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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAHIR ALBERTO ROJAS,)
)
 Plaintiff,)
)
 v.)
)
 R. LOZA, Correctional Officer, R.)
 SINGH, Correctional Officer, D.)
 SANDOVAL, Correctional Officer,)
)
 Defendants.)
 _____)

No. C 07-4662 MMC (PR)

**ORDER DENYING MOTION TO
DISMISS; DENYING MOTION TO
STAY DISCOVERY; DIRECTING
DEFENDANTS TO FILE MOTION
FOR SUMMARY JUDGMENT OR
INFORM COURT CASE CANNOT BE
RESOLVED BY SUMMARY
JUDGMENT**

(Docket Nos. 14 & 23)

On September 10, 2007, plaintiff, a California prisoner incarcerated at Salinas Valley State Prison (“SVSP”) and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983. On April 28, 2008, the Court ordered plaintiff’s complaint served on three SVSP employees alleged to have violated plaintiff’s Eighth Amendment right to be free from the use of excessive force.

Now before the Court is defendants’ motion to dismiss, in which they argue the action cannot proceed because plaintiff failed to exhaust his administrative remedies before filing suit, or, alternatively, because defendants are entitled to qualified immunity. Plaintiff has opposed defendants’ motion, and defendants have filed a reply. Additionally, defendants have filed a motion to stay discovery pending the Court’s ruling on the motion to dismiss.

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United States District Court
For the Northern District of California

FACTUAL BACKGROUND

1
2 In his complaint, plaintiff makes the following allegations with respect to events that
3 occurred at SVSP. On February 12, 2007, plaintiff was on the yard when an announcement
4 was made from the yard tower for all inmates to “prone out” on the ground. In response,
5 correctional officers began to form a “scrimmage line” and directed the inmates to crawl
6 backwards toward the line to be handcuffed. (Compl. ¶ 1.) When it came time for plaintiff
7 to crawl backwards, he yelled out that he could not do so because of an injured right knee.
8 (Compl. ¶ 2.) Plaintiff attempted to stand up to walk the estimated seventy feet to the line to
9 be handcuffed. In response, correctional officers instructed plaintiff to get down and crawl
10 backwards. Plaintiff complied, but continued to plead that he could not crawl because of his
11 right knee. (Compl. ¶ 3.) Correctional officers then instructed plaintiff to lie on his stomach
12 and place his hands on his sides. Plaintiff complied with the request. Nevertheless,
13 defendant correctional officer R. Loza (“Loza”) aggressively thrust his knee into plaintiff’s
14 back, causing plaintiff to lose his breath. Loza next placed plastic flexicuffs on plaintiff and,
15 in so doing, caused the flexicuffs to dig into plaintiff’s wrists and restrict the blood flow to
16 his hands. Loza then lifted plaintiff off the ground by the flexicuffs and started to pull
17 plaintiff toward the line of correctional officers, causing plaintiff great pain. Plaintiff asked
18 Loza and defendant correctional officer R. Singh (“Singh”) to stop jerking him in this painful
19 manner, but they did not. Plaintiff then lost his footing, at which point Loza and Singh
20 swung plaintiff to the ground, causing plaintiff to slam his left shoulder into the ground.
21 (Compl. ¶ 5.)

22 At that point, Loza sprayed plaintiff with pepper spray on his upper body, while he lay
23 on his stomach. As a result, plaintiff experienced pain and was “mostly blinded” by the
24 pepper spray. (Compl. ¶ 6.) Loza and defendant correctional officer D. Sandoval
25 (“Sandoval”) then picked plaintiff up by his arms and transported him indoors to the hobby
26 shop. Once in the hobby shop, Loza and Sandoval pushed plaintiff to walk faster and, in so
27 doing, pushed plaintiff toward a wall. To avoid hitting the wall with his face, plaintiff
28 attempted to cushion the impact with his shoulder. (Compl. ¶ 8.) When he did so, Loza and

1 Sandoval began to assault plaintiff, hitting him in the head and body. Plaintiff was slammed
2 on top of a table, where Loza and Sandoval continued to assault him until an unidentified
3 correctional officer intervened. (Compl. ¶¶ 9-10.) Plaintiff was then placed in a holding
4 “cage” inside the hobby shop. (Compl. ¶¶ 11-12.)

5 While in the holding cage plaintiff was still in handcuffs and could no longer feel any
6 sensation in his hands. He called to Loza and Sandoval to remove the handcuffs but they
7 ignored his pleas. A few hours later the handcuffs were removed by Nurse Sanchez, who
8 also treated plaintiff’s injuries and filled out a medical evaluation sheet. (Compl. ¶¶ 13-14).

9 On or about February 28, 2007, plaintiff received a rules violation report with respect
10 to the above incident. Defendants, in their attempt to cover up their use of excessive force,
11 stated in the report that plaintiff had battered defendants and, by twisting his upper torso, had
12 broken free from defendants’ grasp, causing defendants to fall on top of him. Further,
13 plaintiff’s medical evaluation sheet “was tampered with and rewritten,” omitting plaintiff’s
14 injuries. (Compl. ¶¶ 16-18.)¹ As a result of defendants’ actions, plaintiff suffered serious
15 injury to his head, neck, face and back, loss of sensation in his left hand, and stress, anxiety
16 and mental anguish. (Compl. ¶ 19.)

17 Plaintiff claims defendants’ actions violated his constitutional right, under the Eighth
18 Amendment, to be free from the use of excessive force. See Hudson v. McMillian, 503 U.S.
19 1, 6-7 (1992). He seeks monetary damages.

20 DISCUSSION

21 A. Failure to Exhaust Administrative Remedies

22 Defendants move, under Rule 12(b) of the Federal Rules of Civil Procedure, to
23 dismiss the complaint on the ground plaintiff has failed to exhaust administrative remedies.

24 1. Standard of Review

25 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
26 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
27

28 ¹ Plaintiff does not identify the individual(s) who engaged in this conduct.

1 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison,
2 or other correctional facility until such administrative remedies as are available are
3 exhausted.” 42 U.S.C. § 1997e(a). Nonexhaustion under § 1997e(a) is an affirmative
4 defense; defendants have the burden of raising and proving the absence of exhaustion. Wyatt
5 v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion defense should be raised
6 in an unenumerated Rule 12(b) motion. Id. In deciding such a motion, the district court may
7 look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.² If the court
8 concludes the prisoner has not exhausted nonjudicial remedies, the proper remedy is
9 dismissal of the complaint without prejudice. Id. at 1120.

10 2. The Exhaustion Requirement

11 Exhaustion under § 1997(e)(a) is mandatory and not left to the discretion of the
12 district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006). Exhaustion is a prerequisite to all
13 prisoner lawsuits concerning prison life, whether such actions involve general conditions or
14 particular episodes, whether they allege excessive force or some other wrong, and even if
15 they seek relief not available in grievance proceedings, such as money damages. Porter v.
16 Nussle, 534 U.S. 516, 524 (2002).

17 The State of California provides its prisoners and parolees the right to appeal
18 administratively “any departmental decision, action, condition or policy perceived by those
19 individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15 (“CCR”),
20 § 3084.1(a).³ In order to exhaust available administrative remedies within this system, a
21 prisoner must proceed through several levels of appeal: (1) informal review, (2) first formal
22 level appeal on a CDC 602 inmate appeal form, (3) second formal level appeal to the
23 institution head or designee, and (4) third formal level appeal to the Director of the California

25 ²If the court looks beyond the pleadings in deciding an unenumerated motion to
26 dismiss for failure to exhaust, the court must give the prisoner fair notice of his opportunity
27 to develop the record. Id. at 1120 n.14. Plaintiff was given such notice by the Court in the
28 Order of Service.

³Unless otherwise noted, all further references to code sections are to title 15 of the
California Code of Regulations.

1 Department of Corrections and Rehabilitation (“Director”). See CCR § 3084.5; Barry v.
2 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). A final decision from the Director’s level
3 of review satisfies the exhaustion requirement under § 1997e(a). Id. at 1237-38.

4 The exhaustion requirement cannot be satisfied by the filing of an untimely or
5 otherwise procedurally defective administrative grievance or appeal. See Woodford, 548
6 U.S. at 84. Rather, “proper exhaustion” of available administrative remedies is required. Id.
7 at 92. The requirements of the prison’s grievance process, not the PLRA, define the
8 boundaries of proper exhaustion. Jones v. Bock, 127 S. Ct. 910, 923 (2007).

9 An action must be dismissed unless the prisoner first exhausted his available
10 administrative remedies before he filed suit. McKinney v. Carey, 311 F.3d 1198, 1199 (9th
11 Cir. 2002).

12 3. Analysis

13 Defendants argue plaintiff did not exhaust his administrative remedies because he did
14 not receive a decision from the Director’s level of review with respect to his excessive force
15 claim.

16 In support of their argument, defendants submit a declaration by N. Grannis
17 (“Grannis”), Chief of the Inmate Appeals Branch (“IAB”) at the California Department of
18 Corrections and Rehabilitation (“CDCR”). According to Grannis, the IAB keeps an
19 electronic record of each inmate administrative appeal that has been addressed at the
20 Director’s level of review. (Decl. N. Grannis Supp. Mot. Dismiss (“Grannis Decl.”) ¶ 4.)
21 Specifically, when an appeal is received by the IAB and is accepted for review at the
22 Director’s level of review, it is given an appeal number and logged into the system. (Id.)
23 When, however, an inmate submits an appeal that is “screened out,” i.e., rejected for
24 procedural reasons, at the Director’s level of review, the appeal is returned to the inmate and
25 is not given an appeal number. (Id. ¶ 6.) The IAB, however, does keep an electronic record
26 of the following information for screened out appeals: IAB log number, category
27 (nature/subject) of the appeal, institutional log number of the appeal (if available), inmate
28 name and CDCR number, institution where the appeal arose, date the appeal was received by

1 the IAB, date the appeal was screened out by the IAB, and the reason the appeal was
2 screened out. (Id.)

3 Attached to Grannis's declaration is the IAB computer printout of a report showing
4 each inmate appeal submitted by plaintiff to the Director's level of review. (Id. ¶ 8 & Ex. A.)
5 The report lists which of plaintiff's appeals were addressed at the Director's level of review
6 and which appeals were screened out at the Director's level of review. (Id.)

7 Additionally, defendants submit a declaration by E. Medina ("Medina"), an Appeals
8 Coordinator at SVSP. Medina's job duties include processing inmate appeals, assigning
9 appeals to the appropriate staff for review, and monitoring and maintaining the computer
10 database in the SVSP inmate appeals office. (Decl. E. Medina Supp. Mot. Dismiss ("Medina
11 Decl.") ¶ 1.) Inmate appeals that have been submitted for review and meet CCR criteria for
12 review are recorded in the computer database. (Id. ¶ 2.) Attached to Medina's declaration is
13 a printout of a report from the computer database showing all appeals filed by plaintiff at
14 SVSP through May 28, 2008. (Id. & Ex. A.) The report tracks the status of each of
15 plaintiff's appeals in the SVSP appeals process. (Id.)

16 The records attached to the Grannis and Medina declarations show the following: On
17 March 28, 2007, the SVSP inmate appeals office logged in as received from plaintiff an
18 appeal regarding the February 12, 2007 incident at issue in the instant action. (Medina Decl.
19 ¶ 5 & Exs. A & B.) The appeal was given log number "SVSP-D-07-01389." (Id.) Because
20 the appeal alleged the use of excessive force by SVSP staff, the appeal was designated as a
21 staff complaint pursuant to CCR § 3084.5 and, consequently, it automatically bypassed the
22 informal level of review.⁴ (Medina Decl. ¶ 5 & Ex. B.) At the first formal level of review,
23 the appeal was screened out as untimely because plaintiff had not complied with CCR
24 § 3084.6(c), which regulation provides that a prisoner must submit an appeal "within 15
25 working days of the event or decision being appealed, or of receiving an unacceptable lower
26 appeal level decision." (Id.) Plaintiff then submitted his appeal to the Director's level of

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28 ⁴CCR 3084.5(a)(1)(G) provides that the informal level of review shall be waived for, inter alia, "allegations of misconduct by a departmental peace officer."

1 review, where it was screened out because the appeal had not proceeded through the second
2 level of review.⁵ (Grannis Decl. Ex. A.) Plaintiff resubmitted his appeal to the Director's
3 level of review, where it was again screened out. (Id.)

4 In opposition to the motion to dismiss, plaintiff does not dispute respondent's showing
5 that his appeal concerning the claim at issue herein was not addressed on the merits at the
6 Director's level of review. Rather, he argues the Court should allow his claim to proceed
7 because his appeal was improperly screened out as untimely at the first level of review and,
8 as a result, prison officials prevented him from submitting an appeal and receiving a decision
9 at the second level of review. Thus, plaintiff argues, he was unable to exhaust his
10 administrative remedies because no such remedies remained available to him. See Brown v.
11 Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding prisoner need not exhaust further levels of
12 review once he either has received all remedies available at intermediate level of review or
13 has been reliably informed by administrator that no more remedies are available).

14 Specifically, plaintiff alleges the following:

15 (1) Plaintiff first timely submitted his appeal for review on February 28, 2007, not
16 March 28, 2007, as defendants assert. In support of his contention, plaintiff points to his
17 administrative appeal, which is signed by plaintiff and dated February 28, 2007. (Compl. Ex.
18 F at 4.)

19 (2) On March 28, 2007, the appeal was returned to plaintiff with an Inmate/Parolee
20 Appeal Screening Form. On the form, SVSP Appeals Coordinator Medina wrote that the
21 appeal was being returned as untimely because the date of the alleged incident was
22 February 12, 2007, and plaintiff had submitted his appeal on March 6, 2007, which date was
23 more than fifteen working days after the incident being appealed had occurred. (Compl. Ex.
24 F at 2.)

25 (3) On the same date the screened-out appeal was returned to plaintiff, March 28,
26 2007, plaintiff resubmitted the appeal, together with an inquiry to Medina as to which appeal

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28 ⁵CCR 3084.5(c) provides that the second formal level of review must be completed before an inmate files an appeal at the third, i.e., Director's level, of review.

1 Medina deemed to be untimely, in that plaintiff had submitted his appeal on February 28,
2 2007, and not on March 6, 2007. (Compl. Ex. F at 3.)

3 (4) On April 10, 2007, the appeal was returned to plaintiff with no response. That
4 same date, plaintiff resubmitted the appeal, requesting a second level response. (Compl. Ex.
5 F at 5.) On April 11, 2007, Medina returned the appeal to plaintiff with the original screen-
6 out form from March 28, 2007; the form now included an additional notation by Medina that
7 the appeal had been sent to “Hiring Authority” for review and had been rejected as untimely.
8 Further, Medina wrote, “Do not resubmit appeal.” (Compl. Ex. F at 2.)

9 In his opposition, plaintiff argues that defendants’ exhibits showing plaintiff first
10 submitted his appeal on March 28, 2007 are inaccurate, as evidenced by the fact that his
11 appeal is signed and dated February 28, 2007, and that, contrary to the assertion by Medina
12 that plaintiff first submitted his appeal on March 6, 2007, the SVSP appeal log does not
13 reflect the filing of any appeal on that date.

14 In reply, defendants argue their contentions are supported by uncontraverted evidence
15 that shows plaintiff’s original SVSP appeal bears a stamped received date of March 28, 2007,
16 (Medina Decl. Ex. B), and the SVSP appeals computer database also shows such date is the
17 date on which the appeal was received at the first level of review. (Id. Ex. A).

18 When deciding a non-enumerated Rule 12(b) motion, the Court may look beyond the
19 pleadings and decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. To date, however,
20 the evidence submitted by defendants is insufficient to establish plaintiff’s failure to exhaust
21 his administrative remedies. In particular, defendant’s evidence is insufficient to establish
22 plaintiff failed to comply with the deadline for filing a timely appeal. Indeed, defendant’s
23 themselves have submitted conflicting evidence in that regard. Although the appeals log
24 reflects a “received” date of March 28, 2007, Medina, in a form by which the appeal was
25 returned to plaintiff, informed plaintiff the appeal had been received on March 6, 2007.
26 Further, the appeal is signed and dated February 28, 2007, which is the date plaintiff alleges
27 he submitted it. Under such circumstances, the Court concludes defendants’ records are
28 inadequate to establish plaintiff failed to file a timely appeal. See Wyatt, 315 F.3d at 1120

1 (finding documents produced by defendants inadequate to establish plaintiff failed to
2 exhaust). Consequently, in the absence of additional evidence as to how this appeal was
3 processed, the Court cannot find it is more likely than not that the appeal was not filed in a
4 timely manner.

5 For the foregoing reasons, the Court finds defendants have failed to show
6 administrative remedies remained available to plaintiff to properly exhaust the claim raised in
7 the instant complaint. Accordingly, defendants' motion to dismiss the complaint on the
8 ground plaintiff failed to exhaust administrative remedies will be denied. See Brown, 422
9 F.3d at 940 (holding prisoner satisfied exhaustion requirement where he did not pursue third
10 level appeal but had exhausted all administrative remedies available to him).

11 B. Qualified Immunity

12 Defendants assert they are entitled to qualified immunity on plaintiff's claim of
13 excessive force. Although defendants do not state whether they bring their motion for
14 qualified immunity as a motion to dismiss, pursuant to Rule 12(b)(6), or as a motion for
15 summary judgment, pursuant to Rule 56, defendants, in support of their motion, have
16 submitted no declarations or other evidence outside the pleadings relevant to a qualified
17 immunity determination and rely solely on documents attached to plaintiff's complaint.
18 Accordingly, the Court will decide the motion as a motion to dismiss pursuant to Rule
19 12(b)(6). Cf. Fed. R. Civ. P. 12(d) (providing Rule 12(b)(6) motion that relies on matters
20 outside pleadings must be decided as Rule 56 motion); see also Hydrick v. Hunter, 500 F.3d
21 978, 985 (9th Cir. 2007) (deciding issue of qualified immunity asserted in Rule 12(b)(6)
22 motion).

23 1. Standard of Review

24 A motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted
25 if the complaint does not proffer "enough facts to state a claim for relief that is plausible on
26 its face." Bell Atlantic Corp v Twombly, 127 S. Ct 1955, 1974 (2007). The court "must
27 accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus,
28 127 S. Ct. 2197, 2200 (2007), but need not accept as true allegations that are legal

1 conclusions, unwarranted deductions of fact or unreasonable inferences. See Sprewell v.
2 Golden State Warriors, 266 F.3d 979, 988, amended, 275 F.3d 1187 (9th Cir. 2001).
3 Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient
4 facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d
5 696, 699 (9th Cir. 1990).

6 In considering a motion to dismiss, the court must construe the complaint in the light
7 most favorable to the plaintiff and accept all factual allegations as true. See Cahill v. Liberty
8 Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Federal courts are particularly liberal in
9 construing allegations made in pro se civil rights complaints. See Thompson v. Davis, 295
10 F.3d 890, 895 (9th Cir. 2002). In ruling on a Rule 12(b)(6) motion, the court may not
11 consider any material outside the complaint but may consider exhibits attached thereto. See
12 Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 925 (9th Cir. 2001); Fed.
13 R. Civ. P. 10(c) (treating exhibits attached to complaint as part of complaint for purposes of
14 ruling on 12(b)(6) motion).

15 2. Analysis

16 The defense of qualified immunity protects “government officials . . . from liability
17 for civil damages insofar as their conduct does not violate clearly established statutory or
18 constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald,
19 457 U.S. 800, 818 (1982). The rule of qualified immunity “provides ample protection to all
20 but the plainly incompetent or those who knowingly violate the law.” Burns v. Reed, 500
21 U.S. 478, 495 (1991) (quotation and citation omitted).

22 In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court set forth a particular
23 sequence of questions to be considered in determining whether qualified immunity exists.
24 First, the court must consider this threshold question: “Taken in the light most favorable to
25 the party asserting the injury, do the facts alleged show the officer’s conduct violated a
26 constitutional right?” Id. at 201. If no constitutional right was violated if the facts were as
27 alleged, the inquiry ends and defendants prevail. See id. If, however, a constitutional
28 violation could be made out, the next sequential step is to ask whether the right was clearly

1 established. Id. If the law did not put the officer on notice that his conduct would be clearly
2 unlawful, qualified immunity is appropriate. Id. at 202.

3 a. Constitutional Violation

4 Defendants argue the facts alleged by plaintiff in his complaint fail to show
5 defendants violated plaintiff's Eighth Amendment right to be free from the use of excessive
6 force.

7 Whenever prison officials stand accused of using excessive force in violation of the
8 Eighth Amendment, the core judicial inquiry is whether force was applied in a good-faith
9 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.
10 Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). In determining whether the use of force was
11 for the purpose of maintaining or restoring discipline, or for the malicious and sadistic
12 purpose of causing harm, a court may evaluate the need for application of force, the
13 relationship between that need and the amount of force used, the extent of any injury
14 inflicted, the threat reasonably perceived by the responsible officials, and any efforts made to
15 temper the severity of a forceful response. Id. at 7. A prisoner need not allege that he
16 suffered serious injury in order to establish an Eighth Amendment violation. Id.

17 Here, defendants argue plaintiff cannot show defendants used excessive force because,
18 in contradiction to the allegations in the complaint, the exhibits attached to the complaint
19 show defendants did not use force maliciously and sadistically, but, rather, used force to
20 maintain order and security after plaintiff refused to comply with defendants' orders
21 following a disturbance where more than 100 inmates refused to leave the yard. Defendants
22 further argue that while medical records show plaintiff suffered injuries consistent with
23 defendants' having to force plaintiff to the ground and pepper spray him due to his failure to
24 comply with defendants' orders, the records do not show plaintiff suffered any injuries to his
25 wrists, upper torso or lower torso, from being dragged and assaulted as plaintiff alleges. In
26 support of their argument, defendants rely on the Crime/Incident Report and Rules Violation
27 Report attached by plaintiff to his complaint, which reports were prepared for prison officials
28 by defendant Loza following the incident at issue. (See Compl. Exs. A & G.) Additionally,

1 defendants rely on the Medical Report attached by plaintiff to his complaint, which report
2 was prepared following the incident at issue and shows that plaintiff was pepper sprayed and
3 various injuries were found. (See Compl. Ex. D.)

4 In opposition, plaintiff objects to defendants' characterization of the facts and
5 reasserts the allegations in his complaint. Plaintiff thus makes clear that he is not adopting as
6 true all of the allegations in the exhibits attached to his complaint. See Gant v. Wallingford
7 Bd. of Educ., 69 F.3d 669, 674 (2d Cir. 1995) (holding Rule 10(c) of Federal Rules of Civil
8 Procedure, providing that "an exhibit to a pleading is a part of the pleading for all purposes,"
9 does not require plaintiff to adopt as true full contents of documents attached to complaint).

10 In his complaint, plaintiff alleges that although he was not resisting and posed no
11 threat to prison security, defendants kneed him in the back, placed him in excessively tight
12 flexicuffs, lifted him from the ground and pulled him by the flexicuffs, shoved him to the
13 ground, pepper sprayed him, and slammed him onto a table and assaulted him. Accepting
14 plaintiff's factual allegations as true and construing them in the light most favorable to him,
15 see Cahill, 80 F.3d at 337-38, the Court finds plaintiff has stated a claim for the use of
16 excessive force in violation of the Eighth Amendment. See Hudson, 503 U.S. at 4-5
17 (holding Eighth Amendment claim for excessive force stated whenever correctional officers
18 use wanton and unnecessary force, even in absence of serious injury).

19 b. Clearly Established Right

20 As noted, the second step in the qualified immunity analysis requires the court to
21 determine whether the right was clearly established. In order for a right to be clearly
22 established, "[t]he contours of the right must be sufficiently clear that a reasonable official
23 would understand that what he is doing violates that right." Saucier, 533 U.S. at 202
24 (quotation and citation omitted). "The relevant, dispositive inquiry in determining whether a
25 right is clearly established is whether it would be clear to a reasonable officer that his
26 conduct was unlawful in the situation he confronted." Id.

27 Here, defendants do not argue that, by 2007, the law was not clearly established that
28 prison officials are precluded from using unnecessary force against inmates. Rather,

1 defendants maintain it would not have been clear to a reasonable officer that the conduct
2 alleged by plaintiff was unlawful in the context of subduing an inmate during a prison
3 standoff. When, as required at this stage of the proceedings, the facts pleaded are viewed in
4 the light most favorable to plaintiff, however, plaintiff's allegation that defendants assaulted
5 him when he was not resisting and posed no threat is sufficient to plead conduct that a
6 reasonable person in defendants' position would know was unlawful. See Watts v.
7 McKinney, 394 F.3d 710, 712-13 (9th Cir. 2005) (finding prison guard not entitled to
8 qualified immunity where no trained prison officer could reasonably believe he could
9 lawfully kick genitals of prisoner who was on ground and in handcuffs).

10 For the reasons stated above, the Court finds defendants are not entitled to qualified
11 immunity. Accordingly, defendants' motion to dismiss the complaint on such ground will be
12 denied.

13 C. Motion to Stay Discovery

14 Together with their reply to plaintiff's opposition to the motion to dismiss, defendants
15 filed a motion to stay discovery until the Court has ruled on the motion to dismiss.
16 Specifically, defendants request that discovery be stayed because they have moved for
17 qualified immunity. Plaintiff has not opposed defendants' motion to stay discovery.

18 As a general rule, a district court should stay discovery until the issue of qualified
19 immunity is resolved. See Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Harlow v.
20 Fitzgerald, 457 U.S. 800, 818 (1982). As the Court, by the instant order, has now resolved
21 the issue of qualified immunity against defendants, the motion to stay discovery will be
22 denied as moot.

23 **CONCLUSION**

24 For the reasons stated above, the Court rules as follows:

- 25 1. Defendants' motion to dismiss the complaint for failure to exhaust administrative
26 remedies or, alternatively, on grounds of qualified immunity is hereby DENIED. (Docket
27 No. 14.)
- 28 2. Defendants' motion to stay discovery is hereby DENIED as moot. (Docket No.

1 23.)

2 3. No later than **ninety (90)** days from the date this order is filed, defendants shall file
3 a motion for summary judgment or, alternatively, shall inform the Court they are of the
4 opinion that this case cannot be resolved by summary judgment. The motion for summary
5 judgment shall be supported by adequate factual documentation and shall conform in all
6 respects to Rule 56 of the Federal Rules of Civil Procedure.

7 4. Plaintiff's opposition to the motion for summary judgment shall be filed with the
8 Court and served on defendants no later than **thirty (30)** days from the date defendants'
9 motion is filed.

10 The Ninth Circuit has held that the following notice should be given to plaintiffs:

11 The defendants have made a motion for summary judgment by which they seek
12 to have your case dismissed. A motion for summary judgment under Rule 56 of
13 the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56
14 tells you what you must do in order to oppose a motion for summary judgment.
15 Generally, summary judgment must be granted when there is no genuine issue
16 of material fact--that is, if there is no real dispute about any fact that would
17 affect the result of your case, the party who asked for summary judgment is
18 entitled to judgment as a matter of law, which will end your case.

16 When a party you are suing makes a motion for summary judgment that is
17 properly supported by declarations (or other sworn testimony), you cannot
18 simply rely on what your complaint says. Instead, you must set out specific
19 facts in declarations, depositions, answers to interrogatories, or authenticated
20 documents, as provided in Rule 56(e), that contradict the facts shown in the
21 defendants' declarations and documents and show that there is a genuine issue
22 of material fact for trial. If you do not submit your own evidence in opposition,
23 summary judgment, if appropriate, may be entered against you. If summary
24 judgment is granted in favor of defendants, your case will be dismissed another
25 will be no trial.

21 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

22 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and
23 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
24 must come forward with evidence showing triable issues of material fact on every essential
25 element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants'
26 motion for summary judgment may be deemed to be a consent by plaintiff to the granting of
27 the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran,
28 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir.

1 1994).

2 5. Defendants shall file a reply brief no later than **fourteen (14)** days after
3 plaintiff's opposition is filed.

4 6. The motion shall be deemed submitted as of the date the reply brief is due. No
5 hearing will be held on the motion unless the Court so orders at a later date.

6 7. All communications by the plaintiff with the Court must be served on
7 defendants' counsel, by mailing a true copy of the document to defendants' counsel.

8 8. Discovery may be taken in accordance with the Federal Rules of Civil
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
10 Rule 16-1 is required before the parties may conduct discovery.

11 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
12 Court informed of any change of address and must comply with the Court's orders in a
13 timely
14 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
15 pursuant to Federal Rule of Civil Procedure 41(b).

16 10. Extensions of time are not favored, though reasonable extensions will be
17 granted. However, the party making the motion for an extension of time is not relieved from
18 his or her duty to comply with the deadlines set by the Court merely by having made a
19 motion for an extension of time. The party making the motion must still meet the deadlines
20 set by the Court until an order addressing the motion for an extension of time is received.
21 Any motion for an extension of time must be filed no later than the deadline sought to be
22 extended.

23 This order terminates Docket Nos. 14 and 23.

24 IT IS SO ORDERED.

25 DATED: November 24, 2008

26 
27 MAXINE M. CHESNEY
28 United States District Judge