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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CESAR ENCISO,

Plaintiff,

v.

DR. MOON, et al.,

Defendants.

Case No. 1:12-cv-00924-LJO-SKO (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING (1) PLAINTIFF’S RULE
56(D) MOTION BE DENIED, (2) PARTIES’
REQUESTS FOR JUDICIAL NOTICE BE
GRANTED IN PART (3) DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT BE
GRANTED, AND (4) DEFENDANTS’
MOTIONS FOR PROTECTIVE ORDER, TO
VACATE THE SCHEDULING ORDER,
AND FOR AN EXTENSION OF TIME BE
DENIED AS MOOT

(Docs. 37, 38, 45, 51, and 52)

OBJECTION DEADLINE: TWENTY DAYS
RESPONSE DEADLINE: TEN DAYS

I. Procedural Background

Plaintiff Cesar Enciso (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on June 7, 2012. This action is proceeding against Doctor Moon, Correctional Officer Alcantar,¹ Correctional Counselor Silva, Nurse Jane Doe 1, and Nurse Jane Doe 3 for violation of the Eighth Amendment of the United States Constitution and for negligence under California law. Plaintiff’s claims arise from events

¹ Identified in the complaint as Alcator.

1 which occurred between November 15, 2010, and June 11, 2011, at North Kern State Prison
2 (“NKSP”) and at California State Prison-Corcoran (“CSP-Corcoran”).

3 On May 12, 2014, Defendants Moon, Alcantar, and Silva (“Defendants”) filed a pre-
4 discovery motion for summary judgment based on Plaintiff’s failure to exhaust the available
5 administrative remedies in compliance with 42 U.S.C. § 1997e(a) and California’s Government
6 Claims Act.² Fed. R. Civ. P. 56(a); Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014) (en
7 banc), cert. denied, 135 S.Ct. 403 (2014). (Doc. 45.) Plaintiff filed an opposition on June 30,
8 2014, Defendant filed a reply on July 30, 2014, and the motion was submitted on the record
9 without oral argument pursuant to Local Rule 230(1).³ (Docs. 50-52, 55-59.)

10 **II. Plaintiff’s Rule 56(d) Motion**

11 **A. Legal Standard**

12 In conjunction with his opposition to Defendants’ motion for summary judgment, Plaintiff
13 moved to continue the motion pending discovery. Fed. R. Civ. P. 56(d). (Doc. 50, Opp., court
14 record pp. 22-24.) Rule 56(d) provides that “[i]f a nonmovant shows by affidavit or declaration
15 that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
16 (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to
17 take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). In seeking relief
18 under Rule 56(d), Plaintiff bears the burden of specifically identifying relevant information, where
19 there is some basis for believing that the information actually exists, and demonstrating that the
20 evidence sought actually exists and that it would prevent summary judgment. Blough v. Holland
21 Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009) (quotation marks and citation omitted); Getz
22 v. Boeing Co., 654 F.3d 852, 867-68 (9th Cir. 2011); Tatum v. City and County of San Francisco,
23 441 F.3d 1090, 1100-01 (9th Cir. 2006).

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² Cal. Gov’t Code §§ 900, et seq.

26 _____
³ Plaintiff was provided with contemporaneous notice of the requirements for opposing a summary judgment motion
27 for failure to exhaust administrative remedies. Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012); Woods v. Carey,
684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 960-61 (9th Cir. 1998). (Doc. 45.)

1 **B. Discussion**

2 The issue before the Court is whether Plaintiff exhausted the administrative remedies, and
3 resolution of that issue does not necessitate any discovery relating to the merits of Plaintiff’s
4 medical care claims. The Ninth Circuit recognized that “[e]xhaustion should be decided, if
5 feasible, before reaching the merits of a prisoner’s claims,” and “discovery directed to the merits
6 of the suit” should be left until later. *Albino*, 747 F.3d at 1170. To the extent that the non-moving
7 party needs specific discovery to address issues raised in a dispositive motion, the non-moving
8 party is entitled to seek redress. Fed. R. Civ. P. 56(d); *Albino*, 747 F.3d at 1170-71; *Wyatt v.*
9 *Terhune*, 315 F.3d 1108, 1115 n.7 (9th Cir. 2003) (overruled on other grounds by *Albino*, 747 F.3d
10 at 1168-69). Here, however, Plaintiff’s opposition sets forth no argument that he needs any
11 specific discovery to oppose the exhaustion motion. (Doc. 50, Enciso Dec., court record p. 32,
12 ¶28.)

13 To the contrary, Plaintiff opposed the summary judgment motion in a thorough, detailed
14 opposition supported by documentary evidence regarding exhaustion. Plaintiff’s general argument
15 that he has not had any discovery and has been denied the right to obtain evidence to support his
16 opposition is precisely the type of general argument which does not suffice to obtain relief under
17 Rule 56(d). Accordingly, the Court finds that Plaintiff has not shown the actual existence of
18 relevant information that would prevent summary judgment on the issue of exhaustion, and he is
19 not entitled to deferment of Defendants’ motion under Rule 56(d). *Albino*, 747 F.3d at 1170; see
20 also *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1013 n.29 (9th Cir. 2013) (evidence to be sought
21 through discovery must be based on more than mere speculation).

22 **III. Defendants’ Motion for Summary Judgment**

23 **A. Federal Statutory Exhaustion Requirement**

24 Pursuant to the Prison Litigation Reform Act of 1995 (“PLRA”), “[n]o action shall be
25 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a
26 prisoner confined in any jail, prison, or other correctional facility until such administrative
27 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). This statutory exhaustion
28 requirement applies to all inmate suits about prison life, *Porter v. Nussle*, 534 U.S. 516, 532, 122

1 S.Ct. 983 (2002) (quotation marks omitted), regardless of the relief sought by the prisoner or the
2 relief offered by the process, *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and
3 unexhausted claims may not be brought to court, *Jones v. Bock*, 549 U.S. 199, 211, 127 S.Ct. 910
4 (2007) (citing *Porter*, 534 U.S. at 524).

5 The failure to exhaust is an affirmative defense, and the defendants bear the burden of
6 raising and proving the absence of exhaustion. *Jones*, 549 U.S. at 216; *Albino*, 747 F.3d at 1166.
7 “In the rare event that a failure to exhaust is clear from the face of the complaint, a defendant may
8 move for dismissal under Rule 12(b)(6).” *Albino*, 747 F.3d at 1166. Otherwise, the defendants
9 must produce evidence proving the failure to exhaust, and they are entitled to summary judgment
10 under Rule 56 only if the undisputed evidence, viewed in the light most favorable to the plaintiff,
11 shows he failed to exhaust. *Id.*

12 **B. Summary Judgment Standard**

13 Any party may move for summary judgment, and the Court shall grant summary
14 judgment if the movant shows that there is no genuine dispute as to any material fact and the
15 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted);
16 *Albino*, 747 F.3d at 1166; *Washington Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011).
17 Each party’s position, whether it be that a fact is disputed or undisputed, must be supported by (1)
18 citing to particular parts of materials in the record, including but not limited to depositions,
19 documents, declarations, or discovery; or (2) showing that the materials cited do not establish the
20 presence or absence of a genuine dispute or that the opposing party cannot produce admissible
21 evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may
22 consider other materials in the record not cited to by the parties, although it is not required to do
23 so. Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031
24 (9th Cir. 2001); accord *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

25 The defendants bear the burden of proof in moving for summary judgment for failure to
26 exhaust, *Albino*, 747 F.3d at 1166, and they must “prove that there was an available administrative
27 remedy, and that the prisoner did not exhaust that available remedy,” *id.* at 1172. If the defendants
28 carry their burden, the burden of production shifts to the plaintiff “to come forward with evidence

1 showing that there is something in his particular case that made the existing and generally
2 available administrative remedies effectively unavailable to him.” Id. This requires the plaintiff
3 to “show more than the mere existence of a scintilla of evidence.” In re Oracle Corp. Sec. Litig.,
4 627 F.3d 376, 387 (9th Cir. 2010) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106
5 S.Ct. 2505 (1986)). “If the undisputed evidence viewed in the light most favorable to the prisoner
6 shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.” Albino,
7 747 F.3d at 1166. However, “[i]f material facts are disputed, summary judgment should be
8 denied, and the district judge rather than a jury should determine the facts.” Id.

9 **C. Allegations Underlying Plaintiff’s Legal Claims**

10 Plaintiff was transferred to NKSP on November 15, 2010, and shortly thereafter, he began
11 notifying medical staff of chest pain, pressure on his back and lungs, and difficulty breathing and
12 walking. Plaintiff submitted several health care service request forms without success and after a
13 “significant amount of time” passed, Plaintiff went to the medical clinic and asked Defendant Jane
14 Doe 1, a nurse, why he had not been seen. (Comp., p. 5, ¶4.) She informed him that if his chest
15 really hurt, he would not be able to stand or walk, and she said that he was lying.

16 Plaintiff was later seen by a doctor who gave him one dose of pain medication and ordered
17 x-rays. The x-rays were conducted improperly, and Plaintiff was told in error that he was fine and
18 to submit another request form if he felt more pain. By then, Plaintiff was experiencing searing
19 chest and back pain, nausea, and vomiting, and he could not eat, sleep, move around, or breathe
20 properly. Prison officials, however, refused to see, treat, or properly diagnose him, despite being
21 on notice of his condition.

22 On December 15, 2010, Plaintiff’s cellmate flagged down a nurse and told her that
23 Plaintiff was not mobile and he had been notifying medical staff of chest pain for more than ten
24 days. The nurse placed Plaintiff in a wheelchair and told him policy dictated that any inmate
25 suffering from chest pains must be immediately transported. Plaintiff was then transported to San
26 Joaquin County Hospital.

27 At the hospital, Plaintiff underwent a CT scan and heart monitoring. Dr. Amin determined
28 that Plaintiff had a 4 by 6 inch mass, which was biopsied. Plaintiff was informed that he had

1 valley fever, which he alleges he contracted at NKSP. Dr. Amin prescribed Ablecet B for a
2 minimum of thirty to sixty days and told Plaintiff it was vital that he take the medication.

3 Plaintiff was transferred to the hospital at CSP-Corcoran on December 23, 2010. On
4 January 4, 2011, Defendant Moon discontinued Plaintiff's medication and when Plaintiff told him
5 what Dr. Amin said, Defendant responded that Plaintiff was not a doctor and would not tell
6 Defendant what to do. On January 7, 2011, Plaintiff was discharged and sent back to NKSP
7 without further treatment.

8 Plaintiff immediately began submitting request forms informing staff that he was having
9 severe chest pains, back pain, nausea, vomiting, and breathing problems. Nursing staff told
10 Plaintiff his symptoms were due to Valley Fever and he must be transferred out of the valley.

11 When Plaintiff notified a nurse and Defendant Alcantar that he was having chest pain and
12 difficulty breathing, Defendant Alcantar denied him access to a doctor, telling him it was just
13 valley fever and to go back to his cell and deal with it.

14 On January 14, 2011, Plaintiff contacted his correctional counselor, Defendant Silva, about
15 his condition and his need to get out of the valley. Defendant Silva said he had already spoken to
16 Plaintiff's wife and medical staff, and he was aware of the immediate need for a transfer.
17 Defendant Silva said Plaintiff would be transferred to Correctional Training Facility in Soledad
18 within thirty days, but Plaintiff was never transferred.

19 Plaintiff's health continued to deteriorate over the months, without treatment or a transfer.

20 On March 6, 2011, Plaintiff was no longer able to get out of bed and he notified Officer
21 Sisk, who summoned a nurse. The nurse, Defendant Jane Doe 3, refused to get a stretcher and
22 forced Plaintiff to crawl down the stairs to a wheelchair.

23 Plaintiff was transported back to San Joaquin County Hospital, where Dr. Amin said his
24 worsened condition was due to prison officials' failure to administer proper medication,
25 negligence in treating him, and failure to transfer him. As a result, the valley fever had spread to
26 Plaintiff's spine, exposing Plaintiff to the risk of paralysis.

27 On March 14, 2011, Plaintiff was transferred back to the hospital at CSP-Corcoran. Dr.
28 Amin called the hospital to ensure that Plaintiff received the prescribed or recommended

1 medication. Defendant Moon agreed to provide the medication but he refused to provide any
2 other treatment.

3 On May 17, 2011, Plaintiff was returned to NKSP. Plaintiff alleges that his condition has
4 not improved: his pain has intensified and he can no longer perform basic daily functions.

5 **D. Undisputed Facts**

6 1. Plaintiff arrived at NKSP on November 15, 2010.

7 2. From November 15, 2010, through June 7, 2012, Plaintiff was an inmate at the
8 following prisons:

9 a. NKSP from November 15, 2010, to August 8, 2011, except for time periods
10 when at CSP-Corcoran;

11 b. CSP-Corcoran from December 23, 2010, to January 7, 2011; and from
12 March 14, 2011, to May 17, 2011; and

13 c. California Substance Abuse Treatment Facility and State Prison (“SATF”)
14 from August 8, 2011, to October 11, 2012.

15 3. The basis for Plaintiff’s claim against Defendant Alcantar is Alcantar’s refusal to
16 provide him access to a doctor and her order requiring he go back to his cell. This conduct
17 occurred at NKSP between January 7 and 14, 2011.

18 4. The basis for Plaintiff’s claim against Defendant Silva is Silva’s failure to timely
19 transfer him to a prison outside of the valley fever-threatened area in January 2011.⁴

20 5. The basis for Plaintiff’s claim against Defendant Moon is conduct that occurred at
21 CSP-Corcoran on January 4, 2011, and March 14, 2011. Defendant Moon allegedly failed to
22 continue the course of treatment ordered by outside physicians.

23 6. The California Department of Corrections and Rehabilitation (“CDCR”) has an
24 administrative appeals process that allows inmates to appeal any decision, action, condition, policy
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26 _____
27 ⁴ Plaintiff purports to partially dispute this fact in that he also alleges Defendant Silva lied to him regarding the
28 transfer, a representation he relied on and which delayed any appeal or litigation. This assertion does not form the
basis of Plaintiff’s Eighth Amendment claim against Defendant Silva, however, and Plaintiff’s argument does not
bring this fact into dispute. Plaintiff’s contention regarding when he acquired the knowledge necessary to form the
basis for a claim is discussed in section E.

1 or omission by CDCR or its staff that the inmate can demonstrate has an adverse effect on his
2 welfare.

3 7. Plaintiff was aware of the inmate appeals process maintained by CDCR at the time
4 the events that form the basis of his complaint in this action.

5 8. Plaintiff was familiar with and successfully utilized the inmate appeals process
6 through all levels of review at both NKSP and SATF.

7 9. Plaintiff filed the following inmate appeals at NKSP: (1) NKSP D 11-00695, (2)
8 NKSP X 11-00937, (3) NKSP HC 11019745, and (4) NKSP D 11-00604.

9 10. Plaintiff also filed five appeals at NKSP that were screened out for failure to
10 comply with the regulations governing appeals.

11 11. None of the inmate appeals Plaintiff filed at NKSP concerned Moon, Alcantar or
12 Silva, the failure to treat valley fever, or any of the other conduct alleged against the defendants in
13 the complaint.

14 12. Plaintiff was aware of the inmate appeals process maintained by CDCR when he
15 was transferred to CSP-Corcoran.

16 13. Plaintiff filed no inmate appeals at CSP-Corcoran concerning Moon, Alcantar or
17 Silva.

18 14. During the time period relevant to this action, Plaintiff filed the following inmate
19 appeals at SATF that were accepted for review at some level: (1) SATF-E-11-02609, (2) SATF-G-
20 12-00757, (3) SATF HC 12054467, (4) SATF HC 33 11-13206/SATF HC 11047448, (5) SATF
21 HC 33 11-13190/SATF HC 11047405, (6) SATF HC 11053588, (7) SATF HC 33-11-13007, and
22 (8) SATF HC 33-11-12975.

23 15. Appeal numbers SATF-E-11-02609, SATF-G-12-00757, SATF HC 12054467,
24 SATF HC 33 11-13206/SATF HC 11047448, SATF HC 11053588, SATF HC 33-11-13007, and
25 SATF HC 33-11-12975 did not concern Moon, Alcantar or Silva or their alleged conduct which
26 forms the bases for Plaintiff's claims in this action.

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1 16. Plaintiff filed three appeals at SATF that were screened out, none of which
2 concerned Moon, Alcantar or Silva or their alleged conduct which forms the bases for Plaintiff's
3 claims in this action.

4 17. Plaintiff identifies appeal number SATF HC 11047405/SATF-33-11-13190, dated
5 September 5, 2011, as the inmate appeal that allegedly exhausted his administrative remedies with
6 respect to this action against Moon, Alcantar, and Silva.

7 18. Appeal number SATF HC 11047405/SATF-33-11-13190 was filed at SATF on or
8 about September 12, 2011.

9 19. CDCR appeal regulations in effect in 2010 and to January 28, 2011, required an
10 inmate to file an appeal within fifteen working days of the conduct forming the basis for the
11 appeal.

12 20. CDCR appeal regulations that became operative on January 28, 2011, require an
13 inmate to file an appeal within thirty calendar days of the conduct forming the basis for the appeal.

14 21. Plaintiff did not file an inmate appeal within either fifteen working days or thirty
15 calendar days of the conduct of Moon, Alcantar and Silva that he alleges forms the basis of his
16 complaint.

17 22. Plaintiff filed a claim with the Victim Compensation and Government Claims
18 Board ("VCGCB") on September 13, 2011, and it was assigned claim number G599623.

19 23. Plaintiff's VCGCB claim did not identify the defendants in this action.

20 24. Plaintiff's claim was only accepted by the VCGCB as to allegations arising from
21 facts or events that occurred during the six months prior to the date the claim was presented.

22 25. On October 28, 2011, the VCGCB rejected Plaintiff's claim.

23 26. Plaintiff's undated civil complaint in this action was mailed on June 5, 2012, and it
24 was received by the Court and filed on June 7, 2012.

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1 **E. Eighth Amendment Claims**

2 **1. Summary of Parties' Positions**^{5,6}

3 **a. Defendants**

4 Defendants seek summary judgment on the grounds that Plaintiff failed to file any appeals
5 grieving the facts underlying his claims against them, and that appeal number SATF HC
6 11047405/SATF-33-11-13190, although exhausted, did not mention their conduct at NKSP or at
7 CSP-Corcoran which gave rise the claims against them in this action. Defendants contend that
8 appeal number SATF HC 11047405/SATF-33-11-13190 concerns the failure of SATF medical
9 staff to treat a tumor, and the appeal does not mention Defendants Moon, Alcantar and Silva by
10 name or contain any statement that could be construed as identifying them in any way.
11 Defendants further contend that Plaintiff's VCGCB claim did not identify the defendants in this
12 action or identify the alleged facts which form the basis for this lawsuit, entitling them to
13 judgment.

14 **b. Plaintiff**

15 Plaintiff sets forth numerous arguments, some of which are conclusory and/or irrelevant.
16 Plaintiff's main argument is that he satisfied the PLRA's exhaustion requirement because he
17 "properly exhausted" appeal number SATF HC 11047405/SATF-33-11-13190. Plaintiff contends
18 the appeal was processed at all levels of appeal and it was not rejected as untimely or based on
19 substance, such as the failure to identify involved staff.

20 ⁵ Defendants submitted a substantial amount of evidence in support of their motion and they set forth detailed
21 arguments in their effort to show that Plaintiff was aware of and did use the available administrative remedy process,
22 but the appeal he exhausted did not suffice to exhaust his claims against them in this action. Plaintiff did likewise.
23 However, the parties agree on the basic facts material to resolution of the exhaustion issue, and the relevant
disagreement relates to whether Plaintiff's SATF appeal sufficed to exhaust his claims in this action. Therefore,
omitted from discussion are the arguments, facts, and evidence the Court has determined are not material to resolution
of the motion.

24 ⁶ Defendants request judicial notice of Plaintiff's VCGCB claim and related claim documents. Fed. R. Evid. 201(b).
25 (Doc. 45-3, Motion.) Plaintiff requests judicial notice of his exhibits. Id. (Doc. 52, Motion.) The Court may take
26 judicial notice of matters of public record, including records and reports of administrative agencies. United States v.
14.02 Acres of Land More or Less in Fresno Cnty., 547 F.3d 943, 955 (9th Cir. 2008) (quotations marks and citations
27 omitted). Accordingly, the Court takes judicial notice of the official VCGCB claim documents, as requested by both
28 sides, and of relevant Title 15 regulations, amended effective January 28, 2011. Judicial notice of Plaintiff's other
exhibits is not appropriate, but it is not necessary in any event. Both sides have submitted appeals documents for
consideration and there is no dispute that appeal number SATF HC 11047405/SATF-33-11-13190 is the appeal
relevant to the exhaustion inquiry.

1 Plaintiff's other arguments are that matters raised in an exhausted appeal may later be
2 deemed exhausted in a subsequent appeal;⁷ that courts have declined to dismiss for failure to
3 exhaust where the prisoner lacked sufficient knowledge of the facts to comply with the grievance
4 rules; and that if a grievance concerns an ongoing condition, most courts assume it was timely
5 filed. Plaintiff also argues that there is a difference between believing Defendants' actions were
6 wrong and knowing that their actions violated his rights, and that he filed his appeal within fifteen
7 to thirty days of becoming aware at SATF that Defendants' actions rose to the level of deliberate
8 indifference. Plaintiff argues that his appeal was either timely or subject to equitable tolling, and
9 that his claims are part of a continuing violation and there is no requirement that he file his appeal
10 at a particular prison or at the prison where the events occurred. Plaintiff contends that the
11 ongoing violation did not end until he left NKSP and the valley fever infection zone, at which time
12 his health improved and he was able to assess the facts and determine what issues were subject to
13 appeal. Plaintiff concludes that there are material facts in dispute, precluding summary judgment;
14 and that Defendants acted with deliberate indifference to his medical needs, causing him great
15 suffering.

16 3. Findings

17 Defendants bear the burden of demonstrating the existence of an available administrative
18 remedy and Plaintiff's failure to exhaust that available remedy. *Albino*, 747 F.3d at 1172. Here,
19 there is no dispute that CDCR has an administrative remedy process for inmate grievances which
20 is initiated by submitting a CDCR Form 602 "Inmate/Parolee Appeal" within thirty calendar days
21 (1) of the event or decision being appealed, (2) upon first having knowledge of the action or
22 decision being appealed, or (3) upon receiving an unsatisfactory departmental response to an
23 appeal filed. Cal. Code Regs., tit. 15, §§ 3084.2(a), 3084.8(b)(1) (quotation marks omitted);⁸

24 _____
25 ⁷ Plaintiff cites *Gregory v. Ayers*, No. CIVS042523DFLPANP, 2006 WL 548444, at *2-3 (E.D.Cal. 2006), adopted in
26 full, 2007 WL 987412. In that case, the court denied a motion to dismiss, finding that a subsequent appeal exhausted
27 issues that were raised in an earlier, unexhausted appeal. Plaintiff's argument here, however, is that appeal number
28 SATF HC 11047405/SATF-33-11-13190 exhausted his claims, not that there exists some subsequent appeal which
exhausted his claims. The *Gregory* case is therefore inapposite.

⁸ The regulations were amended effective January 28, 2011. However, both the current regulations and the prior
regulations provided the same general four-level administrative remedy process. The four level process prior to the
amendments effective on January 28, 2011, was described in § 3084.5.

1 Williams v. Paramo, ___ F.3d ___, ___, 2015 WL 74144, at *7 (9th Cir. Jan. 7, 2015); Wilkerson v.
2 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014). The appeal must “describe the specific issue under
3 appeal and the relief requested,” and the inmate “shall list all staff member(s) involved and shall
4 describe their involvement in the issue.” § 3084.2(a). Furthermore, the inmate “shall state all
5 facts known and available to him/her regarding the issue being appealed at the time of submitting
6 the Inmate/Parolee Appeal Form, and if needed, the Inmate Parolee/Appeal Form Attachment.” §
7 3084.2(a)(4). Prior to January 28, 2011, CDCR’s regulations merely required a description of the
8 problem and the action requested. § 3084.2(a) (2010).

9 In this case, there is also no dispute that Plaintiff was aware of the inmate appeals process.
10 The issue is whether appeal number SATF HC 11047405/SATF-33-11-13190 sufficed to exhaust
11 Plaintiff’s Eighth Amendment claims against Defendants. An appeal “suffices to exhaust a claim
12 if it puts the prison on adequate notice of the problem for which the prisoner seeks redress,” and
13 “the prisoner need only provide the level of detail required by the prison’s regulations.” Sapp v.
14 Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010). Plaintiff initiated an appeal at SATF on September
15 5, 2011, in which he stated:

16 The following appeal is in regards to a continuous 42 U.S.C. § 1983 civil rights
17 complaint. These allegations have a very specific adverse effect on me by the
18 *medical staff’s failure to set a remedial plan to remove a tumor which threatens my*
19 *life, as well as forces me to suffer undue harm in the process undertaking federally*
20 *imposed rights. Specifically, I have been forced to suffer maltreatment of a deadly*
21 *tumor for a specified time well exceeding contemporary standards of decency. On*
22 *8/2/11 I placed the Doctor “Kokor” on notice and he failed to set a course of*
23 *remedy. Again on several occasions over the last (30) days on or about 8/19/11-*
24 *8/26 9/2/11 I placed staff on notice. I have placed medical officials on notice upon*
25 *my arrival at SATF on 8/8/11 and they failed to effectively treat my ailment. Even*
26 *before my arrival, I was forced to suffer overwhelming pain in NKSP and was*
27 *hospitalized in San Joaquin due to their negligence and deliberate indifference.*
28 *Then I was hospitalized in Corcoran State Prison Hospital and my condition*
worsened due to substandard care. Now, I have placed SATF/SP medical staff on
notice of these facts and they refuse to properly remedy these threats to my life and
follow the pattern of unconstitutional care which endangered my livelihood.
Contemporary standards of decency amongst medical professionals in the
community would immediately order a remedial plan for a patient with a life
threatening growth and chronic pain. These officials fail to meet even the bare
minimum of required treatments.

(Doc. 50, Opp., Pl, Ex. A, court record pp. 61-62 (emphasis added).) The informal level and first

1 formal level were bypassed, the appeal was denied at the second level of review on November 3,
2 2011, and the appeal was then denied at the final level of review on March 23, 2012, constituting
3 exhaustion of that appeal.

4 In recognition of the fact that exhaustion requirements are designed to deal with parties
5 who do not want to exhaust, “proper exhaustion” of the administrative remedies is required and
6 “proper exhaustion” demands compliance with an agency’s deadlines and other critical procedural
7 rules. *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S.Ct. 2378 (2006) (quotation marks omitted).
8 As previously set forth, at the time the appeal was submitted, the regulations required a description
9 of the specific issue under appeal and the identification of all involved staff members, specifically:

10 (3) The inmate or parolee shall list all staff member(s) involved and shall describe
11 their involvement in the issue. To assist in the identification of staff members, the
12 inmate or parolee shall include the staff member’s last name, first initial, title or
13 position, if known, and the dates of the staff member’s involvement in the issue
14 under appeal. If the inmate or parolee does not have the requested identifying
information about the staff member(s), he or she shall provide any other available
information that would assist the appeals coordinator in making a reasonable
attempt to identify the staff member(s) in question.

15 (4) The inmate or parolee shall state all facts known and available to him/her
16 regarding the issue being appealed at the time of submitting the Inmate/Parolee
Appeal form, and if needed, the Inmate/Parolee Form Attachment.

17 § 3084.2(a)(3), (4) (emphasis added).

18 The Court finds that under regulations in effect at the time Plaintiff filed his appeal, the
19 appeal did not suffice to place prison officials on notice that: (1) he was turned away from the
20 medical clinic by Defendant Jane Doe 1, who accused him of lying about his symptoms; (2)
21 Defendant Moon wrongfully discontinued crucial medication at CSP-Corcoran on January 4,
22 2011, and on March 14, 2011, agreed to provide the medication but refused to provide any other
23 treatment; (3) Defendant Alcantar denied him access to a doctor at NKSP despite his complaint of
24 chest pain; (4) Defendant Silva failed to ensure he was transferred from NKSP within thirty days
25 despite being placed on notice on January 14, 2011, that Plaintiff needed to transfer due to his
26 medical condition; or (5) on March 6, 2011, when Plaintiff was no longer able to get out of bed at
27 NKSP, Defendant Jane Doe 3 refused to get a stretcher and forced Plaintiff to crawl down the
28 stairs to a wheelchair. Plaintiff’s appeal mentioned pain, substandard care, negligence, and

1 deliberate indifference at NKSP and CSP-Corcoran but the appeal contained no details about what
2 occurred at NKSP or CSP-Corcoran and did not mention a failure to timely diagnose or properly
3 treat valley fever or its symptoms.⁹ Rather, the appeal concerns Plaintiff's tumor. While the
4 tumor is allegedly related to valley fever, even under the prior regulations, which required only a
5 description of the problem and constituted a "low floor," Griffin v. Arpaio, 557 F.3d 1117, 1120
6 (9th Cir. 2009), the appeal would not have sufficed to alert prison officials to the nature of the
7 wrong for which redress is now sought, Sapp, 623 F.3d at 824 (quotation marks omitted); accord
8 Akhtar v. Mesa, 698 F.3d 1202, 1211 (9th Cir. 2012).

9 Plaintiff's other arguments do not assist him. Although Plaintiff argues that due to his
10 medical condition, he did not comprehend the facts underlying his Eighth Amendments claims
11 until his health later improved at SATF, this argument is unavailing because the appeal Plaintiff
12 later filed at SATF, purportedly within fifteen to thirty days from the time he realized Defendants
13 violated his rights, did not include the alleged wrongdoing by Defendants at NKSP or CSP-
14 Corcoran. (Opp., court record pp. 18-19; Enciso Dec., ¶¶8, 24, 25, 29.) Plaintiff's arguments that
15 his appeal was timely, his claims are part of an ongoing violation, and he is not required to file the
16 appeal at the prison where the events occurred are similarly unavailing because Plaintiff's appeal
17 was not rejected on any procedural grounds which implicate those considerations.

18 Based on the foregoing, the Court finds that Plaintiff did not exhaust his Eighth
19 Amendment medical care claims against the defendants named in this action and they are entitled
20 to summary judgment.¹⁰ Fed. R. Civ. P. 56; Albino, 747 F.3d at 1166.

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25 ⁹ Plaintiff argues that if inmates do not have identifying information, they are only required to provide any other
26 information that would assist the appeals coordinator in making a reasonable attempt to identify the involved staff, but
27 here, Plaintiff did not provide any information which would have assisted the appeals coordinator in identifying
28 Moon, Silva, Alcantar, or the two Doe nurses, as the appeal lacks any facts providing notice of their alleged
misconduct. (Opp., court record p. 13.)

¹⁰ In his opposition, Plaintiff seeks leave to amend and argues that granting summary judgment without allowing him
to amend would be unjust. However, Defendants have shown they are entitled to judgment and there are no grounds
in the record supporting leave to amend. Albino, 747 F.3d at 1166.

1 **F. State Law Tort Claims**

2 **1. State Statutory Exhaustion Requirement**

3 California’s Government Claims Act requires that a tort claim against a public entity or its
4 employees be presented to the VCGCB no more than six months after the cause of action accrues.
5 Cal. Gov’t Code §§ 905.2, 910, 911.2, 945.4, 950-950.2. Presentation of a written claim, and
6 action on or rejection of the claim are conditions precedent to suit. *Shirk v. Vista Unified Sch.*
7 *Dist.*, 42 Cal.4th 201, 208-09 (Cal. 2007); *State v. Superior Court of Kings Cnty. (Bodde)*, 32
8 Cal.4th 1234, 1239 (Cal. 2004); *Mabe v. San Bernardino Cnty. Dep’t of Pub. Soc. Servs.*, 237 F.3d
9 1101, 1111 (9th Cir. 2001); *Mangold v. California Pub. Utils. Comm’n*, 67 F.3d 1470, 1477 (9th
10 Cir. 1995). Suit must then be commenced not later than six months after the date the written
11 notice was deposited in the mail. Cal. Gov’t Code § 945.6(a)(1) (quotation marks omitted);
12 *Clarke v. Upton*, 703 F.Supp.2d 1037, 1043 (E.D. Cal. 2010); *Baines Pickwick Ltd. v. City of Los*
13 *Angeles*, 72 Cal.App.4th 298, 303 (Cal. Ct. App. 1999).

14 **2. Summary of Parties’ Positions**

15 Defendants move for judgment on Plaintiff’s state law tort claims as barred by the
16 Government Claims Act because Plaintiff’s VCGCB claim exhausted only the legal claims which
17 occurred within the six month period preceding September 13, 2011; Plaintiff’s VCGCB claim did
18 not suffice to exhaust his claims against them; and Plaintiff failed to file suit within six months
19 from the denial of his VCGCB claim.

20 Plaintiff presents little argument in opposition. (Opp., court record p. 22; Enciso Dec.,
21 ¶26.) Plaintiff admits that his VCGCB claim did not identify the defendants but he denies that it
22 failed to identify the facts underlying this suit. Plaintiff states that this action is brought primarily
23 for violation of federal constitutional law, and he argues that while he believes his state law tort
24 claims are timely under the ongoing or continuing wrong theory, he must be allowed to litigate his
25 federal claims, regardless of whether the Court dismisses his state law claims.

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1 **3. Findings**

2 **a. Facts or Events Exhausted by VCGCB Claim**

3 It is undisputed that VCGCB claim number G599623 exhausted only those facts or events
4 that occurred within six months prior to the date of presentation. Under state law, the date of
5 presentation is the date of mailing, and construing the evidence in the light most favorable by
6 Plaintiff, the date of presentation was August 24, 2011. Cal. Gov't Code § 915.2(a). (Opp. court
7 record p. 87.) Thus, Plaintiff's VCGCB claim exhausted facts or events which occurred on or
8 after February 24, 2011.

9 **b. Sufficiency of VCGCB Claim as to Tort Claims Alleged**

10 State law “requires that the claim state the ‘date, place, and other circumstances of the
11 occurrence or transaction which gave rise to the claim asserted,’” and provide “[a] general
12 description of the . . . injury, damage or loss incurred so far as it may be known at the time of
13 presentation of the claim.” *Stockett v. Ass'n of California Water Agencies Joint Powers Ins.*
14 *Auth.*, 34 Cal.4th 441, 445-47, 99 P.3d 500, 20 Cal.Rptr.3d 176 (Cal. 2004) (quoting Cal. Gov't
15 Code § 910). The purpose of the statutes is “to provide the public entity sufficient information to
16 enable it to adequately investigate claims and to settle them, if appropriate, without the expense of
17 litigation.” *Stockett*, 34 Cal.4th at 446 (citations omitted). “Consequently, a claim need not
18 contain the detail and specificity required of a pleading, but need only “fairly describe what [the]
19 entity is alleged to have done.” *Id.* (citations omitted). “As the purpose of the claim is to give the
20 government entity notice sufficient for it to investigate and evaluate the claim, not to eliminate
21 meritorious actions, the claims statute should not be applied to snare the unwary where its purpose
22 has been satisfied.” *Id.* (internal quotation marks and citations omitted).

23 In his VCGCB claim, Plaintiff identified NKSP and SATF as the location of the incidents,
24 and he identified the date of the incidents as May 17, 2011, to present. (Motion, Doc. 45-4, Ex. A;
25 Opp., Ex. B.) Plaintiff stated, “Petitioner arrived to prison at NKSP and from that point forward
26 suffered cruel and unusual punishment violating the 8th Amendment Provision, and negligence
27 under state law.” (*Id.*) Further, Plaintiff stated, “On 11/15/10 petitioner arrived to NKSP and
28 immediately began complaining of severe chest pains medical and custody staff were on notice of

1 this pain, and were deliberately indifferent to it. On 12/15/10, he was taken to hospital and
2 discovered a large tumor. Staff has and continued to refuse and neglect proper treatment, and
3 petitioner continues to suffer.” (Id.)

4 The Court finds that the VCGCB claim did not suffice to exhaust Plaintiff’s claims in this
5 action that arose from events occurring on or after February 24, 2011. Those remaining claims
6 involve Defendant Silva’s failure to ensure Plaintiff was transferred, Defendant Doe 2’s refusal to
7 get a stretcher for Plaintiff, which forced him to crawl down the stairs to a wheelchair, and
8 Defendant Moon’s agreement to keep Plaintiff on the medication prescribed by Dr. Amin but
9 refusal to do anything else. Plaintiff’s claim need only give “adequate information for the public
10 entity to investigate,” but here Plaintiff describes in some detail events which were not within the
11 six month time period accepted for consideration, and he describes the date of the incident as May
12 17, 2011. Thus, the VCGCB claim is devoid of any facts which would have provided state
13 officials adequate notification of Plaintiff’s wrongful treatment by Defendant Doe 2, Defendant
14 Moon, or Defendant Silva. *Stockett*, 34 Cal.4th at 449.

15 **c. Six-Month Statute of Limitations and Equitable Tolling**

16 Finally, Defendants argue that Plaintiff’s state law claims are barred by his failure to file
17 suit within six months of the rejection of his VCGCB claim. Cal. Gov’t Code § 945.6(a)(1).
18 Although it is unnecessary for the Court to resolve this final argument in light of its finding that
19 Plaintiff’s VCGCB claim did not suffice to exhaust his state negligence claims, California law
20 provides for equitable tolling during pursuit of administrative remedies. Equitable tolling applies
21 when an injured person has several legal remedies and reasonably and in good faith pursues one,
22 and equitable tolling is automatic where exhaustion of an administrative remedy is mandatory
23 prior to filing suit. *McDonald v. Antelope Valley Community College Dist.*, 45 Cal.4th 88, 100-01
24 (Cal. 2008) (quotation marks and citation omitted). Thus, in a situation such as this, the six month
25 statute of limitations would have been tolled until completion of the prison’s administrative
26 remedy process on March 23, 2012. *Id.* at 101. Plaintiff then filed suit within the next three
27 months.

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1 **IV. Conclusion and Recommendations**

2 In conclusion, the Court finds that Plaintiff's inmate appeal number SATF HC
3 11047405/SATF-33-11-13190, while exhausted, did not suffice to exhaust the Eighth Amendment
4 claims in this action against Defendants Moon, Alcantar, Silver, Jane Doe 1, and Jane Doe 3.
5 Further, Plaintiff's VCGCB claim did not suffice to exhaust his state law negligence claims
6 against Defendants Moon, Alcantar, Silver, Jane Doe 1, and Jane Doe 3. Accordingly, the Court
7 **HEREBY RECOMMENDS** that:

- 8 1. Plaintiff's Rule 56(d) motion be denied;
- 9 2. The parties' requests for judicial notice be **GRANTED** in part;
- 10 3. Defendants' motion for summary judgment for failure to exhaust, filed on May 12,
11 2014, be **GRANTED**;
- 12 4. Defendants' motions for a protective order, to vacate the scheduling order, and for
13 an extension of time to respond to Plaintiff's discovery requests, filed on March 6, 2014, be
14 **DENIED** as moot; and
- 15 5. Judgment be entered in favor of all defendants based on Plaintiff's failure to
16 exhaust and the action be closed.

17 These Findings and Recommendations will be submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
19 **twenty (20) days** after being served with these Findings and Recommendations, the parties may
20 file written objections with the Court. Local Rule 304(b). The document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendations." Responses, if any, are due
22 within **ten (10) days** from the date the objections are filed. Local Rule 304(d). The parties are
23 advised that failure to file objections within the specified time may result in the waiver of rights on
24 appeal. Wilkerson, 772 F.3d at 838-39 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
25 1991)).

26 **IT IS SO ORDERED.**

27 Dated: **February 17, 2015**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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