

1 Plaintiff alleges that he requires special shoes that meet his medical needs, and that he had
2 previously been permitted to order and wear these shoes. He claims the shoes were previously ordered
3 by Chambers or sent to him directly from a shoe company and paid for by his family. He claims the
4 shoes are prescribed by a doctor, yet prison officials subsequently refused to permit him to have them.
5 He alleges that Lindburg prevented him from obtaining shoes from an outside vendor unless they were
6 medically authorized, and when Plaintiff showed him the medical authorization it was rejected as
7 expired. When he obtained the medical update and sent it to Lindburg, he contends that Lindburg
8 continued to refuse to issue the shoes, stating he had to consult with Williams. He initiated the grievance
9 process and was denied relief by Baros, who told him the shoes were a comfort item and had to be
10 ordered from the prison canteen or package program. Williams agreed and suggested Plaintiff order the
11 shoes from Chambers. Chambers told Plaintiff he would not receive his shoes because he was no longer
12 able to special order shoes for health reasons. Plaintiff grieved the issue to McDaniel, who denied his
13 request for assistance. Without the shoes, he claims he suffers in pain as he attempts to engage in day-to-
14 day activities.

15 Plaintiff previously sought a preliminary injunction, but his request was denied, with the court
16 finding he had not demonstrated a likelihood of success on the merits, likelihood of suffering irreparable
17 harm, that the balance of equities tipped in his favor, or that injunctive relief was in the public interest.
18 (*See* ECF Nos. 17, 21, 34.) Plaintiff appealed that determination, and the Ninth Circuit affirmed the
19 decision. (ECF No. 44.)

20 Defendants now move for summary judgment, arguing: (1) Plaintiff failed to exhaust his
21 administrative remedies; (2) there is no evidence McDaniel or Baros had any personal participation in
22 the alleged events; (3) Plaintiff cannot establish deliberate indifference; and (4) Defendants are entitled
23 to qualified immunity.

24 **II. LEGAL STANDARD**

25 "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to
26 the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th
27 Cir. 1994) (citation omitted). In considering a motion for summary judgment, all reasonable inferences
28 are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "The court shall grant summary judgment
2 if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled
3 to judgment as a matter of law." Fed. R. Civ. P. 56(a). On the other hand, where reasonable minds could
4 differ on the material facts at issue, summary judgment is not appropriate. *See Anderson*, 477 U.S. at
5 250.

6 A party asserting that a fact cannot be or is genuinely disputed must support the
7 assertion by:

8 (A) citing to particular parts of materials in the record, including depositions,
9 documents, electronically stored information, affidavits or declarations, stipulations
(including those made for purposes of the motion only), admissions, interrogatory
10 answers, or other materials; or

11 (B) showing that the materials cited do not establish the absence or presence of a
12 genuine dispute, or that an adverse party cannot produce admissible evidence to
13 support the fact.

14 Fed. R. Civ. P. 56(c)(1)(A), (B).

15 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be made
16 on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or
17 declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

18 In evaluating whether or not summary judgment is appropriate, three steps are necessary: (1)
19 determining whether a fact is material; (2) determining whether there is a genuine dispute as to a material
20 fact; and (3) considering the evidence in light of the appropriate standard of proof. *See Anderson*, 477
21 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of the suit
22 under the governing law will properly preclude the entry of summary judgment; factual disputes which
23 are irrelevant or unnecessary will not be considered. *Id.* at 248.

24 In deciding a motion for summary judgment, the court applies a burden-shifting analysis. "When
25 the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward
26 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at
27 trial.'...In such a case, the moving party has the initial burden of establishing the absence of a genuine
28 [dispute] of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*,
213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party
bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1)

1 by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
2 demonstrating the nonmoving party failed to make a showing sufficient to establish an element essential
3 to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp. v.*
4 *Cartrett*, 477 U.S. 317, 323-25 (1986).

5 If the moving party satisfies its initial burden, the burden shifts to the opposing party to establish
6 that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
7 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of material fact, the opposing
8 party need not establish a genuine dispute of material fact conclusively in its favor. It is sufficient that
9 "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions
10 of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.
11 1987) (quotation marks and citation omitted). "Where the record taken as a whole could not lead a
12 rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*,
13 475 U.S. at 587 (citation omitted). The nonmoving party cannot avoid summary judgment by relying
14 solely on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must
15 go beyond the assertions and allegations of the pleadings and set forth specific facts by producing
16 competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

17 That being said,

18 [i]f a party fails to properly support an assertion of fact or fails to properly address
19 another party's assertion of fact as required by Rule 56(c), the court may: (1) give an
20 opportunity to properly support or address the fact; (2) consider the fact undisputed for
21 purposes of the motion; (3) grant summary judgment if the motion and supporting
materials—including the facts considered undisputed—show that the movant is entitled
to it; or (4) issue any other appropriate order.

22 Fed. R. Civ. P. 56(e).

23 At summary judgment, the court's function is not to weigh the evidence and determine the truth
24 but to determine whether there is a genuine dispute of material fact for trial. *See Anderson*, 477 U.S. at
25 249. While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be
26 drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not significantly
27 probative, summary judgment may be granted. *Id.* at 249-50 (citations omitted).

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III. DISCUSSION

A. Exhaustion

Defendants acknowledge Plaintiff submitted a grievance that was directed at property staff for giving him an unauthorized notification for a pair of basketball shoes he had ordered in the mail, and that he complained that property staff should have given him his “medical shoes,” attaching a medical order related to his chronic medical condition. (ECF No.26 at 4.) Defendants likewise admit that Plaintiff took this grievance through the second and final level. They argue, however, that he did not grieve he had been denied requests for shoes other than these, and he did not identify his chronic medical condition, or the type of shoe required. (Id. at 10.) As such, they contend he failed to properly exhaust his administrative remedies.

The court disagrees.

The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative remedies irrespective of the forms of relief sought and offered through administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

The failure to exhaust administrative remedies is “an affirmative defense the defendant must plead and prove.” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)), *cert. denied*, 135 S.Ct. 403 (Oct. 20, 2014). Unless the failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion for summary judgment. *See id.* (overruling in part *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) which stated that failure to exhaust should be raised in an “unenumerated Rule 12(b) motion”).

As such: “If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts [in a preliminary proceeding].” *Id.*, 1168, 1170-71 (citations omitted). “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s claim. If discovery is appropriate, the

1 district court may in its discretion limit discovery to evidence concerning exhaustion, leaving until
2 later—if it becomes necessary—discovery related to the merits of the suit." *Id.* at 1170 (citing *Pavey v.*
3 *Conley*, 544 F.3d 739, 742 (7th Cir. 2008)). If there are disputed factual questions, they "should be
4 decided at the very beginning of the litigation." *Id.* at 1171.

5 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely or
6 otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion." *Woodford*
7 *v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the agency holds out, and
8 doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* (quoting *Pozo v.*
9 *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original). Thus, "[s]ection 1997e(a)
10 requires an inmate not only to pursue every available step of the prison grievance process but also to
11 adhere to the 'critical procedural rules' of that process." *Reyes v. Smith*, 810 F.3d 654, 657 (9th Cir.
12 2016) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). "[I]t is the prison's requirements, and not the
13 PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). That
14 being said, an inmate exhausts available administrative remedies "under the PLRA despite failing to
15 comply with a procedural rule if prison officials ignore the procedural problem and render a decision on
16 the merits of the grievance at each available step of the administrative process." *Reyes*, 810 F.3d at 658.

17 Within NDOC, the exhaustion process is governed by Administrative Regulation (AR) 740.
18 (ECF No. 26-21.) An inmate is supposed to attempt to resolve grievable issues through discussion with
19 their caseworker, and then must complete three levels of grievance review—informal, first and second
20 levels— in order to exhaust administrative remedies. (*Id.* at 5-10.)

21 Where the grievance system does not discuss the particular level of specificity required for
22 exhaustion, the court requires the grievance to alert the prison to the nature of the wrong for which the
23 redress is sought. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). In this action, Plaintiff
24 claims that he was not provided with medically prescribed shoes. The grievance documentation in the
25 record sufficiently put the Defendants on notice of the nature of the wrong for which he sought redress
26 by referencing the fact that shoes he claimed were medically prescribed were deemed unauthorized. (*See*
27 ECF No. 26-13 at 8-12.) Therefore, Defendants are not entitled to summary judgment on the basis that
28 Plaintiff failed to exhaust his administrative remedies. The court will now address the arguments

1 pertaining to the merits of Plaintiff’s Eighth Amendment claim.

2 **B. Eighth Amendment Deliberate Indifference to Serious Medical Needs**

3 A prisoner can establish an Eighth Amendment violation arising from deficient medical care if
4 he can prove prison officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble*,
5 429 U.S. 97, 104 (1976). A claim of deliberate indifference requires an examination of two elements:
6 the seriousness of the prisoner’s medical need, and the nature of the defendant’s response to that need.
7 *Akhtar v. Mesa*, 698 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
8 Cir. 2006)). “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in
9 further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin v. Smith*, 974
10 F.2d 1050, 1059 (9th Cir. 1992), *rev’d on other grounds in WMX Tech, Inc. v. Miller*, 104 F.3d 1133
11 (9th Cir. 1997)). Examples of conditions that are “serious” in nature include “an injury that a reasonable
12 doctor or patient would find important and worthy of comment or treatment; the presence of a medical
13 condition that significantly affects an individual’s daily activities; or the existence of chronic and
14 substantial pain.” *McGuckin*, 974 F.2d at 1059-60; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000)
15 (citation omitted).

16 If the medical need is “serious,” the plaintiff must show the defendant acted with deliberate
17 indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation omitted). Deliberate
18 indifference is only present when a prison official “knows of and disregards an excessive risk to inmate
19 health or safety[.]” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Akhtar*, 698 F.3d at 1213 (citation
20 omitted).

21 Defendants do not dispute that Plaintiff requires special shoes, i.e., size 15 E wide, extra
22 cushioned shoes. Defendants do argue that this need for special-sized shoes does not constitute a serious
23 medical need. Plaintiff, on the other hand, claims that he experienced pain when he had ill-fitting shoes.

24 Assuming, without deciding, that Plaintiff suffers from a serious medical condition relative to
25 his feet and footwear, the court nevertheless concludes there is no evidence that Defendants were
26 deliberately indifferent to his condition.

27 Plaintiff first complained of foot pain in 2008, and a medical order issued on April 23, 2008, that
28 Plaintiff be provided with appropriate-sized tennis shoes, which could be specially ordered if necessary.

1 (ECF No. 28-1 at 10; ECF No. 28-1 at 13; ECF No. 33 at 13.) Plaintiff sent a kite to Dr. Scott on
2 May 15, 2008, regarding the shoes on order, stating that the boots he was wearing were too big and hurt
3 his ankles. (ECF No. 28-1 at 9.) In response, he was advised that the shoes did not need to be ordered
4 by medical, but that he needed to obtain shoes that were the right size for him from the prison laundry.
5 (*Id.*) There is a notation in Plaintiff's medical file on November 9, 2010, that he was reclassified to a
6 lower bunk due to a history of foot injury. (ECF No. 28-1 at 14.)

7 Defendants acknowledge that Baros, Sandie, Lindberg and Chambers were on notice that
8 Plaintiff needed appropriate-sized tennis shoes. (ECF No. 26 at 15-16.) Chambers oversaw the issuance
9 of special order shoes to Plaintiff on multiple occasions, and specifically on July 30, 2008, March 29,
10 2010, April 20, 2012, and July 15, 2014. (Chambers Decl., ECF No. 26-8 at 2 ¶¶ 8-9, ECF No. 26-19
11 at 2 ¶¶ 6-7; ECF No. 26-15.) According to Plaintiff, he had been provided New Balance shoes through
12 Chambers, which fit his needs, but the shoes were subsequently changed to another brand, which hurt
13 his feet. (ECF No. 33 at 4-5, 18-19 ¶¶ 4, 6.) He refused to accept these shoes, and this is what led to him
14 have his family order a different pair of shoes to be sent to Plaintiff at LCC. (ECF No. 33 at 5, 18-19.)
15 This comports with Chambers' version of events that in July 2015, he offered Plaintiff another pair of
16 special order shoes which Plaintiff refused, stating that he had a personal pair of shoes sent in.
17 (Chambers Decl., ECF No. 26-8 at 2 ¶ 10; Chambers Decl., ECF No. 26-19.)

18 A pair of Reebok Royal Court Flyer shoes in size 15 were ordered by Plaintiff's family member
19 from a vendor called Walkenhorst's, for a total of \$56.89, and were shipped to Plaintiff at LCC.
20 (ECF No. 26-1 at 2-4; ECF No. 26-2 at 2¹.)

21 Chambers reviewed the shoes Plaintiff had referenced, and they were not issued to Plaintiff
22 because they were not from an authorized vendor, which was conveyed to Plaintiff. (Chambers Decl.,
23 ECF No. 26-8 at 3 ¶ 11; Sandie Decl., ECF No. 26-9 ¶¶ 10, 17-18; Lorton Decl., ECF No. 26-10 at 2 ¶ 9;
24 Lindberg Decl., ECF No. 26-12 ¶ 10; ECF No. 33 at 6.) Plaintiff acknowledges that he was advised that
25 the same shoes were available from the prison's authorized vendor, ACCESS SECUREPAK. (ECF No.

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28 This is the declaration of Roy Lorton, a correctional officer assigned to LCC's property room, who authenticates
a photograph taken of the shoes delivered to LCC and addressed to Plaintiff, which were held in the property room along with
a copy of the accompanying invoice.

1 33 at 6.) Sandie had reviewed ACCESS SECUREPAK’s catalog and determined that they offer men’s
2 shoes up to size 17 4E. (Sandie Decl., ECF No. 26-9 ¶ 19.) Plaintiff also admits that he was told his
3 family could obtain a refund from the shoes purchased from Walkenhorst’s and apply it to shoes
4 purchased from ACCESS SECUREPAK. (ECF No. 33 at 6.) In fact, Sandie had confirmed with
5 Plaintiff’s family member that she could obtain a refund from Walkenhorst’s for the unauthorized shoes,
6 and apply those funds toward the purchase from an NDOC-approved vendor. (Sandie Decl., ECF No.
7 26-9 at 3 ¶ 11.)

8 Plaintiff argues that the problem with this is that Defendants waited until after the shoes his
9 family ordered had arrived to tell him that his vendor was not authorized, and had he known about
10 ACCESS SECUREPAK, he would have had his family purchase the shoes from them in the first place.
11 (ECF No. 33 at 6.) The fact that Plaintiff did not find out about the authorized vendor until after the
12 shoes had been sent in by his family does not make Defendants deliberately indifferent to an excessive
13 risk to Plaintiff’s health when Plaintiff acknowledges that his family member could obtain a refund and
14 purchase appropriately sized shoes acceptable to Plaintiff from the prison’s approved vendor.

15 There is a medical order in Plaintiff’s file dated December 2, 2015, which states that Plaintiff had
16 “his own special order prosthetic shoes that are in property. The shoes correct a flat foot pronation
17 deformity.” (ECF No. 28-1 at 11.) The form stated that the “orthotic shoes” should be released from
18 property. (*Id.*) This order was rejected by Sandie. (*Id.*) Sandie did so because the shoes came from an
19 unauthorized vendor, and were not “prosthetic” shoes or “orthotic” devices as NDOC’s regulations
20 define those terms. (Sandie Decl., ECF No. 26-9 ¶¶ 20-21.) Plaintiff argues that Sandie was not
21 medically qualified to make that determination. (ECF No. 33 at 7.) Sandie’s determination appears to
22 be consistent with NDOC’s regulations which require medically required prosthetics to come from an
23 authorized vendor (ECF No. 26-3, ECF No. 26-4), and common understanding of the terms “prosthetic”
24 and “orthotic.” In any event, Plaintiff does not dispute he was still able to purchase the shoes through
25 NDOC’s authorized vendor.

26 In support of his opposition, Plaintiff provides a declaration of another inmate who says he was
27 permitted to purchase shoes from a vendor other than ACCESS SECUREPAK six months after Plaintiff
28 received his shoes. (ECF No. 33 at 22-23.) This does not create a genuine dispute as to any material fact

1 in this action. This is not evidence that Defendants were deliberately indifferent *to Plaintiff's* health
2 because regardless of what occurred with this other inmate, Plaintiff still had a mechanism to obtain
3 appropriately-sized shoes.

4 In sum, the material facts are not genuinely in dispute, and the record does not demonstrate
5 Defendants were deliberately indifferent to a serious medical need when they denied Plaintiff issuance
6 of shoes from an unauthorized vendor, but he still had a mechanism to obtain appropriate-sized shoes
7 from an authorized vendor. Therefore, Defendants' motion for summary judgment should be granted.

8 **IV. RECOMMENDATION**

9 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING**
10 Defendants' Motion for Summary Judgment (ECF No. 26) and entering judgment in Defendants' favor.

11 The parties should be aware of the following:

12 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this
13 Report and Recommendation within fourteen days of receipt. These objections should be titled
14 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points
15 and authorities for consideration by the district judge.

16 2. That this Report and Recommendation is not an appealable order and that any notice of appeal
17 pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of
18 judgment by the district court.

19 DATED: September 22, 2017.

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WILLIAM G. COBB
23 UNITED STATES MAGISTRATE JUDGE
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