would ask Dr. Rudas to renew my pain meds.
When she returned RN Kourtnee told me Dr. Rudas 15 said quote "He would not renew my pain
medication, that there's a new sheriff in town." This is an emergency 602. I've been without 16 my
pain medication since 8-13-18-cannot bear any weight on my r/leg, in severe pain. 17 18 (See
Doc. 39-4 at 18 [Section A], 20 [Continuation, Section A].)4 Plaintiff attached supporting 19
documents including "(CDC 7243-(Office/Clinic Note 6-12-18) – (Preliminary Consultation 4- 20
12-16 1-of-2) – (CDCR 7474 6-15-18) – (CDC 7362 8-16-18).)" (Id.) 21 In the institutional level
response dated November 9, 2018, the issues are described as (1) 22 "Disagrees with treatment by
primary care provider (PCP)," (2) "Disagrees with Morphine being 23 discontinued," and (3) "To
be provided Morphine." (See Doc. 39-4 at 22.) The disposition is 24 3 The Court has reviewed all
exhibits submitted with Defendant's motion. It has elected not to summarize health care 25
grievances that are not relevant to whether Plaintiff exhausted his specific claim that Defendant
Rudas failed to provide him adequate medical care in 2018 as these other grievances involve other
issues and were submitted prior to 26 the grievance at issue here. (See, e.g., 39-4 at 43-63 [Exhibit
C - MCSP HC 15046508], 64-80 [Exhibit D - MCSP HC 16048321], 81-85 [Exhibit E – MCSP
HC 1604319], 86-100 [Exhibit F – MCSP HC 17000356], 101-125 27 [Exhibit G – MCSP HC
17050791].) 4 1 "Intervention" and the basis for the disposition is as follows: 2 You had a CDCR
7362 Health Care Services Request form (7362) RN appointment on August 20, 2018, requesting
the medication, 3 Morphine be renewed. The primary care provider (PCP) was consulted and
stated opiates are not indicated for chronic pain. You 4 were educated to continue Naproxen for
pain. RN Martinez contacted your PCP and inquired if there was anything else that can 5 be done
for your pain management while you are awaiting your surgical consult and your PCP responded
that you would be 6 scheduled to be seen to consider Cymbalta (NON-NARCOTIC) treatment. 7 8
(Id. at 23.) Plaintiff was advised that if he was "dissatisfied with the Institutional Level 9
Response," he was to "explain the reason in Section B of the CDCR 602 HC, Health Care 10

Grievance, and submit the entire health care grievance package for headquarters' review. The 11 headquarters' level review constitutes the final disposition on your health care grievance and 12 exhausts your administrative remedies." (Id. at 24.) 13 Thereafter, Plaintiff explained his dissatisfaction with the institutional level response: 14 I am dissatisfied with the [institutional] level. I'm sending Doctor Rudas own documents as "evidence" of how his own assessment 15 shows how [severe] my situation is but yet he and the medical staff do nothing to help with my pain. I [suffered] daily as to where I can 16 not perform my ADLs and I [stopped] taking showers due to falling twice. Doctor Rudas discontinued my pain medication for no other 17 reason then to see me suffer and to torture me. The Cymbalta did not help me with pain and was discontinued also. I need help. 18 19 (See Doc. 19-20 [Section B].) 20 In the headquarters level response dated March 13, 2019, the issue identified in the appeal 21 is "Discontinued pain medication" and the medication at issue is identified as "Morphine." (See

22 Doc. 39-4 at 15.) The disposition is "No intervention." (Id.) In part, the response reads as follows:

23 Your health care grievance package, health record, and all pertinent departmental policies and procedures were reviewed. These records 24 indicate you are enrolled in the Chronic Care Program where your medical conditions and medication are closely monitored. Your 25 medical records support your having received evaluation and treatment was determined medically necessary, including but not 26 limited to: primary care provider evaluation, registered nurse assessment, durable medical equipment, and medication. Your most 27 recent primary care provider evaluation for issues related to this grievance was on February 19, 2019; the provider noted a history of 1 examination was completed, noting a referral for an orthopedic surgery consultation was submitted. There is no documentation to 2 support the primary care provider determined morphine was medically indicated at that time. Records indicate you have a primary 3 care provider appointment currently pending scheduling to review the orthopedic surgery consultation referral. Your current medication 4 profile indicates orders for cholecalciferol and acetaminophen for pain. 5 6 (See Doc. 39-4 at 15-16.)

7 VIII. DISCUSSION

8 The Court must determine whether Plaintiff exhausted his administrative remedies 9 regarding his Eighth Amendment deliberate indifference to serious medical needs claim 10 specifically concerning the adequacy of medical treatment by Defendant Rudas. Rudas does not 11 argue that Plaintiff's claim concerning the discontinuation of morphine is not exhausted and the 12 record reveals that claim is, in fact, exhausted. The Court's focus is limited to determining 13 whether Plaintiff's MCSP HC 18002563 grievance is exhausted by sufficiently addressing, and 14 providing notice of, Plaintiff's claim as alleged in the operative complaint that Rudas failed to 15 provide him with adequate medical care or treatment. 16 A. Grievance MCSP HC 18002563 Did Not Exhaust Plaintiff's Claim Against Defendant Rudas Concerning the Adequacy of Medical Care 17 Unrelated to the Discontinuation of Pain Medication 18 1. Defendant Has Met His Initial

Burden 19 Defendant Rudas's evidence establishes there was an administrative remedy available to 20 Plaintiff at Mule Creek State Prison. See UDF 3-6. Further, Defendant's evidence establishes that 21 Plaintiff failed to exhaust that remedy as concerns his claim that Defendant failed to provide 22 adequate medical care. See UDF 7-10. 23 Specifically, the evidence reveals that the relevant grievance complained of Defendant 24 Rudas's discontinuation of prescription morphine in August 2018. UDF 7. The grievance did not 25 set forth any facts indicating that Defendant Rudas failed to provide adequate medical care. *Id.* In 26 fact, Plaintiff's operative complaint indicates that at the time Defendant discontinued Plaintiff's 27 morphine, Plaintiff had not yet been seen by Defendant Rudas. (See Doc. 1 at 4:22-27 ["Dr. 1 discontinue my pain medication"].) While a grievance "need not include legal terminology or 2 legal theories," there is nothing in the relevant grievance that would alert prison officials to the 3 factual basis for Plaintiff's theory that Rudas failed to provide adequate medical care—the 4 grievance solely concerns Plaintiff's complaint that Rudas discontinued the morphine 5 prescription. See *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). Thus, the undersigned 6 finds that MCSP HC18002563 failed to alert the prison to the nature of the wrong for which 7 redress is sought and provide sufficient information "to allow prison officials to take appropriate 8 responsive measures" with respect to whether Defendant Rudas failed to provide medical 9 treatment in violation of Plaintiff's Eighth Amendment rights. See *id.* at 1121 (quoting *Johnson v. Testman*, 380 F.3d 691, 697 (2nd Cir. 2004)). 11 To the extent the institutional level response to Plaintiff's grievance identifies three issues, 12 including Plaintiff's disagreement with his PCP, the Court finds that reference too relates directly 13 to Plaintiff's complaint regarding the discontinuation of prescription morphine when read in 14 context. Moreover, the headquarters level response references and considered only the 15 discontinuation of pain medication. 16 Significantly too, the Court notes Plaintiff's grievance is dated September 9, 2018, yet 17 Plaintiff's complaint indicates he was treated by Defendant Rudas on October 15, October 23,

18 November 7, and December 3, 2018. (See Doc. 1 at 4:28, 5:18, 6:10, 19-22; see also Doc. 47 at 2-

19 4 [same; Plaintiff's opposition].) Therefore, Plaintiff's complaints about the adequacy of any 20 treatment by Defendant Rudas had not yet arisen when Plaintiff submitted grievance MCSP HC 21 18002563. Thus, that grievance did not exhaust Plaintiff's claim against Rudas concerning the 22 adequacy of medical treatment. *Sapp*, 623 F.3d at 818; *Morton v. Hall*, 599 F.3d 942, 946 (9th 23 Cir. 2010) (finding grievance that complained of visitation restrictions and did not mention an 24 assault or that the visitation restriction was related to the assault was insufficient to put prison 25 officials on notice that staff conduct contributed to the assault); *O'Guinn v. Lovelock Correctional* 26 *Center*, 502 F.3d 1056, 1062 (9th Cir. 2007) (grievance requesting lower bunk due to plaintiff's 27 balance issues caused by previous brain injury did not exhaust claim that prison deprived plaintiff 1 P, 2022 WL 4096178, at *8 (E.D. Cal. Sept. 7, 2022) ("As the grievances did not identify ... 2 actions taken by [defendant Fox] and were filed before plaintiff's claim against

defendant Fox 3 arose, the grievances could not alert the prison to the harm stated in plaintiff's claim against 4 defendant Fox as this harm had not yet occurred. ... Therefore, these grievances cannot exhaust 5 plaintiff's claim against defendant Fox"); *Patkins v. Ferguson*, No. 18-cv-05139-EMC, 2020 WL 6 978649, at *7 (N.D. Cal. Feb. 28, 2020) ("Mr. Patkins' inmate appeals that mentioned retaliation 7 generally and some specific acts of retaliation did not suffice to exhaust administrative remedies 8 for other specific acts of retaliation that were not mentioned in the inmate appeals"); *Ethridge v. 9 Rodriguez*, No. 1:12-cv-2088 AWI SAB PC, 2015 WL 13237012, at *7 (E.D. Cal. Nov. 13, 2015) 10 ("Administrative remedies are not exhausted as to any new issue, information or person later 11 named by the appellant prisoner that was not included in the originally submitted CDCR Form 12 602 and addressed through all levels of administrative review"). 13 For the reasons discussed above, even viewing the evidence in the light most favorable to 14 Plaintiff, the Court finds Defendant Rudas has met his initial burden of showing the existence of 15 an available administrative remedy and that Plaintiff failed to exhaust that remedy as concerns his 16 claim that Defendant failed to provide adequate medical care. *Albino*, 747 F.3d at 1166, 1172. 17 The burden now shifts to Plaintiff to "come forward with evidence showing that there is 18 something in his particular case that made the existing and generally available administrative 19 remedies effectively unavailable to him." *Id.* 20 2. Plaintiff Has Failed to Meet His Burden of Production 21 First, the Court notes that Plaintiff disputes UDF numbers 2 through 4 and 7. As concerns 22 UDF 2—"Serrano filed his Complaint on July 28, 2022, alleging that Defendant R. Rudas, M.D. 23 failed to address pain in his knee resulting from prior surgeries, and failed to provide appropriate 24 medical care resulting in the amputation of his leg"—Plaintiff states: "Plaintiff deny plaintiff 25 made the statement made by defendant." (Doc. 47 at 6.) But UDF number 2 does not attribute any 26 statement to Plaintiff; rather, it merely summarizes the allegations in Plaintiff's complaint. 27 Plaintiff's objection should be overruled. *Anderson*, 477 U.S. at 248. 1 argues "Plaintiffs' denys [sic] that this Cal. Code Regs., tit. 15, §§ 3999.227-399.237 was the 2 Rules and Regulation for the California Code of Regulations Title 15, which govern the inmate 3 appeals process, and was already available to any inmate in the [CDCR] in 2018." (Doc. 47 at 8- 4 9.) Plaintiff admits that before September 1, 2017, health care appeals were governed by "sections 5 §§ 3084-3086...and plaintiffs will admit that in 2019 the health care grievances section was 6 changed without regulatory effect and can now be found at Title 15, §§ 3999.225-3999.237" 7 (*Id.* at 9.) Plaintiff's objections to UDF numbers 3 and 4 do not present a genuine issue of 8 material dispute. Regardless of which section of the California Code of Regulations applies to 9 Plaintiff's grievance, this record demonstrates that administrative remedies were available to 10 Plaintiff. His objections should be overruled. *Anderson*, 477 U.S. at 248. 11 As concerns UDF 7, Plaintiff alleges his grievance MCSP HC 18002563 asserts "that he 12 was being denied any helpful medical treatment or any helpful medication," citing to his 13 complaint at page 2, lines 1-16.5 (Doc. 47 at 9.) But as this Court found above, that grievance 14 exhausts only Plaintiff's claim that Defendant Rudas discontinued his pain medication, in 15

significant part because Plaintiff had not yet been seen by Defendant at the time his grievance 16 was submitted. Thus, Plaintiff's objection to UDF number 7 should be overruled. See *Cafasso*, 17 U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1061 (9th Cir. 2011) ("To survive 18 summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not 19 sweeping conclusory allegations"); *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 20 (9th Cir. 1996) (a mere allegation does not create a factual dispute). 21 Further, to the extent Plaintiff's opposition to Defendant's summary judgment motion 22 relies solely on the allegations asserted in his original complaint, such reliance is insufficient to 23 meet his burden of production. Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 586, n.11. 24 Next, to the extent Plaintiff argues the merits of his claims in his opposition, those 25 arguments are not appropriate. Defendant's summary judgment motion concerns the exhaustion 26 of administrative remedies only. See, e.g., *Williams v. Thompson*, No. 1:19-cv-00330-AWI-CDB 27 5 The Court's CM/ECF system designates this page as "Page 5" despite Plaintiff's handwritten entry designating that 1 (PC), 2023 WL 2823388 at *1 (E.D. Cal. Apr. 7, 2023) ("at this stage of the proceedings, 2 defendants' motion for summary judgment is based on non-exhaustion of remedies and does not 3 address the merits of his constitutional claims"). Hence, the merits of Plaintiff's claims were not 4 considered here and would be addressed only in any later filed summary judgment motion not 5 involving the exhaustion of administrative remedies, if appropriate.6 6 Finally, Plaintiff does not argue administrative remedies were unavailable to him. And 7 nothing in this record indicates the administrative grievance procedure at Mule Creek State Prison 8 "operates as a simple dead end," or is "so opaque that it becomes ... incapable of use," or that any 9 prison officials thwarted Plaintiff "from taking advantage" of the process by "machination, 10 misrepresentation, or intimidation." *Ross*, 578 U.S. at 643-44. 11 In short, Plaintiff has failed to meet his burden to produce evidence indicating "there is 12 something in his particular case that made the existing and generally available administrative 13 remedies effectively unavailable to him." *Albino*, 747 F.3d at 1172. Nor has Plaintiff shown that 14 the materials cited by Defendant do not establish the absence of a genuine dispute. Fed. R. Civ. P. 15 56(c); *Matsushita*, 475 U.S. at 586. 16 Summary 17 The Court finds that the MCSP HC 18002563 grievance did not exhaust Plaintiff's 18 administrative remedies regarding his deliberate indifference to serious medical needs claim 19 against Defendant Rudas for a failure to provide adequate medical care. Therefore, the 20 undersigned will recommend Defendant's motion for partial summary judgment be granted.7

21 IX. CONCLUSION AND RECOMMENDATION

22 Based upon the foregoing, this Court HEREBY RECOMMENDS that: 23 1. Defendant's motion for partial summary judgment based on Plaintiff's failure to 24 25 6 See Doc. 29 (Discovery and Scheduling Order issued 7/10/2024) at 3 ("The deadline for filing all dispositive motions (other than a motion for summary judgment for failure to exhaust) is May 19, 2025" [emphasis omitted]). 26 7 To be clear, Plaintiff's claim concerning Defendant Rudas's discontinuation of pain medication is exhausted and 27 therefore the Court's recommendation does

not affect that claim. Assuming the recommendation were to be adopted by the presiding district judge, this action would proceed against Defendant Rudas on that claim alone. 1 exhaust his claim that Defendant Rudas failed to provide adequate medical care (Doc. 2 39) be GRANTED; and 3 2. Plaintiffs claim against Defendant Rudas alleging a violation of the Eighth 4 Amendment for deliberate indifference to Plaintiffs serious medical needs based on 5 the allegation that Defendant Rudas failed to provide adequate medical care be 6 DISMISSED without prejudice. 7 These Findings and Recommendations will be submitted to the United States District 8 | Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(). Within 14 days 9 | after being served with a copy of these Findings and Recommendations, a party may file written 10 | objections with the Court. Local Rule 304(b). The document should be captioned, “Objections to 11 | Magistrate Judge’s Findings and Recommendations” and shall not exceed 15 pages without 12 | leave of Court and good cause shown. The Court will not consider exhibits attached to the 13 | Objections. To the extent a party wishes to refer to any exhibit(s), the party should reference the 14 | exhibit in the record by its CM/ECF document and page number, when possible, or otherwise 15 | reference the exhibit with specificity. Any pages filed in excess of the 15-page limitation may be 16 | disregarded by the District Judge when reviewing these Findings and Recommendations under 28 17 | U.S.C. § 636(b)()(C). A party’s failure to file any objections within the specified time may result 18 | in the waiver of certain rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014). 19 | IT IS SO ORDERED. | Dated: _ May 21, 2025 | Wr bo
21 UNITED STATES MAGISTRATE JUDGE
22 23 24 25 26 27 28 21