UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LATHAHN McELROY,

Plaintiff,

v.

GUSTAFSON, et al.,

Defendants.

No. 2:12-cv-1518-TLN-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He claims that defendants Gustafson, Robertson, Deems, and Virga were deliberately indifferent to his serious medical needs and that Gustafson used excessive force against him. Plaintiff has filed a motion for partial summary judgment, ECF No. 34, and defendants' opposition includes a counter-motion for summary judgment. ECF No. 44. Plaintiff then filed a "Supplemental Motion [for] Summary Judgment," which he filed after the cross-motions were fully briefed and submitted for decision. ECF No. 72. Defendants have moved to strike that "supplemental" motion. ECF No. 73. Plaintiff then responded with what he styles as a motion for rebuttal to the motion to strike, which the court construes as an opposition to the motion to strike. ECF No. 78. Additionally, plaintiff has filed a motion for a preliminary

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injunction.[1] ECF No. 79. For the reasons that follow, it is recommended that (1) plaintiff's motion for summary judgment be denied, (2) defendants' motion for summary judgment be denied as to Gustafson but granted as to Robertson, Deems, and Virga, (3) plaintiff's "Supplemental Motion [for] Summary Judgment" be denied, (4) defendants' motion to strike plaintiff's "supplemental motion" be denied, (5) plaintiff's "motion for rebuttal" be denied, and (6) plaintiff's motion for a preliminary injunction be denied.

I. Background[2]

Plaintiff was transferred from California State Prison-Sacramento ("CSP-Sac") to High Desert State Prison ("HDSP") on November 14, 2011. ECF No. 52 at 1.[3] He claims that upon his arrival at HDSP, defendant Gustafson, a correctional officer, ordered him to "remove his clothing and hand it to him along with [his] cane and back brace . . . ." *Id.* at 2; ECF No. 1 ("Compl.") at 4. Gustafson allegedly stated that the cane and back brace would not be returned. ECF No. 52 at 2. Plaintiff says he was subsequently ordered to bend and squat, movements that he claims he could not perform because of his "handicap." Compl. at 4. Allegedly, while plaintiff was attempting to explain his physical inability to bend and squat as ordered, Gustafson pepper sprayed plaintiff. *Id.* Plaintiff claims he fell face first to the ground and was then handcuffed behind his back. ECF No. 52 at 3; Compl. at 4. Plaintiff argues that Gustafson's actions amounted to excessive force and deliberate indifference to his medical needs in violation of the Eighth Amendment. Compl. at 3.

Plaintiff also claims that defendant Robertson, a physician's assistant at HDSP, was deliberately indifferent to plaintiff's medical needs. *Id.* at 6. Specifically, plaintiff claims that Robertson discontinued his medications (nasal spray, pine tar/coal tar soap, Metamucil, psyllium powder, lactolose, and magnesium citrate) and medical appliances (cane, wheelchair, back brace,

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[1] Defendants have not filed an opposition to plaintiff's motion for a preliminary injunction.

[2] This action proceeds on plaintiff's verified complaint, filed June 6, 2012. ECF No. 1.

[3] For ease of reference, all citations to court documents are to the pagination assigned via the court's electronic filing system.

and leg brace). *Id.* at 4-5. Plaintiff also contends that Robertson prevented him from seeing a doctor to reinstate his medications and appliances, and that Robertson failed to provide physical therapy. *Id.* at 6.

Lastly, plaintiff claims that defendants Deems and Virga were deliberately indifferent to his serious medical needs when they "adversely transferred" him to HDSP with knowledge of his medical condition. *Id.* at 3. Deems is the Chief Medical Officer at CSP-Sac and Virga is the Warden of that institution. *Id.* at 2. According to plaintiff, they transferred him from CSP-Sac to HDSP with knowledge that he was disabled and that the transfer would expose him to "injurious conditions." *Id.* at 3, 6.

II. Standard

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant to the determination of the issues in the case, or in which there is insufficient evidence for a jury to determine those facts in favor of the nonmovant. *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a summary judgment motion asks whether the evidence presents a sufficient disagreement to require submission to a jury.

The principal purpose of Rule 56 is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thus, the rule functions to "'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments). Procedurally, under summary judgment practice, the moving party bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). If the moving

party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts that show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995).

A clear focus on where the burden of proof lies as to the factual issue in question is crucial to summary judgment procedures. Depending on which party bears that burden, the party seeking summary judgment does not necessarily need to submit any evidence of its own. When the opposing party would have the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See, e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex*, 477 U.S. at 323-24 ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322. In such a circumstance, summary judgment must be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

To defeat summary judgment the opposing party must establish a genuine dispute as to a material issue of fact. This entails two requirements. First, the dispute must be over a fact(s) that is material, i.e., one that makes a difference in the outcome of the case. *Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). Whether a factual dispute is material is determined by the substantive law applicable for the claim in question. *Id.* If the opposing party is unable to produce evidence sufficient to establish a required element of its claim that party fails in opposing summary judgment. "[A] complete failure of proof concerning an essential element

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of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322.

Second, the dispute must be genuine. In determining whether a factual dispute is genuine the court must again focus on which party bears the burden of proof on the factual issue in question. Where the party opposing summary judgment would bear the burden of proof at trial on the factual issue in dispute, that party must produce evidence sufficient to support its factual claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Devereaux*, 263 F.3d at 1076. More significantly, to demonstrate a genuine factual dispute the evidence relied on by the opposing party must be such that a fair-minded jury "could return a verdict for [him] on the evidence presented." *Anderson*, 477 U.S. at 248, 252. Absent any such evidence there simply is no reason for trial.

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *See id.* at 249, 255; *Matsushita*, 475 U.S. at 587. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank*, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex*, 477 U.S. at 322). If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted). In that case, the court must grant summary judgment.[4]

[4] Concurrent with their counter-motion for summary judgment, defendants advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. ECF No. 44-1; *see Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999);

III. Analysis

A. Plaintiff's Motion for Partial Summary Judgment

Plaintiff seeks partial summary judgment with respect to his excessive force claim against Gustafson.[5] ECF No. 34. "When prison officials use excessive force against prisoners, they violate the inmates' Eighth Amendment right to be free from cruel and unusual punishment." *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). To establish such a claim a plaintiff must show that prison officials applied force maliciously and sadistically to cause harm, rather than in a good-faith effort to maintain or restore discipline. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). Whether plaintiff has produced evidence sufficient to make such a showing involves an evaluation of (1) the need for application of force, (2) the relationship between that need and the amount of force used, (3) the threat reasonably perceived by the responsible officials, and (4) any efforts made to temper the severity of a forceful response. *Id.* at 7; *see also id.* at 9-10 ("The Eighth Amendment's prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." (internal quotation marks and citations omitted)).

Plaintiff argues that "[t]he undisputed facts of this case show that the plaintiff was subjected to the unlawful use of pepper spray." ECF No. 34 at 3. In support, he relies on his declaration stating that Gustafson confiscated his mobility devices, that he had told Gustafson that he needed his cane to perform the ordered bend and squat, that Gustafson pepper sprayed and tightly handcuffed plaintiff behind his back, and that plaintiff did not resist or disobey orders. *Id.* at 5, ¶¶ 2-5. According to plaintiff, he was complying with Gustafson's orders and there was no

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Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988). The court notes that plaintiff opposed defendants' motion before conducting any discovery in this matter. On August 6, 2014, the court held a hearing; defense counsel was physically present and plaintiff appeared via video-conference. ECF No. 67. The court inquired as to whether plaintiff wished to defer resolution of defendants' motion so that he could propound discovery. Plaintiff did not request discovery prior to resolution of defendants' motion. The motion is thus ripe for adjudication.

[5] Neither this motion nor plaintiff's "Supplemental Motion" seeks summary judgment on his deliberate indifference claim against Gustafson.

basis for the use of force, yet Gustafson sprayed him in the face with pepper spray. Plaintiff is a percipient witness and obviously his version of the events is relevant and admissible. But Gustafson disputes that version of events.

According to Gustafson's declaration he did not confiscate plaintiff's cane or back brace when plaintiff arrived at HDSP and he had no authority to confiscate any medically prescribed assistive device without the approval of medical staff. ECF No. 44-4 ("Gustafson Decl.") ¶¶ 3, 4. Gustafson did not recall plaintiff even having a cane or back brace when he arrived at HDSP.[6] *Id.* at ¶ 3. As for the pepper spraying, Gustafson asserts that plaintiff refused to submit to Gustafson's order to bend and squat and a subsequent order to place his hands behind his back and submit to handcuffs. Gustafson Decl. ¶¶ 5-7. Gustafson states that when plaintiff refused to submit to handcuffs he ordered plaintiff to get down, but plaintiff did not comply and remained standing. *Id.* at ¶¶ 8-9. Gustafson states that he sprayed plaintiff in the facial area with pepper spray to gain compliance with the orders and to have plaintiff submit to handcuffs. *Id.* at ¶ 10. Gustafson contends that plaintiff's refusal to comply with lawful orders disrupted the processing of inmates and created the suspicion that plaintiff was attempting to introduce contraband into HDSP. *Id.* at ¶ 16.

Clearly, plaintiff and Gustafson describe very different versions of what occurred. While plaintiff contends that Gustafson confiscated his mobility devices and gratuitously pepper sprayed plaintiff in the face in spite of plaintiff having explained that he needed his cane to perform the ordered bend and squat, ECF No. 34 at 5, ¶¶ 2-5, Gustafson contends that he did not confiscate the cane or back brace and that plaintiff refused to comply with the several orders which necessitated the pepper spraying to gain compliance, Gustafson Decl. ¶¶ 3, 7-10, 16. These factual disputes are material, as plaintiff's claim depends on whether Gustafson's use of the pepper spray was malicious and sadistic or a good-faith effort to maintain order and discipline. *See Hudson*, 503 U.S. at 6-7. Further, the dispute is genuine. Both individuals are percipient witnesses to what occurred. A jury could credit either witness' version and the credibility

[6] Gustafson suggests plaintiff's own evidence indicates that his chrono for a cane expired three months before his transfer to HDSP. ECF No. 34 at 8.

determination cannot be made on summary judgment. Whether a jury will credit Gustafson or plaintiff remains to be seen, but if it believes Gustafson it could reasonably return a verdict for Gustafson based on the account provided in his declaration. Accordingly, plaintiff's motion for partial summary judgment on the excessive force claim against Gustafson must be denied.

B. Defendants' Counter-Motion for Summary Judgment

1. Gustafson

Gustafson also moves for summary judgment as to the same event. ECF No. 44-2 at 6-8. He also asserts on summary judgment a defense of qualified immunity. *Id.* at 9. For the same reasons identified above, Gustafson's motion must be denied.

a. Excessive Force

As discussed, Gustafson argues that the use of pepper spray was justified by plaintiff's "refusal to follow lawful orders." ECF No. 44-2 at 7. He states in the declaration that he did not confiscate the cane and back brace and pepper sprayed plaintiff to gain compliance with lawful orders. ECF No. 44-4 ("Gustafson Decl.") ¶¶ 3, 10. This includes the alleged refusal to comply with orders to bend at the waist, spread his buttocks, and cough as part of the unclothed body search, to submit to handcuffs, and to get down. *Id.* at ¶¶ 5, 7-9. Gustafson's declaration indicates that plaintiff arrived at HDSP with twenty to thirty other inmates of various custody levels; Gustafson states that he was responsible for ensuring that these inmates were processed into the institution safely. *Id.* at ¶ 13-15. According to Gustafson, plaintiff's refusal to comply disrupted the processing of other inmates and created the suspicion that plaintiff was attempting to introduce contraband into the institution. *Id.* at ¶ 16.

As with plaintiff's motion, this motion presents a factual dispute between two percipient witnesses whose descriptions of what occurred conflict in material ways. Plaintiff's contention that Gustafson confiscated the cane and back brace, ECF No. 52 at 2,[7] cannot be squared with

[7] Plaintiff's factual assertions are set out in a document he styles as "Plaintiff's objections to Defendants[']] Motion for Summary Judg[]ment and Undisputed Facts." This document consists of several enumerated factual assertions and is subscribed with a certification stating: "I declare that this Motion is made in furtherance of the truth." While this language is not the proper form for verification of a declaration, thus rendering the document technically not in a form admissible for trial, the statements therein are nonetheless admissible here. They purport to

Gustafson's denial. Likewise, plaintiff's assertion that he did not refuse to comply with the order to bend at the waist, spread his buttocks, and cough as part of the unclothed body search, but rather stated that he had no balance and needed his cane to bend and squat is sufficient to defeat summary judgment on Gustafson's assertion that the pepper spraying was reasonably necessary. *Id.* According to plaintiff, Gustafson ordered plaintiff to get on the ground, which plaintiff was unable to do without an assistive device. *Id.* at 2. Although Gustafson claims that the refusal to submit to handcuffs created a situation in which Gustafson had to use pepper spray to maintain discipline, ECF No. 44-3 at 2, ¶ 12, plaintiff states that he was pepper sprayed while trying to explain that he was handicapped. Plaintiff also insists that he did not refuse to comply with an order to submit to handcuffs. Rather, he asserts that Gustafson neither attempted to handcuff plaintiff nor told plaintiff to turn around to be handcuffed. ECF No. 52 at 2. Finally, plaintiff disputes Gustafson's characterization of how plaintiff became prone on the ground. Gustafson states that plaintiff assumed a prone position and submitted to handcuffs after being pepper sprayed. Gustafson Decl. at ¶ 14. Plaintiff contends that the pepper spray caused him to lose his balance and fall, and that he injured his back, hip, and knee when he was handcuffed. ECF No. 52 at 3.

As discussed above, both individuals were percipient to the encounter but describe very different versions of what occurred. If plaintiff's account is believed, a reasonable jury could find in his favor. The respective credibility of plaintiff and Gustafson over these disputed facts simply cannot be resolved on summary judgment.

Plaintiff has established a genuine dispute as to several facts that affect whether, as Gustafson claims, Gustafson's use of pepper spray was justified. Further, as noted, the disputed facts are material to plaintiff's claim that the use of the pepper spray was malicious and gratuitous and not a good-faith effort to maintain order and discipline. *See Hudson*, 503 U.S. at 6-7. Thus,

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be plaintiff's account of what he actually experienced during the event and describe his percipient observations regarding facts that are in dispute. Thus, the content is capable of presentation in a form admissible at trial. It is therefore properly considered for purposes of summary judgment. *See Fraser v. Goodale*, 342 F.3d 1032, 1037-38 (9th Cir. 2003).

Gustafson's counter-motion for summary judgment on plaintiff's excessive force claim against Gustafson must be denied.

b. Deliberate Indifference

Gustafson also seeks summary judgment on plaintiff's claim of deliberate indifference. To succeed on an Eighth Amendment claim predicated on the denial of medical care, a plaintiff must establish that he had a serious medical need and that the defendant's response to that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial, delay or intentional interference with medical treatment or by the way in which medical care is provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

To act with deliberate indifference, a prison official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if he knows that plaintiff faces "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. A physician need not fail to treat an inmate altogether in order to violate that inmate's Eighth Amendment rights. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition, even if some treatment is prescribed, may constitute deliberate indifference in a particular case. *Id.*

It is important to differentiate common law negligence claims of malpractice from claims predicated on violations of the Eighth Amendment's prohibition of cruel and unusual punishment. In asserting the latter, "[m]ere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06; *see also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

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Gustafson argues that summary judgment in his favor is appropriate because (1) as a correctional officer, he could not take away a medically prescribed assistive device without the approval of medical staff, (2) he did not confiscate plaintiff's cane or back brace,[8] and (3) plaintiff did not have a valid chrono for a cane or back brace at the time of his arrival at HDSP. ECF No. 44-2 at 3, 7.

Gustafson's argument that he lacked authority to take away the cane or back brace and therefore could not have violated plaintiff's rights is a non sequitur. Establishing that he lacked such authority does not establish as a matter of law that he did not, in fact, take the cane and back brace from plaintiff. Whether Gustafson did or did not have authority to take away a medically prescribed assistive device, plaintiff states in his declaration that Gustafson did in fact confiscate the cane and back brace. ECF No. 52 at 3. Plaintiff also disputes in his declaration the assertion that he did not have a valid chrono for the cane and brace when he arrived at HDSP. *Id.* He submitted a February 2011 chrono which indicates only a temporary, six-month cane accommodation. ECF No. 34 at 8. He acknowledges that the chrono is of limited duration but contends that "the chrono and cane is supposed to be reevaluated approx. the date of expiration and to remain the property of plaintiff pursuant to [Cal. Code Regs. tit. 15, § 3358(b)]."[9] ECF No. 52 at 3. With respect to the back brace, plaintiff points to a January 2007 chrono that provides a permanent accommodation. ECF No. 34 at 9.

Although Gustafson disputes plaintiff's version of what occurred, the dispute simply underscores the point that summary judgment is not appropriate here. Plaintiff, himself a

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[8] This claim appears in the facts section of Gustafson's counter-motion but not in the "Argument" section.

[9] That regulation provides:

> No inmate shall be deprived of a prescribed orthopedic or prosthetic appliance in the inmates possession upon arrival into the department's custody or properly obtained while in the department's custody unless a department physician or dentist determines the appliance is no longer needed and the inmate's personal physician, if any, concurs in that opinion.

Cal. Code Regs. tit. 15, § 3358(b).

percipient witness to the events, has shown that specific facts that are material to his claim are in genuine dispute. This includes the disputes over whether plaintiff had a cane and back brace when he arrived, whether plaintiff had a valid chrono for a cane and back brace, and whether Gustafson without justification confiscated those assistive devices upon plaintiff's arrival at HDSP. Those disputed facts are material because plaintiff's deliberate indifference claim hinges on whether Gustafson knew that plaintiff faced a substantial risk of serious harm and whether Gustafson disregarded that risk by failing to take reasonable measures to abate it. *See Farmer*, 511 U.S. at 847. Plaintiff's testimony suggests that Gustafson confiscated the cane knowing that plaintiff was disabled, and that Gustafson punished plaintiff with pepper spray when he did not perform tasks he was obviously physically incapable of performing. ECF No. 52 at 2. The dispute is also genuine because a fair-minded jury, if it credits plaintiff's testimony, could return a verdict for plaintiff. Thus, there are genuine disputes over material facts and Gustafson's counter-motion for summary judgment on this claim must be denied.

c. Qualified Immunity

Gustafson's qualified immunity argument also does not warrant summary judgment in his favor.

Qualified immunity protects government officials from liability for civil damages where a reasonable person would not have known that their conduct violated a clearly established right. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry." *Tolan v. Cotton*, ___ U.S. ___, ___, 134 S. Ct. 1861, 1865 (2014) (per curiam). "The first asks whether the facts, 'taken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a federal right.'" *Id.* (internal bracketing omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "The second prong of the qualified-immunity analysis asks whether the right in question was 'clearly established' at the time of the violation." *Tolan*, 134 S. Ct. at 1866 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). A plaintiff invokes a "clearly established" right when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. at 640. "The salient

question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan*, 134 S. Ct. at 1866 (internal bracketing and quotation marks omitted).

Gustafson's qualified immunity argument rests on his disputed version of the encounter and his contention that there was no constitutional violation. As discussed above, material facts are in genuine dispute as to whether there was a constitutional violation. Specifically, there is a dispute as to whether Gustafson used his pepper spray to restore order and discipline and whether Gustafson ever confiscated plaintiff's assistive medical devices. If there was no constitutional violation, then of course there was no violation of a clearly established constitutional right. But the material factual disputes which preclude summary judgment on that question also preclude summary judgment on Gustafson's assertion of qualified immunity here. *See LaLonde v. County of Riverside*, 204 F.3d 947, 953 (9th Cir. 2000) ("The determination of whether a reasonable officer could have believed his conduct was lawful is a determination of law that can be decided on summary judgment only if the material facts are undisputed.").

2. Robertson

Plaintiff claims that Robertson was deliberately indifferent to plaintiff's serious medical needs when he discontinued plaintiff's medications and medical appliances. Compl. at 4-6.[10] Robertson argues that this claim fails because plaintiff "essentially alleges a difference of medical opinion." ECF No. 44-2 at 8.[11] Robertson emphasizes that he met with plaintiff several times

[10] In his complaint, plaintiff also claimed that Robertson was deliberately indifferent because he prevented plaintiff from being examined by a medical doctor and because he failed to provide plaintiff physical therapy. Compl. at 6. However, plaintiff abandoned these arguments in subsequent filings and his deposition. *See* Pl.'s Dep. at 49:14-15 ("The main thing I sued [Robertson] for was because he [discontinued] all of my chronological orders."); ECF No. 52 at 4 ("Robertson requested physical therapy for [plaintiff] on December 23, 2011."); ECF No. 72 at 11 (alleging that Robertson provided physical therapy). Because plaintiff has reduced his allegations against Robertson to a single claim (i.e., that Robertson was deliberately indifferent to plaintiff's serious medical needs when he discontinued plaintiff's medications and medical appliances), he has conceded the other claims.

[11] Robertson also argues that plaintiff cannot establish an Eighth Amendment deliberate indifference claim "because [Robertson] saw [plaintiff] several times and made medical evaluations." ECF No. 44-2 at 8. However, the Ninth Circuit long ago made clear that a

between November 2011 and June 2012, and that plaintiff "did not exhibit any dermatological concerns" or "demonstrate that he had any ambulatory or other disabilities" during Robertson's physical examination. *Id.* Robertson submitted several of plaintiff's medical records from the time period specified in plaintiff's complaint. *See* ECF No. 46-2. Of particular relevance here are the following medical records, each of which bears Robertson's signature: (1) a December 22, 2011 progress note indicating that plaintiff's skin condition was abnormal and that plaintiff agreed to a plan that included contacting a dermatologist, advising plaintiff to purchase alternative soap from the canteen, and a three-day prescription for Benadryl, *id.* at 12; (2) a December 23, 2011 progress note indicating that plaintiff's skin condition was within normal limits, *id.* at 14; (3) a March 16, 2012 progress note indicating that plaintiff's skin condition was within normal limits, stating that "no visible psoriatic or any other dermatologic concerns discovered in PE," and advising plaintiff "to return when psoriasis is present [and] visible" *id.* at 31; (4) an April 4, 2012 form removing plaintiff from a disability program because plaintiff was "able to demonstrate no ambulatory or other disability [at] this time," *id.* at 32; and (6) an April 4, 2012 chronological order discontinuing plaintiff's cane, soft shoes, bottom bunk, and extra mattress, *id.* at 34.

a. Medications

Plaintiff asserts in his declaration that Robertson met with him several times while at HDSP. ECF No. 52 at 4. Plaintiff also indicates that he did not receive certain medications that he had received at other institutions. Compl. at 4.[12] Plaintiff asserted in his deposition that

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physician need not fail to treat an inmate altogether in order to violate that inmate's Eighth Amendment rights; a failure to competently treat a serious medical condition, may constitute deliberate indifference. *Ortiz*, 884 F.2d 1314. Thus, the issue here is not simply whether Robertson examined plaintiff on those occasions. Rather, the focus is on whether plaintiff has produced evidence upon which a reasonable jury could conclude that the treatment was so wanting in light of known risks that it constitutes deliberate disregard of a known serious medical need, or instead has established nothing more than a difference of medical opinion.

[12] Aside from the statements in plaintiff's complaint, the only evidence that plaintiff was prescribed these medications is a single document that plaintiff attached to his "Supplemental Motion for Summary Judgment." ECF No. 72 at 36. That document indicates that a physician did in fact prescribe psyllium powder and coal tar soap in January 2007, but that those prescriptions expired in February 2007—more than four years before plaintiff's transfer to HDSP.

Robertson had told him the pharmacy at HDSP did not stock those medications, and that Robertson "got mad [that plaintiff] asked him again and again for the same things." Pl.'s Dep. at 50:18-25, 52:9-21.[13] Responding to Robertson's claim that plaintiff did not exhibit any dermatological concerns during a physical evaluation, plaintiff states that he twice had to be treated "for a gruesome breakout on his face, feet, and arms which plaintiff still suffers this skin condition." ECF No. 52 at 4. But plaintiff's contention does not specifically dispute Robertson's assertion that when he examined plaintiff there were no signs or symptoms indicating a dermatological concern. Thus, their respective assertions appear to speak past each other. Robertson's statement does not claim plaintiff never suffered any such breakouts, and plaintiff does not dispute that he did not exhibit any dermatological concerns during Robertson's examination. The relevant inquiry here is whether there is sufficient evidence that Robertson knew of a serious medical need but failed to treat it. *Jett v. Penner*, 439 F.3d at 1096. The evidence before the court fails to support that Robertson had such knowledge. While deliberate indifference may be shown by the denial, delay or intentional interference with medical treatment or by the way in which medical care is provided, *Hutchinson v. United States*, 838 F.2d at 394, a mere difference in opinion over treatment cannot support an Eighth Amendment claim.

In *Toguchi*, the Ninth Circuit addressed an Eighth Amendment claim based on a physician's decision to discontinue a prescription for a prisoner. 391 F.3d at 1058. In affirming the district court's grant of summary judgment for the defendants, the Ninth Circuit framed the plaintiff's claim as one involving choices between alternative courses of treatment:

> [A] mere difference of medical opinion is insufficient, as a matter of law, to establish deliberate indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). Rather, to prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment was medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to the prisoner's health. *Id.* (citation omitted).

[13] Defendants lodged with the court a copy of plaintiff's December 13, 2013 deposition transcript. *See* ECF No. 45.

Id. (internal quotation marks, bracketing, and ellipsis omitted); *see also Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) ("Under the Eighth Amendment, Forbes is not entitled to demand specific care.").

Plaintiff has not shown—nor even alleged—that Robertson's discontinuation of his medications was medically unacceptable under the circumstances and was chosen in conscious disregard of an excessive risk to plaintiff's health. That HDSP did not stock those medications does not meet the standard the Ninth Circuit identified in *Toguchi*, nor does plaintiff's claim that Robertson had become frustrated over plaintiff's repeated requests. Establishing frustration over repeated requests for alternatives that were not stocked at HDSP does not establish the treatment described by Robertson was so wanting as to violate the Eighth Amendment. While plaintiff has certainly established a difference of opinion between he and Robertson (and arguably between plaintiff's previous physicians and Robertson), plaintiff has not established that Robertson was deliberately indifferent to plaintiff's serious medical needs.

b. Assistive Devices

Believing plaintiff's evidence, Robertson told plaintiff that he discontinued the assistive devices because he did not believe plaintiff needed them. Pl.'s Dep. at 51:1-12. That explanation is consistent with Robertson's observation in the April 4, 2012 document, which stated plaintiff was "able to demonstrate no ambulatory or other disability [at] this time." ECF No. 46-2 at 32. Nevertheless, plaintiff "object[s]" to that statement, asserting that he "fell three times at [HDSP] and twice at Wasco in July when he saw physician Patel and his chrono was re-evaluated to [']no prolonged standing or walking[']and again an assistive device was re-administ[er]ed in opposition to P.A. Robertson[']s opinion." ECF No. 52 at 5.[14]

Even believing plaintiff's claims that he fell several times without the assistive devices and that a physician subsequently issued a chronological order authorizing such devices, plaintiff has not shown that Robertson was deliberately indifferent to his serious medical needs. Again,

[14] As with plaintiff's other "objection," his response does not conflict with Robertson's statement. That is, plaintiff could have fallen five times without his assistive devices, but still not have demonstrated any ambulatory or other disabilities during Robertson's examination.

plaintiff has simply established a difference of medical opinion between himself and Robertson and between other physicians and Robertson. As noted, a deliberate indifference claim requires more than a difference of medical opinion. *Toguchi*, 391 F.3d at 1058. Although plaintiff disagrees with the choice of treatment provided, he has not shown that such choice amounts to deliberate indifference. Even when plaintiff's allegations are viewed in the light most favorable to him, they do not raise a triable issue of fact with respect to whether Robertson acted with deliberate indifference to plaintiff's serious medical needs. Accordingly, summary judgment in Robertson's favor is appropriate.[15]

3. Deems and Virga

Plaintiff names as defendants Deems and Virga simply because they are supervisors and not because of any personal involvement by them in the matters complained of by plaintiff. To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal constitutional or statutory right; and (2) that the violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the facts establish the defendant's personal involvement in the constitutional deprivation or a causal connection between the defendant's wrongful conduct and the alleged constitutional deprivation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable for the unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009). Because respondeat superior liability is inapplicable to § 1983 suits, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* It is plaintiff's responsibility to allege facts to state a plausible claim for relief. *Iqbal*, 129 S. Ct. at 1949; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

[15] Robertson also contends that he is entitled to qualified immunity. Because Robertson is entitled to summary judgment on the merits of plaintiff's deliberate indifference claim against Robertson, the court need not address the issue of qualified immunity as to that claim.

Here, plaintiff improperly attempts to impose liability on Deems and Virga solely because of their supervisory roles. Plaintiff stated in his deposition that he sued Deems for no reason other than Deems was in charge of the medical staff at CSP-Sac and the transfer of plaintiff's paperwork was not "a smooth process." ECF No. 44-5 at 15 (Pl.'s Dep. at 57:2-17). Plaintiff also testified that he was suing Virga for no other reason than Virga was in charge of CSP-Sac. *Id.* at 14 (Pl.'s Dep. at 54:13-18). As noted, plaintiff may not sue an official on the theory that the official is liable for the unconstitutional conduct of his or her subordinates. *Iqbal*, 129 S. Ct. at 1948. Because respondeat superior liability is inapplicable to § 1983 suits, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* Plaintiff's unsupported and conclusory allegations that Deems and Virga are somehow liable for Gustafson's alleged wrongdoing falls short of what is required to demonstrate involvement or personal participation in any constitutional deprivation. Accordingly, summary judgment must be granted in favor of defendants Deems and Virga.[16]

C. Plaintiff's "Supplemental Motion to Summary Judgment"

Plaintiff filed a "Supplemental Motion to Summary Judgment," through which he appears to reiterate his arguments and to request summary judgment against Robertson, Deems, and Virga.[17] ECF No. 72 at 29. As explained in the analysis above, those defendants are entitled to summary judgment and nothing submitted in plaintiff's "supplemental motion" alters that analysis. Although plaintiff had ample time to oppose defendants' motion in the first instance, and as previously discussed, failed to demonstrate the existence of any genuine disputes for trial,

[16] Deems and Virga also contend they are entitled to qualified immunity. Because they are entitled to summary judgment on the merits, the court need not address their qualified immunity argument.

[17] Plaintiff may also be attempting to assert new causes of action through this filing. *See* ECF No. 72 at 9 (false imprisonment), 10 ("vindictive segregation") 11 (failure to treat plaintiff's injuries from his altercation with prison guards), and 16 (intentional infliction of emotional and psychological damages). At this stage in the proceedings, however, plaintiff may not amend his complaint without leave of court. If plaintiff wishes to amend his complaint, he must file a motion to amend in accordance with Rule 15 of the Federal Rules of Civil Procedure and submit a proposed amended complaint that is complete in itself without reference to any earlier filed complaint, in accordance with Local Rule 220.

the court has considered plaintiff's "Supplemental Motion" and finds that it does not present any new evidence or arguments of consequence to the above analysis with respect to defendants' motion for summary judgment. Thus, plaintiff's motion must be denied for the same reasons set forth in the recommendation to grant summary judgment in favor of defendants Robertson, Deems, and Virga.[18]

D. Plaintiff's Motion for a Preliminary Injunction[19]

While plaintiff's filings requesting a preliminary injunction are largely incoherent, it appears that he is requesting that the court (1) take judicial notice that plaintiff is being deprived of medical care, ECF No. 74 at 4, and (2) order defendants to provide "meaningful and effective aspects of rehabilitative accommodations," including medication and assistive devices that were previously prescribed, *id.* at 2, 5. In support of his motion, plaintiff contends that he is "under attack repetitively [sic] . . . from defendants," that his confidential mail has been opened, and that he was subject to a "[c]ruel & unusual . . . adverse transfer classification hearing, suddenly . . . and without notice" on November 5, 2014. ECF No. 79 at 3, 5-6.

The request for judicial notice must be denied because the "fact" that plaintiff wants judicially noticed—that is, that he has been deprived of medical care—is not an appropriate subject for judicial notice. Federal Rule of Evidence 201 permits the court to take judicial notice only of a fact that is "not subject to reasonable dispute." The defendants reasonably dispute whether they have deprived plaintiff of medical care. Accordingly, plaintiff's request for judicial notice must be denied.

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[18] This outcome moots defendants' motion to strike plaintiff's supplemental motion, ECF No. 73, as well as plaintiff's "Motion for Rebuttal" of defendant's motion to strike, ECF No. 78.

[19] Specifically, plaintiff filed a "Motion for Injunction of Permanent Injunctive Medical Relief," ECF No. 74, and a "Motion and Writ for Movant Temporary Restraining Order (Now) in Favor of Preliminary Injunction," ECF No. 79. *See also* ECF No. 79 at 14 ("Plaintiff is entitled to a temporary restraining order and/or mandatory permanent injunction . . . ."). Requests for temporary restraining orders which are not ex parte and without notice are governed by the same general standards that govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); *Los Angeles Unified Sch. Dist. v. U.S. Dist. Court*, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J., dissenting); *Century Time Ltd. v. Interchron Ltd.*, 729 F. Supp. 366, 368 (S.D.N.Y. 1990).

Further, plaintiff has not met the standards for obtaining preliminary injunctive relief. A preliminary injunction will not issue unless necessary to prevent threatened injury that would impair the courts ability to grant effective relief in a pending action. *Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (per curiam). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has also held that the "sliding scale" approach it applies to preliminary injunctions—that is, balancing the elements of the preliminary injunction test, so that a stronger showing of one element may offset a weaker showing of another—survives *Winter* and continues to be valid. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). "In other words, 'serious questions going to the merits,' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. In cases brought by prisoners involving conditions of confinement, any preliminary injunction "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct the harm." 18 U.S.C. § 3626(a)(2).

The only support that plaintiff provides for his claim that he has a "great likelyhood [sic] of success" on the merits is his reference to his previous filings. ECF No. 79 at 16. But for the reasons discussed in the summary judgment analysis above, plaintiff's previous filings fail to establish that he is likely to succeed on the merits. To the contrary, he fails to overcome summary judgment for defendants as to most of his claims. While plaintiff has survived summary judgment with respect to his claims against Gustafson, plaintiff has only demonstrated a genuine dispute over material facts as to those claims. He simply presents a factual dispute for which credibility determinations must be made at trial, not that he is likely to succeed on the

merits as to those claims. Nor has he shown irreparable harm if his motion is not granted. Accordingly, his request for a preliminary injunction must be denied.

Plaintiff also alleges in this motion unauthorized access to his confidential mail and the constitutionality of his transfer classification hearing. However, these allegations do not relate the events alleged in the complaint and cannot be litigated in this case. The new allegations must instead be pursued in a separate civil rights or habeas action after following the proper course of exhaustion. *See* 28 U.S.C. § 2254(b)(1) (generally requiring exhaustion of state court remedies prior to the filing of a federal habeas petition); *Rhodes v. Robinson*, 621 F.3d 1002, 1004-07 (9th Cir. 2010) and *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam) (together holding that civil rights claims must be exhausted prior to the filing of the original or supplemental complaint).

IV. Recommendation

Accordingly, it is hereby RECOMMENDED that:

1. Plaintiff's motion for summary judgment (ECF No. 34) be denied;

2. Defendants' motion for summary judgment (ECF No. 44) be denied as to Gustafson, but granted as to Robertson, Deems, and Virga;

3. Plaintiff's "Supplemental Motion to Summary Judgment" (ECF No. 72) be denied;

4. Defendants' motion to strike plaintiff's supplemental motion (ECF No. 73) be denied;

5. Plaintiff's "Motion for Rebuttal" of defendant's motion to strike (ECF No. 78) be denied; and

6. Plaintiff's motion for a preliminary injunction (ECF Nos. 74, 79) be denied.[20]

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

[20] If this recommendation is adopted, this action will proceed solely as to plaintiff's Eighth Amendment claims against Gustafson.

within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 8, 2015.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE