

1 and was refused, with the explanation that hot meals were not available to inmates going
2 through initial processing. Hatcher was classified as a maximum security inmate due to the
3 seriousness of offenses in his arrest history and past violent behavior.

4 After Hatcher eventually complied with directions and changed into his jumpsuit,
5 Defendant Deputy Jeremy Lucha then believed that Hatcher could be escorted to his assigned
6 housing unit without restraints. It is here where the parties' accounts differ. The parties do
7 not dispute that force was used by Defendants Lucha, Victor Galindo, James Russell, and
8 Victor Cabello, and that Defendant Matthew Neill shot a Taser at Hatcher. However, the
9 parties do dispute some of the degree of force – for example, whether Hatcher was kicked in
10 the face – as well as whether Hatcher was cooperative or combative. In his statements to an
11 officer completing an internal investigation, which is the only evidence submitted by Hatcher
12 as to his version of the facts, Hatcher contends that he obeyed all orders.¹ Defendants'
13 declarations, on the other hand, describe Plaintiff as resisting all commands and efforts to
14 subdue him, including after being shot with a Taser once, and then a second time. After the
15 incident, Hatcher was taken within minutes to the jail infirmary.

16 Under 42 U.S.C. § 1983, Hatcher alleges excessive force, deliberate indifference to
17 medical needs, and violation of his rights to privacy and equal protection. He also asserts
18 supervisory and municipal liability based on allegations of pattern and practice. In addition,
19 Hatcher alleges several state law claims, including assault and battery, intentional infliction
20 of emotional distress, violation of California Civil Code section 52.1, and negligence.

21 22 **LEGAL STANDARD**

23 Summary judgment is appropriate when there is no genuine dispute as to material
24 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
25 Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby,*
26 *Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there is

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28 ¹The Court addresses below Defendants' objections to consideration of this evidence.

1 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The
2 court may not weigh the evidence and must view the evidence in the light most favorable to
3 the nonmoving party. *Id.* at 255.

4 A party seeking summary judgment bears the initial burden of informing the court of
5 the basis for its motion, and of identifying those portions of the pleadings and discovery
6 responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*
7 *Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at
8 trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than
9 for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 985 (9th Cir. 2007).
10 However, on an issue for which its opponent will have the burden of proof at trial, the
11 moving party can prevail merely by “pointing out to the district court . . . that there is an
12 absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. If
13 the moving party meets its initial burden, the opposing party must then “set out specific facts
14 showing a genuine issue for trial” to defeat the motion. Fed. R. Civ. P. 56(e)(2); *Anderson*,
15 477 U.S. at 250.

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17 **DISCUSSION**

18 **I. Evidentiary Issues**

19 The Court addresses the evidentiary issues raised by Defendants in their reply papers
20 before turning to the parties’ substantive arguments. First, Defendants observe that they
21 marked some of the exhibits filed by Hatcher in opposition as “confidential.” Defendants
22 frame this observation as an evidentiary objection, but they cite no authority for the
23 proposition that confidential documents must, by nature of their confidentiality, be excluded
24 from evidence. To the contrary, the issue presented by the documents’ “confidentiality”
25 designations is whether they should have been filed in the public record. Because Hatcher’s
26 counsel appears to have violated the protective order in this case by not meeting and
27 conferring with opposing counsel prior to filing the documents, the parties are ordered to
28 meet and confer on whether any of the documents marked as “confidential” meet the

1 requirements for filing under seal set forth in Civil Local Rule 79-5.² Any motion to seal
2 documents must be filed on or before **April 11, 2011**.³

3 Defendants also object that Hatcher's exhibits have not been properly authenticated.
4 The exhibits are all attached to the declaration of Gayla Libet, Hatcher's counsel, who
5 declares that the exhibits "are true and correct copies of original documents in the possession
6 of plaintiff's counsel in this case." Libet Decl. ¶ 4. This, of course, does not authenticate
7 that the documents are true and correct copies of what they purport to be. At argument,
8 Hatcher's counsel further explained that the majority of the exhibits were produced by
9 Defendants during discovery – a statement that was not but should have been included in her
10 declaration. Upon review, Exhibits 2, 3, 4, 5, 7, and 9 appear to be documents produced by
11 Defendants, as they bear Bates stamps beginning "AC," presumably for Alameda County.
12 Although Defendants' counsel stated at oral argument that Defendants contested the
13 authenticity of the documents, this is belied by Defendants' arguments on reply that many of
14 the exhibits should not be considered because Defendants designated them as "confidential."
15 Nor have Defendants argued that any of the documents attached to the Libet declaration are
16 not what they purport to be. Thus, although the Court recognizes that counsel's
17 representation that these documents were produced by Defendants during discovery was not
18 made under penalty of perjury, the Court nonetheless finds it proper to consider Exhibits 2, 3,
19 4, 5, 7, and 9. *See, e.g., Orr v. Bank of Am.*, 285 F.3d 764, 777 n.20 (9th Cir. 2002) (noting
20 that "documents produced by a party in discovery were deemed authentic when offered by
21 the party-opponent" in *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881,
22 889 n.12 (9th Cir. 1996)); *Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F. Supp.
23 2d 1116, 1123 n.10 (N.D. Cal. 2010) ("Since Defendants do not specify any reason to doubt
24 the authenticity of documents that they themselves produced in discovery, the Court finds the
25 documents properly authenticated under Fed. R. Evid. 901."); *but see Clark v. County of*

26 ²While violations of court orders are subject to sanctions, this Court opts not to begin
27 sanctions proceedings against Hatcher's counsel at this time.

28 ³As Defendants have not asked the Court to seal the documents in question
immediately, the Court does not do so.

1 *Tulare*, --- F. Supp. 2d ---, 2010 WL 4791683, at *5 n.3 (E.D. Cal. 2010) (holding that “the
2 attorney’s declaration, that the documents were produced in discovery,” was insufficient to
3 establish authenticity). Counsel are forewarned, however, that such sloppiness in presenting
4 evidence will not be tolerated at trial.

5 Defendants also raise hearsay objections to the most critical of the evidence on which
6 Hatcher relies: his statements made to an officer conducting an internal investigation, the
7 results of which are included as Exhibit 4 to the Libet declaration. The Court specifically
8 asked Hatcher’s counsel to respond to these objections at oral argument, but she failed to do
9 so. In addition, Hatcher’s counsel inexplicably relied exclusively on the statements
10 contained in the investigative report, even though Hatcher’s deposition had been taken.
11 Nonetheless, “[a]t the summary judgment stage, we do not focus on the admissibility of the
12 evidence’s form. We instead focus on the admissibility of its contents.” *Fraser v. Goodale*,
13 342 F.3d 1032, 1036 (9th Cir. 2003) (holding that a court could consider the contents of a
14 diary, even though they were hearsay, because “[t]he contents of the diary are mere
15 recitations of events within Fraser’s personal knowledge and, depending on the
16 circumstances, could be admitted into evidence at trial in a variety of ways” – e.g., through
17 direct testimony or as a recorded recollection). Because it appears that Hatcher’s version of
18 events could be admitted at trial through direct testimony, the Court will consider his
19 statements as reflected in the investigative report.

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II. Substantive Issues

A. Claims Against Defendant Vicente Clemente

After oral argument concluded and this matter was taken under submission, Hatcher’s
counsel asked to address the Court to make one additional statement: that Hatcher did not
oppose granting summary judgment to Defendant Vicente Clemente, as he was not at the
scene during the incident in question. With good cause appearing, Defendants’ motion is
therefore GRANTED as to Defendant Clemente.

1 **B. State Law Claims**

2 Defendants’ motion made several arguments on Hatcher’s state law claims, including
3 that Defendants are immune from liability for all such claims. Hatcher’s opposition failed to
4 respond to the immunity argument, and the Court construes that failure as a concession that
5 judgment is appropriate on these claims. Accordingly, Defendants’ motion is GRANTED as
6 to all state law claims.

7 **C. Federal Claims**

8 Hatcher asserts several constitutional violations under 42 U.S.C. § 1983: excessive
9 force, deliberate indifference to medical needs, and violation of his rights to privacy and
10 equal protection. He also contends that supervisory and municipal liability are appropriate in
11 this case. The Court addresses each of these claims below.

12 **1. Privacy**

13 First, Hatcher’s opposition failed to include any argument on his privacy claim under
14 § 1983, which the Court construes as abandoned. Thus, Defendants’ motion is GRANTED
15 as to this claim.

16 **2. Equal Protection**

17 Next, as Defendants correctly observe, there is no evidence that any of Defendants’
18 actions were based on Hatcher’s race. The only statements relevant to this claim in
19 Hatcher’s opposition papers are that Plaintiff “was and is readily recognizable as an African-
20 American,” Opp’n at 8, and “Defendant deputy sheriffs were Caucasian,” *id.* at 24. This is
21 not sufficient evidence to establish an equal protection violation, and summary judgment is
22 therefore GRANTED to Defendants.

23 **3. Deliberate Indifference to Medical Needs**

24 Plaintiff’s § 1983 claim also alleges deliberate indifference to medical needs under the
25 Eighth Amendment. Plaintiff does not contest that “a prison official cannot be found liable
26 under the Eighth Amendment for denying an inmate humane conditions of confinement
27 unless the official knows of and disregards an excessive risk to inmate health or safety.”
28 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

1 Defendants argue that summary judgment is appropriate because Plaintiff cannot show
2 that Defendants ignored Plaintiff's medical needs. For example, Defendant Lucha declares
3 that:

4 After Mr. Hatcher was physically subdued and handcuffed, it was
5 apparent he had been injured. SRJ Prison Health Services Nurse
6 Reyes was immediately summoned, and responded to the scene
7 with a gurney within approximately ten minutes. SRJ Prison
8 Health Services Nurse Reyes completed an assessment of Inmate
9 Hatcher. Inmate Hatcher was then placed on a gurney and taken
10 to the SRJ Infirmary where he was provided additional care by
11 PHS Nurse Azucenas.

12 Lucha Decl. ¶ 15.

13 Plaintiff counters this evidence by citing to pages from Defendants' internal
14 investigation in which Nurse Reyes states that he never saw Plaintiff on the evening in
15 question, and Nurse Azucenas states that he does not recall seeing Plaintiff. Ex. 4 to Libet
16 Decl. at AC0117-18. However, although Nurses Reyes and Azucenas told the investigators
17 that they did not treat or did not recall treating Plaintiff that evening, the medical records
18 from Prison Health Services include notes from both nurses. Ex. 7 to Libet Decl. at AC0302.
19 Nurse Reyes made an entry at 10:55, minutes after the incident occurred. *Id.* Nurse
20 Azucenas made an entry at 11:15. *Id.* The record indicates that Plaintiff was monitored
21 throughout the evening and the next day, and that he was seen by Dr. G.A. Wilson early the
22 next morning. *Id.* at AC0302-07. Hatcher complains that he was not immediately sent to an
23 outside emergency room for treatment, but that is not dispositive; the record clearly
24 establishes, without dispute, that the Defendant deputies sought to provide Hatcher with
25 immediate medical treatment for his injuries, and no reasonable juror could find otherwise.
26 Consequently, Defendants' motion for summary judgment is GRANTED as to Hatcher's
27 claim based on deliberate indifference to medical needs.

28 4. Excessive Force

Hatcher also alleges that his constitutional rights were violated by Defendants' use of
excessive force. Although Hatcher's opposition brief cited cases analyzing this issue under
the Fourth Amendment, Hatcher's counsel conceded at oral argument that the Eighth

1 Amendment governs this claim. Thus, the Court’s “core judicial inquiry is . . . whether force
2 was applied in a good-faith effort to maintain or restore discipline, or maliciously and
3 sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

4 Because this is Defendants’ motion for summary judgment, all disputed facts must be
5 construed in a light most favorable to Hatcher. Under Hatcher’s version of events, Ex. 4 to
6 Libet Decl. at AC0104-07, he said to himself out loud, “That asshole could have gave us a
7 hot tray.” When Defendant Lucha heard that statement and told Hatcher not to disrespect
8 staff, Hatcher apologized. Lucha then grabbed Hatcher’s arm and told him to get on the wall,
9 and Hatcher did as directed. He subsequently complied with Lucha’s direction to put his
10 hands behind his back, at which time he was handcuffed. Hatcher complied with directions
11 and got on the ground, lying face down, at which time Lucha placed Hatcher in a choke hold
12 from behind and Galindo, who had run over from the other side of the yard, knelt on
13 Hatcher’s back and used his other knee to strike Hatcher repeatedly.⁴ Hatcher did not resist
14 the deputies but did turn around to try and get some air. He saw other deputies running to the
15 area and then saw a black boot kick him in the face, causing bleeding. He estimated that
16 fifteen to twenty deputies jumped on top of him and punched him.

17 A deputy then picked Hatcher up and sat him in the middle of the walkway between
18 housing units, where he sat dazed from being kicked in the head. He heard a deputy say
19 “shoot him,” and then he felt something, presumably a Taser, that caused him to fall to the
20 ground. A deputy snatched Hatcher by the leg, and his jail pants came off. The deputies
21 then got Hatcher back on the ground and started to punch him again, before pulling Hatcher
22 back to his feet. While Hatcher was asking why the deputies were doing this to him, he felt
23 another shot in his elbow, followed by a third shot in his hip. Hatcher was then dragged
24 along the concrete walkway and received several abrasions to his knee and legs.

25 If Hatcher was truly as obedient as he contends, then the above force would not have
26 been necessary to maintain or restore discipline, and this would have been clear to a

27 ⁴Hatcher later gave a conflicting version of events: that, after he was handcuffed,
28 Lucha placed him in a choke hold while still standing and then Lucha and Galindo took him
to the ground. This difference is not material to the outcome of this motion.

1 reasonable officer. Thus, there is a triable issue as to whether the use of force was
2 constitutional under the Eighth Amendment, and it would be improper to grant qualified
3 immunity to Defendants. Indeed, Defendants' arguments are premised on their conclusion
4 that Hatcher "violently resisted the Defendants' efforts to control him." Reply at 10.
5 However, at summary judgment, with the facts viewed in a light most favorable to Hatcher,
6 the Court cannot conclude that Hatcher "violently resisted." Nor can Hatcher's admitted use
7 of the word "asshole" justify the force that Hatcher contends was used against him, even
8 under the deferential Eighth Amendment standard. Accordingly, summary judgment as to
9 the remaining individual Defendants is DENIED as to Hatcher's excessive force claim under
10 § 1983.

11 5. Municipal and Supervisory Liability

12 Finally, Hatcher argues that he is "entitled to recover damages" under § 1983 against
13 the County of Alameda and its sheriff, Gregory J. Ahern, because he "can demonstrate by a
14 preponderance of the evidence that said defendants adhered to a policy, practice, or custom
15 that caused plaintiff to be deprived of his constitutional rights." Opp'n at 8. However, the
16 opposition asserts only in the most conclusory fashion that: "Callous and deliberate
17 disregard for plaintiff was shown by several COUNTY Santa Rita Jail employees in positions
18 superior to named defendant deputy sheriffs, who all denied his Inmate Grievances regarding
19 the sheriffs' assault and battery upon him and his resulting injuries. This is common practice
20 in Santa Rita Jail." *Id.* Nowhere does Hatcher cite to any evidence of this purported
21 "common practice." There is evidence that Hatcher filed inmate grievances that were denied,
22 but Hatcher fails to explain why this is evidence of a common practice or would otherwise be
23 sufficient to give rise to municipal liability under § 1983.⁵

24 In addition, Defendants correctly observe that, "[u]nder Section 1983, supervisory
25 officials are not liable for actions of subordinates on any theory of vicarious liability. A

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27 ⁵Nor did Hatcher include citations to this evidence in his amended opposition, despite
28 the Court's instructions to "file an amended opposition brief that includes specific citations to
the record, including exhibit and page numbers," after Hatcher's original opposition
contained no citations to the record. Feb. 24, 2011 Order at 1.

1 supervisor may be liable if there exists either (1) his or her personal involvement in the
2 constitutional deprivation, or (2) a sufficient causal connection between the supervisor's
3 wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 645-46
4 (9th Cir. 1989) (citations omitted). Hatcher has presented no evidence that Sheriff Ahern
5 was personally involved in the incident, nor has he provided evidence that the alleged
6 constitutional violation had any causal connection with any of Ahern's actions.

7 Accordingly, the Court GRANTS Defendants' motion for summary judgment as to the
8 § 1983 claims asserted against Defendants Ahern and the County of Alameda.

9
10 **CONCLUSION**

11 In sum, for the reasons discussed above, Defendants' motion for summary judgment is
12 DENIED as to the excessive force claim under 42 U.S.C. § 1983 against Defendants Lucha,
13 Russell, Galindo, Cabello, and Neill. The motion is GRANTED as to all other claims.

14 Counsel are reminded that any motion to seal any portion of the exhibits to the Libet
15 declaration pursuant to Civil Local Rule 79-5 must be filed on or before **April 11, 2011**.
16 Counsel are further reminded that General Order No. 62 governs the electronic filing of
17 documents under seal.

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19 **IT IS SO ORDERED.**

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21 Dated: 03/31/11



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23 THELTON E. HENDERSON, JUDGE
24 UNITED STATES DISTRICT COURT
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