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Attorneys for Defendants
COUNTY OF SAN MATEO
and CHRISTINA CORPUS

Electronically
FILED
by Superior Court of California, County of San Mateo
ON 11/8/2023
By /s/ Ashlee Nelson
Deputy Clerk

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' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE A SUR-REPLY RESPONDING TO PLAINTIFFS' SUR-OPPOSITION; MEMORANDUM OF POINTS AND AUTHORITIES; APPENDIX A: SUR-REPLY BRIEF

Date: ~~December 4, 2023~~ 3/4/2024
Time: 2:00 PM
Dept.: 23

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

NOTICE OF MOTION AND MOTIONS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 4, 2023 at 2:00 PM, or as soon thereafter as the matter may be heard in Department 23, Courtroom 8A of the above entitled Court, located at 400 County Center, Redwood City, California 94063, the Honorable V. Raymond Swope presiding, Defendants the County of San Mateo and Christina Corpus, in her official capacity as Sheriff of San Mateo County (collectively, "Defendants") will, and hereby do, move this Court for leave to file a Sur-Reply to Plaintiffs' October 31, 2023 Sur-Opposition (which Plaintiffs styled as a "sur-reply"). Defendants' proposed Sur-Reply is attached as Appendix A to this Motion for Leave to File a Sur-Reply.

Defendants seek leave to file the attached Sur-Reply to respond to purported new evidence presented by Plaintiffs in support of their October 31, 2023 Sur-Opposition and to respond to the legal arguments Plaintiffs presented regarding this alleged evidence in their October 31, 2023 Sur-Opposition. This motion is based on this notice, the memorandum of points and authorities filed in support thereof, Defendants' proposed Sur-Reply, the Declaration of Sergeant Cristopher Serrano, the Declaration of Chad E. DeVeaux, Defendants' Opposition to Plaintiffs' Objection to Defendants' Supplemental Request for Judicial Notice (which Plaintiffs incorrectly styled as an "Opposition" to Defendants Supplemental Request for Judicial Notice), all other pleadings and papers on file in this action, and such other matters as may be presented by counsel at the hearing on this motion.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' motion to file a Sur-Opposition (which they style as a "Sur-Reply"[1]), claims briefing "is warranted here" to address new evidence presented by Plaintiffs after the close of briefing.[2] Defendants attempted to avert subjecting the Court to additional briefing by offering to file declarations explaining the parties' dispute. Defendants further advised that if Plaintiffs were "set on filing a sur-opposition brief" that Defendants "reserve[d] the right to file [their] own sur-reply brief explaining what has transpired from [their] point of view and why, as a matter of law, the purported grievance is irrelevant in any event."[3]

Plaintiffs claim their new "evidence" which Defendants have not had an opportunity to address in their briefing (and which is actually inadmissible[4]), requires additional briefing despite the fact that "there is no California Rule of Court provision governing sur-replies." Mtn. for Leave at 3:15-16. Defendants do not support or contest Plaintiffs' contention that additional briefing is warranted. But when a Court "exercises its discretion to consider" a sur-response brief filed by a party, in order to avoid prejudice, it is proper that "the [C]ourt will permit ***all sides*** to file … briefs" addressing the issue raised by the first party's brief. *Rodriguez v. Anderson* (Jan. 7, 2021) 2021 WL 2420156, at *1 (emphasis added); *accord e.g.*, *Sandoval-Linares v. Albencer* (C.D. Cal. Dec. 10, 2020) 2020 WL 7343128, at *1; *McLellan v. Fitbit, Inc.* (N.D. Cal. Oct. 11, 2017) 2017 WL 4551484, at *7; *Bayer AG v. Carlsbad Tech., Inc.* (S.D. Cal. Oct. 24, 2001) 2001 WL 34125673, at *1. As such, if the Court exercises its discretion to permit Plaintiffs to file their Sur-Opposition, Defendants request that they also be allowed to file a Sur-Reply addressing Plaintiffs' purported "evidence."

II. FACTUAL BACKGROUND

Defendants' Motion for Judgment on the Pleadings argued that Plaintiffs' claims fail under

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[1] A Sur-Reply is a "movant's second supplemental response to another party's opposition to a motion." *Surreply*, Black's Law Dict. (11th ed. 2019).
[2] *See* Plaintiffs' Motion for Leave to File Sur-Reply ("Mtn. for Leave") at 3:15-16.
[3] Decl. of Chad E. DeVeaux ("CED Decl.") ¶ 14, Ex. C.
[4] *See* Defendants' Objection to the Declaration of Cara Gagliano in Support of Plaintiffs' Opposition to Defendants' Supplemental Request for Judicial Notice and Exhibit One Thereto.

California's exhaustion of administrative remedies doctrine. A prisoner "must exhaust available administrative remedies before filing a lawsuit." *Parthemore*, 221 Cal.App.4th at 1380. And "it is [the plaintiffs'] burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy" in order to state a prima facie case. *Westinghouse*, 42 Cal.App.3d at 37. In Opposition, Plaintiffs claimed Mr. Greenberg purportedly filed grievances raising the claims presented in the AC that "were never acknowledged."[5] In response, Defendants sought judicial notice of all inmate grievances in the County's file filed by Mr. Greenberg. None addressed the mail policy and all were "acknowledged" with a "Supervisor's response."

After the close of briefing, Plaintiffs' counsel emailed Defendants a grievance supposedly filed by Mr. Greenberg in October 2022. CED Decl. ¶¶ 5-8, Exs. A-C. Defendants provided this document to the Sheriff's Department's custodian of records, who concluded that the County has no record that this purported grievance was ever filed. Decl. of Cristofer Serrano ("Serrano Decl.") ¶¶ 14-16. He further explained that under the jail's grievance policy, if the alleged grievance had been filed, a copy should reside in the jails records and a Supervisor's Response should have been provided. *Id.* ¶ 15. As such, the County can neither confirm that the grievance was authentic, nor can he confirm that it was a forgery. *Id.*

Defendants explained this to Plaintiffs' counsel and offered to file custodian of records declaration presenting these findings and an attorney declaration that would collectively advise the Court that:

> (1) Plaintiffs' counsel have represented that the grievance is authentic, (2) that the County can neither confirm nor affirmatively disprove whether that's true and has no record of the grievance, and (3) that there is now a dispute of fact regarding whether Mr. Greenberg filed any grievances pertaining to the mail policy.

CED Decl. ¶¶ 11-13, Ex. C.

Defendants' counsel stated they believed this was "sufficient to fully put the Court on notice of the issue. " CED Decl. ¶ 14, Ex. C. Defendants also advised that if Plaintiffs "believe that a sur-opposition brief is necessary," Defendants "reserve the right to file [their] own sur-reply

[5] *See* Plaintiffs' Opposition to the Motion ("Opp.") at 10:18-19.

brief explaining what has transpired from our point of view and why, as a matter of law, the purported grievance is irrelevant in any event." CED Decl. ¶ 14, Ex. C.

Rebuffing this suggestion, Plaintiffs demanded Defendants abandon their argument that "a failure to grieve by Mr. Greenberg" is a basis for the motion. CED Decl. ¶ 16, Ex. C. Defendants advised they would "tell the Court that there is a dispute of fact regarding whether Mr. Greenberg filed a grievance addressing the mail policy." CED Decl. ¶ 17, Ex. C. But they "contend that even if the grievance is authentic, Mr. Greenberg did not exhaust his remedies because the alleged grievance raises Eighth Amendment cruel and unusual punishment allegations, not the California law free speech and invasion of privacy claims raised by the [AC]." CED Decl. ¶ 17, Ex. C. Plaintiffs did not respond, but instead filed their Sur-Opposition. CED Decl. ¶ 18.

III. CONCLUSION

In fairness, Defendants request that if the Court permits Plaintiffs to file their Sur-Opposition, that it also allow Defendants to file their own brief presenting their side of the story. When a party is permitted to file a Sur-Response, it is proper that "the [C]ourt will permit ***all sides*** to file … briefs" addressing the issue raised by the first party's brief. *Rodriguez*, 2021 WL 2420156, at *1 (emphasis added).

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

EXHIBIT A

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Attorneys for Defendants
COUNTY OF SAN MATEO
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

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Defendants.

Case No. 23-CIV-01075

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

DEFENDANTS' SUR-REPLY TO PLAINTIFFS' SUR-OPPOSITION

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

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

I. INTRODUCTION

Plaintiffs Sur-Opposition—which they style as a "Sur-Reply"[1]—represents that "Zachary Greenberg filed a grievance protesting Defendants' mail policy" and Defendants "introduc[ed] new evidence through a request for judicial notice" that "falsely claim[ed] that he did not" do so.[2] Plaintiffs are wrong for three independent reasons.

First, the County has no record that the alleged grievance was ever filed and cannot confirm its authenticity.[3] And Plaintiffs have provided only a hearsay declaration from an attorney lacking the personal knowledge to authenticate it. Second, even if it could be authenticated, it would not exhaust Mr. Greenberg's remedies because it does not raise "the specific claims … asserted in [Plaintiffs'] complaint." *See Evans*, 128 Cal.App.4th at 1130. Third, the grievance is irrelevant in any event because Mr. Greenberg's claims are moot as he "[i]s no longer under the physical control of [the County]." *See Giraldo*, 168 Cal.App.4th at 257.

II. FACTUAL BACKGROUND

After Defendants filed their reply and RJN showing that none of Mr. Greenberg's 28 grievances on record with the County addressed the mail policy, Plaintiffs' counsel emailed Defendants presenting a grievance that they represent Mr. Greenberg filed that claimed the mail policy subjected him to "cruel and unusual punishment."[4] Defendants investigated the alleged grievance. CED Decl. ¶¶ 5-10; Serrano Decl. ¶¶ 5-16. The County's grievance policy requires that copies of all inmate grievances shall be maintained in accordance with established records retention schedules. Serrano Decl. ¶ 13. This is not conditioned on the outcome of the grievance. *Id.* Further, a Supervisors' Response shall be provided regardless of the merits. *Id.* A response shall be provided even if it is determined that the issue subject to the inmate's grievance does not lie within the jurisdiction of the Grievance Policy. *Id.*

The Sheriff's Department's custodian of records examined the alleged grievance. *Id.* ¶ 14-

[1] A Sur-Reply is a "movant's second supplemental response to another party's opposition to a motion." *Surreply*, Black's Law Dict. (11th ed. 2019).
[2] Plaintiffs' Sur-Reply to Defs' Motion for Judgment on the Pleadings ("Sur-Opp'n") at 2:1-7.
[3] Decl. of Sergeant Cristofer Serrano ("Serrano Decl.") ¶ 16.
[4] Decl. of Chad E. DeVeaux ("CED Decl.") ¶ 5, Exs. A-C.

16. He explained that if the alleged grievance was filed in October 2022, a copy should be kept in the jail's files and a Supervisor's Response should have been provided. *Id.* ¶ 15. He thoroughly reviewed the jail's grievance records, both physical and digital, but concluded that there is no copy of the alleged grievance in the jail's files. *Id.* ¶ 16. Thus, the County can neither confirm the authenticity of the grievance, nor can it definitively conclude that it is a forgery. *Id.*

III. ANALYSIS

A. Plaintiffs' Purported Grievance Is Inadmissible

"Authentication of a writing is required before it may be received in evidence." Evid. Code § 1401. "To authenticate a writing, its proponent must introduce evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 249 (disapproved on other grounds by *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776 fn. 4). This rule applies with equal vigor to when an "attorney for [a party] … has filed a declaration in opposition to [an opposing party's] motion." *Wilson v. Sup. Ct.* (1964) 226 Cal.App.2d 715, 721. "Declarations by … party's counsel as to essential facts are generally objectionable as hearsay ... except where the lawyer somehow has personal knowledge of the facts. Otherwise, the lawyer's declarations are inadmissible hearsay." Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 9:61, p. 9(I)-34 (citing *Star Motor Imports, Inc. v. Sup. Ct.* (1979) 88 Cal.App.3d 201). Applying this rule, *O'Laskey* found that a recording of a conversation was inadmissible for lack of foundation because the attorney-declarant could not authenticate it. 224 Cal.App.3d at 250. The attorney's declaration attested that he "received the … tape from [a private] investigator" who the "attorney hired" to conduct an investigation. *Id.* at 244, 249. The tape was inadmissible hearsay because "no foundation for the tape was laid" because the attorney-declarant was not present during the conversation and thus, the "attorney [could not] know the true and complete extent of the conversation." *Id.* at 250.

Here, Plaintiffs represent that Mr. Greenberg "filed a grievance protesting Defendants' mail policy on or about October 20, 2022" and any claim that Mr. Greenberg did not grieve the mail policy is demonstrably false" because "Mr. Greenberg in fact *did* file a grievance protesting the County's mail policy." Sur-Opp'n at 2:2-3, 3:4-5 (emphasis in original). But Plaintiffs'

declaration fails the test for foundation discussed above. Like the lawyer in *O'Laskey*, the attorney's declaration states "[Mr.] Greenberg provided [her] with an Inmate Grievance Form…." Gagliano Decl. ¶ 2. Based on this, she claims "he signed [the form]" and she implies that it is authentic. *See id.* The declarant does not attest that she was present when Mr. Greenberg signed or filed the grievance. She does not even attest that she was even acquainted with him on "October 20, 2022." *See id.* Plaintiffs' declaration and exhibit are also inadmissible because they do not comply with CCP § 2015.15's mandate that declarations be "declared under the laws of the State of California." It is "clear that out-of-state declarations offend [§] 2015.5, and are not deemed sufficiently reliable for purposes of that statute, unless they follow its literal terms." *Kulshrestha v. First Union Comm'l Corp*. (2004) 33 Cal.4th 601, 611. Here, the declarant only states: "I declare under penalty of perjury under the laws of the United States …." Gagliano Decl. at 4:22-24.

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

Plaintiffs' Opposition claimed they were not required to exhaust administrative remedies because they claim the policy was "unavailable" to challenge jail rules.[5] Their Sur-Opposition repeats this argument. *See* Sur-Opp'n at 3:12-13. In *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 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 had stated claims "arising under federal … statutes" would not be accepted. *Id.* 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 still "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.*

C. Even if Plaintiffs' *Could* Authenticate the Grievance, It Is Irrelevant

"No evidence is admissible except relevant evidence." Evid. Code § 350. Here, the alleged

[5] *See* Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings at 10:13-16.

grievance is wholly irrelevant to the issues presented in the case at bar.

1. The Alleged Grievance Did Not Raise any of Plaintiffs' Claims

Plaintiffs claim any contention that Mr. Greenberg did not exhaust his remedies "is demonstrably false" because he "in fact *did* file a grievance" that raised the same claims presented in Plaintiffs' Amended Complaint ("AC"). Sur-Opp'n at 3:4-10 (emphasis in original). Not so.

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*, 128 Cal.App.4th at 1130 (emphasis added). This means to satisfy the "[e]xhaustion" requirement, an 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.

The AC asserts two claims. First, it alleges that the mail policy is an "invasion of privacy" and thus "constitutes an unreasonable search and seizure of correspondence" in which Plaintiffs "maintain a reasonable expectation of privacy" in violation of Article I, § 13 of the California Constitution. AC ¶¶ 48, 90. Second, it claims that the mail policy "violates Article I, [§] 2 of the California Constitution" by inhibiting inmates' freedom "to express themselves." *Id.* ¶¶ 2, 89.

The 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 meaning 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. Thus, the alleged grievance did not raise either of the "specific claims" at issue. Accordingly, it is irrelevant as a matter of law.

2. The Grievance Is *Further Evidence* Mr. Greenberg Failed to Exhaust

Plaintiffs argue that the Court cannot address the exhaustion issue because "the Court must assume the truth of all factual allegations in the Amended Complaint." Sur-Opp'n at 2:13-14. Not so. It is settled that a Court "may take judicial notice of [inmate grievance] forms" in deciding a

pleadings motion "relevant to exhaustion." *McCollum v. Cal.* (Dec. 13, 2007) 2007 WL 4390616, at *3; *accord e.g.*, *Hudson v. Pfeiffer* (E.D. Cal. Dec. 17, 2021) 2021 WL 5989158, at *2-3. As such, the Court *can* take judicial notice of the grievances Mr. Greenberg filed while he was incarcerated in the County's jail. Plaintiffs do not contest this law. Rather, they argue that the "28 grievances" that Defendants sought judicial notice of omitted *one* additional grievance—meaning "29 grievances" are at issue.[6] While the authenticity of the alleged *29th* grievance is in dispute, the grievance, if evaluated with the judicially noticeable "28 grievances" presented by the County, shows Mr. Greenberg did *not* exhaust his remedies. Plaintiffs do not contend that any other grievances exist. 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 the new alleged grievance—nor *any* of the other 28 grievances—raised the claims at issue in this case.

3. Mr. Greenberg's Claims Are Moot in any Event

Plaintiffs do not allege that any other Plaintiffs besides Mr. Greenberg grieved the policy. Thus, the grievance is irrelevant to the issue of whether other Plaintiffs exhausted their remedies. And whether Mr. Greenberg grieved is irrelevant because his claims are moot in any event. He is "incarcerated at Folsom State Prison." AC ¶ 21. He "[i]s no longer under the physical control" of the County, and "the challenged conduct no longer applie[s] to h[im]." *Giraldo*, 168 Cal.App.4th at 257. Thus, he lacks standing because an inmate's transfer from a jail "while his claims are pending" will "moot any claims for injunctive relief relating to the [jail's] policies." *Id.* at 259.

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

[6] *See* Plaintiffs' Opp. to Defs' Supp. RJN ("Objection") at 4:14-15, 4:23-25.