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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER PRESTFIELD,

Plaintiff,

v.

GEORGE M. ZAKHARY,

Defendant.

Case No. 1:20-cv-01551-NONE-EPG (PC)

FINDINGS AND RECOMMENDATION,
RECOMMENDING THAT DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT BE
GRANTED

(ECF No. 38)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

Plaintiff Christopher M. Prestfield is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Defendant Doctor George M. Zakhary has moved for summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies before filing this action. For the reasons given below, it is recommended that Defendant’s motion for summary judgment be granted and this case be dismissed without prejudice.

I. BACKGROUND

Plaintiff filed his complaint on November 2, 2020. (ECF No. 1). This action is proceeding on Plaintiff’s Fourteenth Amendment claim regarding Defendant’s alleged failure to advise Plaintiff of risks associated with a surgery to repair a facial fracture. (ECF No. 5, pp. 2, 5-6).

On September 24, 2021, Defendant filed a motion summary judgment, arguing that Plaintiff failed to exhaust his administrative remedies before filing this action. (ECF No. 38).

1 Plaintiff filed an opposition on October 19, 2021, and Defendant filed a reply on October 26,
2 2021. (ECF Nos. 39, 40).

3 **II. LEGAL STANDARDS**

4 **A. Summary Judgment**

5 Summary judgment in favor of a party is appropriate when there “is no genuine dispute
6 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
7 P. 56(a); *Albino v. Baca* (“*Albino II*”), 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc) (“If there
8 is a genuine dispute about material facts, summary judgment will not be granted.”). A party
9 asserting that a fact cannot be disputed must support the assertion by “citing to particular parts
10 of materials in the record, including depositions, documents, electronically stored information,
11 affidavits or declarations, stipulations (including those made for purposes of the motion only),
12 admissions, interrogatory answers, or other materials, or showing that the materials cited do not
13 establish the absence or presence of a genuine dispute, or that an adverse party cannot produce
14 admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

15 A party moving for summary judgment “bears the initial responsibility of informing the
16 district court of the basis for its motion, and identifying those portions of ‘the pleadings,
17 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
18 any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
19 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). If the moving party
20 moves for summary judgment on the basis that a material fact lacks any proof, the Court must
21 determine whether a fair-minded jury could reasonably find for the non-moving party.
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla
23 of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on
24 which the jury could reasonably find for the plaintiff.”). “[A] complete failure of proof
25 concerning an essential element of the nonmoving party’s case necessarily renders all other
26 facts immaterial.” *Celotex*, 477 U.S. at 322. Additionally, “[a] summary judgment motion
27 cannot be defeated by relying solely on conclusory allegations unsupported by factual data.”
28 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

1 In reviewing the evidence at the summary judgment stage, the Court “must draw all
2 reasonable inferences in the light most favorable to the nonmoving party.” *Comite de*
3 *Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011). It
4 need only draw inferences, however, where there is “evidence in the record . . . from which a
5 reasonable inference . . . may be drawn”; the court need not entertain inferences that are
6 unsupported by fact. *Celotex*, 477 U.S. at 330 n. 2 (citation omitted). Additionally, “[t]he
7 evidence of the non-movant is to be believed.” *Anderson*, 477 U.S. at 255.

8 In reviewing a summary judgment motion, the Court may consider other materials in
9 the record not cited to by the parties, but is not required to do so. Fed. R. Civ. P. 56(c)(3);
10 *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

11 In a summary judgment motion for failure to exhaust, the defendant has the initial
12 burden to prove “that there was an available administrative remedy, and that the prisoner did
13 not exhaust that available remedy.” *Albino II*, 747 F.3d at 1172. If the defendant carries that
14 burden, “the burden shifts to the prisoner to come forward with evidence showing that there is
15 something in his particular case that made the existing and generally available administrative
16 remedies effectively unavailable to him.” *Id.* However, “the ultimate burden of proof remains
17 with the defendant.” *Id.* “If material facts are disputed, summary judgment should be denied,
18 and the district judge rather than a jury should determine the facts.” *Id.* at 1166.

19 **B. Exhaustion**

20 Section 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA) provides that
21 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
22 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
23 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

24 Prisoners are required to exhaust the available administrative remedies prior to filing
25 suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201
26 (9th Cir. 2002) (per curiam). The exhaustion requirement applies to all prisoner suits relating to
27 prison life. *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Exhaustion is required regardless of the
28 relief sought by the prisoner and regardless of the relief offered by the process, unless “the

1 relevant administrative procedure lacks authority to provide any relief or to take any action
2 whatsoever in response to a complaint.” *Booth v. Churner*, 532 U.S. 731, 736 (2001); *see Ross*
3 *v. Blake*, 578 U.S. 632, 643 (2016).

4 Under the PLRA, a grievance suffices if it alerts the prison to the nature of the
5 wrong for which redress is sought. The grievance need not include legal
6 terminology or legal theories, because [t]he primary purpose of a grievance is
7 to alert the prison to a problem and facilitate its resolution, not to lay
8 groundwork for litigation. The grievance process is only required to alert
9 prison officials to a problem, not to provide personal notice to a particular
10 official that he may be sued.

11 *Reyes v. Smith*, 810 F.3d 654, 659 (9th Cir. 2016) (alteration in original) (citations and internal
12 quotation marks omitted).

13 There are no “special circumstances” exceptions to the exhaustion requirement. *Ross*,
14 578 U.S. at 648. The one significant qualifier is that “the remedies must indeed be ‘available’
15 to the prisoner.” *Id.* at 639. The *Ross* Court described this qualification as follows:

16 [A]n administrative procedure is unavailable when (despite what regulations or
17 guidance materials may promise) it operates as a simple dead end—with officers
18 unable or consistently unwilling to provide any relief to aggrieved inmates. . . .

19 Next, an administrative scheme might be so opaque that it becomes, practically
20 speaking, incapable of use. . . .

21 And finally, the same is true when prison administrators thwart inmates from
22 taking advantage of a grievance process through machination, misrepresentation,
23 or intimidation. . . . As all those courts have recognized, such interference with an
24 inmate’s pursuit of relief renders the administrative process unavailable. And
25 then, once again, § 1997e(a) poses no bar.

26 *Id.* at 643-44 (internal citations omitted).

27 “When prison officials improperly fail to process a prisoner’s grievance, the prisoner is
28 deemed to have exhausted available administrative remedies.” *Andres v. Marshall*, 867 F.3d
1076, 1079 (9th Cir. 2017)

If the Court concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal
without prejudice of the portions of the complaint barred by section 1997e(a). *Jones*, 549 U.S.
at 223–24; *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

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1 **III. DISCUSSION**

2 **A. The Parties’ Positions**

3 **1. Defendant’s motion for summary judgment**

4 Citing to the California Code of Regulations, Defendant argues that administrative
5 remedies were available to Plaintiff regarding his claim. (ECF No. 38-1, pp. 7-8). Specifically,
6 Plaintiff had the right to file a grievance concerning “health care policies, decisions, actions,
7 conditions, or omissions that have a material adverse effect on their health or welfare.” Cal.
8 Code Regs. tit. 15, § 3999.226(a). Any grievance would have to be filed within 30 days of
9 “[t]he action or decision being grieved” or the “[i]nitial knowledge of the action or decision
10 being grieved.” Cal. Code Regs. tit. 15, § 3999.227(b)(1)-(2). Additionally, the grievance
11 would be required to include in a clear and coherent manner “any involved staff member’s last
12 name, first initial, title or position, and the date(s) and description of their involvement,” or if
13 there is not information to identify any staff member, “any other available information that may
14 assist in processing the health care grievance.” Cal. Code Regs. tit. 15, § 3999.227(g)(1)-(2).
15 And the grievance would be “subject to an institutional level review and [could] receive a
16 headquarters’ level grievance appeal review, if requested.” Cal. Code Regs. tit. 15,
17 § 3999.226(a)(1). And “[t]he headquarters’ level review [would] constitute[] the final
18 disposition on a health care grievance and exhaust[] administrative remedies” Cal. Code
19 Regs. tit. 15, § 3999.230(h).

20 Defendant argues that although Plaintiff is familiar with the health care grievance
21 process, having submitted numerous grievances before and after the events at issue in the
22 complaint, Plaintiff failed to submit a health care grievance relating to the claim at issue here—
23 Defendant’s alleged failure to properly inform Plaintiff of the risks of his June 21, 2019
24 operation to repair a facial fracture at the Community Medical Center in Fresno, California.
25 (ECF No. 38-1, p. 9). While Defendant acknowledges that Plaintiff filed two health care
26 grievances generally touching on his face injury, LAC HC 19000928 and SAC HC 20000167,
27 neither relate to the claim presented in the complaint. (*Id.* at 4-5). Specifically, LAC HC
28 19000928 concerned allegedly improper care at the Treatment and Triage Area at California

1 State Prison before Plaintiff’s surgery—alleging that staff tried to treat Plaintiff with only a
2 “pain shot”—and improper medical care after his surgery—alleging that Plaintiff received
3 inadequate pain medication. (ECF No. 38-2, pp. 22-37). And SAC HC 20000167 concerned the
4 discontinuation of a specific medication, Gabapentin, following Plaintiff’s surgery. (*Id.* at 39-
5 50). Defendant argues that because neither of these grievances relate to the claim at issue here,
6 and Plaintiff filed no other health care grievance related to his claim, Plaintiff has failed to
7 properly exhaust his administrative remedies before filing suit. (ECF No. 38-1, p. 10).

8 In support of the motion for summary judgment, Defendant has submitted the
9 declaration of S. Gates, who is currently employed by California Correctional Health Care
10 Services (CCHCS) in the Policy and Risk Management Services division as the Chief of the
11 Health Care Correspondence and Appeals Branch. (ECF No. 38-2, p. 1). Citing the California
12 Code of Regulations discussed above, Gates recounts the procedural mechanism available to
13 Plaintiff to file a health care grievance. (*Id.* at 2). And Gates declares that, since August 1,
14 2008, health care grievances have been processed by CCHCS. (*Id.*). All levels of the process
15 are tracked through a computer database called the Health Care Appeals and Risk Tracking
16 System (HCARTS), which “is kept as a regularly conducted activity, and the computer entries
17 are made at or near the time of the occurrence by the employee who is processing the health
18 care appeal/grievance.” (*Id.*). Gates’s office conducted a review of HCARTS, which reveals
19 that Plaintiff never submitted any health care appeal related to the claim at issue here. (*Id.* at 3-
20 4). Gates has provided an attached printout of Plaintiff’s grievance history spanning 2007-2021
21 (*Id.* at 7-14).

22 **2. Plaintiff’s opposition**

23 Plaintiff’s opposition asserts that he did file health care grievances “on more than one
24 occasion relatively soon after the procedure that is at the heart of this action.” (ECF No. 39, p.
25 2). He alleges that prison officials “simply failed to respond” to them “on numerous occasions
26 until it became obvious that the only remedy in this case . . . must be obtained through the
27 courts.” (*Id.*). Plaintiff states that he cannot prove that he filed the health care grievances
28 “because it is the Defendant’s agents and officers responsibility to document and record the

1 contested filings.” (*Id.* at 3).

2 Plaintiff states that this Court has noted that he “appears to be a rational and capable
3 actor.”¹ (*Id.*). Plaintiff argues that common sense dictates that a rational person would have
4 exhausted his administrative remedies before filing suit. (*Id.* at 4). He also states that he pled
5 guilty in his criminal case because the facts showed he was guilty and he did not want to “waste
6 anyone’s time,” indicating that he would not waste time in this case by falsely claiming he filed
7 health care grievances. (*Id.* at 5). Plaintiff concludes by asserting that he is more likely to be
8 telling the truth than Defendant, who has failed to “act in good faith” in other cases similar to
9 his. (*Id.*). Plaintiff attaches no sworn document supporting his allegations.

10 3. Defendant’s reply

11 Defendant’s reply argues that Plaintiff’s unsworn statements that he exhausted his
12 administrative remedies may not be considered admissible evidence for purposes of opposing
13 their motion for summary judgment. (ECF No. 40, p. 5) (citing Fed. R. Civ. P. 56(c)(1)(A)).
14 Defendant states that because Plaintiff has failed to reproduce Defendant’s statement of
15 undisputed facts as required by Local Rule 260(b), this Court may accept Defendant’s
16 statement of undisputed facts as true.² (*Id.* at 3). And Defendant contends that, although he has
17 provided over 5,000 pages of documents to Plaintiff in this case, Plaintiff is unable to point to
18 any single document to support his unsworn allegations. (*Id.* at 8). Moreover, Plaintiff provides
19 no details concerning his alleged submission of the grievances, such as how many grievances
20 he submitted, and fails to explain why his other grievances were processed but not those
21 relating to the claim in this case. (*Id.* at 7-9). In support of the reply, Defendant offers the

22 ¹ Perhaps Plaintiff is referring to the Court’s order denying Plaintiff’s motion for a competency hearing
23 and *pro bono* counsel, in which the Court concluded, “And, as noted, Plaintiff’s filings in this case have
24 thus far been coherent, including the instant filing. Thus, Plaintiff appears to be able to litigate this
action.” (ECF No. 35, p. 5).

25 ² Local Rule 260(b), provides, in part, as follows: “Any party opposing a motion for summary judgment
26 or summary adjudication shall reproduce the itemized facts in the Statement of Undisputed Facts and
27 admit those facts that are undisputed and deny those that are disputed, including with each denial a
28 citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission,
or other document relied upon in support of that denial. The opposing party may also file a concise
‘Statement of Disputed Facts,’ and the source thereof in the record, of all additional material facts as to
which there is a genuine issue precluding summary judgment or adjudication. The opposing party shall
be responsible for the filing of all evidentiary documents cited in the opposing papers. *See* L.R. 133(j).”

1 declaration of defense counsel Howard Skebe, which discusses the documents provided to
2 Plaintiff as part of this case, including documents related to the issue of exhaustion. (ECF No.
3 40-1).

4 **B. Analysis**

5 As an initial matter, Defendant has shown, and Plaintiff does not dispute, that there was
6 an available administrative remedy for Plaintiff to pursue. Specifically, at the time relevant to
7 Plaintiff's claim, Plaintiff could file a grievance relating to "health care policies, decisions,
8 actions, conditions, or omissions that have a material adverse effect on [his] health or welfare."
9 Cal. Code Regs. tit. 15, § 3999.226(a). Moreover, he could pursue further review of any
10 grievance at the institutional level and headquarters level. Cal. Code Regs. tit. 15, §§
11 3999.226(a)(1), 3999.230(h).

12 Additionally, Plaintiff does not dispute Defendant's contention that neither of the two
13 health care grievances discussed above (LAC HC 19000928 and SAC HC 20000167) relate to
14 his claim. Accordingly, the only issue is whether Plaintiff submitted any health care grievance
15 related to his claim that Defendant failed to properly advise him of the risks involved with his
16 June 21, 2019 surgery.

17 On this point, Defendant has produced evidence that Plaintiff failed to file any health
18 care grievance related to his claim; specifically, the declaration of Gates and attachments
19 showing that all health care grievances and responses are tracked in HCARTS and that review
20 of this system revealed no health care grievance relating to the claim in this case. *See* Fed. R.
21 Civ. P. 56(c)(1) (noting that a party asserting that a fact cannot be genuinely disputed may
22 support the assertion with "declarations" among other documents); (ECF No. 38-2, p. 2). This
23 evidence is also memorialized in Defendant's Statement of Undisputed Facts, which this Court
24 may accept as undisputed because Plaintiff failed to admit or deny those facts as required by
25 Local Rule 260(b). *See Brito v. Barr*, No. 2:18-cv-00097-KJM-DB, 2020 WL 4003824, at *6
26 (E.D. Cal. July 15, 2020) (deeming defendant's undisputed facts as admitted after plaintiff
27 failed to comply with Local Rule 260(b)).

28 The Court concludes that because Defendant has carried his burden to show that there

1 was an available administrative remedy and that Plaintiff did not exhaust that remedy prior to
2 commencement of this lawsuit, “the burden shifts to [Plaintiff] to come forward with evidence
3 showing that there is something in his particular case that made the existing and generally
4 available administrative remedies effectively unavailable to him.” *Albino II*, 747 F.3d at 1172.

5 Here, Plaintiff asserts that he filed an unspecified number of health care grievances
6 regarding his claim, but they were “not recorded and responded to.” (ECF No. 39, p. 3).

7 Plaintiff appears to be invoking a line of authority, noted above, that a prison’s failure to
8 process a grievance means that a court will deem the exhaustion requirement satisfied. *See*

9 *Fordley v. Lizarraga*, No. 19-15691, 2021 WL 5227674, at *7 (9th Cir. Nov. 10, 2021)

10 (“[W]here inmates take reasonably appropriate steps to exhaust but are precluded from doing
11 so by a prison’s erroneous failure to process the grievance, we have deemed the exhaustion
12 requirement satisfied.”). Plaintiff also contends that he is a truthful and rational person who
13 would have exhausted his administrative remedies.

14 As an initial matter, as Defendant points out, Plaintiff’s above statements in his
15 opposition are not sworn under penalty of perjury. Thus, the opposition brief is not admissible

16 as evidence on summary judgment. *See Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004)

17 (noting that a court may consider verified pleadings as evidence for *pro se* parties); *Johnson v.*

18 *Sandy*, No. 2:12-cv-02922-JAM-AC-P, 2015 WL 1894400, at *1 (E.D. Cal. Apr. 24, 2015)

19 (“Unsworn declarations not signed under penalty of perjury do not constitute admissible

20 evidence properly considered in ruling on a motion for summary judgment.” (citing 28 U.S.C. §
21 1746)).

22 However, even if Plaintiff had sworn to the statements in his opposition, they would be
23 insufficient to defeat summary judgment. Notably, although Plaintiff contends that the

24 grievances were not responded to, Plaintiff’s allegations lack any detailed factual support that
25 would help to ascertain whether he filed any health care grievance. For example, Plaintiff does

26 not provide a description of the contents of any grievance nor allege when, where, how, or to

27 whom he submitted it. Moreover, Plaintiff does not put forth evidence that he took any follow-

28 up action on the grievances he claims to have filed; rather, he indicates that he decided to file

1 suit because “it became obvious that the only remedy . . . must be obtained through the courts.”
2 (ECF No. 39, p. 2). Relatedly, Plaintiff admits that he cannot provide any evidence in support
3 of his assertions, for example, any copy of a health care grievance he claims he submitted after
4 his surgery. Lastly, Plaintiff fails to provide any explanation for why his other health care
5 grievances were properly recorded and responded to, yet his purportedly filed grievances on
6 this one claim were not.

7 In sum, the Court concludes that Plaintiff’s allegations do not raise a genuine issue of
8 fact because “[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting
9 evidence, is insufficient to create a genuine issue of material fact.” *F.T.C. v. Publ’g Clearing*
10 *House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *as amended* (Apr. 11, 1997); *see Combs v.*
11 *Moore*, No. 1:19-cv-00390-NONE-BAM, 2020 WL 6561124, at *6 (E.D. Cal. Nov. 9, 2020)
12 (finding no genuine issue of material fact because “[t]here is no evidence before the Court,
13 aside from Plaintiff’s own allegations, that he ever attempted to submit any grievances related
14 to the claims in this action prior to the filing of this lawsuit” and “Plaintiff . . . failed to present
15 more than his own allegations, unsupported by evidence in the record, to demonstrate that he
16 was unable to exhaust his administrative remedies”), *report and recommendation adopted*,
17 2021 WL 534878 (E.D. Cal. Feb. 11, 2021); *Otto v. Quinn*, No. EDCV 16-1883 AB (AS), 2019
18 WL 4221090, at *4 (C.D. Cal. June 6, 2019) (finding that plaintiff’s “conclusory and
19 unsupported assertion that he exhausted his administrative remedies is insufficient to avoid
20 summary judgment”), *report and recommendation adopted*, 2019 WL 7037781 (C.D. Cal.
21 Dec. 19, 2019).

22 Because the PLRA requires complete exhaustion of a grievance prior to filing suit, and
23 because Plaintiff did not exhaust his claim prior to filing suit, Defendant’s motion for summary
24 judgment should be granted and this case should be dismissed without prejudice for failure to
25 exhaust. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1200 (9th Cir. 2002) (requiring
26 dismissal without prejudice where a prisoner “d[oes] not exhaust his administrative remedies
27 prior to filing suit but is in the process of doing so when a motion to dismiss is filed”).

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1 **IV. CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

3 1. Defendant’s motion for summary judgment (ECF No. 38) be GRANTED; and

4 2. This action be DISMISSED without prejudice because Plaintiff failed to exhaust
5 his available administrative remedies before filing this action.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty
8 (21) days after being served with these findings and recommendations, any party may file
9 written objections with the Court. Such a document should be captioned “Objections to
10 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be
11 served and filed within fourteen (14) days after service of the objections. The parties are
12 advised that failure to file objections within the specified time may result in the waiver of rights
13 on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v.*
14 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

15
16 IT IS SO ORDERED.

17 Dated: November 19, 2021

18 /s/ Eric P. Gray
19 UNITED STATES MAGISTRATE JUDGE
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