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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. SULLIVAN,

Plaintiff,

v.

CHEN, et al.,

Defendants.

No. 1:12-cv-01662-AWI-EPG (PC)

**AMENDED ORDER ADOPTING
FINDINGS AND RECOMMENDATIONS
AND GRANTING SUMMARY
JUDGMENT IN FAVOR OF
DEFENDANTS CHEN, PATEL, AND
MARCHIANO**

(ECF No. 118, 119, 123, 138)

Plaintiff, Michael J. Sullivan, is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action brought under 42 U.S.C. § 1983 against Dr. Chen, Dr. Patel, and Dr. Marchiano. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 8, 2018, the assigned magistrate judge entered findings and recommendations recommending that the motion for summary judgment filed by Defendants Chen and Patel be granted for failure to exhaust. (ECF No. 138.) Defendant Dr. Marchiano has not yet been served in the case and was thus not part of the motion for summary judgment

The findings and recommendations were served on Plaintiff and contained notice that any

1 objections thereto were to be filed within twenty-one days. (*Id.*) Plaintiff requested, and the Court
2 granted, additional time for Plaintiff to file his objections. (ECF No. 142, 143, 146, 147.) Plaintiff
3 timely filed objections on November 2, 2018. (ECF No. 151.)

4 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a
5 *de novo* review of this case. Having carefully reviewed the entire file, including Plaintiff's
6 objections, the Court finds the findings and recommendations to be supported by the record and
7 by proper analysis.

8 Further, the Court notes that though Dr. Marchiano has not yet been served—and so did
9 not join this motion—summary judgment should issue in his favor as well. Plaintiff's claims
10 against Dr. Marchiano arise from the same set of facts, and so the conclusion as to exhaustion, as
11 set forth in the Magistrate Judge's Findings and Recommendations, would equally apply to him.
12 For this reason, summary judgment will be granted as to Plaintiff's Eighth Amendment Claim
13 against Dr. Marchiano. *See Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery*, 44 F.3d 800,
14 803 (9th Cir. 1995) (affirming grant of summary judgment in favor of nonappearing defendant
15 where plaintiff, in response to summary judgment motion filed by defendant who had appeared,
16 had "full and fair opportunity to brief and present evidence" on dispositive issue as to claim
17 against nonappearing defendant).

18 Accordingly,

- 19 1. The November 26, 2018 Order (Doc. No. 153) and Judgment (Doc. No. 156) are
20 hereby vacated;
- 21 2. The findings and recommendations entered August 8, 2018 (ECF No. 138) are
22 ADOPTED in full;
- 23 3. The motion for summary judgment for failure to exhaust filed by Defendants Dr.
24 Chen and Dr. Patel (ECF No. 119, 123) is GRANTED, and applies to Plaintiff's
25 Eighth Amendment claim against Defendants Dr. Chen, Dr. Patel, and Dr.
26 Marchiano;
- 27 4. The subpoena issued to Dr. Marchiano on November 15, 2018 (Doc. No. 152) is
28 recalled;

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5. The motion to compel filed by Defendants Dr. Chen and Dr. Patel (ECF No. 118) is DENIED as moot; and
6. The Clerk of the Court is directed to CLOSE this case.

IT IS SO ORDERED.

Dated: November 27, 2018



SENIOR DISTRICT JUDGE