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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 JOHN ANTHONY CAPUTO,

12 Plaintiff,

13 vs.

14 DR. SCHERFFENBERG,

15 Defendant.
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1:13-cv-00415-AWI-GSA-PC

FINDINGS AND RECOMMENDATION,
RECOMMENDING THAT DEFENDANT'S
RULE 12(b)(6) MOTION TO DISMISS FOR
FAILURE TO EXHAUST BE GRANTED
(Doc. 14.)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

17 **I. BACKGROUND**

18 John Anthony Caputo ("Plaintiff") is a former state prisoner proceeding pro se and in
19 forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the
20 Complaint commencing this action on March 21, 2013. (Doc. 1.) This case now proceeds on
21 the initial Complaint, against defendant Dr. Sharffenberg ("Defendant")¹ for use of excessive
22 force in violation of the Eighth Amendment, and for retaliation in violation of the First
23 Amendment. (Id.)

24 On April 11, 2014, Defendant filed a Rule 12(b)(6) motion to dismiss this action on the
25 ground that Plaintiff's failure to exhaust administrative remedies is evident on the face of the
26 Complaint. (Doc. 14.) On June 4, 2014, Plaintiff filed an opposition to the motion. (Doc. 18.)
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28 ¹ Plaintiff spells Defendant's name as "Scherrffenberg" throughout the Complaint; however, Defendant reports that the correct spelling is "Sharffenberg." (Memorandum, Doc. 14-1 at 1 fn.1.)

1 Defendant did not file a reply to Plaintiff's opposition. Defendant's motion to dismiss is now
2 before the court.

3 **II. PLAINTIFF'S ALLEGATIONS**

4 The events at issue in the Complaint allegedly occurred at the California Substance
5 Abuse Treatment Facility in Corcoran, California, when Plaintiff was incarcerated there.
6 Defendant Dr. Sharffenberg was an employee of the California Department of Corrections and
7 Rehabilitation at the time of the events at issue.

8 Plaintiff claims that Dr. Sharffenberg intentionally injured him because he filed an
9 inmate grievance. Specifically, Plaintiff alleges that on May 18, 2012, he was summoned to
10 the G Yard clinic to speak with Defendant regarding a 602 Plaintiff had filed. Plaintiff alleges
11 that "while in a heated argument Dr. Scherffenberg wants to give me a prostate exam. Doing
12 so he Dr. Scherffenberg hurts me bad! To this day I bleed, have trouble using rest room, have
13 nightmares, etc." (Complaint, Doc. 1 at 3 ¶IV.)

14 **III. LEGAL STANDARDS**

15 **A. Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim**

16 In considering a motion to dismiss, the court must accept all allegations of material fact
17 in the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d
18 1081 (2007); Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740, 96 S.Ct. 1848, 48
19 L.Ed.2d 338 (1976). The court must also construe the alleged facts in the light most favorable
20 to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974),
21 overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139
22 (1984); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All ambiguities or
23 doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen, 395 U.S. 411,
24 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). In addition, pro se pleadings are held to a less
25 stringent standard than those drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520, 92
26 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, legally conclusory statements, not supported by
27 actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct.
28 1937, 1949–50, 173 L.Ed.2d 868 (2009).

1 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials
2 outside the complaint and pleadings. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);
3 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)
4 documents whose contents are alleged in or attached to the complaint and whose authenticity
5 no party questions, see id. at 454; (2) documents whose authenticity is not in question, and
6 upon which the complaint necessarily relies, but which are not attached to the complaint, see
7 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and
8 materials of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377
9 (9th Cir. 1994).

10 **B. Statutory Exhaustion Requirement**

11 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (“PLRA”) provides that
12 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
13 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
14 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners
15 are required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock,
16 549 U.S. 199, 211, 127 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-
17 1201 (9th Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner and
18 regardless of the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct.
19 1819 (2001), and the exhaustion requirement applies to all prisoner suits relating to prison life,
20 Porter v. Nussle, 435 U.S. 516, 532, 122 S.Ct. 983 (2002).

21 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
22 defense under which defendants have the burden of raising and proving the absence of
23 exhaustion. Jones, 549 U.S. at 216. The failure to exhaust nonjudicial administrative remedies
24 that are not jurisdictional is ordinarily subject to a motion for summary judgment in which the
25 court may look beyond the pleadings. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014).
26 However, where an inmate’s complaint shows a failure to exhaust on its face, it is subject to
27 dismissal under Rule 12(b)(6). Id. at 1166; Jones, 549 U.S. at 215 (“A complaint may be
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1 subject to dismissal under Rule 12(b)(6) when an affirmative defense ... appears on its face.”)
2 (quoting Loveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001)).

3 **C. CDCR’s Administrative Grievance System**

4 The Court takes judicial notice of the fact that the California Department of
5 Corrections and Rehabilitation (CDCR) has an administrative grievance system for prisoner
6 complaints. Cal.Code Regs., tit. 15 § 3084.1. The process is initiated by submitting a CDCR
7 Form 602. Id. at § 3084.2(a)(2012). In 2012, prisoners were required to submit appeals within
8 thirty calendar days of the event being appealed or of receiving an unacceptable lower level
9 appeal decision. Id. at § 3084.8(b)(2012). Three formal levels of appeal are involved,
10 including the first level, second level, and third level. Id. at § 3084.7(2012). In order to satisfy
11 § 1997e(a), California state prisoners are required to use this process to exhaust their claims
12 prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 85 (2006); McKinney, 311 F.3d. at 1199-
13 1201.

14 **IV. DEFENDANT’S MOTION**

15 Defendant moves to dismiss this action on the ground that Plaintiff’s failure to exhaust
16 the CDCR’s administrative appeals process for Plaintiff’s claims against Defendant is evident
17 on the face of the Complaint. Defendant asserts that in the body of the Complaint, Plaintiff
18 indicates that an inmate appeal or administrative remedy process is available at his institution.
19 (Complaint, Doc. 1 at 2, ¶II-A.) Plaintiff also indicates that he has not filed an appeal or
20 grievance concerning all of the facts contained in the Complaint. (Id. at 2 ¶II-B.) Plaintiff
21 explains this failure by stating that he was “[r]uning [*sic*] out of time to file.” (Id.) Lastly,
22 Plaintiff indicates that the inmate appeal or administrative remedy process is not completed,
23 and again states that he was “[r]unning out of time to file.” (Id. at 2, ¶II-C.)

24 Defendant argues that Plaintiff’s awareness of the administrative remedy process and
25 his failure to exhaust his administrative remedies are evident on the face of the Complaint
26 because Plaintiff attests to these facts. Defendant argues that under these facts, dismissal is
27 appropriate, and is in line with the Ninth Circuit’s recent holding in Albino that “in the rare

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1 event that a failure to exhaust is clear on the face of the complaint, a defendant may move for
2 dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166.

3 Defendant also argues that Plaintiff’s reasoning for his failure to exhaust, that he was
4 “[r]unning out of time,” is legally inadequate. Defendant argues that this explanation cannot
5 excuse Plaintiff’s failure to exhaust prior to bringing this action because Plaintiff was still well
6 within the statute of limitations for the claims contained in the Complaint at the time of its
7 filing on March 21, 2013. Defendant asserts that the statute of limitations for personal injury
8 actions arising in California and brought under § 1983 is two years, and Plaintiff is allowed two
9 more years as a prisoner for tolling. Cal.Code of Civil Procedure §§ 335.1, 352.1. Defendant
10 concludes that the last day on which Plaintiff’s Complaint could be filed was May 18, 2016,
11 which is four years from the alleged wrongful act of May 18, 2012 by defendant Sharffenberg
12 and more than three years before expiration of the statute of limitations. Defendant concludes
13 that therefore Plaintiff was not “running out of time” to file his Complaint.

14 **Plaintiff’s Opposition**

15 Plaintiff filed a response to the motion to dismiss. However, he makes no argument
16 concerning exhaustion of administrative remedies. Plaintiff merely argues that his Complaint
17 and medical records are sufficient to support his claims and to prevent dismissal of his case.

18 **Discussion**

19 The court finds that Defendant has met his burden of raising and proving that Plaintiff’s
20 failure to exhaust administrative remedies is evident on the face of the Complaint. Defendant
21 has shown that Plaintiff indicates in the body of the Complaint that an inmate appeal or
22 administrative remedy process is available at his institution, (Complaint, Doc. 1 at 2, ¶II-A.);
23 that he has not filed an appeal or grievance concerning all of the facts contained in the
24 Complaint, (id. at 2 ¶II-B.); and that he did not complete the appeals process because he was
25 “[r]unning out of time to file, (id. at 2, ¶II-C.) Defendant has shown that Plaintiff was not
26 running out of time to file this case, establishing that Plaintiff’s lawsuit was subject to a four-
27 year statute of limitations, and demonstrating that Plaintiff filed the Complaint more than three
28 years before the expiration of time. Plaintiff offers no argument in opposition to Defendant’s

1 arguments. Therefore, Defendant is entitled to dismissal of this case based on Plaintiff's failure
2 to exhaust administrative remedies before filing suit.

3 **V. CONCLUSION AND RECOMMENDATION**

4 Based on the foregoing, the court finds that Defendant has met his burden of
5 demonstrating that Plaintiff failed to exhaust his administrative remedies prior to filing suit, in
6 compliance with § 1997e(a). Defendant has shown evidence that Plaintiff failed to exhaust his
7 remedies by an inmate appeal pursuant to Title 15 of the California Code of Regulations §
8 3084.1, et seq., concerning Plaintiff's allegations in the Complaint against Defendant in this
9 action. Plaintiff has not shown that he exhausted all the remedies available to him. Therefore,
10 the court finds that Defendant is entitled to dismissal of this action, and Defendant's motion to
11 dismiss should be granted.

12 Therefore, **IT IS HEREBY RECOMMENDED** that Defendant's Rule 12(b)(6) motion
13 to dismiss for failure to exhaust remedies, filed on April 11, 2014, be GRANTED, without
14 prejudice.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court. Such a document should be captioned "Objections to Magistrate
19 Judge's Findings and Recommendations." Any reply to the objections shall be served and filed
20 within ten days after service of the objections. The parties are advised that failure to file
21 objections within the specified time may waive the right to appeal the District Court's order.
22 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23
24 IT IS SO ORDERED.

25 Dated: September 8, 2014

26 /s/ Gary S. Austin
27 UNITED STATES MAGISTRATE JUDGE
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