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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Saul Beltran-Ojeda,

Plaintiff,

vs.

John Doe, et al.,

Defendants.

) No. CV 12-1287-PHX-DGC (MEA)

) **ORDER**

Plaintiff Saul Beltran-Ojeda brought this civil rights action under 42 U.S.C. § 1983 against Maricopa County Sheriff Joseph Arpaio and Dr. Richard Friedman (Doc. 10). Before the Court is Defendants’ second Motion to Dismiss (Doc. 24), which Plaintiff opposes (Doc. 26). The Court will grant the motion in part and deny it in part.

I. Background

In Count I of his Second Amended Complaint, Plaintiff alleged that, in violation of the Fourteenth Amendment, Arpaio was deliberately indifferent to unsafe conditions of confinement and, as a result, Plaintiff contracted hepatitis C (Doc. 10 at 3). In Count II, Plaintiff alleged that, in violation in the Fourteenth Amendment, Dr. Friedman failed to treat Plaintiff’s hepatitis C symptoms (*id.* at 4).

Defendants move to dismiss Plaintiff’s claims on the ground that he failed to properly

1 exhaust administrative remedies as required under the Prison Litigation Reform Act (PLRA),
2 42 U.S.C. § 1997e(a) (Doc. 24).¹

3 **II. Exhaustion Legal Standard²**

4 Under the PLRA, a prisoner must exhaust available administrative remedies before
5 bringing a federal action. See 42 U.S.C. § 1997e(a); Griffin v. Arpaio, 557 F.3d 1117, 1119
6 (9th Cir. 2009). Exhaustion is required for all suits about prison life, Porter v. Nussle, 534
7 U.S. 516, 523 (2002), regardless of the type of relief offered through the administrative
8 process, Booth v. Churner, 532 U.S. 731, 741 (2001). A prisoner must complete the
9 administrative review process in accordance with the applicable rules. See Woodford v.
10 Ngô, 548 U.S. 81, 92 (2006).

11 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 212 (2007). Thus,
12 the defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
13 F.3d at 1119. There can be no absence of exhaustion unless a defendant demonstrates that
14 applicable relief remained available in the grievance process. Brown v. Valoff, 422 F.3d
15 926, 936-7 (9th Cir. 2005). Because exhaustion is a matter of abatement in an unenumerated
16 Rule 12(b) motion, a court may look beyond the pleadings to decide disputed issues of fact.
17 Wyatt, 315 F.3d at 1119-20. And when considering disputed issues of fact, a court has broad
18 discretion as to the method used in resolving the dispute because “there is no right of jury
19 trial” as to an issue arising in a pre-answer motion. Ritza v. Int’l Longshoremen’s &
20 Warehousemen’s Union, 837 F.2d 365, 369 (9th Cir. 1988) (quotation omitted). If a court
21 finds that the plaintiff failed to exhaust administrative remedies, the proper remedy is
22 dismissal without prejudice. Wyatt, 315 F.3d at 1120.

23
24 ¹The Court issued the Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120
25 n. 14 (9th Cir. 2003), which informed Plaintiff of his obligation to respond and the evidence
26 necessary to successfully rebut Defendants’ contentions (Doc. 25).

27 ²In their motion, Defendants set forth the standard under Federal Rule of Civil
28 Procedure 12(b)(6) that applies to motions to dismiss for failure to state a claim (Doc. 24 at
2-3). That is not the standard applied to motions to dismiss for failure to exhaust remedies.
See Wyatt, 315 F.3d at 1119 (failure to exhaust remedies subject to an unenumerated Rule
12(b) motion).

1 **III. Medical Grievance Procedure**

2 To demonstrate that there were remedies available, Defendants must submit adequate
3 and complete documents of the grievance system established at the Maricopa County
4 Sheriff's Office (MCSO) jail. See Wyatt, 315 F.3d at 1119, 1120 & n. 5; see also Brown,
5 422 F.3d at 936-37. Defendants submit the affidavit of Michelle Kraetsch, a Sergeant
6 assigned to the MCSO Inmate Hearing Unit (Doc. 24, Ex. A, Kraetsch Aff. ¶ 1). She avers
7 that inmates are notified of the grievance procedures when they receive the MCSO Rules and
8 Regulations, which is available in both English and Spanish (id. 6). Attached to Kraetsch's
9 affidavit are a copy of MCSO Policy DJ-3, *Inmate Grievance Procedure*, and excerpts from
10 the *MCSO Rules and Regulations* (id., Attachs. 1-2).

11 Kraetsch states that under Policy DJ-3, the first step in the medical grievance
12 procedure requires an inmate to submit a medical grievance form, which is forwarded—via
13 the Bureau Hearing Unit—to the medical unit for the charge nurse to respond (id. ¶ 5). If not
14 satisfied with the response, the inmate may submit an Institutional Grievance Appeal, which
15 is forwarded—again via the Bureau Hearing Unit—to the medical unit for a response (id.).
16 If not satisfied, the inmate may file an External Appeal Grievance form, which is picked up
17 by a detention sergeant, forwarded to the Bureau Hearing Unit, and then forwarded to the
18 medical unit (id.). The Correctional Health Services Liaison then determines if the grievance
19 ends or should be sent to the External Referee for a response (id.). Any response from the
20 External Referee is forwarded to the inmate, and the administrative remedy process is
21 completed (id.). At each step in the process, there are time frames in which the inmate must
22 file each appeal and medical staff must respond (id.; Doc. 24, Ex. A, Attach. 2 (Doc. 24-1
23 at 23)).

24 **IV. Discussion**

25 **A. Plaintiff's Grievance #12-01148**

26 Defendants state that four months after Plaintiff filed this lawsuit, he submitted a
27 medical grievance, identified as grievance #12-11048 (Doc. 24 at 6). According to
28 Defendants, this is the only grievance Plaintiff exhausted prior to filing his Second Amended

1 Complaint (*id.*). They argue that this grievance does not serve to exhaust remedies because
2 (1) the issue raised in the grievance is unrelated to the claims in this lawsuit and (2) the
3 grievance was not exhausted prior to Plaintiff initiating the lawsuit (*id.* at 6-7). As to this
4 second ground, Defendants assert that because the claims in Plaintiff’s Second Amended
5 Complaint arose before he filed his original complaint—as evidenced by the fact that he
6 raised the same claims in his original complaint—he was required to exhaust remedies prior
7 to initiating the lawsuit (*id.* at 7). See Rhodes v. Robinson, 621 F.3d 1002, 1006-07 (9th Cir.
8 2010) (if new claims arise *after* the original Complaint is filed, the exhaustion requirement
9 is satisfied with respect to these new claims if they are exhausted prior to the filing of a
10 supplement, amended complaint).

11 Plaintiff filed his original Complaint on June 4, 2012 (Doc. 1 at 6) and his Second
12 Amended Complaint on November 14, 2012 (Doc. 10 at 7). He initiated grievance #12-
13 11048 on October 15, 2012 (Doc. 24, Ex. A, Attach. 4 (Doc. 24-3 at 8)). The grievance was
14 appealed through to the External Referee and timely responded to on November 19, 2012
15 (Doc. 24, Ex. A, Attach. 4 (Doc. 24-3 at 11)).

16 Defendants mistakenly assert that grievance #12-11048 was exhausted before the date
17 of the Second Amended Complaint (Doc. 24 at 7). They appear to rely on the court docket
18 showing that the amended pleading was received and docketed on December 3, 2012 (Doc.
19 10). But the filing date is the date Plaintiff signed the amended pleading—November 14,
20 2012 (*id.* at 7). See Houston v. Lack, 487 U.S. 266, 273 (1988) (filing date is the date a
21 prisoner delivers his complaint to prison officials for mailing); Douglas v. Noelle, 567 F.3d
22 1103, 1108 (9th Cir. 2009) (the date prisoner delivers complaint to officials for mailing is
23 determined by the date of the prisoner’s declaration). Thus, Plaintiff filed his Second
24 Amended Complaint five days *before* receiving the External Referee’s response, which does
25 not constitute proper exhaustion, regardless of when Plaintiff’s claims arose.

26 **B. Availability of Remedies**

27 The PLRA “does not require exhaustion when circumstances render administrative
28 remedies ‘effectively unavailable.’” Sapp v. Kimbrell, 623 F.3d 813, 822 (9th Cir. 2010).

1 An administrative remedy becomes unavailable for purposes of exhaustion if prison officials’
2 actions thwart an inmate’s attempts to exhaust. See, e.g., Nunez v. Duncan, 591 F.3d 1217,
3 1226 (9th Cir. 2010); Brown, 422 F.3d at 943 n. 18. Administrative remedies may also be
4 unavailable when prison officials fail to respond to properly filed grievances or fail to abide
5 by internal regulations governing the appeals process. See Nunez, 591 F.3d at 1224; Brown,
6 422 F.3d at 937-38, 943 n. 18. The Ninth Circuit has explained that information provided
7 to the prisoner, such as response memoranda and regulations or directives that explain the
8 scope of the grievance process, serves to demonstrate whether remedies remained available.
9 Brown, 422 F.3d at 937 (“information provided the prisoner is pertinent because it informs
10 our determination of whether relief was, as a practical matter, ‘available’”).

11 Plaintiff states that he attempted to exhaust numerous medical grievances, but MCSO
12 staff did not comply with Policy DJ-3 in that they failed timely pick up Plaintiff’s grievances.
13 Plaintiff states that they signed-off on some grievances without informing him if there were
14 errors or allowing him to correct deficiencies, they failed to timely respond to grievances,
15 and they failed to inform him which documents he should use (Doc. 26 at 5-9). He alleges
16 that MCSO staff intentionally prevented processing of his appeals and that he did not receive
17 any assistance from CHS or MCSO staff for his inability to speak or write English (id. at 8-
18 11). Plaintiff specifically alleges that he received no orientation and that, on numerous
19 occasions, he asked for an interpreter so that he could get responses to his grievances in
20 Spanish (id. at 10-11).³ According to Plaintiff, without an interpreter or staff assistance, he
21 was forced to seek help from other inmates to write health requests and grievances and to
22 interpret what many of the grievances said (id.). He points out that all of his documents are
23 clearly written by different inmates because he did not have an interpreter, and he states that
24 it has been very difficult for him (id. at 11). Plaintiff adds that many of his grievances
25 submitted in Spanish were refused (id. at 12).

27 ³Two grievances submitted by Plaintiff are written in Spanish and the response from
28 jail officials is written in English (Doc. 26, Attach. 3 (grievance #12-07604 and #12-06240)
(Doc. 26-3 at 9, 11)).

1 In their reply, Defendants do not address Plaintiff's claim that he did not receive any
2 staff assistance with grievances despite his inability to speak or write English, nor do they
3 dispute his claims that he made requests for an interpreter and that he received no orientation
4 (see Doc. 27). As mentioned, the *Rules and Regulations* are available in Spanish, and
5 Kraetsch attests that so are the grievance forms (Doc. 24, Ex. A, Kraetsch Aff. ¶¶ 6-7).
6 Nonetheless, Policy DJ-3 specifically provides that jail staff must make a reasonable effort
7 to provide an interpreter for those inmates who do not read or communicate in English
8 (Doc. 24, Ex. A, Attach. 1 (Doc. 24-1 at 9-10)). Thus, if Defendants failed to provide any
9 interpreter assistance to Plaintiff when requested, and at the same time refused to accept
10 some grievances in Spanish and responded to some grievances only in English, it may
11 support a finding that remedies were rendered unavailable, which would constitute an
12 exception to the exhaustion requirement. See Nunez, 591 F.3d at 1224 (an administrative
13 remedy is not available if a prisoner, through no fault of his own, was prevented from
14 availing himself of it).

15 The record demonstrates that Plaintiff was aware of the grievance procedure at the jail
16 (Doc. 10 at 5; Doc. 26 at 6). Therefore, to qualify for an exception to the exhaustion
17 requirement, he must show that he filed a grievance that would have sufficed to exhaust his
18 claim but that, due to jail officials' actions, he was prevent from exhausting it. See Sapp, 623
19 F.3d at 823-24.

20 Before reviewing Plaintiff's medical grievances to determine whether any would have
21 sufficed to exhaust the claims in this lawsuit, the Court must address an issue Defendants
22 raised above with regard to grievance #12-11048. That is, are the claims in Counts I and II
23 of the Second Amended Complaint "new" claims that arose after Plaintiff filed his original
24 complaint, in which case he needed only to exhaust prior to filing the amended pleading on
25 November 14, 2012, or did the Second Amended Complaint claims arise before the original
26 complaint was filed, in which case Plaintiff had to exhaust prior to initiating the lawsuit on
27 June 4, 2012. See Rhodes, 621 F.3d at 1006-07. As Defendants point out in their motion
28 (Doc. 24 at 8), Plaintiff raised the exact same claims in both his original complaint and the

1 Second Amended Complaint; specifically, (1) that his constitutional rights were violated
2 when he contracted hepatitis C during his confinement as a result of unsanitary conditions
3 of confinement (compare Doc. 1, Count I with Doc. 10, Count I), and (2) that his
4 constitutional rights were violated when Defendant Doe—later identified as Dr.
5 Friedman—failed to provide treatment for his hepatitis C (compare Doc. 1, Count III with
6 Doc. 10, Count II). Because the same claims were raised in the original complaint, they
7 arose prior to the filing of this action, and Plaintiff was required to exhaust remedies for both
8 claims before initiating this suit on June 4, 2012. See Vaden v. Summerhill, 449 F.3d 1047,
9 1051 (9th Cir. 2006).

10 Among all the grievance documents submitted by the parties, only four grievances
11 were filed before June 4, 2012 (Doc. 24, Ex. A, Attach. 4 (grievances dated 11/5/10, 3/10/12,
12 and two dated 5/19/12) (Doc. 24-2 at 5-10)). Only one of these four grievances relates to
13 either one of Plaintiff’s claims (id. (Doc. 24-2 at 8-10)). This grievance, dated 5/19/12 and
14 identified as grievance #12-04831, complains about the lack of treatment for Plaintiff’s
15 hepatitis C (id.). The grievance does not name Dr. Friedman specifically, but the grievance
16 form simply instructs the inmate to “briefly describe your grievance and a proposed
17 resolution” (id.). See Jones, 549 U.S. at 218 (level of detail required in a grievance is defined
18 by the jail’s requirements, not the PLRA). In grievance #12-04831, Plaintiff refers to his
19 communications with “the doctor” and complains about his untreated symptoms, his repeated
20 requests for hepatitis C treatment, and the fact that nothing is being done (id.). The Court
21 finds that this grievance was sufficient to put jail officials on notice of Plaintiff’s claim in
22 Count II. See Griffin, 557 F.3d at 1120 (an administrative remedy suffices if it alerts the
23 prison to a problem); see also Jones, 549 U.S. at 219 (citing Johnson v. Johnson, 385 F.3d
24 503, 522 (5th Cir. 2004) (“[w]e are mindful that the primary purpose of a grievance is to alert
25 prison officials to a problem, not to provide personal notice to a particular official that he
26 may be sued; the grievance process is not a summons and complaint that initiates adversarial
27 litigation.”)). It follows that if this grievance was pursued through all levels of administrative
28

1 appeals, it would have sufficed to exhaust Plaintiff's claim in Count II. See Sapp, 623 F.3d
2 at823-24.

3 But this grievance does not put officials on notice of Plaintiff's claim that unlawful
4 conditions of confinement caused him to contract hepatitis C, and there were no other
5 grievances filed prior to June 4, 2012 concerning this claim. Therefore, Count I will be
6 dismissed for failure to exhaust, and Arpaio will be dismissed as a Defendant.

7 Grievance #12-04831 is written in English, and the face of the document shows a
8 response, in English, under the section titled "Sergeant Action Taken and/or Delegated to
9 Officer 'Medical' Action Taken to Resolve" (Doc. 24, Ex. A, Attach. 4 (Doc. 24-2 at 8)).
10 The response is dated May 26, 2012 (id.). Plaintiff states that each of his medical grievances
11 were signed by a shift sergeant and each grievance was sent to the next level (Doc. 26 at 6-7).
12 Indeed, immediately below the response on grievance #12-04831 is a box checked stating
13 that "[t]his grievance has been . . . forwarded to the next level" (Doc. 24, Ex. A, Attach. 4
14 (Doc. 24-2 at 8)). Below that are two more sections: one is a space for the Shift
15 Commander's action and the other is a space for the Bureau Hearing Unit's Response (id.).
16 Both of these spaces on grievance #12-04831 are blank (id.). Plaintiff notes that there were
17 no responses from the Shift Commander, yet "no one explain[ed] what was happening" or
18 told him that he was making any mistakes (Doc. 26 at 6-7). Plaintiff argues that this
19 demonstrates jail officials were not following the grievance procedures (id.).

20 Kraetsch attests that the grievance form "contains standard language that explains the
21 sequential steps in the grievance process" (Doc. 24, Ex. A, Kraetsch Aff. ¶ 7). At the bottom
22 of the grievance form for grievance #12-04831, there is an instruction to the inmate stating
23 "[i]f not satisfied with the Hearing Officer's resolution, submit an Inmate Institutional
24 Grievance Appeal form within 24 hours of receipt to the Jail/Division Commander through
25 the Hearing Officer" (Doc. 24, Ex. A, Attach. 4, (Doc. 24-2 at 8)). Relying on the language
26 on the grievance form, Plaintiff submitted his medical grievance; there was a response; the
27 grievance was forwarded to the next level; and after he received the Hearing Officer's
28 response, he could file an Institutional Grievance Appeal.

1 But the directions on the face of the form do not match the directions for a medical
2 grievance. Under the *Rules and Regulations*, if a medical grievance is not resolved, the
3 inmate may submit a Grievance Appeal Form within 24 hours to the nursing supervisor
4 (Doc. 24, Ex. A, Attach. 2 (Doc. 24-1 at 23)). Policy DJ-3 provides that if a medical
5 grievance is not resolved, the charge nurse or Hearing Unit will inform the inmate of his right
6 to appeal to the appropriate medical manager by filing an Institutional Grievance Appeal
7 form (id., Attach 1 (Doc. 24-1 at 12)). According to these directives, Plaintiff did not need
8 to wait for a response from the Shift Commander and Bureau Hearing Officer to proceed to
9 the appeal level.⁴

10 On this record, documentary information provided to Plaintiff included conflicting
11 language as to when an appeal was to be filed. Moreover, in failing to provide an interpreter
12 or explain to Plaintiff his right to appeal by filing an Institutional Grievance Appeal form,
13 jail officials did not abide by their own internal regulations. In these circumstances, pursuant
14 to Ninth Circuit precedent, administrative remedies were effectively unavailable after
15 Plaintiff received the May 26, 2012 response to his grievance. See Nunez, 591 F.3d at 1224,
16 1226; Brown, 422 F.3d at 937. Plaintiff's failure to exhaust the grievance is therefore
17 excused, and Defendants' request to dismiss Count II will be denied.

18 **IT IS ORDERED:**

19 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion to
20 Dismiss (Doc. 24).

21 (2) Defendants' Motion to Dismiss (Doc. 24) is **granted in part** and **denied in part**
22 as follows:

23 (a) the Motion is **granted** as to Count I, and Count I is dismissed for failure to
24 exhaust administrative remedies; and

25
26 ⁴From other medical grievance documents submitted by the parties, it appears that
27 Plaintiff figured out months later that he could proceed to the Institutional Grievance Appeal
28 level without a response from the Shift Commander and Bureau Hearing Officer (see Doc.
24, Ex. A, Attach. 4, grievance #12-07604 (Doc. 24-3 at 9, 11) & grievance #12-11048 (Doc.
24-3 at 16-17)).

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(b) the Motion is **denied** as to Count II.
(3) Arpaio is dismissed as a Defendant.
(4) The remaining claim is Count II against Dr. Friedman.

DATED this 18th day of November, 2013.



David G. Campbell
United States District Judge