UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH R. HENRY, Plaintiff, v. MATTHEW CATE, et al., Defendants.	Case No. 1:14-cv-00791-LJO-SKO (PC) FINDINGS AND RECOMMENDATIONS RECOMMENDING DEFENDANTS' MOTIONS TO STRIKE AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BE DENIED (Docs. 16, 23, and 26) OBJECTION DEADLINE: FIFTEEN DAYS

I. **Procedural History**

Plaintiff Kenneth Henry ("Plaintiff"), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 23, 2014. This action for damages is proceeding against Defendants Jolley,[1] Contreras, and Ortega ("Defendants") for using excessive physical force against Plaintiff in 2013, in violation of the Eighth Amendment of the United States Constitution.

On May 6, 2015, Defendants Contreras and Jolley filed a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Plaintiff filed an opposition on May 22, 2015, Defendants Contreras and Jolley filed a reply on June 2, 2015; and Defendant Ortega filed a notice of joinder

[1] Identified as Jolly in the complaint.

in the motion on June 12, 2015.[2] On June 19, 2015, Plaintiff filed a surreply and on June 23, 2015, Defendants Contreras and Jolley filed a motion to strike.[3]

Defendants Contreras and Jolley's motion to dismiss has been submitted upon the record pursuant to Local Rule 230(*l*), and for the reasons that follow, the Court recommends the motion be denied.

II. **Motion to Dismiss Standard**

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, and dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quotation marks and citations omitted). In resolving a 12(b)(6) motion, a court's review is generally limited to the operative pleading. *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006); *Schneider v. California Dept. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)) (quotation marks omitted); *Conservation Force*, 646 F.3d at 1242; *Moss v.*

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[2] Defendants' motion to strike certain new allegations in Plaintiff's opposition, set forth with their reply, should be denied. Defendants' reliance on Federal Rule of Civil Procedure 12(f) is misplaced; the reply at issue is not a pleading. Fed. R. Civ. P. 7(a), 12(f); *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885-86 (9th Cir. 1983). Notwithstanding that deficiency, "[m]otions to strike are disfavored and infrequently granted." *Neveu v. City of Fresno*, 392 F.Supp.2d 1159, 1170 (E.D.Cal. 2005). With limited exceptions not present here, a court's review is limited to the four corners of the pleading, *U.S. v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011) (citing *Schneider v. California Dept. of Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)), and it suffices for the moving party to focus its argument on whether newly pled allegations entitle the non-moving party to an opportunity to amend its pleading, *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014).

[3] Parties do not have the right to file surreplies and motions are deemed submitted when the time to reply has expired. Local Rule 230(*l*). The Court generally views motions for leave to file a surreply with disfavor. *Hill v. England*, No. CVF05869 REC TAG, 2005 WL 3031136, at *1 (E.D. Cal. 2005) (citing *Fedrick v. Mercedes-Benz USA, LLC*, 366 F.Supp.2d 1190, 1197 (N.D. Ga. 2005)). However, district courts have the discretion to either permit or preclude a surreply. *See U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1203 (9th Cir. 2009) (district court did not abuse discretion in refusing to permit "inequitable surreply"); *JG v. Douglas County School Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008) (district court did not abuse discretion in denying leave to file surreply where it did not consider new evidence in reply); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without giving the non-movant an opportunity to respond). In this instance, the Court declines to consider Plaintiff's surreply and it recommends Defendants' motion to strike be denied as moot.

U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court must accept the well-pleaded factual allegations as true and draw all reasonable inferences in favor of the non-moving party. *Daniels-Hall*, 629 F.3d at 998; *Sanders*, 504 F.3d at 910; *Huynh*, 465 F.3d at 996-97; *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000). Courts may not supply essential elements not initially pled, *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014), but "[c]ourts in this circuit have an obligation to give a liberal construction to the filings of pro se litigants, especially when they are civil rights claims by inmates," *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013). Pro se complaints "may only be dismissed 'if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012)). "This rule relieves pro se litigants from the strict application of procedural rules and demands that courts not hold missing or inaccurate legal terminology or muddled draftsmanship against them." *Blaisdell*, 729 F.3d at 1241.

III. Discussion

A. Introduction

Plaintiff's complaint was screened and the Court determined it stated a claim upon which relief may be granted. 28 U.S.C. § 1915A; *Nordstrom*, 762 F.3d at 908 ("Dismissal for failure to state a claim under § 1915A 'incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).'") (quoting *Wilhelm*, 680 F.3d at 1121); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (section 1915(e)(2)(B)(ii) screening standard is the same as Rule 12(b)(6) standard). Defendants' acknowledgement that the complaint was screened is appreciated; however, they present no arguments which persuade the Court it erred in determining that Plaintiff's Eighth Amendment claims were cognizable or that any other grounds justifying relief from the screening order exist. *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) ("A district court abuses its discretion in applying the law of the case doctrine only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed

circumstances exist; or (5) a manifest injustice would otherwise result."). As explained below, Plaintiff's allegations are sufficient to allow him to proceed past the pleading stage.

B. <u>Eighth Amendment Excessive Force Claims</u>

Plaintiff's Eighth Amendment claims arise from two alleged incidents of excessive force against him at California Correctional Institution in Tehachapi, where he was incarcerated at the time. The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S.Ct. 2508 (2002) (citing *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078 (1986)) (quotation marks omitted). Among unnecessary and wanton inflictions of pain are those that are totally without penological justification, *Hope*, 536 U.S. at 737 (citing *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392 (1981)) (quotation marks omitted), and punitive treatment which amounts to gratuitous infliction of wanton and unnecessary pain is prohibited by the Eighth Amendment, *id.* at 738 (quotation marks omitted).

What is necessary to show sufficient harm under the Eighth Amendment depends upon the claim at issue, with the objective component being contextual and responsive to contemporary standards of decency. *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S.Ct. 995 (1992) (quotation marks and citations omitted). For excessive force claims, the core judicial inquiry is whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *Wilkins v. Gaddy*, 559 U.S. 34, 37, 130 S.Ct. 1175 (2010) (per curiam) (citing *Hudson*, 503 U.S. at 7) (quotation marks omitted). Not every malevolent touch by a prison guard gives rise to a federal cause of action. *Wilkins*, 559 U.S. at 37, 130 S.Ct. at 1178 (citing *Hudson*, 503 U.S. at 9) (quotation marks omitted). Necessarily excluded from constitutional recognition is the *de minimis* use of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. *Wilkins*, 559 U.S. at 37-8, 130 S.Ct. at 1178 (citing *Hudson*, 503 U.S. at 9-10) (quotations marks omitted).

In determining whether the use of force was wanton and unnecessary, courts may evaluate the extent of the prisoner's injury, the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials,

and any efforts made to temper the severity of a forceful response. *Hudson*, 503 U.S. at 7 (quotation marks and citations omitted). While the absence of a serious injury is relevant to the Eighth Amendment inquiry, it does not end it. *Hudson*, 503 U.S. at 7. The malicious and sadistic use of force to cause harm always violates contemporary standards of decency. *Wilkins*, 559 U.S. at 37, 130 S.Ct. at 1178 (citing *Hudson*, 503 U.S. at 9) (quotation marks omitted). Thus, it is the use of force rather than the resulting injury which ultimately counts. *Id.* at 37-8.

C. Claim Against Defendant Jolley

In his complaint, Plaintiff alleges that on June 21, 2013, Defendant Jolley kept staring at him during an escort to the medical clinic. After they arrived at the clinic and Plaintiff was seated in a chair, he asked Defendant Jolley if there was a problem. Defendant Jolley pulled Plaintiff up from his chair, escorted him to the medical clinic podium, and "violently bashed" his head into the podium, causing him to need codeine for ten days for pain management. (Doc. 1, Comp., p. 6.)

Plaintiff is entitled to have his factual allegations taken as true and construed in the light most favorable to him, and he is entitled to be afforded the benefit of any doubt. *Nordstrom*, 762 F.3d at 908; *Blaisdell*, 729 F.3d at 1241. Moreover, Plaintiff is required only to allege a short and plain statement of his claim, Fed. R. Civ. P. 8(a)(2) *Johnson v. City of Shelby*, __ U.S. __, __, 135 S.Ct. 346, 346 (2014) (per curiam), and at the pleading stage, Plaintiff need only present facts supporting a claim that physical force was used "'maliciously and sadistically to cause harm,'" *Wood v. Beauclair*, 692 F.3d 1041, 1049-50 (9th Cir. 2012) (quoting *Hudson*, 503 U.S. at 6).

Although Plaintiff's specific factual allegations are brief and some of the allegations in the complaint recite words taken from the legal standard applicable to Eighth Amendment excessive force claims, his complaint amounts to more than mere conclusory allegations which reiterate the legal standard. Accepting Plaintiff's factual allegations as true and construing them in the light most favorable to him, he has shown a use of force that was totally unprovoked and not undertaken in any good faith effort to maintain or restore discipline. Moreover, although Plaintiff does not describe his injury, it is inferable from his allegations that he sustained an injury to his head and he alleges that he needed codeine for ten days, which supports the inference that he sustained an injury meriting medical treatment in the form of prescription-strength pain

medication. The gratuitous use of force by a correctional officer in the absence of any need to use force supports a claim for relief under the Eighth Amendment and Defendants' arguments to the contrary are rejected.[4] Furthermore, the Court declines to find that as a matter of law, bashing an inmate's head into a podium for no reason at all constitutes a *de minimis* use of force. *Wilkins*, 559 U.S. at 37-38.

Regarding several of Defendants' specific arguments, Plaintiff is not required to offer an explanation for Defendant Jolley's motivation; Plaintiff is not required to provide further detail regarding the severity of his injury, as he is not required to show significant injury to maintain a claim; and Plaintiff's allegations are not implausible as a matter of law.[5] *Id.* at 37-40. Plaintiff has described an unjustified use of physical force that injured him, and although Plaintiff would be entitled to the benefit of any doubt with respect to any necessary factual construction, his complaint is notably devoid of *any* facts supporting an inference that the use of force might have

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[4] Defendants cited three district court cases in support of their motion. All three cases are distinguishable, however. One case involved grabbing an inmate's wheelchair and spinning him around, causing injury. *Armstrong v. Hedgpeth*, No. 1:11-cv-00761-LJO-GSA-PC, 2013 WL 595125, at *5 (E.D.Cal. Feb. 15, 2013). Such an act may or may not suffice to support a claim, depending on additional facts might be pled. In that case, the court stated that the plaintiff "must allege facts showing that under the circumstances, there was no need for the defendant to use the amount of force described." *Armstrong*, 2013 WL 595125, at *6. The Court may take judicial notice of its own records, *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980), and following amendment, the court in the *Armstrong* case determined on June 4, 2014, that the use of force at issue was *de minimis*. In this case, Plaintiff's head was bashed into a podium in the absence of any need for force, an act which is not equivalent to spinning a wheelchair around and which the Court declines to find is *de minimis*.

In *Miller v. Brown*, the court was unable to determine whether pulling an inmate's handcuffs and using pepper spray was force employed in a good faith effort to maintain or restore discipline or was instead malicious and sadistic for the purpose of causing harm. *Miller v. Brown*, No. 1:12-cv-01589-LJO-BA[M] (PC), 2014 WL 496919, at *7 (E.D.Cal. Feb. 6, 2014). In this case, although the facts are minimal, Plaintiff provided enough context to show that the uses of force were not employed to maintain order or restore discipline and were instead totally unprovoked and unjustified.

Finally, in *Kabil v. Youngblood*, the plaintiff alleged only that his stool was kicked away and he was locked down unreasonably. *Kabil v. Youngblood*, No. 1:08-cv-00281-SMS PC, 2009 WL 2475006, at *4, 14 (E.D.Cal. Aug. 11, 2009). Kicking a stool away is not equivalent to bashing a head into a podium or hitting an inmate with batons, and the complaint in that case was so lacking that the court found it "baffling" to the reader. *Kabil*, 2009 WL 2475006, at *1. No such deficiency exists here.

[5] Defendants' argument that "[i]t is simply not plausible that a correctional officer would decide to bash an inmate's head into a podium for no reason at all" must be rejected. (Doc. 16-1, Motion, 6:27-7:1.) The credibility of Plaintiff's version of events is not subject to resolution at the pleading stage, and the allegation that a guard used physical force to harm an inmate in the absence of any justification is *not* facially implausible. *See Blantz v. California Dep't of Corrs. & Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013) (facially implausible allegations need not be accepted as true); *Wilkins*, 559 U.S. at 38 (guard allegedly punched, kicked, kneed, choked, and body slammed inmate without any provocation after inmate asked for grievance form); *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005) (per curiam) (officer allegedly slammed inmate's face into wall without warning and kicked inmate in the genitals and back, all without any provocation).

been employed in a good faith effort to maintain or restore discipline.

D. Claim Against Defendants Contreras and Ortega

Next, Plaintiff alleges that on August 1, 2013, Defendant Ortega was escorting him back to his building when Defendant Contreras walked up and began violently assaulting Plaintiff.[6] (Comp., 7:10.) Plaintiff alleges the incident was staged by Defendants Ortega and Contreras, and he sustained permanent injuries to his lower leg, right shoulder, and head.

Despite their brevity, Plaintiff's allegations also suffice to state a claim for relief against Defendants Contreras and Ortega. Plaintiff's exhibits demonstrate that the force at issue involved baton strikes against him; and he alleges that he did nothing wrong to justify the use of any force against him and that he sustained permanent injuries to his lower leg, top right shoulder, and head. Where the use of batons against an inmate was allegedly unprovoked, there is no inference to be drawn that the force was used in a good faith effort to maintain or restore discipline. To the contrary, the inference compelled by the facts is that the force was used to cause harm, and the facts do not lend themselves to a finding that the force used was *de minimis* as a matter of law. An inmate who alleges that two guards hit him with their batons and injured him, in the absence of any provocation or justification, states a claim under the Eighth Amendment. While Plaintiff may not ultimately prevail on his claim, he is entitled to proceed beyond the pleading stage; the Court cannot find that his allegations "are too speculative to warrant further factual development." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013) (en banc), *cert. denied*, 134 S.Ct. 1283 (2014).

Finally, Defendants' argument that Plaintiff's version of events is contradicted by his exhibits is rejected. Courts are not "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are

[6] Plaintiff's exhibits show he was charged in prison disciplinary proceedings with resisting a peace officer, and the incident involved the use of a baton and hands. The outcome is unclear from the complaint, but if Plaintiff was found guilty and the length of his sentence was affected, his claim against Defendants Contreras and Ortega may be barred. *See Wilkinson v. Dotson*, 544 U.S. 74, 81-2, 125 S.Ct. 1242, 1248 (2005) ("[A] state prisoner's § 1983 action is barred (absent prior invalidation) - no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) - *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.")

merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall*, 629 F.3d 992 at 998. However, the purportedly contradictory facts contained in Plaintiff's exhibits are Defendants' own reports of events, which are appended to Plaintiff's rules violation report. Those "facts" cannot provide a basis for disregarding Plaintiff's allegations because they are contested as opposed to "established."[7] *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D.Cal. 1993). Although brief, Plaintiff's allegations are neither fatally conclusory nor mere legal conclusions and therefore, any factual disputes must be resolved in Plaintiff's favor at this stage in the proceedings.

IV. Recommendation

In conclusion, the allegation that a correctional officer, totally unprovoked and absent any justification, bashed a prisoner's head into a podium and caused an injury requiring prescription pain medication for ten days supports a plausible claim for relief under the Eighth Amendment. Likewise, the allegation that two correctional officers, totally unprovoked and absent justification, hit a prisoner with their batons, causing injury to his leg, shoulder, and head supports a plausible claim. Although brief, Plaintiff's factual allegations are neither conclusory nor vague and they are not limited to a recitation of the applicable legal standard. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). As a result, the allegations must be taken as true and to the extent Plaintiff's version lacks credibility and/or there exist factual disputes between the parties over what occurred, those determinations may not be made at the pleading stage. *See e.g.*, *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2912); *Starr*, 652 F.3d at 1216-17.

Accordingly, the Court HEREBY RECOMMENDS that:

1. Defendants' motion to strike new allegations in Plaintiff's opposition be DENIED;
2. Defendants' motion to strike Plaintiff's surreply be DENIED as moot; and
3. Defendants' motion to dismiss for failure to state a claim, filed on May 6, 2015, be DENIED.

These Findings and Recommendations will be submitted to the United States District

[7] Comp., Exs. 9-11.

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

IT IS SO ORDERED.

Dated: **July 13, 2015**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE