

1 II. Screening of First Amended Complaint (FAC)

2 A. Legal Standards

3 The court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a).
5 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
6 legally “frivolous or malicious,” fail to state a claim upon which relief may be granted, or seek
7 monetary relief from a defendant who is immune from such relief. Id., § 1915A(b)(1),(2).

8 B. Plaintiff’s Allegations

9 The FAC repeats the essential allegations of the original complaint, challenging
10 conditions of plaintiff’s prior confinement at California State Prison Sacramento (CSP-SAC), and
11 adding allegations specific to plaintiff’s retaliation claim against defendant Oleachea. In light of
12 these similarities, the court repeats its prior summary of plaintiff’s principal allegations, see ECF
13 No. 8 at 3-5:

14 Plaintiff’s allegations focus on the challenged conduct of defendant
15 D. Oleachea, a CSP-SAC correctional officer (CO). On February 6,
16 2011, plaintiff was visiting with his wife in the prison visiting area.
17 After about 45 minutes, plaintiff was called to the podium and
18 directed to the strip out area, where he was searched. The search
19 was triggered by a report from defendant Oleachea, who was
20 operating the surveillance camera that scanned the visiting room,
21 that plaintiff appeared to take and/or hold a \$20 bill in his hand.
22 The search of plaintiff failed to reveal any money or other
23 contraband. Nevertheless, plaintiff’s visit was terminated and he
24 was issued a Rules Violation Report (RVR) (Log No. B-11-02-
25 013), alleging “Possession of Contraband (Money).” See ECF No. 1
26 at 16.1 Plaintiff wrote a letter of complaint to defendant D. Lieber
27 (“the Chief Disciplinary Officer and Associate Warden in charge of
28 reviewing all administrative appeals,” see Complaint (Cmplt.), ECF
No. 1 at 2, ¶ 4), who allegedly never responded. Plaintiff was found
“Not Guilty” at the subsequent disciplinary hearing held March 7,
2011

Thereafter, on November 6, 2011, plaintiff was again visiting with
his wife in the prison visiting area. While plaintiff was having his
picture taken, defendant Oleachea called plaintiff and his wife aside
and told them that the visit was being terminated because plaintiff’s
wife was dressed inappropriately. Plaintiff asked if his wife could
put on her sweater, but Oleachea said no. Plaintiff told Oleachea
that he would not leave the visiting area without speaking with the
sergeant, Oleachea’s supervisor. Plaintiff walked back to his
assigned visiting table and sat down. Oleachea instructed plaintiff’s
wife to stand by the stairs and then walked over to plaintiff.

1 Oleachea pulled out his pepper spray and instructed the other
2 visitors to move.

3 Defendant R. Sandoval, another CO, came to plaintiff's table and
4 stood next to Oleachea. Sandoval reportedly told Oleachea "four
5 times to put that away (his pepper spray) and . . . that we don't need
6 that out here." Cmplt., ECF No. 1 at 7, ¶ 30. As plaintiff attempted
7 to explain to Sandoval why he wanted to speak with the sergeant,
8 defendant Oleachea "out of nowhere and unprovoked, sprays
9 plaintiff directly in the face while plaintiff sat in his seat." *Id.* at ¶
10 32. Plaintiff avers that he then "calmly gets up and walks in the
11 opposite direction of defendant Oleachea," but Oleachea "sprays a
12 second burst of pepper spray into the back of plaintiff's head." *Id.*
13 at ¶¶ 33-4. Plaintiff then "changes directions, walking towards the
14 right to get away," but Oleachea "sprays plaintiff a third time to the
15 right side of plaintiff's face and yells get down!" *Id.* at ¶¶ 35-6. "As
16 plaintiff was getting down, defendant Oleachea sprays plaintiff a
17 fourth time." *Id.* at ¶ 37. Plaintiff was then cuffed, taken to a
18 holding cage, decontaminated and examined, then returned to his
19 cell.

20 Plaintiff's wife, then age 64, was "cordoned off in the visiting room
21 control booth suffering the effects of the pepper spray while the
22 other civilian visitors were sent outside on the patio to get fresh
23 air." *Id.* at ¶ 40. Plaintiff's wife complained to CO Mirlohi that she
24 had asthma and was having trouble breathing. Mirlohi initially
25 failed to respond, but then called for CO Hammon to escort her to a
26 bunker.

27 Plaintiff was issued an RVR (Log No. B-11-11-020) for "Refusing
28 a Direct Order." See ECF No. 1 at 39. Plaintiff was found guilty. *Id.*
at 43. However, the hearing officer found that the incident had not
warranted issuance of an RVR, and reduced the matter to an
administrative CDC-128A Custodial Counseling Chrono. Plaintiff
was counseled and reprimanded.

Plaintiff avers that he filed and exhausted a prison administrative
grievance challenging the conduct of defendant Oleachea on
November 6, 2011. *Id.* at ¶ 52; see also ECF No. 1 at 2. Plaintiff's
exhibits include the statements of visitors to the prison that day who
reported to officials that Oleachea's response was unprovoked by
plaintiff. See e.g. *id.* at 28. Plaintiff was interviewed in March 2013
by a member of CDCR's Legal Affairs Office concerning the
November incident. Plaintiff was thereafter served with a subpoena
to be a witness before the State Personnel Board in proceedings
against Oleachea, but "on the account of defendant Oleachea
accepting something with lesser consequences, plaintiff did not
have to appear at the hearing." *Id.* at ¶ 51.

Plaintiff alleges that he has been diagnosed him with chronic dry
eye syndrome due to the pepper spray incident. Plaintiff suffers
from blurred vision, sensitivity to light, and persistent eye irritation
and pain, which require the use of artificial tears. Plaintiff alleges
that he suffers nightmares about being pepper sprayed, which cause
him to have difficulty breathing. Plaintiff states that he has been a

1 mental health patient since 1994, is diagnosed with manic
2 depression and major depression, and is prescribed mood
stabilizers.

3 C. Federal Claims

4 For the detailed reasons set forth in the court’s prior screening order (see ECF No. 8), the
5 court finds that the FAC states an Eighth Amendment claim for excessive force against defendant
6 Oleachea, and Eighth Amendment failure to protect claims against defendants Sandoval and
7 Hall.¹ The court further finds that the FAC states a First Amendment retaliation claim against
8 defendant Oleachea. Cf. ECF No. 8 at 9-10, and FAC, ECF No. 9 at, inter alia, ¶¶ 10 and 25
9 (“Defendant Oleachea cuffed Plaintiff and as they were walking away, Defendant says to
10 Plaintiff, “That’s for writing me to the warden.”).

11 The FAC no longer names Lieber or Hall. For this reason and for the reasons previously
12 stated by the court, the undersigned recommends that defendants Lieber and Virga be dismissed
13 from this action.

14 D. State Law Claims

15 The complaint also asserts, without discussion, state law claims for assault and battery,
16 negligence, intentional infliction of emotional distress, and supervisory liability. See ECF No. 9
17 at 4. For the following reasons, the court finds that the FAC states cognizable state law claims
18 against defendant Oleachea for assault and battery, and for intentional infliction of emotional
19 distress; against defendants Sandoval and Hall for negligence; and against CDCR for supervisory
20 liability under California Government Code section 815.2(a).

21 ¹ The court previously found a cognizable failure to protect claim against defendant Hall for the
22 following reasons, ECF No. 8 at 12:

23 Plaintiff’s allegations against defendant Hall, together with the
24 factual conflict in the record (Hall and Oleachea provide conflicting
25 accounts whether Oleachea had Hall’s permission to work in the
26 visiting room on November 6, 2011), are sufficient to infer a
27 possible “sufficient causal connection” between Hall’s supervisory
28 decisions and Oleachea’s use of excessive force against plaintiff,
that is, Hall’s alleged failure to protect plaintiff. Although the
existing information raises more questions than it resolves – e.g.,
was Hall aware of Oleachea’s alleged animosity toward plaintiff?
did Oleachea engage in prior incidents of excessive force against
prisoners of which Hall was aware? – these matters can be
developed through discovery.

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1. Assault and Battery

Under California law, a claim against a law enforcement officer for assault and battery is stated by allegations that the officer used unreasonable force, causing injury or other harm to plaintiff. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 922 (9th Cir. 2001) (citations omitted). “A state law battery claim is a counterpart to a federal claim of excessive use of force. In both, a plaintiff must prove that the peace officer’s use of force was unreasonable.” Brown v. Ransweiler (2009) 171 Cal. App. 4th 516, 527 (citation omitted).

The court finds plaintiff’s allegations of excessive force against defendant Oleachea are also sufficient to state a cognizable state law claim for assault and battery.

2. Negligence

The elements of a negligence cause of action under California law are: “(1) a legal duty to use due care; (2) a breach of such legal duty; (3) the breach was the proximate or legal cause of the resulting injury; and (4) actual loss or damage resulting from the breach of the duty of care.” Megargee v. Wittman, 550 F. Supp. 2d 1190, 1209 (E.D. Cal. 2008) (citations omitted)). It is a “long-established principle of California negligence law that the reasonableness of a peace officer’s conduct must be determined in light of the totality of the circumstances.” Hayes v. County of San Diego, 57 Cal.4th 622, 632 (2013) (citations omitted).

Liberal construing plaintiff’s allegations that defendant Sandoval, though standing nearby and capable of intervening, failed to stop Oleachea’s alleged excessive use of pepper spray against plaintiff, the court finds these allegations sufficient at the screening stage to state a negligence claim against Sandoval. Similarly, plaintiff’s allegations that defendant Hall failed to adequately supervise officer schedules, including informal scheduling switches, resulting in Oleachea’s unauthorized presence in the visiting room on the subject day (see n. 1, supra), states a negligence claim against Hall. Plaintiff adequately alleges that both defendants breached their legal duties of care, resulting in injury to plaintiff.

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1 court's form entitled "Waiver of Service of Summons," for completion by each defendant, (5) one
2 copy of the form entitled "Consent to Proceed Before United States Magistrate Judge," and (6)
3 one self-addressed stamped envelope for return of the signed waiver to plaintiff. Plaintiff shall
4 promptly file the signed waivers with the court.

5 A defendant's failure, without good cause, to sign and return a waiver requested by
6 plaintiff will require the defendant to pay the full costs associated with his or her personal service.
7 Should a defendant whose physical address is known require personal service, plaintiff may file a
8 supported motion requesting the assistance of the United States Marshall. See Fed. R. Civ. P.
9 4(c)(3).

10 IV. Defendants Lieber and Virga

11 The undersigned previously screened out plaintiff's claims against defendants Lieber and
12 Virga. ECF No. 8 at 6-9 (Lieber) and 10-13 (Virga). That discussion is incorporated by
13 reference here, and submitted to the district judge as a recommendation for dismissal.

14 V. Conclusion

15 For the foregoing reasons, IT IS HEREBY ORDERED that:

16 1. Service of the complaint is appropriate for defendants Oleachea, Sandoval and Hall, on
17 the claims noted above.

18 2. Within 90 days after the filing date of this order, plaintiff shall file with the court all
19 waivers of service received by defendants² and, if necessary, shall file a supported motion
20 requesting the assistance of the United States Marshall to personally serve the remaining
21 defendants.³

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23 ² It is recommended that plaintiff send the waiver packages to defendants as soon as possible
24 after the filing date of this order. Plaintiff will need to verify the current addresses of each
25 defendant, make several copies of each document, and prepare each defendant's package for
26 mailing, including self-addressed stamped envelopes. The waivers, which are to be returned to
27 plaintiff within 30 days after they are sent, must be filed with the court by plaintiff, either as
28 received or all together.

³ Such motion should set forth plaintiff's efforts to obtain the identified defendant's waiver,
including at least one attempt by plaintiff to follow up on his initial request for waiver; and
evidence supporting the accuracy of the defendant's current address, including any inquiries made
by plaintiff to CDCR or the Office of the California Attorney General, and responses thereto.

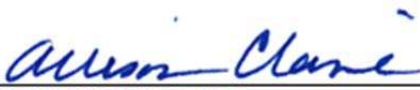
1 3. The Clerk of the Court is directed to send plaintiff the following documents: (a) one
2 copy of this order, (b) one copy of the endorsed FAC filed August 3, 2016 (ECF No. 9), (c) one
3 copy of this court's form entitled "Notice of Lawsuit and Request for Waiver of Service of
4 Summons" (Form AO 398), (d) one copy of this court's form entitled "Waiver of Service of
5 Summons" (Form AO 399), and (e) a copy of the Local Rules of Court.

6 4. Defendants shall reply to the complaint within the time provided in Federal Rules of
7 Civil Procedure 4(d)(3) and 12(a).

8 Further, IT IS HEREBY RECOMMENDED that defendants Lieber and Virga be
9 dismissed from this action for the reasons set forth at ECF No. 8.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that
15 failure to file objections within the specified time may waive the right to appeal the District
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: May 3, 2018

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19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE
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