



1 indifference claim against Defendants Rene Pfister and Danelli Taylor (referred to as  
2 “nurse Valentine” in the complaint) and officer John Doe. (ECF No. 5.) The following  
3 facts are taken from the complaint.

4 On August 21, 2013, Plaintiff started experiencing attacks from his Crohn’s  
5 disease that lasted over twenty-four hours. (ECF No. 6 at 3.) Defendant Taylor brought  
6 Plaintiff his daily medication and told him to submit a kite so that he could be scheduled  
7 to be seen by a physician. (*Id.*) The next day, Plaintiff told Defendants Taylor and Pfister  
8 that he was still experiencing Crohn’s attacks and that he needed to see a physician  
9 immediately. (*Id.* at 4.) Taylor told Plaintiff to submit a kite and when he told her he had,  
10 she told him he would have to wait to be seen. (*Id.*) Plaintiff’s pain continued to worsen  
11 and he asked both nurses for assistance, but received no help. (*Id.*)

12 On August 26, 2013, the lower right side of Plaintiff’s stomach swelled up like a  
13 balloon; he asked defendant John Doe correctional officer for a doctor and was told to  
14 shut up. (*Id.*) A few hours later, a different correctional officer found Plaintiff non-  
15 responsive in his cell. (*Id.*) He was then transported to St. Mary’s Hospital in Reno. (*Id.*)  
16 At the hospital, Plaintiff underwent surgery for an intestinal rupture and spent twenty-one  
17 days in the hospital during his recovery. (*Id.*)

### 18 **III. LEGAL STANDARD**

#### 19 **A. Review of the Magistrate Judge’s Recommendations**

20 This Court “may accept, reject, or modify, in whole or in part, the findings or  
21 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party  
22 timely objects to a magistrate judge’s report and recommendation, then the court is  
23 required to “make a *de novo* determination of those portions of the [report and  
24 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1).

#### 25 **B. Summary Judgment Standard**

26 “The purpose of summary judgment is to avoid unnecessary trials when there is  
27 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
28 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the

1 pleadings, the discovery and disclosure materials on file, and any affidavits “show there  
2 is no genuine issue as to any material fact and that the movant is entitled to judgment as  
3 a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is  
4 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could  
5 find for the nonmoving party and a dispute is “material” if it could affect the outcome of  
6 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49  
7 (1986). Where reasonable minds could differ on the material facts at issue, however,  
8 summary judgment is not appropriate. See *id.* at 250-51. “The amount of evidence  
9 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to  
10 resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718  
11 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S.  
12 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts  
13 and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*  
14 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

15 The moving party bears the burden of showing that there are no genuine issues  
16 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once  
17 the moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting  
18 the motion to “set forth specific facts showing that there is a genuine issue for trial.”  
19 *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the  
20 pleadings but must produce specific evidence, through affidavits or admissible discovery  
21 material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,  
22 1409 (9th Cir. 1991), and “must do more than simply show that there is some  
23 metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th  
24 Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
25 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position  
26 will be insufficient.” *Anderson*, 477 U.S. at 252.

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1 **IV. DISCUSSION**

2 **A. Defendants' Motion for Summary Judgment**

3 The Magistrate Judge recommends granting Defendants' Motion, finding that  
4 Plaintiff failed to exhaust his administrative remedies before filing this lawsuit as required  
5 under the Prison Litigation Reform Act ("PLRA"). (ECF No. 53.) Under the PLRA, a §  
6 1983 claim may not be brought by a prisoner until he has exhausted all available  
7 administrative remedies. 42 U.S.C. § 1997e(a). Exhaustion requires that an inmate use  
8 all procedures the prison "holds out," *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir.  
9 2009), including compliance with agency deadlines and other critical procedural rules,  
10 *Woodford v Ngo*, 548 U.S. 81, 90-91 (2006). The level of detail required in an  
11 administrative grievance is determined by the prison's applicable procedures. *Morton v.*  
12 *Hall*, 599 F.3d 942, 926 (9th Cir. 2010). Proper exhaustion is not required under the  
13 PLRA if administrative remedies are "effectively unavailable." *v. Kimbrell*, 623 F.3d  
14 813, 823 (9th Cir. 2010). A remedy is "available" to inmates when it is "capable of use  
15 [or] at hand." *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc) (quoting  
16 *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005)).

17 The Magistrate Judge found that Plaintiff failed to dispute that he did not file a  
18 grievance related to the claims in this case pursuant to WCDF's grievance procedures  
19 found at Washoe County Sheriffs Standard Operating Procedure ("SOP") 720.033. (ECF  
20 No. 53 at 5-6.) SOP 720.033 provides that the first step in the grievance process  
21 requires an oral complaint or an informal grievance must be presented within five (5)  
22 days from the date of the event. (ECF No. 41-2 at 4.) In opposing summary judgment,  
23 Plaintiff argued that he exhausted his administrative remedies because he was granted  
24 access to a doctor and treatment and he was not required to pursue an already available  
25 remedy. (ECF No. 51 at 9-10.) The Magistrate Judge correctly rejected this argument as  
26 being legally deficient. (ECF No. 53 at 6.)

27 In his objection, Plaintiff contends that the grievance process was not available to  
28 him because he "was in [the] hospital on an intravenous morphine drip post operatively

1 to the event for 16 days” and could not initiate the grievance process within the five (5)  
2 day deadline required under SOP 720.033. (ECF No. 54 at 2, 5.) Plaintiff also contends  
3 that he “attempted to bring his concern to the only available deputy in a position to  
4 receive his complaint, but the actions of that deputy foreclosed Plaintiff’s access to the  
5 SOP 720.033” because that deputy told Plaintiff to “shut the f\_\_k up.” (*Id.* at 5.) In his  
6 reply, Plaintiff clarified that the deputy who allegedly told him to “shut up” was John Doe  
7 guard as alleged in his complaint. (ECF No. 56 at 2.)

8 Defendants correctly noted that these arguments were not presented in Plaintiff’s  
9 opposition to the Motion. (ECF No. 55 at 3.) The Court has discretion, but is not required,  
10 to consider new arguments raised for the first time in a party’s objection to a magistrate  
11 judge’s ruling.” *Brown v. Roe*, 279 F.3d 742, 7444-46 (9th Cir. 2002). The Court will  
12 consider Plaintiff’s new arguments because of the dispositive nature of Defendants’  
13 Motion.

14 Plaintiff’s new arguments fail to show that the administrative remedies were not  
15 unavailable to him. The incident that gives rise to the deliberate indifference claim  
16 against Pfister and Taylor occurred on August 21, 2013, when Plaintiff alleged he  
17 informed Taylor that he started experiencing attacks from his Crohn’s disease and Taylor  
18 told Plaintiff to submit a kite so that he could be scheduled to be seen by a physician.  
19 (ECF No. 6 at 4.) The next day, Plaintiff told defendants Taylor and Pfister that he was  
20 still experiencing Crohn’s attacks and that he needed to see a physician immediately,  
21 and he was again told to submit a kite (*Id.* at 4.) On August 26, 2013, five (5) days after  
22 his initial complaint, Plaintiff was transported to St. Mary’s Hospital where he underwent  
23 surgery for an intestinal rupture and spent twenty-one days in the hospital during his  
24 recovery. (*Id.*) Thus, Plaintiff was not hospitalized immediately as he appears to suggest  
25 in his objection. Based on Plaintiff’s allegations in his complaint, he had five (5) days  
26 before he was hospitalized to grieve the denial of his request for medical attention by  
27 Pfister and Taylor.

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1 As for Plaintiff' argument that John Doe guard's response made the grievance  
2 process unavailable to him, the complaint alleges that on August 26, 2013, when the  
3 lower right side of his stomach swelled up like a balloon, he asked defendant John Doe  
4 correctional officer for a doctor and was told to shut up. (ECF No. 6 at 4.) Based on  
5 Plaintiff's allegations, he asked John Doe for help, but he did not attempt to initiate the  
6 first level grievance with John Doe. Even assuming that Plaintiff's hospitalization starting  
7 on August 26, 2013, for sixteen (16) days rendered the grievance process unavailable to  
8 him because he could not have filed the grievance within five (5) days, Plaintiff would be  
9 excused from exhaustion only with respect to his claim against John Doe, not his claim  
10 against Pfister and Taylor.

11 The Court agrees with Magistrate Judge Cooke that Plaintiff failed to exhaust his  
12 administrative remedies as to his claim against Pfister and Taylor. Accordingly, the Court  
13 will adopt the R&R.

14 **V. CONCLUSION**

15 It is therefore ordered, adjudged and decreed that the Report and  
16 Recommendation of Magistrate Judge Valerie P. Cooke (ECF No. 53) is accepted and  
17 adopted in full.

18 It is further ordered that Defendants' Motion for Summary Judgment (ECF No. 40)  
19 is granted.

20 It is further ordered that the Clerk enter judgment and close this case.

21 DATED THIS 8<sup>th</sup> day of May 2017.

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24 MIRANDA M. DU  
25 UNITED STATES DISTRICT JUDGE  
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