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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNY STEWARD,
Plaintiff,
v.
G. THUMSER, et al.,
Defendants.

No. 2:16-cv-1232 GEB KJN P

ORDER

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis is granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly

1 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.
2 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
3 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
4 § 1915(b)(2).

5 On June 2, 2016, plaintiff filed his original complaint. On August 22, 2016, he filed an
6 amended complaint as of right. Fed. R. Civ. P. 15(a). Plaintiff's amended complaint is now
7 before the court.¹ As more fully explained below, plaintiff's amended complaint is dismissed
8 with leave to amend.

9 II. Screening Standards

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

15 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
16 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
17 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
18 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
19 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
20 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
21 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
22 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
23 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
24 1227.

25
26 ¹ On August 25, 2016, another amended complaint was filed, which appears to be a photocopy of
27 plaintiff's first amended complaint, with the exception that on the proof of service, plaintiff
28 changed August 11, 2016, to August 21, 2016. (Compare ECF No. 7 at 116 to ECF No. 10 at
116.) Because the August 25, 2016 filing is duplicative of the August 22, 2016 filing, the court
strikes the second filing.

1 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain
2 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
3 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
4 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
5 In order to survive dismissal for failure to state a claim, a complaint must contain more than “a
6 formulaic recitation of the elements of a cause of action;” it must contain factual allegations
7 sufficient “to raise a right to relief above the speculative level.” Id. at 555. However, “[s]pecific
8 facts are not necessary; the statement [of facts] need only ‘give the defendant fair notice of what
9 the . . . claim is and the grounds upon which it rests.’” Erickson v. Pardus, 551 U.S. 89, 93
10 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).
11 In reviewing a complaint under this standard, the court must accept as true the allegations of the
12 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most
13 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other
14 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

15 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
16 constitutional or statutory right; and (2) that the violation was committed by a person acting under
17 the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Jones v. Williams, 297 F.3d
18 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
19 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal
20 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.
21 See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989); Johnson v. Duffy, 588 F.2d 740, 743-44
22 (9th Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable
23 for the unconstitutional conduct of his or her subordinates. Ashcroft v. Iqbal, 556 U.S. 662, 679
24 (2009). In sum, plaintiff must identify the particular person or persons who violated his rights.

25 III. Plaintiff’s Complaint

26 In his 116 page filing, plaintiff alleges constitutional violations arising from three discrete
27 incidents that occurred while he was housed at California Medical Facility (“CMF”) in Vacaville.
28 First, plaintiff alleges that defendants Harrison and Pompey used excessive force on December

1 12, 2013, by deploying 7 to 8 cans of pepper spray directly into plaintiff's eyes, nose and mouth,
2 and then defendants Tapiz and Jones maliciously used hot water to decontaminate plaintiff, who
3 was blinded and choking from the pepper spray, which increased the burning in plaintiff's eyes,
4 all in violation of plaintiff's Eighth Amendment rights. Plaintiff also contends that defendant
5 Thumsen failed to properly train the officers on the proper way to use pepper spray. (ECF No. 7
6 at 15.) Plaintiff claims he sustained permanent damage to his eyes.

7 Second, plaintiff challenges alleged defects in the investigation of the subsequent
8 rules violation report ("RVR"), as well as at the hearing on the rules violation. Specifically,
9 plaintiff contends that defendant Olson fabricated the report to make it look like plaintiff
10 was the aggressor and inmate Nunez was the victim, and then recites a list of 13 prison staff who
11 plaintiff claims "were involved in fabricating evidential [sic] documentation of the altercation
12 plaintiff and inmate Nunez had on 12/12/13." (ECF No. 7 at 8, 9.) While not entirely clear, it
13 appears plaintiff alleges his due process rights were violated by such actions.

14 Third, plaintiff alleges that, following the altercation, while he was housed in the SHU and
15 later transferred to a different prison, a portion of his personal property was lost, stolen, or
16 misplaced, and once he arrived at Corcoran, his television was confiscated by prison staff because
17 the TV was not allowed under new prison regulations. (ECF No. 7 at 17.)

18 IV. Discussion

19 A. Use of Force Incident

20 "When prison officials use excessive force against prisoners, they violate the inmates'
21 Eighth Amendment right to be free from cruel and unusual punishment." Clement v. Gomez, 298
22 F.3d 898, 903 (9th Cir. 2002). In order to establish a claim for the use of excessive force in
23 violation of the Eighth Amendment, a plaintiff must establish that prison officials applied force
24 maliciously and sadistically to cause harm, rather than in a good-faith effort to maintain or restore
25 discipline. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). In making this determination, the court
26 may evaluate (1) the need for application of force, (2) the relationship between that need and the
27 amount of force used, (3) the threat reasonably perceived by the responsible officials, and (4) any
28 efforts made to temper the severity of a forceful response. Id. at 7; see also id. at 9-10 ("The

1 Eighth Amendment’s prohibition of cruel and unusual punishment necessarily excludes from
2 constitutional recognition *de minimis* uses of physical force, provided that the use of force is not
3 of a sort repugnant to the conscience of mankind.” (internal quotation marks and citations
4 omitted)). Not “every malevolent touch by a prison guard gives rise to a federal cause of action.”
5 Id. at 9.

6 Plaintiff alleges that defendants Harrison and Pompey used excessive force on December
7 12, 2013, by deploying 7 to 8 cans of pepper spray directly into plaintiff’s eyes, nose and mouth,
8 permanently damaging plaintiff’s eyes. As a result, plaintiff claims he suffered significant
9 damage in breathing and his vision. (ECF No. 7 at 11.) Such allegations state potentially
10 cognizable excessive force claims against defendants Harrison and Pompey. Plaintiff should
11 include such claims in any second amended complaint.

12 Also, plaintiff contends that defendant Thumsen failed to properly train the officers on the
13 proper way to use pepper spray. (ECF No. 7 at 15.) However, there is no respondeat superior
14 liability under 42 U.S.C. § 1983. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). For that
15 reason, Thumsen’s position as warden does not make him legally responsible for the actions of
16 the staff at the prison unless a prisoner can show that the warden played some role in the
17 constitutional violation. Taylor, 880 F.2d at 1045 (holding supervisor is “only liable for
18 constitutional violations of his subordinates if the supervisor participated in or directed the
19 violations, or knew of the violations and failed to act to prevent them.”). For example, to state a
20 claim for failure to train, a prisoner must allege facts to support a finding that the failure to train
21 amounted to deliberate indifference. See Clement, 298 F.3d at 905;² Canell v. Lightner, 143 F.3d

22
23 ² In order to impose liability for failure to train, a plaintiff must establish that “in light of the
24 duties assigned to specific officers or employees, the need for more or different training is
25 obvious, and the inadequacy so likely to result in violations of constitutional rights, that the
26 policy-makers . . . can reasonably have been said to have been deliberately indifferent to the
27 need.” Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002). . . . In Clement, plaintiff had set
28 forth numerous instances where prison officials had used pepper spray to harm bystander inmates,
such that it was clear that supervisors were on “actual or constructive notice” of the need to train.
Id.; Mixon v. Roe, 2006 WL 279296, at *1 (E.D. Cal. Feb. 6, 2006), report and recommendation
adopted, 2006 WL 845850 (E.D. Cal. Mar. 31, 2006), aff’d sub nom. Mixon v. Pliler, 214 F.
App’x 662 (9th Cir. 2006).

1 1210, 1213 (9th Cir. 1998). In other words, plaintiff must allege that, not only was the training
2 inadequate, but that the inadequacy was the result of a deliberate or conscious choice by the
3 warden. City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989) (“Only where a failure to train
4 reflects a ‘deliberate’ or ‘conscious’ choice by a municipality -- a ‘policy’ as defined by our prior
5 cases -- can a city be liable for such a failure under § 1983.”).

6 Here, unlike in Clement, plaintiff challenges one instance of an alleged excessive use of
7 pepper spray, and fails to demonstrate that defendant Thumsen was personally involved in such
8 use of force. Moreover, it is unclear that it was the warden’s duty to train correctional officers in
9 the use of pepper spray. Thus, plaintiff’s allegations as to Warden Thumsen fail to state a
10 cognizable failure to train claim. Although it appears unlikely that plaintiff can allege facts
11 demonstrating liability on an alleged failure to train claim in this context, such claim is dismissed
12 without prejudice.

13 In addition, plaintiff alleges defendants Tapiz and Jones forced plaintiff to decontaminate
14 under hot water rather than cool water. Specifically, plaintiff alleges that defendant Tapiz led
15 plaintiff, who was totally blinded at the time, to the hot water and told him to get under the water
16 for decontamination. (ECF No. 7 at 5.) Plaintiff claims that when he opened his eyes as directed,
17 “the pain was excruciatingly unbearable.” (Id.) Plaintiff stumbled from under the hot water, but
18 was led back by defendant Tapiz who said, “it’s not all that hot.” (Id.) At some point, plaintiff
19 fell to the floor, but plaintiff was pushed back under the hot water by defendant Tapiz who said,
20 “come on -- I don’t have all day!” (Id.) Plaintiff asserts that defendant Tapiz insisted that this
21 was the proper way to decontaminate. (Id.) Plaintiff heard another officer talking to defendant
22 Tapiz, and plaintiff learned it was defendant Jones replacing defendant Tapiz. Plaintiff states that
23 he complained that the pepper spray burning had increased at least 50% under the hot water. (Id.)
24 Eventually, plaintiff pled long enough that defendant Jones let plaintiff go to the sink and rinse
25 his eyes. (Id.) Plaintiff contends that the hot water “intensified the burn all over [his] body.”
26 (ECF No. 7 at 6.) Plaintiff declares that defendants Tapiz and Jones “maliciously used hot water
27 to decontaminate plaintiff while plaintiff was blinded and choking on O.C. pepper spray.” (ECF

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1 No. 7 at 3.) Further, plaintiff asserts that prison policy dictates that prison officials must use cool
2 water to decontaminate inmates after the use of pepper spray. (ECF No. 7 at 7.)

3 Some courts have addressed claims concerning decontamination by hot water rather than
4 cool water as a failure to protect claim under the Eighth Amendment. Garcia v. Covello, 2015
5 WL 160673, at *8 (C.D. Cal. Jan. 12, 2015) (prisoner failed to demonstrate that using hot water
6 rather than cold constitutes an excessive risk of serious harm).³ Other courts have addressed such
7 claims in the context of excessive force. See Jones v. Ryan, 2011 WL 227569 at *7 (S.D. Cal.
8 Jan. 24, 2011) (finding plaintiff presented no evidence of injury from decontamination with hot
9 water after pepper spray).

10 Plaintiff's allegations against defendant Tapiz appear to be sufficient to state a potentially
11 cognizable Eighth Amendment excessive force claim. However, although plaintiff baldly states
12 that defendant Jones "maliciously" used hot water, plaintiff's allegations fail to show actions by
13 Jones that rise to the level of malicious. Therefore, plaintiff is granted leave to clearly identify

14 ³ The Eighth Amendment requires prison officials to take reasonable measures to guarantee the
15 safety of prisoners. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). The failure of a prison
16 official to protect inmates from dangerous conditions at the prison violates the Eighth
17 Amendment only when two requirements are met: (1) the objective component -- the deprivation
18 alleged must be sufficiently serious, see Farmer, 511 U.S. at 834 (citing Wilson v. Seiter, 501
19 U.S. 294, 298 (1991)); and (2) the subjective component -- the prison official must possess a
20 sufficiently culpable state of mind. See id. (citing Wilson, 501 U.S. at 297).

21 In determining whether a deprivation is sufficiently serious to satisfy the objective
22 component of an Eighth Amendment claim, a court must consider the circumstances, nature, and
23 duration of the deprivation. Id. at 834 (citing Wilson, 501 U.S. at 298). With respect to the
24 subjective component, the requisite state of mind depends on the nature of the claim. In prison
25 conditions cases, the necessary state of mind is one of "deliberate indifference." See, e.g., Allen
26 v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994) (outdoor exercise); Farmer, 511 U.S. at 834 (inmate
27 safety); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (inmate health); Wilson, 501 U.S. at 302-03
28 (general conditions of confinement).

"Deliberate indifference" has both subjective and objective components. A prison official
must "be aware of facts from which the inference could be drawn that a substantial risk of serious
harm exists and . . . must also draw the inference." Farmer, 511 U.S. at 837. Liability may
follow only if a prison official "knows that inmates face a substantial risk of serious harm and
disregards that risk by failing to take reasonable measures to abate it." Id. at 847. Deliberate
indifference describes a more blameworthy state of mind than negligence. See Farmer, 511 U.S.
at 835 (citing Estelle, 429 U.S. at 104). Negligence is not enough to amount to an Eighth
Amendment violation. Farmer, 511 U.S. at 835. Deliberate indifference is not shown by merely
stating that a defendant should have known of a risk, but requires an actual perception of a risk
that does not exist merely because a reasonable person should have perceived a risk. Id. at 836.

1 the nature of his claims against both defendants Jones and Tapiz, and to allege additional facts, if
2 he can, to demonstrate that he can state a cognizable Eighth Amendment claim against defendant
3 Jones.

4 B. RVR and Hearing

5 Insofar as plaintiff challenges the issuance of the RVR on grounds that it included false
6 information, plaintiff cannot state a cognizable civil rights claim. See e.g., Dawson v. Beard,
7 2016 WL 1137029 at *5-6 (E.D. Cal. 2016) (“The issuance of a false RVR, alone, does not state a
8 claim under section 1983.”); Ellis v. Foulk, 2014 WL 4676530, at *2 (E.D. Cal. 2014) (noting
9 that claims of arbitrary action by prison officials are grounded in “the procedural due process
10 requirements as set forth in Wolff v. McDonnell [418 U.S. 539, 556-57 (1974)]”) (quoting
11 Hanrahan v. Lane, 747 F.2d 1137, 1140 (7th Cir. 1984)); Solomon v. Meyer, 2014 WL 294576, at
12 *2 (N.D. Cal. 2014) (“[T]here is no constitutionally protected right to be free from false
13 disciplinary charges.”) (citing Chavira v. Rankin, 2012 WL 5914913, at *1 (N.D. Cal. 2012)
14 (“The Constitution demands due process, not error-free decision-making.”)); Johnson v. Felker,
15 2013 WL 6243280, at *6 (E.D. Cal. 2013) (“Prisoners have no constitutionally guaranteed right
16 to be free from false accusations of misconduct, so the mere falsification of a [rules violation]
17 report does not give rise to a claim under section 1983.”) (citing Sprouse v. Babcock, 870 F.2d
18 450, 452 (8th Cir. 1989), and Freeman v. Rideout, 808 F.2d 949, 951-53 (2d. Cir. 1986)).

19 Moreover, it appears that any due process challenge to the RVR is not properly brought
20 under 42 U.S.C. § 1983. In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the Supreme Court
21 held that to recover damages for “harm caused by actions whose unlawfulness would render a
22 conviction or sentence invalid,” a § 1983 plaintiff must prove that the conviction or sentence was
23 reversed, expunged, or otherwise invalidated. Id. The Heck bar preserves the rule that federal
24 challenges, which, if successful, would necessarily imply the invalidity of incarceration or its
25 duration, must be brought by way of petition for writ of habeas corpus, after exhausting
26 appropriate avenues of relief. Muhammad v. Close, 540 U.S. 749, 750-51 (2004). However,
27 “challenges to disciplinary proceedings are barred by Heck only if the § 1983 action would be
28 seeking a judgment at odds with [the prisoner’s] conviction or with the State’s calculation of time

1 to be served.” Nettles v. Grounds, 830 F.3d 922, 927 (9th Cir. July 26, 2016) (*en banc*), citing
2 Muhammad, 540 U.S. at 754-55. “If the invalidity of the disciplinary proceedings, and therefore
3 the restoration of good-time credits, would not necessarily affect the length of time to be served,
4 then the claim falls outside the core of habeas and may be brought in § 1983.” Id.; *see, e.g., Pratt*
5 *v. Hedrick*, 2015 WL 3880383, *3 (N.D. Cal. June 23, 2015) (§ 1983 challenge to disciplinary
6 conviction not Heck-barred where “the removal of the rule violation report or the restoration of
7 time credits” would not necessarily result in a speedier release for inmate with indeterminate life
8 sentence and no parole date).

9 Specifically, where the claim involves the loss of good-time credits as a result of an
10 adverse prison disciplinary finding, the claim is not cognizable. *See* Edwards v. Balisok, 520
11 U.S. 641, 646 (1987) (holding that § 1983 claim not cognizable because allegations of procedural
12 defects and a biased hearing officer implied the invalidity of the underlying prison disciplinary
13 sanction of loss of good-time credits); *cf.* Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir. 2003)
14 (holding that the favorable termination rule of Heck and Edwards does not apply to challenges to
15 prison disciplinary hearings where the administrative sanction imposed does not affect the overall
16 length of confinement and, thus, does not go to the heart of habeas), cert. denied, 541 U.S. 1063
17 (2004); *see also* Wilkerson v. Wheeler, 772 F.3d 834 (9th Cir. 2014) (discussing loss of good-
18 time credits); Nettles v. Grounds, 788 F.3d 992 (9th Cir. 2015) (discussing loss of good-time
19 credits). If a § 1983 complaint states claims which sound in habeas, the court should not convert
20 the complaint into a habeas petition. *See id.*; Trimble v. City of Santa Rosas, 49 F.3d 583, 586
21 (9th Cir. 1995). Rather, such claims must be dismissed without prejudice and the complaint
22 should proceed on any remaining cognizable § 1983 claims. *See* Balisok, 520 U.S. at 649; Heck,
23 512 U.S. at 487; Trimble, 49 F.3d at 585.

24 Here, plaintiff alleges that he was subjected to a disciplinary proceeding that was based on
25 false information, and that was not properly investigated or reviewed. It is unclear whether
26 plaintiff can allege facts demonstrating that his due process rights were violated based on the
27 limited due process rights required in the prison disciplinary context. Wolff, 418 U.S. at 571.⁴

28 ⁴ In prison disciplinary proceedings, an inmate is not entitled to the full panoply of due process

1 However, the exhibits appended to the amended complaint confirm that plaintiff suffered the loss
2 of 90 days of behavioral credits. (ECF No. 7 at 75.) Because plaintiff seeks money damages, his
3 challenge to the disciplinary proceeding is barred by the favorable termination rule of Heck
4 because a judgment in favor of plaintiff on his claim will necessarily imply the invalidity of the
5 disciplinary action, and plaintiff has not demonstrated that the disciplinary action has been
6 “reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
7 authorized to make such determination, or called into question by a federal court’s issuance of a
8 writ of habeas corpus.” See e.g., Cox v. Clark, 321 Fed. App’x 673, 676 (9th Cir. 2009)
9 (affirming dismissal of due process claim pursuant to Balisok to the extent that plaintiff sought
10 restoration of good-time credits and the reversal of a disciplinary decision); McCoy v. Spidle,
11 2009 WL 1287872, *7-*8 (E.D. Cal. May 6, 2009) (“A challenge under section 1983, seeking
12 only damages and declaratory relief for procedural due process violations is also barred if the
13 nature of the challenge would necessarily imply the invalidity of the deprivation of good-time
14 credits.”).

15 Therefore, to the extent plaintiff asserts that he was deprived of a constitutionally-
16 protected liberty interest because prison officials imposed discipline that caused him to lose time
17 credits and extended his stay in prison, he may have a due process claim, but would need to assert
18 such a claim in a petition for writ of habeas corpus rather than a civil rights complaint.

19 ////

20 rights that apply to traditional criminal cases. Wolff, 418 U.S. at 556. Rather, due process
21 requires that the prisoner receive: (1) written notice of the charges; (2) at least 24 hours between
22 the time the prisoner receives written notice and the time of the hearing, so that the prisoner may
23 prepare his defense; (3) a written statement by the fact finders of the evidence they rely on and
24 reasons for taking disciplinary action; (4) the right of the prisoner to call witnesses and present
25 documentary evidence in his defense, when permitting him to do so would not be unduly
26 hazardous to institutional safety or correctional goals; and (5) legal assistance to the prisoner
27 where the prisoner is illiterate or the issues presented are legally complex. Wolff, 418 U.S. at
28 563-71. The disciplinary hearing must be conducted by a person or body that is “sufficiently
impartial to satisfy the Due Process Clause.” Wolff, 418 U.S. at 571. Finally, the decision
rendered on a disciplinary charge must be supported by “some evidence” in the record.
Superintendent v. Hill, 472 U.S. 445, 455 (1985). The “some evidence” standard is “minimally
stringent,” and a decision must be upheld if there is any reliable evidence in the record that could
support the conclusion reached by the fact finder. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir.
1994) (citing Hill, 472 U.S. at 455-56, and Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)).

1 C. Property Claims

2 Plaintiff challenges the loss and confiscation of certain items of personal property.

3 The United States Supreme Court has held that “an unauthorized intentional deprivation
4 of property by a state employee does not constitute a violation of the procedural requirements of
5 the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for
6 the loss is available.” Hudson v. Palmer, 468 U.S. 517, 533 (1984). Thus, where the state
7 provides a meaningful postdeprivation remedy, only authorized, intentional deprivations
8 constitute actionable violations of the Due Process Clause. An authorized deprivation is one
9 carried out pursuant to established state procedures, regulations, or statutes. Piatt v. McDougall,
10 773 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142,
11 1149 (9th Cir. 1987).

12 In the instant case, plaintiff has not alleged any facts which suggest that the first
13 deprivation of property was authorized. The California Legislature has provided a remedy for tort
14 claims against public officials in the California Government Code, §§ 900, et seq. Because
15 plaintiff has not attempted to seek redress in the state system, he cannot sue in federal court on the
16 claim that the state deprived him of property without due process of the law. The court concludes
17 that this claim must, therefore, be dismissed as frivolous. See 28 U.S.C. § 1915(e)(2).

18 With regard to plaintiff’s claim that prison staff at Corcoran confiscated plaintiff’s
19 television based on new prison regulations, such claim is not related to his claim of excessive
20 force used at CMF. Thus, plaintiff must pursue such unrelated claim in a separate complaint filed
21 in the Fresno Division of the Eastern District, as further explained below.

22 On the table of contents page, plaintiff states that deprivation or limitation of property in
23 retaliation for exercise of constitutional rights is unconstitutional. (ECF No. 7 at 23.) However,
24 plaintiff fails to provide factual allegations to support a retaliation claim.

25 To state a viable First Amendment retaliation claim, a prisoner must allege five elements:
26 “(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3)
27 that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First
28 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”

1 Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). Conduct protected by the First
2 Amendment includes communications that are “part of the grievance process.” Brodheim v. Cry,
3 584 F.3d 1262, 1271 n.4 (9th Cir. 2009). If plaintiff intends to assert a retaliation claim, he must
4 specifically identify the protected conduct at issue, name the defendant who took adverse action
5 against him, and plead that the allegedly adverse action was taken “because of” plaintiff’s
6 protected conduct.

7 Plaintiff recounts his myriad efforts to exhaust his administrative remedies as to his
8 missing property, but he fails to provide factual allegations demonstrating a retaliatory motive in
9 connection with his lost property, and fails to address each of the Rhodes elements. (ECF No. 7
10 at 29-40.) Plaintiff does not specifically identify a defendant who intentionally deprived plaintiff
11 of his personal property in retaliation for plaintiff’s conduct protected under the First
12 Amendment. Moreover, even if plaintiff can allege facts demonstrating that a defendant
13 retaliated against plaintiff for such protected conduct, he must bring such claims in a separate
14 action because they are unrelated to plaintiff’s alleged excessive force claims.

15 D. Unrelated Claims Must be Brought in Separate Actions

16 As noted above, some of plaintiff’s claims are not properly joined under Federal Rule of
17 Civil Procedure 20(a) concerning joinder of claims and defendants. Rule 20(a) provides that all
18 persons may be joined in one action as defendants if “any right to relief is asserted against them
19 jointly, severally, or in the alternative with respect to or arising out of the same transaction,
20 occurrence, or series of transactions or occurrences” and “any question of law or fact common to
21 all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(2).

22 Here, the acts or omissions giving rise to plaintiff’s claims were not part of the same
23 transaction, occurrence or series of transactions or occurrences. Also, the claim concerning
24 property is against an entirely different set of defendants.⁵ Plaintiff’s claims concerning property
25 and retaliation are severed from this action because they do not (a) arise out of the same
26

27 ⁵ Plaintiff confirms that the defendant Jones who was involved in the decontamination claim is
28 different from the defendant Jones named in connection with the loss of property allegation.
(ECF No. 7 at 14.)

1 transaction, occurrence, or series of transactions or occurrences and (b) present questions of law
2 or fact common to all defendants. Such severed claims may continue in a separate suit if
3 promptly initiated by plaintiff. See DirecTV, Inc. v. Leto, 467 F.3d 842, 846 (3d Cir. 2006)
4 (claims that are severed rather than dismissed may continue in a separate suit so that they will not
5 be time-barred).

6 E. Brevity

7 Finally, in his 116 page pleading, plaintiff names 16 defendants, and his 40 page amended
8 complaint includes numerous allegations extraneous to any claims for relief, including
9 discussions about life in prison, his efforts to exhaust his administrative remedies,⁶ and his
10 personal life history. (ECF No. 7 at 24, 26-27, 29-31; 34-37, 39.)⁷ The federal rules contemplate
11 brevity. See Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002) (noting that
12 “nearly all of the circuits have now disapproved any heightened pleading standard in cases other
13 than those governed by Rule 9(b).”); Fed. R. Civ. P. 84; cf. Rule 9(b) (setting forth rare
14 exceptions to simplified pleading). Plaintiff’s claims must be set forth in short and plain terms,
15 simply, concisely and directly. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002)
16 (“Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus
17 litigation on the merits of a claim.”); Fed. R. Civ. P. 8. Plaintiff must eliminate from his amended
18 pleading all preambles, introductions, argument, speeches, explanations, stories, griping,
19 vouching, evidence, attempts to negate possible defenses, summaries, and the like. McHenry v.
20 Renne, 84 F.3d 1172, 1180 (9th Cir. 1996) (affirming dismissal of § 1983 complaint for violation
21 of Rule 8 after warning); see Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (reiterating that
22 “firm application of the Federal Rules of Civil Procedure is fully warranted” in prisoner cases).

23 ⁶ Plaintiff is required to exhaust all available administrative remedies prior to filing his claims in
24 federal court. 42 U.S.C. § 1997e(a); Booth v. Churner, 532 U.S. 731, 741 (2001). However,
25 failure to exhaust is “an affirmative defense the defendant must plead and prove.” Jones v. Bock,
549 U.S. 199, 204, 216 (2007). Thus, plaintiff is not required to demonstrate, in his complaint,
26 that such remedies were unavailable, or that his efforts to exhaust were impeded.

27 ⁷ Plaintiff also asks the court to order a polygraph examination. The court is not authorized to
28 order parties to submit to polygraph examinations. In addition, “polygraph exams are generally
deemed unreliable as evidence.” Toussaint v. McCarthy, 926 F.2d 800, 805 (9th Cir. 1990),
citing see People v. Miller, 208 Cal. App. 3d 1311, 1314 (1989) (collecting cases).

1 The court (and defendants) should be able to read and understand plaintiff's pleading within
2 minutes. McHenry, 84 F.3d at 1177. A long, rambling pleading, including many defendants with
3 unexplained, tenuous or implausible connection to the alleged constitutional injury or joining a
4 series of unrelated claims against many defendants very likely will result in delaying the review
5 required by 28 U.S.C. § 1915 and an order dismissing plaintiff's action pursuant to Fed. R. Civ.
6 P. 41 for violation of these instructions. The court finds that plaintiff's amended complaint does
7 not contain a short and plain statement of his claims as required by Fed. R. Civ. P. 8(a)(2).

8 V. Leave to Amend

9 Therefore, plaintiff's amended complaint is dismissed. The court, however, grants leave
10 to file an amended complaint. Plaintiff is granted leave to file an amended complaint that seeks
11 to adequately allege the following claims: Eighth Amendment excessive force claims against
12 defendants Harrison and Pompey, defendant Thumsen's alleged failure to train officers Harrison
13 and Pompey on the use of pepper spray, and Eighth Amendment claims against defendants Tapiz
14 and Jones based on their use of hot water in the decontamination process. As discussed above,
15 plaintiff must raise any other, unrelated claims in separate actions.

16 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
17 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.
18 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each
19 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is
20 some affirmative link or connection between a defendant's actions and the claimed deprivation.
21 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743
22 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil
23 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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1 Plaintiff may not change the nature of this suit by alleging new, unrelated claims.⁸ See
2 Fed. R. Civ. P. 20(a)(2).

3 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to
4 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
5 complaint be complete in itself without reference to any prior pleading. This requirement exists
6 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
7 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
8 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
9 original complaint, each claim and the involvement of each defendant must be sufficiently
10 alleged.

11 Finally, the court has revised the form for filing a civil rights complaint by a prisoner.
12 Because plaintiff's amended complaint was unduly long, plaintiff is required to file any second
13 amended complaint on the form used by this district. In addition, plaintiff's amended pleading is
14 limited to 20 pages. Plaintiff shall not exceed the page limit and shall not append exhibits to his
15 amended pleading. The court and any party may refer to the exhibits plaintiff previously
16 provided. (ECF No. 7.) Failure to comply with this order will result in the dismissal of this
17 action.

18 In accordance with the above, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff's request for leave to proceed in forma pauperis is granted.
- 20 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
21 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §1915(b)(1).

22 ⁸ A plaintiff may properly assert multiple claims against a single defendant. Fed. Rule Civ. P.
23 18. In addition, a plaintiff may join multiple defendants in one action where "any right to relief is
24 asserted against them jointly, severally, or in the alternative with respect to or arising out of the
25 same transaction, occurrence, or series of transactions and occurrences" and "any question of law
26 or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). Unrelated
27 claims against different defendants must be pursued in separate lawsuits. See George v. Smith,
28 507 F.3d 605, 607 (7th Cir. 2007). This rule is intended "not only to prevent the sort of morass [a
multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the
required filing fees -- for the Prison Litigation Reform Act limits to 3 the number of frivolous
suits or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C.
§ 1915(g)." George, 507 F.3d at 607.

1 All fees shall be collected and paid in accordance with this court's order to the Director of the
2 California Department of Corrections and Rehabilitation filed concurrently herewith.

3 3. Plaintiff's second amended complaint (ECF No. 10) is stricken.

4 4. Plaintiff's amended complaint (ECF No. 7) is dismissed.

5 5. Within thirty days from the date of this order, plaintiff shall complete the attached
6 Notice of Amendment and submit the following documents to the court:

7 a. The completed Notice of Amendment; and


8 b. An original and one copy of the Second Amended Complaint.

9 Plaintiff's second amended complaint shall comply with the requirements of the Civil Rights Act,
10 the Federal Rules of Civil Procedure, and the Local Rules of Practice, and may not exceed 20
11 pages in length. The second amended complaint must also bear the docket number assigned to
12 this case and must be labeled "Second Amended Complaint."

13 Failure to file an amended complaint in accordance with this order may result in the
14 dismissal of this action.

15 6. The Clerk of the Court is directed to send plaintiff two forms for filing a civil rights
16 complaint by a prisoner, a petition for writ of habeas corpus, and two applications to proceed in
17 forma pauperis by a prisoner.

18 Dated: October 20, 2016

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20 _____
KENDALL J. NEWMAN
21 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNY STEWARD,
Plaintiff,
v.
G. THUMSER, et al.,
Defendants.

No. 2:16-cv-1232 GEB KJN P

NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order
filed _____.

_____ Second Amended Complaint (must be on court's
form and shall not exceed 20 pages)

DATED:

Plaintiff