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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 CHARLES EDWARD MOORE,

7 Plaintiff,

8 v.

9 A. BULATAO, *et al.*,

10 Defendants.
11

Case No. [13-cv-02852-JD](#)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

Re: Dkt. No. 20

12
13 Plaintiff, a state prisoner proceeding pro se, has brought a civil rights action under 42
14 U.S.C. § 1983. Defendants have filed a motion to dismiss citing failure to state a claim, failure to
15 exhaust administrative remedies and qualified immunity. Plaintiff has filed an opposition, and
16 defendants have filed a reply.

17 **I. BACKGROUND**

18 This action alleges excessive force and conspiracy against defendant California State
19 Correctional Officers Bulatao and Smethers. Plaintiff alleges the defendants were escorting him to
20 another part of the prison and “[b]efore I left the cell, I grabbed the 22 appeal form, to show it to
21 the Sgt. Both officers know I wanted to talk to the Sgt. When I tried to stop they forced me to the
22 floor. When I got up, I could not walk on my left leg. I thought it was a cramp, it hurt that bad. I
23 could not walk on it for over 10 days and it was a month before I could walk on it normally. They
24 put a bruise on my leg that was 8 1/4” by 5”.” Complaint at 3. Plaintiff also names several other
25 defendants and states they conspired to deprive him of his right to sue in federal court.

26 **II. LEGAL STANDARD**

27 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal
28 sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200

1 (9th Cir. 2003). All allegations of material fact are taken as true. *Erickson v. Pardus*, 551 U.S.
2 89, 94 (2007). However, legally conclusory statements, not supported by actual factual
3 allegations, need not be accepted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (courts are
4 not bound to accept as true “a legal conclusion couched as a factual allegation”). “A plaintiff’s
5 obligation to provide the grounds of his entitlement to relief requires more than labels and
6 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*
7 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotation marks omitted).
8 Rather, the allegations in the complaint “must be enough to raise a right to relief above the
9 speculative level.” *Id.*

10 A motion to dismiss should be granted if the complaint does not proffer enough facts to
11 state a claim for relief that is plausible on its face. *See id.* at 558-59, 574. “[W]here the well-
12 pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the
13 complaint has alleged-but it has not ‘show[n]’-‘that the pleader is entitled to relief.’” *Iqbal*, 556
14 U.S. at 679 (citation omitted).

15 The treatment a prisoner receives in prison and the conditions under which he is confined
16 are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31
17 (1993). “After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes
18 cruel and unusual punishment forbidden by the Eighth Amendment.” *Whitley v. Albers*, 475 U.S.
19 312, 319 (1986) (ellipsis in original) (internal quotation marks and citation omitted). When prison
20 officials stand accused of using excessive force in violation of the Eighth Amendment, the core
21 judicial inquiry is whether force was applied in a good-faith effort to maintain or restore
22 discipline, or maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U.S. 1, 6
23 (1992); *Whitley*, 475 U.S. at 320-21. In determining whether the use of force was for the purpose
24 of maintaining or restoring discipline, or for the malicious and sadistic purpose of causing harm, a
25 court may evaluate the need for application of force, the relationship between that need and the
26 amount of force used, the extent of any injury inflicted, the threat reasonably perceived by the
27 responsible officials, and any efforts made to temper the severity of a forceful response. *Hudson*,
28 503 U.S. at 7.

1 A civil conspiracy is a combination of two or more persons who, by some concerted
2 action, intend to accomplish some unlawful objective for the purpose of harming another, which
3 results in damage. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). To prove a
4 civil conspiracy, the plaintiff must show that the conspiring parties reached a unity of purpose or
5 common design and understanding, or a meeting of the minds, in an unlawful agreement. *Id.* To
6 be liable, each participant in the conspiracy need not know the exact details of the plan, but each
7 participant must at least share the common objective of the conspiracy. *Id.* A defendant's
8 knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and
9 from evidence of the defendant's actions. *Id.* at 856-57.

10 **III. ANALYSIS**

11 Plaintiff's conspiracy allegations are conclusory and vague. Plaintiff states several
12 defendants conspired to prevent him from suing, but he fails to adequately describe any concerted
13 action by the defendants, a meeting of the minds or even how he was prevented from suing. This
14 claim will be dismissed with leave to amend.

15 While the allegations in the complaint regarding excessive force set forth the basic
16 elements of the claim and provide some factual support, they are also quite conclusory. In the
17 opposition to the motion to dismiss plaintiff provides additional information regarding the assault.
18 He states he was handcuffed prior to the incident, was not flailing his arms, had simply tried to
19 turn to speak to a sergeant, and that defendants did not attempt to temper their response. But these
20 alleged facts are in the brief, the Court's review is limited to the contents of the complaint.
21 *Allarcom Pay Television v. Gen. Instrument Group*, 69 F.3d 381, 385 (9th Cir. 1995). The
22 excessive force claim will also be dismissed with leave to amend. In an amended complaint
23 plaintiff should provide additional information regarding the incident similar to what he conveyed
24 in the opposition brief.

25 **Exhaustion and Qualified Immunity**

26 Defendants also assert that plaintiff failed to administratively exhaust the claims and that
27 they are entitled to qualified immunity. After defendants filed the motion to dismiss, the Ninth
28 Circuit held in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), that a motion for summary

1 judgment is the appropriate procedural device for pretrial determination of whether administrative
2 remedies have been exhausted. *Id.* at 1168-69. In their reply, defendants acknowledge the change
3 in law but note that *Albino* provided that if exhaustion deficiencies are plain on the face of the
4 complaint, a Rule 12 motion is still appropriate. *Id.* at 1169. The Ninth Circuit also stated that
5 such cases will be rare. *Id.* In the complaint, plaintiff cited to various administrative appeals that
6 he filed on the first, second and third levels; thus a motion to dismiss is not the appropriate time to
7 address the exhaustion argument. The exhaustion argument may be brought at the summary
8 judgment stage.


9 The Court will defer ruling on the qualified immunity argument because the excessive
10 force and conspiracy claims are being dismissed with leave to amend.

11 **IV. CONCLUSION**

12 The motion to dismiss (Docket No. 20) is **GRANTED**, and the complaint is dismissed
13 with leave to amend. The amended complaint must be filed within **twenty-eight (28) days** of the
14 date this order is filed and must include the caption and civil case number used in this order and
15 the words AMENDED COMPLAINT on the first page. Because an amended complaint
16 completely replaces the original complaint, plaintiff must include in it all the claims he wishes to
17 present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate
18 material from the original complaint by reference. Failure to amend within the designated time
19 will result in the dismissal of this action.

20 **IT IS SO ORDERED.**

21 Dated: July 9, 2014

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24 JAMES DONATO
25 United States District Judge