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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GEORGE G. CHOATE,  
Plaintiff,  
v.  
P. FOWLER, et al.,  
Defendants.

Case No. 1:19-cv-00473-NONE-SKO (PC)

**FINDINGS AND RECOMMENDATIONS  
TO GRANT DEFENDANT NAJM'S  
MOTION TO DISMISS**

(Doc. 28)

14-DAY DEADLINE

**ORDER DISCHARGING ORDER TO  
SHOW CAUSE**

(Doc. 29)

Plaintiff George G. Choate raises claims of excessive force against Defendants Fowler and Najm in his operative, first amended complaint. (Doc. 20; *see also* Doc. 22.) Before the Court is Defendant Najm's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Doc. 28.) For the reasons set forth below, the Court recommends that the motion be granted and that Defendant Najm be dismissed from this action.

**I. BACKGROUND**

Defendant Najm ("Defendant") filed his motion to dismiss on the grounds that Plaintiff's first amended complaint (Doc. 20) fails to allege sufficient facts to state a cognizable claim against him. (*See* Doc. 28-1 at 3-4.) Although defense counsel's office served the motion on Plaintiff (*see id.* at 5), Plaintiff failed to file an opposition or a statement of non-opposition to the

1 motion within 21 days in accordance with Local Rule 230(1). Therefore, the Court issued an order  
2 to show cause why this action should not be dismissed for Plaintiff's failure to prosecute. (Doc.  
3 29.)

4 On July 10, 2020, Plaintiff filed a response to the order to show cause, in which he states  
5 that he is "dismissing SGT. Najm from this lawsuit since he is not the one who used excessive  
6 force." (Doc. 30.) Because the parties have not stipulated to the dismissal pursuant to Federal  
7 Rule of Civil Procedure 41, the Court construes Plaintiff's filing as a statement of non-opposition  
8 to Defendant's motion to dismiss. The Court also finds that Plaintiff's response is sufficient to  
9 warrant discharging the order to show cause.

## 10 II. LEGAL STANDARD

11 A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro*  
12 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In resolving a 12(b)(6) motion, the Court's review is  
13 generally limited to the "allegations contained in the pleadings, exhibits attached to the complaint,  
14 and matters properly subject to judicial notice." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519  
15 F.3d 1025, 1030-31 (9th Cir. 2008) (internal quotation marks and citations omitted). Dismissal is  
16 proper if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged  
17 under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.  
18 1988) (citation omitted).

19 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
20 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556  
21 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court  
22 "accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light  
23 most favorable to the non-moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998  
24 (9th Cir. 2010) (citation omitted). In addition, the Court construes pleadings of *pro se* prisoners  
25 liberally and affords them the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.  
26 2010) (citation omitted). However, "the liberal pleading standard ... applies only to a plaintiff's  
27 factual allegations," not his legal theories. *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989).

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1     **III.   DISCUSSION**

2           “Inmates who sue prison officials for injuries suffered while in custody may do so under  
3 the Eighth Amendment’s Cruel and Unusual Punishment Clause or, if not yet convicted, under  
4 the Fourteenth Amendment’s Due Process Clause.” *Castro v. Cty. of Los Angeles*, 833 F.3d 1060,  
5 1067-68 (9th Cir. 2016). To establish excessive force under the Due Process Clause, a pretrial  
6 detainee must show that the defendant “purposely or knowingly used [force] against him [that]  
7 was objectively unreasonable.”<sup>1</sup> *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

8           Defendant contends that Plaintiff fails to state a cognizable excessive force claim against  
9 him because he “fails to allege any facts that Sergeant Najm used *any* force, let alone excessive  
10 force ..., or that Sergeant Najm caused him to be subjected to excessive force.” (Doc. 28-1 at 3.)

11           In his operative, first amended complaint, Plaintiff alleges the following: “While being  
12 place[d] back into my cell (while handcuffed) by Senior Deputy P. Fowler, Sergeant Naajm [sic]  
13 and several other deputies, I was taken to the ground and punched twice by P. Fowler for no  
14 reason.” (Doc. 20 at 3.)

15           Plaintiff’s statement is ambiguous, i.e., it is unclear whether Sergeant Najm, Deputy  
16 Fowler, and/or the “other deputies” took Plaintiff to the ground, and whether such action is part of  
17 the excessive force claim of which he complains. Given the standard for Rule 12(b)(6) motions,  
18 as well as the liberal pleading standard for *pro se* plaintiffs, the Court would be inclined to  
19 interpret the statement as an allegation that Najm participated in the use of excessive force.  
20 However, because Plaintiff does not oppose Defendant’s motion to dismiss and explicitly admits  
21 that “Najm ... is not the one who used excessive force” (Doc. 30), the Court interprets the  
22 statement accordingly. Therefore, the Court recommends that Defendant’s motion be granted.

23     **IV.   CONCLUSION**

24           Based on the foregoing, the Court RECOMMENDS that Defendant Najm’s motion to  
25 dismiss (Doc. 28) be GRANTED and that he be DISMISSED from this action with prejudice. The  
26 Court additionally DISCHARGES its order to show cause (Doc. 29).

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<sup>1</sup> It is unclear whether, at the times relevant to this lawsuit, Plaintiff was a pretrial detainee or instead serving a sentence for a criminal conviction. For purposes of this motion, the Court assumes the former.

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These Findings and Recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days of the date of service of these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned, “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may result in waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: July 15, 2020

/s/ Sheila K. Overt  
UNITED STATES MAGISTRATE JUDGE