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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOHN B. KENNEY,  
12 Plaintiff,  
13 v.  
14 KASEYLEE LAWRENCE; and  
15 MATTHEW KOERBER,  
16 Defendants.

Case No.: 13cv248-WQH-AGS

**ORDER**

17 HAYES, Judge:

18 The matters before the Court are the motion for summary judgment filed by  
19 Defendants Lawrence and Koerber (ECF No. 617), four motions for summary judgment  
20 filed by Plaintiff Kenney (ECF Nos. 618, 619, 620, 621), and two motions for  
21 reconsideration filed by Plaintiff Kenney (ECF No. 624, 626).

22 **I. PROCEDURAL BACKGROUND**

23 On October 21, 2013, Plaintiff John B. Kenney initiated this action by filing a First  
24 Amended Complaint alleging that he was subjected to the deprivation of his rights under  
25 federal and state law as a result of his involvement with the Occupy San Diego protests in  
26 late 2011 and early 2012. (ECF No. 21). The Complaint alleged facts describing five  
27 incidents involving the San Diego Police Department (“SDPD”), three named San Diego  
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1 Police Officers, and Doe San Diego Officers 1-200. The remaining claims in this action  
2 are as follows: 1) a claim pursuant to 42 U.S.C. § 1983 for excessive force and a violation  
3 of the First Amendment against Defendant Koerber with respect to October 14, 2011 and  
4 2) a claim pursuant to 42 U.S.C. § 1983 for violations of the First Amendment and Fourth  
5 Amendment against Defendant Lawrence with respect to January 31, 2012. All other  
6 claims and Defendants have been dismissed or granted summary judgment. (ECF No.  
7 499).

8 On February 22, 2018, Defendants Koerber and Lawrence filed a motion for full or  
9 partial summary judgment after seeking leave of the Court. (ECF No. 617).

10 On February 26, 2018, Plaintiff filed four motions for summary judgment without  
11 seeking leave of Court. (ECF Nos. 618, 619, 620, 621). On February 28, 2018, the Court  
12 issued an order stating that it would not require any response to these motions from  
13 Defendants. (ECF No. 623).

14 On March 1, 2018, Plaintiff filed a motion for reconsideration of a previous order  
15 granting Defendants leave to file the additional motion for summary judgment. Plaintiff  
16 requests that the Court allow him additional time to file an opposition to Defendants'  
17 motion because his work was delayed by various computer issues. (ECF No. 624).

18 On March 4, 2018, Plaintiff filed a second motion for reconsideration and a  
19 "preliminary" opposition to the motion for summary judgment filed by Defendants. (ECF  
20 No. 626).

21 On March 5, 2019, Defendants filed a response in opposition to Plaintiff's request  
22 for a continuance of the briefing schedule on their pending motion for summary judgment.  
23 (ECF No. 627).

## 24 **II. FACTUAL BACKGROUND**

25 On October 14, 2011, the SDPD was conducting an enforcement action to clear the  
26 Civic Plaza of personal property believed to be in violation of the encroachment ordinance  
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1 of the City. Protestors, including Plaintiff, had formed “human chains” by linking arms  
2 and surrounding the tents and other equipment to prevent officers from removing them. In  
3 an effort to move Plaintiff out of the way, Defendant Koerber tried to pry Plaintiff’s arm  
4 free, used a pressure point tactic and head control takedown, and issued an oleoresin  
5 capsicum (“OC”) spray in Plaintiff’s direction.

6 On January 31, 2012, two SDPD police officers informed Defendant Lawrence that  
7 a bag had been left alone in the Civic Center Plaza and appeared to be abandoned. After  
8 walking over to the area and observing that no one was standing near the bag, Defendant  
9 Lawrence directed the police officers to impound the bag. Plaintiff subsequently stated  
10 that it was his bag.

### 11 **III. LEGAL STANDARD**

12 “A party may move for summary judgment, identifying each claim or defense—or  
13 the part of each claim or defense—on which summary judgment is sought. The court shall  
14 grant summary judgment if the movant shows that there is no genuine dispute as to any  
15 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
16 56(a). A material fact is one that is relevant to an element of a claim or defense and whose  
17 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*  
18 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The materiality of a fact is determined  
19 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby,*  
20 *Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

21 The moving party has the initial burden of demonstrating that summary judgment is  
22 proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then shifts  
23 to the opposing party to provide admissible evidence beyond the pleadings to show that  
24 summary judgment is not appropriate. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S.  
25 at 322, 324. The opposing party’s evidence is to be believed, and all justifiable inferences  
26 are to be drawn in her favor. *See Anderson*, 477 U.S. at 255. To avoid summary judgment,  
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1 the opposing party cannot rest solely on conclusory allegations of fact or law. *See Berg v.*  
2 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, the nonmovant must designate  
3 which specific facts show that there is a genuine issue for trial. *See Anderson*, 477 U.S. at  
4 256.

5 **IV. MOTIONS FOR SUMMARY JUDGMENT BY PLAINTIFF (ECF No. 618,**  
6 **619, 620, 621).**

7 Plaintiff moves for summary judgment against Defendants Armentano (ECF No.  
8 618), the City of San Diego and the SDPD (ECF No. 621), Eraca (ECF No. 619), and  
9 Lawrence (ECF No. 620) regarding the “1/31/12 Unlawful Search & Seizure (sic)  
10 incident.”<sup>1</sup> Defendants Armentano, the City of San Diego, the SDPD, and Eraca have been  
11 dismissed from this action. Accordingly, the motions for summary judgment as to those  
12 claims and parties that have been dismissed from this action are denied. (ECF Nos. 618,  
13 619, 621).

14 Further, the Court has concluded that disputed issues of fact exist in relation to the  
15 First Amendment and Fourth Amendment claim against Defendant Lawrence arising from  
16 incidents on January 31, 2012. *See* ECF No. 385 at 14–15. Plaintiff has failed to satisfy  
17 his burden with respect to Defendant Lawrence to demonstrate that there is “no genuine  
18 dispute as to any material fact and [that Plaintiff] is entitled to judgment as a matter of  
19 law.” Fed. R. Civ. P. 56(a).

20 The motions for summary judgment filed by Plaintiff are denied. (ECF No. 618,  
21 619, 620, 621).

22 **V. MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS**  
23 **LAWRENCE AND KOERBER (ECF No. 617)**

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26 <sup>1</sup> While each of the four motions are aimed at different Defendants, the motions are identical in relevant  
27 part.

1 Defendants Lawrence and Koerber seek summary judgment in their favor on  
2 qualified immunity grounds. (ECF No. 617-1 at 5). Defendants contend that with respect  
3 to Defendant Koerber’s “use of a pain pressure point, takedown, and deployment of O.C.  
4 spray to prevent Plaintiff from re-joining the human chain,” Plaintiff has failed to show  
5 that Defendant Koerber violated a statutory or constitutional right which was clearly  
6 established at the time of the challenged conduct. *Id.* at 13. Defendants contend that  
7 Defendant Koerber is entitled to summary judgment on the First Amendment claim  
8 because Plaintiff has failed to provide any evidence that Koerber intended to inhibit  
9 Plaintiff’s speech. *Id.* at 17. With respect to Defendant Lawrence, Defendants contend  
10 that there was no clearly established law with respect to the length of time property must  
11 be unattended before an officer can make a determination that it is abandoned and  
12 authorized it to be impounded. *Id.* Further, Defendants contend that Plaintiff has failed to  
13 provide any evidence that Defendant Lawrence intended to inhibit Plaintiff’s speech. *Id.*  
14 at 18.

15 Plaintiff asserts that his personal papers and property were never abandoned and  
16 contends that Defendant Lawrence inhibited his constitutional rights in impounding his  
17 property. Plaintiff contends that disputed issues of material fact exist with respect to the  
18 use of force by Defendant Koerber. (ECF No. 656).

19 The Court concludes that Defendants have not satisfied their burden on summary  
20 judgment to demonstrate that “there is no genuine dispute as to any material fact and [that  
21 they are] entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The motion for  
22 summary judgment filed by Defendants Koerber and Lawrence is denied. (ECF No. 617).

## 23 **VI. MOTIONS FOR RECONSIDERATION (ECF No. 624, 626)**

24 The first motion for reconsideration filed by Plaintiff requests that the Court grant  
25 him additional time to respond to the motion for summary judgment filed by Defendants  
26 Lawrence and Koerber. (ECF No. 624). Plaintiff reiterates this request in a second motion  
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1 for reconsideration and “preliminary” response in opposition to the motion for summary  
2 judgment filed by Defendants Lawrence and Koerber. (ECF No. 626). The Court has  
3 denied the motion for summary judgment filed by Defendants Lawrence and Koerber.  
4 Plaintiff’s motions for reconsideration are denied as moot. (ECF No. 624, 626).

5 **VII. CONCLUSION**

6 IT IS HEREBY ORDERED that the motion for summary judgment filed by  
7 Defendants Koerber and Lawrence is DENIED. (ECF No. 617).

8 IT IS FURTHER ORDERED that the motions for summary judgment filed by  
9 Plaintiff are DENIED. (ECF No. 618, 619, 620, 621).

10 IT IS FURTHER ORDERED that the motions for reconsideration filed by Plaintiff  
11 are DENIED. (ECF No. 624, 626).

12 Dated: March 6, 2018

  
13 Hon. William Q. Hayes  
14 United States District Court