

1 A complaint must contain “a short and plain statement of the claim showing that the pleader is
2 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do
4 not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550
5 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated
6 in the deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

7 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally
8 construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th
9 Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible, which
10 requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is
11 liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,
12 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not sufficient, and
13 “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying the plausibility
14 standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

15 **II.**

16 **COMPLAINT ALLEGATIONS**

17 Plaintiff names correctional officers Gutierrez, Herrera, and Serna, as Defendants.

18 Unnecessary and excessive force was used by Gutierrez, Herrera, and Serna which violated
19 Plaintiff’s rights under the Eighth and Fourteenth Amendments by physical assault with use of batons
20 and pepper spray.

21 Plaintiff seeks compensatory and punitive damages.

22 Regarding Plaintiff’s exhaustion of administrative remedies, he indicates that remedies are
23 available at his institution, and that he has submitted a request for relief regarding these matters. He
24 further indicates that the appeal is in the process of being completed at the highest level of review.

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1 **III.**

2 **DISCUSSION**

3 **A. Exhaustion of Administrative Remedies**

4 Pursuant to the PLRA, “[n]o action shall be brought with respect to prison conditions under [42
5 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
6 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
7 Prisoners are required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock,
8 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).

9 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the relief
10 offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and the exhaustion requirement
11 applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532 (2002). Although the
12 “failure to exhaust is an affirmative defense under the PLRA,” a prisoner’s complaint may be subject to
13 dismissal for failure to state a claim when an affirmative defense appears on its face. Jones v. Bock, 549
14 U.S. at 202, 215; see also Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc) (noting that
15 where a prisoner’s failure to exhaust is clear from the fact of the complaint, his complaint is subject to
16 dismissal for failure to state a claim, even at the screening stage); Wyatt v. Terhune, 315 F.3d 1108,
17 1120 (9th Cir. 2003) (“A prisoner’s concession to nonexhaustion is a valid ground for dismissal[.]”),
18 overruled on other grounds by Albino, 747 F.3d at 1166.

19 In California, a prison inmate satisfies the administrative exhaustion requirement by following
20 the procedures set forth in sections 3084.1 through 3084.8 of Title 15 of the California Code of
21 Regulations. An inmate “may appeal any policy, decision, action, condition, or omission by the
22 department or its staff that the inmate...can demonstrate as having a material adverse effect upon his or
23 her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). The regulations require the prisoner
24 to proceed through all three levels of review. See Cal. Code Regs. tit. 15, § 3084.2(a). A decision at the
25 third level of review, known as the director’s level of review, is not appealable and constitutes the third
26 level of administrative review. Id.

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1 Here, as discussed above, Plaintiff has affirmatively alleged that although he has submitted an
2 appeal regarding his allegations, his appeal is still in the process of being completed at the highest level
3 of review. Therefore, Plaintiff's failure to exhaust his administrative remedies prior to filing suit is clear
4 from the face of the complaint. Based on Plaintiff's concession of nonexhaustion, this action must be
5 dismissed, without prejudice. Jones, 549 U.S. at 211; McKinney, 311 F.3d at 1199-1201; see also City
6 of Oakland, Cal. v. Hotels.com LP, 572 F.3d 958, 962 (9th Cir. 2009) (“[F]ailure to exhaust the
7 administrative remedies is properly treated as a curable defect and should generally result in a dismissal
8 without prejudice.”); Albino, 747 F.3d at 1170 (“Exhaustion should be decided, if feasible, before
9 reaching the merits of a prisoner’s claim”); Rhodes v. Robinson, 621 F.3d 1002, 1004 (9th Cir. 2010)
10 (the “exhaustion requirement does not allow a prisoner to file a complaint addressing non-exhausted
11 claims.”) (citing McKinney, 311 F.3d at 1199). Further, although the Court would typically grant
12 Plaintiff leave to amend due to his pro se status, amendment is futile in this instance because the failure
13 to exhaust cannot be cured by the allegation of additional facts. See Lopez v. Smith, 203 F.3d 1122,
14 1127 (9th Cir. 2000); see also Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279 F.3d 817,
15 824 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal without leave
16 to amend). Accordingly, this action must be dismissed, without prejudice, for failure to exhaust the
17 administrative remedies.

18 **IV.**

19 **RECOMMENDATION**

20 For the reasons explained, it is **HEREBY RECOMMENDED** that this action be dismissed,
21 without prejudice, for failure to exhaust the administrative remedies.

22 This Findings and Recommendation will be submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days**
24 after being served with this Findings and Recommendation, Plaintiff may file written objections with
25 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
26 Recommendation.” Plaintiff is advised that failure to file objections within the specified time may result

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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: November 7, 2018



UNITED STATES MAGISTRATE JUDGE