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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

HERMAN D. SHEAD,

Plaintiff,

v.

C/O VANG,

Defendant.

Case No. 1:09-cv-00006-AWI-SKO (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DEFENDANT’S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON STATE LAW TORT  
CLAIMS BE GRANTED

(Doc. 97)

OBJECTION DEADLINE: THIRTY DAYS  
RESPONSE DEADLINE: FIFTEEN DAYS

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**I. Background**

Plaintiff Herman D. Shead (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 5, 2009. This action for damages is proceeding against Defendant Vang (“Defendant”) for excessive force, in violation of the Eighth Amendment of the United States Constitution, and for violation of state law arising out of the incident of excessive force.<sup>1</sup>

Pending before the Court is Defendant’s motion for partial summary judgment on Plaintiff’s state law tort claims, filed on September 30, 2013.<sup>2</sup> Fed. R. Civ. P. 56. (Doc. 97.)

<sup>1</sup> Plaintiff’s tort claims may include assault, battery, and/or negligence. (Doc. 1, Comp., pp. 9-10; Doc. 18, Order, p. 2:9-11.)

<sup>2</sup> On October 1, 2013, one day after Defendant filed his motion for summary judgement, this action was dismissed, with prejudice, for failure to obey court orders and failure to prosecute. On August 13, 2015, the dismissal was set

1 Plaintiff filed an opposition on September 21, 2015, Defendant filed a reply on September 28,  
2 2015, and the motion has been submitted on the record without oral argument pursuant to Local  
3 Rule 230(l).<sup>3</sup> (Docs. 120-122, 124.)

4 **II. Summary Judgment Standard**

5 Any party may move for summary judgment, and the Court shall grant summary judgment  
6 if the movant shows that there is no genuine dispute as to any material fact and the movant is  
7 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted);  
8 *Washington Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position, whether  
9 it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of  
10 materials in the record, including but not limited to depositions, documents, declarations, or  
11 discovery; or (2) showing that the materials cited do not establish the presence or absence of a  
12 genuine dispute or that the opposing party cannot produce admissible evidence to support the fact.  
13 Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the  
14 record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen*  
15 *v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v.*  
16 *Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

17 Defendant does not bear the burden of proof at trial and in moving for summary judgment,  
18 he need only prove an absence of evidence to support Plaintiff’s case. *In re Oracle Corp. Sec.*  
19 *Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106  
20 S.Ct. 2548 (1986)). If Defendant meets his initial burden, the burden then shifts to Plaintiff “to  
21 designate specific facts demonstrating the existence of genuine issues for trial.” *In re Oracle*  
22 *Corp.*, 627 F.3d at 387 (citing *Celotex Corp.*, 477 U.S. at 323). This requires Plaintiff to “show  
23 more than the mere existence of a scintilla of evidence.” *Id.* (citing *Anderson v. Liberty Lobby,*  
24 *Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)).

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26 aside on the ground that Plaintiff’s counsel abandoned him, constituting extraordinary circumstances justifying relief  
from judgment. Fed. R. Civ. P. 60(b)(6).

27 <sup>3</sup> Pursuant to the order filed on August 17, 2015, Defendant re-served his motion for summary judgment along with  
28 the requisite notice of the requirements for opposing the motion on September 3, 2015. *Woods v. Carey*, 684 F.3d  
934, 939-41 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d 952, 960-61 (9th Cir. 1998). (Docs. 112, 117.)

1           However, in judging the evidence at the summary judgment stage, the Court may not make  
2 credibility determinations or weigh conflicting evidence, *Soremekun v. Thrifty Payless, Inc.*, 509  
3 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all  
4 inferences in the light most favorable to the nonmoving party and determine whether a genuine  
5 issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v.*  
6 *City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted).  
7 The Court determines only whether there is a genuine issue for trial. *Thomas v. Ponder*, 611 F.3d  
8 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted).

9 **III. Discussion**

10 **A. Summary of Parties' Arguments**

11           Defendant moves for summary judgment on Plaintiff's state law tort claims based on  
12 Plaintiff's failure to comply with the Government Claims Act, which requires that suit be filed  
13 within six months of the rejection of a claim by the Victim Compensation and Governmental  
14 Claims Board.<sup>4</sup> (Doc. 1, Comp., p. 34.) In his complaint, Plaintiff alleged compliance with the  
15 Government Claims Act and he included a rejection letter for Claim G572345. (*Id.*) During  
16 discovery, Plaintiff represented that the only documents and information relating to his  
17 compliance with the Government Claims Act were included with his complaint. (Doc. 1, Comp.,  
18 p. 34; Doc. 97-4, Motion, p. 5:17-20, p. 11, p. 20:26-27:4, p. 25.) The letter pertaining to Claim  
19 G572345 was dated and mailed on February 29, 2008, and it informed Plaintiff that his Claim had  
20 been rejected on February 21, 2008. (Doc. 1, Comp., p. 34; Doc. 97-4, ¶4.) This rejection  
21 triggered Plaintiff's obligation to file suit within six months from February 29, 2008, but he did  
22 not file suit for approximately ten months. (Doc. 1, Comp., p. 34.)

23           In response, Plaintiff does not dispute any of the facts offered by Defendant but he disputes  
24 Defendant's legal argument. Plaintiff contends that his state law tort claims should not be  
25 dismissed because he invoked section 1983 in this action, the Government Claims Act's claim  
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27 <sup>4</sup> The Government Claims Act was formerly known as the California Tort Claims Act. *City of Stockton v. Superior*  
28 *Court*, 42 Cal.4th 730, 741-42 (Cal. 2007) (adopting the practice of using Government Claims Act rather than  
California Tort Claims Act).

1 presentation requirements do not apply when the Civil Rights Act is invoked, and the statute of  
2 limitations governing his section 1983 claim controls.

3 In reply, Defendant reiterates his entitlement to partial summary judgment on Plaintiffs  
4 state law tort claims, and he argues that the Court's exercise of supplemental jurisdiction over  
5 Plaintiff's state law claims does not eliminate the requirement that Plaintiff comply with the  
6 Government Claims Act as to those claims.

7 **B. Applicability of Government Claims Act to State Law Tort Claims**

8 The Government Claims Act requires that a tort claim against a public entity or its  
9 employees be presented to the California Victim Compensation and Government Claims Board no  
10 more than six months after the cause of action accrues. Cal. Gov't Code §§ 905.2, 910, 911.2,  
11 945.4, 950, 950.2. Presentation of a written claim and either action on or rejection of the claim are  
12 conditions precedent to suit, *DiCampli-Mintz v. Cnty. of Santa Clara*, 55 Cal.4th 983, 989-90, 289  
13 P.3d 884, 887 (Cal. 2012); *Shirk v. Vista Unified Sch. Dist.*, 42 Cal.4th 201, 208-09 (Cal. 2007);  
14 *State v. Superior Court of Kings Cnty. (Bodde)*, 32 Cal.4th 1234, 1239 (Cal. 2004), and suit must  
15 then be commenced not later than six months after the date the written rejection notice was  
16 deposited in the mail, Cal. Gov't Code § 945.6(a)(1) (quotation marks omitted); *Clarke v. Upton*,  
17 703 F.Supp.2d 1037, 1043 (E.D. Cal. 2010); *Baines Pickwick Ltd. v. City of Los Angeles*, 72  
18 Cal.App.4th 298, 303 (Cal. Ct. App. 1999).

19 The Court has original jurisdiction over Plaintiff's federal constitutional claim and it has  
20 supplemental jurisdiction over his state law tort claims because they "are so related" to the federal  
21 constitutional claim that "they form the same case or controversy." 28 U.S.C. § 1367(a). While  
22 supplemental jurisdiction "is designed to enable courts to handle cases involving state-law claims  
23 in the way that will best accommodate the values of economy, convenience, fairness, and comity,"  
24 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351, 108 S.Ct. 614 (1988) (citing *United Mine*  
25 *Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, (1966)), Plaintiff's argument that  
26 the federal court's exercise of supplemental jurisdiction over his state law tort claims eliminates  
27 the requirement that he comply with the Government Claims Act is not legally supportable,  
28 *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir. 1988). Unlike section

1 1983, which contains no statute of limitations and is therefore subject to California’s two-year  
2 statute of limitations for personal injury actions, *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir.  
3 2012) (citing *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004)), California has provided  
4 for a specific statute of limitations governing claims brought against public entities or their  
5 employees, *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 696 (9th Cir. 2003) (citing *Silva v.*  
6 *Crain*, 169 F.3d 608, 610-11 (9th Cir. 1999)) (Section 945.6 is a special statute of limitations  
7 which governs claims under the Government Claims Act). “[T]he intent of the Government  
8 Claims Act is not to expand the rights of plaintiffs against government entities but to confine  
9 potential governmental liability to rigidly delineated circumstances,” and compliance with the  
10 Government Claims Act is an element of Plaintiff’s state law tort claims which he is required to  
11 prove. *DiCampli-Mintz*, 55 Cal.4th at 991, 289 P.3d at 888 (citations and internal quotation marks  
12 omitted); *Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist.*, 140 Cal.App.3d 111, 115,  
13 189 Cal.Rptr. 208 (Cal. Ct. App. 1983); *Chase v. State of California*, 67 Cal.App.3d 808, 812, 136  
14 Cal.Rptr. 833 (Cal. Ct. App. 1977). Accordingly, Plaintiff’s argument that the existence of  
15 supplemental jurisdiction over his state law claims exempts him from having to comply with the  
16 Government Claims Act as to those claims must be rejected. *Karim-Panahi*, 839 F.2d at 637; *see*  
17 *also Survine v. Cottle*, No. CV F 12-1453 LJO JLT, 2013 WL 103576, at \*7, 9 (E.D.Cal. Jan. 8,  
18 2013) (plaintiffs’ argument that state law fraud claim subject to section 1376(a) supplemental  
19 jurisdiction avoids Government Claims Act is “nonsense”); *Creighton v. City of Livingston*, 628  
20 F.Supp.2d 1199, 1224-25 (E.D.Cal. 2009) (plaintiff’s supplemental state law claims barred unless  
21 he complied with Government Claims Act requirements).

22         Applying the Government Claims Act provisions, Plaintiff had six months from the date  
23 the notice of rejection was mailed to him on February 29, 2008, within which to file suit. Cal.  
24 Gov’t Code § 945.6(a)(1). Affording Plaintiff the benefit of the prison mailbox rule, he did not  
25 file suit until ten months later, on December 29, 2008. *Douglas v. Noelle*, 567 F.3d 1103, 1107  
26 (9th Cir. 2009). Plaintiff’s state law tort claims are therefore barred by the six month statute of  
27 limitations and Defendant is entitled to judgment on that ground.

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1 **IV. Recommendation**

2 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendant’s motion for  
3 partial summary judgment on Plaintiff’s state law tort claims, filed on September 30, 2013, be  
4 GRANTED, leaving only Plaintiff’s Eighth Amendment excessive force claim at issue for  
5 settlement or jury trial.<sup>5</sup>

6 These Findings and Recommendations will be submitted to the United States District  
7 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
8 **thirty (30) days** after being served with these Findings and Recommendations, the parties may  
9 file written objections with the Court. Local Rule 304(b). The document should be captioned  
10 “Objections to Magistrate Judge’s Findings and Recommendations.” Responses, if any, are due  
11 within **fifteen (15) days** from the date the objections are filed. Local Rule 304(d). The parties are  
12 advised that failure to file objections within the specified time may result in the waiver of rights on  
13 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923  
14 F.2d 1391, 1394 (9th Cir. 1991)).

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16 IT IS SO ORDERED.

17 Dated: October 14, 2015

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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<sup>5</sup> A settlement conference is scheduled for February 22, 2016. A trial date has not yet been selected.