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Deputy Clerk

PATRICK M. RYAN (SBN 203215)
pryan@bzbm.com
CHAD E. DEVEAUX (SBN 215482)
cdeveaux@bzbm.com
TAYLOR YAMAHATA (SBN 347192)
tyamahata@bzbm.com
BARTKO ZANKEL BUNZEL & MILLER
A Professional Law Corporation
One Embarcadero Center, Suite 800
San Francisco, California 94111
Telephone: (415) 956-1900
Facsimile: (415) 956-1152

Attorneys for Defendants
COUNTY OF SAN MATEO
and CHRISTINA CORPUS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County

Defendants.

(Exempt from Filing Fees pursuant to Government Code §6103)

Case No. 23-CIV-01075

Assigned for All Purposes to:
Hon. V. Raymond Swope, Dept. 23

DEFENDANTS' OPPOSITION TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

Date: December 4, 2023
Time: 2:00 PM
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

I. INTRODUCTION

Plaintiffs' objection to Defendants' Supplemental Request for Judicial Notice of Mr. Greenberg's grievances ("RJN")—which Plaintiffs' style as an "*Opposition*" to Defendants' RJN[1]—claims the RJN was improper. Plaintiffs' objection fails for three independent reasons.

First, Plaintiffs' claim that they are immune from the exhaustion doctrine because the policy was "unavailable" fails as a matter of law. Even when a "grievance process" facially *appears* to be unavailable, "the claimant must present the question to the [agency] so [it can] decide the issue in the first instance." *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 490-91.

Second, Plaintiffs claim "whether Mr. Greenberg grieved the mail policy … is an inappropriate attempt to resolve a factual question" at the pleading stage.[2] But in deciding a "motion for judgment on the pleadings," the Court "may consider matters which may be judicially noticed." *Barker v. Hull* (1987) 191 Cal.App.3d 221, 224. And legions of decisions recognize that the Court may "take judicial notice of [an inmate] Plaintiff's inmate grievances related to [the] case." *Hudson v. Pfeiffer* (E.D. Cal. Dec. 17, 2021) 2021 WL 5989158, at *2-3.

Finally, Plaintiffs' claim that the RJN raised new matter is meritless because it responded to arguments Plaintiffs raised for the first time in their Opposition. Judicially noticeable exhibits filed in support of a "reply brief" that "respon[ds] to speculations or arguments raised by [a party] in opposition to [the submitting party's] motion" are "proper" and do not "raise new matter." *Shandralina G. Homonchuck* (2007) 147 Cal.App.4th 395, 406 fn. 12.

II. ANALYSIS

A. Plaintiffs (Again) Falsely Claim They Are Immune from the Exhaustion Rule

Plaintiffs' Opposition to Defendants' motion argued that they were not required to exhaust their administrative remedies because they claim the policy was "unavailable" to challenge jail rules.[3] They repeat this argument in their objection to Defendants' RJN. Objection at 3:13-19. The

[1] To properly contest a request for judicial notice, a litigant must "object to the request." *See Shuster v. BAC Home Loans Serv., LP*, 211 Cal.App.4th 505, 508-09.

[2] *See* Plfs' Opposition to Defs' Supplemental Request for Judicial Notice ("Objection") at 3:22-23.

[3] *See* Plfs' Opposition to Defs' Motion for Judgment on the Pleadings (Opp.") at 10:13-16.

decision in *Bockover* shows that Plaintiffs are wrong. There, the plaintiff also argued "exhaustion was unnecessary" because the grievance policy's remedies were "unavailable" since "her claim ar[ose] under" the "Americans with Disabilities Act," but the agency stated claims "arising under federal … statutes" would not be accepted. *Bockover*, 28 Cal.App.4th at 486, 489-91. The court dismissed her claim because "it lies within the power of [the state agency] to determine, in the first instance and before judicial relief may be obtained, whether a given controversy falls within its granted jurisdiction." *Id.* at 490. When a "grievance process" appears to be unavailable, "the claimant must present the question to the [agency] so [it can] decide the issue in the first instance." *Id.* at 490-91. Plaintiffs' "***preconception of the futility of administrative action [does] not permit [them] to bypass the administrative remedy***." *Id.* at 490 (emphasis added). Defendants' reply explained this law.[4] But Plaintiffs' Sur-Opposition does not even address it.

B. Inmate Grievances *Are* Judicially Noticeable

Plaintiffs assert that Defendants' RJN was improper because "the question of whether Mr. Greenberg grieved the mail policy … is an inappropriate attempt to resolve a factual question" which cannot be done at the pleading stage. Objection at 3:22-23. But it is settled that in deciding a "motion for judgment on the pleadings," the Court "may consider matters which may be judicially noticed." *Barker*, 191 Cal.App.3d at 224. And Plaintiffs do not—and cannot—contend that it is improper for the Court to take judicial notice of an inmate's grievances.

A "Court may take judicial notice of [an inmate] Plaintiff's inmate grievances related to [the] case." *Hudson*, 2021 WL 5989158, at *2-3; *accord e.g.*, *McCollum v. Cal.* (Dec. 13, 2007) 2007 WL 4390616, at *3 (***rejecting inmate's argument*** "***that the Court cannot consider the grievance forms … relevant to exhaustion" in a pleadings motion and holding that "[t]he Court … may take judicial notice of the [grievance] forms and does so here***") (emphasis added).

Plaintiffs do not contest this law. Rather, they argue that the "28 grievances" that the County has a record of receiving that Defendants sought judicial notice of omitted *one* additional grievance—meaning "29 grievances" are at issue rather than 28. Objection at 4:14-15, 4:23-25.

[4] *See* Defendants' Reply in Support of Motion for Judgment on the Pleadings at 15:16-22.

While the authenticity of this alleged 29th grievance is in dispute, the alleged grievance, if evaluated with the judicially noticeable "28 grievances" presented by the County, definitively shows that Mr. Greenberg did *not* exhaust his administrative remedies as a matter of law.

To satisfy the "doctrine of exhaustion of administrative remedies," a claimant must prove that he or she ***raised*** "***the specific claims … asserted in [his or] her complaint***" ***in a grievance and gave the agency*** "***the opportunity to consider" those "specific claims***." *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1130 (emphasis added). This means that for an inmate to satisfy the "Exhaustion of Administrative Remedies" requirement, the inmate must plead and prove that he or she "submit[ted] grievances relating to the specific claims in th[e] action." *Neufeld v. Bautista* (N.D. Cal. Jan. 31, 2014) 2014 WL 458358, at *2. Plaintiffs' Amended Complaint ("AC") asserts two claims. First, it alleges the mail policy is an "invasion of privacy" and "an unreasonable search and seizure of correspondence … in which Plaintiffs and others maintain a reasonable expectation of privacy" in violation of Article I, § 13 of the California Constitution. AC ¶¶ 48, 90. Second, it claims the policy "violates Article I, [§] 2 of the California Constitution" by inhibiting inmates' freedom "to express themselves." *Id.* ¶¶ 2, 89.

Mr. Greenberg's alleged grievance does not make either of these claims. Instead, it contends that the mail policy constitutes "cruel and unusual punishment" under the Eighth Amendment. Gagliano Decl. ¶ 4, Ex. 1. A plaintiff's "Eighth Amendment claims differ meaningfully from" a plaintiff's "Fourth Amendment claims" because they "are based on entirely different constitutional rights." *Marler v. Derr* (D. Haw. Mar. 23, 2023) 2023 WL 2614314, at *5. Likewise, a free speech claim "clearly states a claim under a different cause of action" than an Eighth Amendment claim. *Deeds v. Bannister* (D. Nev. Jan. 8, 2013) 2013 WL 1250343, at *2.

Plaintiffs do not claim any other grievances exist not before the Court. Rather, they allege that their unauthenticated *29th grievance* creates an issue of fact regarding whether Mr. Greenberg exhausted his remedies. But it cannot because neither this alleged grievance—nor *any* of the other grievances on record—raised the claims at issue in this case. Accordingly, the Court can determine as a matter of law that Mr. Greenberg did not exhaust his administrative remedies.

C. Defendants' Supplemental RJN Properly Responded to Plaintiffs' Opposition

Plaintiffs claim the RJN "is untimely" because it raised *new matter* that should have been presented "with their motion, not their reply." Objection at 2:6-7, 2:18, 3:2-3. But Defendants' RJN responded to arguments *Plaintiffs raised for the first time* in their Opposition brief. Judicially noticeable exhibits filed in support of a "reply brief" that "respon[d] to speculations or arguments raised by [a party] in opposition to [the submitting party's] motion" are "proper" and do not "raise new matter." *Shandralina*, 147 Cal.App.4th at 406 fn. 12.

The "failure to exhaust administrative remedies" is *not* "an affirmative defense." *Westinghouse*, 42 Cal.App.3d at 37. It was Plaintiffs' "burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy" or to specifically plead that they are "excuse[d]" from doing so. *Id.* Defendants' Motion for Judgment on the Pleadings explained why this was fatal to Plaintiffs' case. *See* Mtn. for Judgment on the Pleadings Part III-A-3. But Plaintiffs' AC did not even acknowledge that inmates have an obligation to exhaust administrative remedies. *See id.* Rather, Plaintiffs' *Opposition* addressed the exhaustion rule for the first time—raising Plaintiffs' fallacious argument that they "were not required to file grievances or exhaust administrative remedies" because relief was supposedly "unavailable." *See* Opp. at 10:13-20. But as explained in Part II-A, *supra*, this contention fails. In relation to this new argument, Plaintiffs cited a statement in the AC that Mr. Greenberg filed "grievances protesting the mail policy" that "were never acknowledged." Opp. at 10:18-19. But this line did not address the exhaustion doctrine as required by hornbook pleading rules. *See* AC ¶ 82; *see also Westinghouse*, 42 Cal.App.3d at 37. Indeed, Plaintiffs' argue *for the first time in their Sur-Opposition* that Mr. Greenberg satisfied California's exhaustion requirement by "fil[ing] a grievance protesting the County's mail policy." Sur-Opp'n at 3:4-5.

It was Plaintiffs' Opposition and Sur-Opposition—not Defendants' reply or RJN—that raised *new matter* by addressing the exhaustion requirement for the first time that their AC ignored. Thus, the RJN was proper because it "respon[ded] to speculations [and] arguments raised by [Plaintiffs'] opposition…." *See Shandralina*, 147 Cal.App.4th at 406 n.12.

DATED: November 6, 2023

Respectfully submitted,

BARTKO ZANKEL BUNZEL & MILLER
A Professional Law Corporation

By: 

Chad E. DeVeaux
Attorneys for Defendants COUNTY OF SAN MATEO and CHRISTINA CORPUS

PROOF OF SERVICE

I, Maggie M. Lopez, hereby certify that on this 7th day of November 2023, a copy of the foregoing

- **DEFENDANTS' OPPOSITION TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE**

was served via email, on the following:

CARA GAGLIANO (SBN 308639)
AARON MACKEY (SBN 286647)
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Email: cara@eff.org
amackey@eff.org
victoria@eff.org (assistant)

Attorneys for Plaintiffs: *A.B.O. Comix, Kenneth Roberts, Zachary Greenberg, Ruben Gonzalez-Magallanes, Domingo Aguilar, Kevin Prasad, Malti Prasad, and Wumi Oladipo*

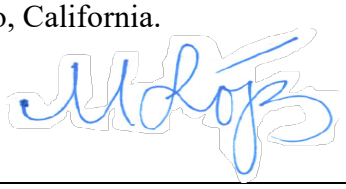
STEPHANIE KRENT (SBN 5535414)
ALEX ABDO
SCOTT WILKENS (SBN 226259)
JENNIFER JONES (SBN 6040760)
MAYZE TEITLER (SBN 6013692)
KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, NY 10115
Tel.: (646) 745-8500
Email: stephanie.krent@knightcolumbia.org
alex.abdo@knightcolumbia.org
scott.wilkens@knightcolumbia.org
jennifer.jones@knightcolumbia.org
mayze.teitler@knightcolumbia.org

MARIA DEL PILAR GONZALEZ MORALES (SBN 308550)
SARA HAJI
SOCIAL JUSTICE LEGAL FOUNDATION
523 West 6th Street, Suite 450
Los Angeles, CA 90014
Tel.: (213) 973-4063
Fax: (213) 973-4063
Email: pgonzalez@socialjusticelaw.org
shaji@socialjusticelaw.org

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Executed on November 7, 2023, at San Francisco, California.



Maggie M. Lopez