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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHAEL LEE RHUDY,
12 Plaintiff,
13 v.
14 RAUL MELENDEZ, Correctional
15 Officer, IMPERIAL COUNTY JAIL,
16 Defendants.

Case No.: 16CV3026 JAH (BGS)

**REPORT AND
RECOMMENDATION TO:
(1) GRANT DEFENDANTS'
MOTION TO DISMISS and
(2) GRANT PLAINTIFF LEAVE TO
FILE AN AMENDED COMPLAINT**

[ECF 12]

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20 Plaintiff Michael Lee Rhudy, a prisoner proceeding *pro se* has filed a Complaint,
21 brought under 42 U.S.C. § 1983, alleging a violation of the Eighth Amendment based on
22 being fed a “brick” diet while in custody. (Compl. at 3.) Defendants Correctional
23 Officer Raul Melendez (“Melendez”) and Imperial County Jail (collectively
24 “Defendants”) have filed a Motion to Dismiss Plaintiff’s Complaint. (Mot. to Dismiss
25 (“Mot.”) [ECF 12].) Defendants argue the Complaint should be dismissed for a variety
26 of reasons addressed below. (Mot. at 4-9.) Plaintiff has filed an Opposition to the
27 Motion. (Pl.’s Mot. to Go Forward with Civil Rights Lawsuit (“Opp’n”) [ECF No. 15].)
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1 Defendants have filed a Reply. (ECF No. 16.) The Motion has been referred to the
2 undersigned Magistrate Judge for a Report and Recommendation. For the reasons set
3 forth below, the Court **RECOMMENDS** that Defendants’ Motion to Dismiss be
4 **GRANTED** and Plaintiff be **GRANTED** leave to file an Amended Complaint.

5 **BACKGROUND¹**

6 Plaintiff alleges that while he was in administrative segregation, he “went to a
7 hearing for being out of [his] cell, [he] refused, and asked to go back to [his] cell.
8 (Compl. at 3.) On the way back to his cell, Plaintiff alleges Melendez said Plaintiff was
9 going to have a “real bad week.” (*Id.*) The next morning, Plaintiff alleges he was served
10 “the brick diet” for 9 days.” Melendez then allegedly “came by [Plaintiff’s] cell, . . .
11 asked [him] how he was doing, smiled at [him], and said only 8 more days to go.” (*Id.*)
12 Plaintiff alleges he lost twelve pounds in the nine days he was receiving the “brick” twice
13 a day without lunch. (*Id.*) Plaintiff additionally alleges Melendez “went out of his way
14 to make by life real bad while [he] was in the Imperial County Jail.” (*Id.*)

15 **DISCUSSION**

16 **I. Motion to Dismiss**

17 **A. Standard for Motion to Dismiss under Rule 12(b)(6)**

18 Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).
19 “A dismissal under [R]ule 12(b)(6) ‘may be based on either a lack of a cognizable legal
20 theory or the absence of sufficient facts alleged under a cognizable legal theory.’” *Kwan*
21 *v. SanMedica Int’l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (quoting *Johnson v. Riverside*
22 *Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008)).

23 Under Rule 8(a)(2), the complaint need only provide a “short and plain statement
24 of the claim showing that [the plaintiff] is entitled to relief.” Although “the statement
25 need only give the defendant[s] fair notice of what ... the claim is and the grounds upon
26

27 ¹ The following summary is drawn from the allegations stated in Plaintiff’s Complaint
28 and is not to be construed as findings of fact by the Court.

1 which it rests,” it “must, at a minimum, plead ‘enough facts to state a claim to relief that
2 is plausible on its face.’” *Johnson*, 534 F.3d at 1122 (quoting *Erickson v. Pardus*, 551
3 U.S. 89, 127 (2007) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). “A claim
4 has facial plausibility when the plaintiff pleads factual content that allows the court to
5 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
6 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

7 The Court must view the factual allegations of the complaint “in the light most
8 favorable to [the plaintiff], accepting all well-pleaded factual allegations as true, as well
9 as any reasonable inferences drawn from them.” *Johnson*, 534 F.3d at 1123 (citing
10 *Broam v Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). Additionally, because Plaintiff “is
11 an inmate . . . proceed[ing] pro se, his complaint ‘must be held to less stringent standards
12 than formal pleadings drafted by lawyers.’” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.
13 2010) (explaining that courts should “continue to construe *pro se* filings liberally when
14 evaluating them under *Iqbal*.”). Particularly in civil rights case, the court must “construe
15 the pleadings liberally and . . . afford the petitioner the benefit of any doubt.” *Id.* (citing
16 *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). “However, a liberal
17 interpretation of a *pro se* civil rights complaint may not supply essential elements of the
18 claim that were not initially pled. Vague and conclusory allegations of official
19 participation in civil rights violations are not sufficient to withstand a motion to dismiss.”
20 *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014) (citing *Pena v Gardner*, 976 F.2d
21 469, 471 (9th Cir 1992)).

22 The Court’s review on a motion to dismiss under Rule 12(b)(6) is generally limited
23 to the allegations of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th
24 Cir. 2001) (citing *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993)).
25 “[A] court *may not* look beyond the complaint to a plaintiff’s moving papers, such as a
26 memorandum in opposition to a defendant’s motion to dismiss.” *Schneider v. Cal. Dep’t*
27 *of Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original) (citing *Harrell*
28 *v. United States*, 13 F.3d 232, 236 (7th Cir. 1993)). “Facts raised for the first time in

1 plaintiff's opposition papers should be considered by the court in determining whether to
2 grant leave to amend or to dismiss the complaint with or without prejudice." *Broom*, 320
3 F.3d at 1026 n.2 (citing *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d
4 1133, 1137-38 (9th Cir. 2001)). Here, Plaintiff has asserted additional allegations in his
5 Opposition to the Motion to Dismiss. (Opp'n at 1-2.) The Court has not considered
6 those allegations in evaluating the sufficiency of the Complaint under Rule 12(b)(6), but
7 does consider them for purposes of leave to amend.

8 **B. 42 U.S.C § 1983**

9 "To state a claim under § 1983, a plaintiff [1] must allege the violation of a right
10 secured by the Constitution and laws of the United States, and [2] must show that the
11 alleged deprivation was committed by a person acting under color of state law." *Naffe v.*
12 *Frey*, 789 F.3d 1030, 1035-36 (9th Cir. 2015) (quoting *West v. Atkins*, 487 U.S. 42, 48
13 (1988)). Dismissal pursuant to Rule 12(b)(6) "is proper if the complaint is devoid of
14 factual allegations that give rise to a plausible inference of either element." *Id.* at 1036
15 (citing *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000), *Price v. Hawaii*,
16 939 F.2d 702, 707-09 (9th Cir. 1991), and *Iqbal*, 556 U.S. at 678). Here, Plaintiff claims
17 that Defendants violated the Eighth Amendment by putting Plaintiff on a "brick diet" for
18 9 days.

19 "The Eighth Amendment's prohibition against cruel and unusual punishment
20 imposes duties on prison officials to 'provide humane conditions of confinement.'" *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (quoting *Farmer v. Brennan*, 511
21 U.S. 825, 832 (1994)). "Prison officials must ensure that inmates receive adequate food,
22 clothing, shelter, and medical care." *Id.* (quoting *Farmer*, 511 U.S. at 832).

24 An Eighth Amendment claim based on conditions of confinement, like that
25 asserted here, "requires a two-part showing." *Id.*; see also *Farmer*, 511 U.S. at 832- 35
26 (discussing conditions of confinement and two requirements for an Eighth Amendment
27 claim). "First, the deprivation alleged must be, objectively, sufficiently serious; a prison
28 official's act or omission must result in the denial of 'the minimal civilized measure of

1 life's necessities." *Farmer*, 511 U.S. at 834. Second, "[t]he inmate must then make a
2 subjective showing that the deprivation occurred with deliberate indifference to the
3 inmate's health or safety." *Foster*, 554 F3d at 812 (citing *Farmer*, 511 U.S. at 834).

4 **1. Objective Prong**

5 Denial of food can be a sufficiently serious deprivation because food is one of
6 life's basic necessities." *Id.* at 812-13 (citing *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th
7 Cir. 1996)). "[S]ustained deprivation of food can be cruel and unusual punishment when
8 it results in pain without any penological purpose." *Id.* at 814 (citing *Phelps v. Kapnolas*,
9 308 F.3d 180, 187 (2nd Cir. 2002)). However, the Eighth Amendment requires only that
10 prisoners receive food that is adequate to maintain health; it need not be tasty or
11 aesthetically pleasing." *LeMaire v. Maass*, 12 F3d 1444, 1456 (9th Cir. 1993) (citing
12 *Cunningham v. Jones*, 567 F.2d 653, 659-60 (6th Cir. 1977)). "The fact that food
13 occasionally contains foreign objects or sometimes is served cold, while unpleasant, does
14 not amount to a constitutional deprivation." *Id.* (quoting *Hamm v. DeKalb Cnty.*, 774
15 F.2d 1567, 1575 (11th Cir. 1985)).

16 The Complaint does not allege Plaintiff was denied food entirely, but rather he was
17 fed a "brick diet" twice a day for 9 days. (Compl. at 3.) Defendants assert that California
18 law authorizes providing prisoners a "Disciplinary Isolation Diet," a loaf, served only two
19 times per day as a substitute for the standard three meals per day. (Mot. at 3 (citing Cal.
20 Code Regs. tit. 15, § 1247).²) Defendants also argue the Complaint is insufficient
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23 ² The Court grants Defendants Request for Judicial Notice of California Code of
24 Regulations, title 15, section 1247, but only for the proposition that the California Code
25 of Regulations authorizes a disciplinary diet, a "Disciplinary Separation Diet," that is
26 provided two times a day as a substitute for three meals per day. At this stage in the
27 proceedings, whether the diet described in the regulations was actually provided to
28 Plaintiff or the nutritional makeup of the diet he was served is not before the Court
because it was not pled in the Complaint. However, the regulations specify exactly what
the "disciplinary diet loaf" must consist of and how it must be served. Cal. Code Regs.
tit. 15, § 1247(a) ("Such diet shall be served twice in each 24 hour period and shall

1 because it does not “allege that the diet was nutritionally inadequate, or posed a health
2 risk, or that he suffered any physical harm from it.” (Mot. at 8.) However, Plaintiff does
3 allege he lost 12 pounds during the nine-day period he was on the diet. (Compl. at 3.)

4 One of the challenges with Plaintiff’s Complaint is that it is unclear whether
5 Plaintiff is alleging that he suffered a serious deprivation because he received only two
6 meals as opposed to three or that the two meals he was provided were themselves
7 somehow lacking.³ The allegations of “no food for 9 days the worst of my life,” in
8 conjunction with the allegation he was served the “brick twice a day for 9 days” suggests
9 to the Court that he may have chosen not to consume the food provided because there
10 was something wrong with it. But for purposes of the objective analysis, it matters what
11 was wrong with it. In *LeMaire v. Maass*, the Ninth Circuit explained that food served to
12 prisoners “need not be tasty or aesthetically pleasing;” it need only be “adequate to
13 maintain health.” 12 F.3d at 1456 (finding objective component was not satisfied). If
14 Plaintiff chose not to consume a nutritionally adequate diet because it was not
15 aesthetically pleasing, then that is not a serious deprivation, at least not when provided
16 for this short period of time. However, if the diet was nutritionally insufficient or in
17 some other way inadequate to maintain health, then Plaintiff may have suffered a serious
18 deprivation.

19 While Plaintiff does allege weight loss during the nine days he was on the diet, the
20 Court cannot infer solely from that allegation, particularly without any allegations as to
21 the food or whether Plaintiff consumed it, that Plaintiff suffered a serious deprivation.
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24 consist of one-half of the loaf (or a minimum of 19 oz. cooked loaf) described below or
25 other equally nutritious diet, along with two slices of whole wheat bread and at least one
26 quart of drinking water if the cell does not have a water supply”); *see also* Cal. Code
27 Regs. tit. 15, § 1247(b) (recipe for the disciplinary diet loaf).

28 ³ As discussed below, Plaintiff sets forth new allegations in his Opposition, including that
he could not keep the food down. This might suggest it was not provision of two meals,
rather than three, that resulted in his weight loss.

1 The Court is not requiring Plaintiff to allege the particular nutritional makeup of the diet,
2 but he needs to at least allege whether he ate the food provided or if he did not, why he
3 did not.

4 **2. Subjective Prong**

5 “To establish a prison official’s deliberate indifference, an inmate must show that
6 the official was aware of the risk to the inmate’s health or safety and that the official
7 deliberately disregarded the risk.” *Foster*, 554 F.3d at 814 (citing *Johnson v. Lewis*, 217
8 F.3d 726, 734 (9th Cir. 2000)). Deliberate indifference is itself a two-part inquiry.
9 *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). “First, the inmate must show
10 that the prison officials were aware of a ‘substantial risk of serious harm’ to an inmate’s
11 health or safety.” *Id.* (quoting *Farmer*, 511 U.S. at 837). “Second, the inmate must show
12 that the prison officials had no ‘reasonable’ justification for the deprivation, in spite of
13 that risk.” *Id.* (citing *Farmer*, 511 U.S. at 844). Plaintiff’s Complaint satisfies neither
14 part of the two-part inquiry under the subjective analysis.

15 As to the first part of the inquiry, there are no facts alleged that would suggest
16 prison officials were aware of a substantial risk of harm to Plaintiff. Plaintiff alleges
17 Melendez asked him after he had been on the diet one day “how [he] was doing, smiled at
18 [him], and said only eight more days to go.” (Compt. at 3.) This suggests Melendez
19 knew Plaintiff was on the special diet and would be for the next eight days, but there is
20 no indication he was aware of a substantial risk to Plaintiff in being on the diet. The
21 Complaint also alleges Plaintiff was told by someone that only Melendez could take him
22 off the diet and Melendez told him to “deal with it.” (Compl. at 6.) The Court can infer
23 from this that Plaintiff complained to Melendez and someone else about being on this
24 diet. However, there are no allegations in the Complaint indicating what he told prison
25 staff or Melendez that would have made them aware he was at substantial risk harm. The
26 Court cannot infer Plaintiff told them something that created awareness. Additionally,
27 Plaintiff has not alleged “very obvious and blatant circumstances indicating that the
28 prison official knew the risk existed.” *Foster*, 554 F.3d at 814 (finding complete denial

1 of meals, sometimes two per day, over 23 days was sufficiently obvious). The only
2 possible indicator that Plaintiff was suffering any harm is the allegation that he lost
3 weight, but there are no allegations that would suggest anyone other than Plaintiff would
4 have been aware of that loss. Additionally, given a disciplinary diet provided only two
5 times a day is recognized and even specified for inmates under certain circumstances, the
6 provision of a twice-a-day diet alone would not have alerted Defendants to a substantial
7 risk of serious harm to Plaintiff's health or safety when provided for such a short period
8 of time. Plaintiff would need to allege something that would have alerted Melendez that
9 Plaintiff was facing some substantial risk in being placed on or continuing on this diet.

10 As to the second part of the inquiry, "no 'reasonable' justification for the
11 deprivation, in spite of that risk," *Thomas*, 611 F.3d at 1150, the only allegations giving
12 any indication why Plaintiff was placed on this diet do not suggest there was no
13 reasonable justification for the diet. They actually suggest the opposite. The Complaint
14 indicates that Plaintiff refused to participate in a hearing for a violation (being out of his
15 cell) and he was then put on this diet. (Compl. at 3.) Plaintiff also alleges that Melendez
16 made the comment that Plaintiff was going to have a real bad week right after Plaintiff's
17 refusal to participate in the hearing. (*Id.*) These allegations might suggest Plaintiff was
18 put on the diet for disciplinary reasons which could be a reasonable justification for the
19 diet. And, although Melendez's taunting comment may be unprofessional, it alone does
20 not suggest he "deliberately disregarded the risk," assuming there was one.

21 The allegations of the Complaint do not state a sufficiently serious deprivation that
22 Defendants were aware of and disregarded without any reasonable justification.

23 **C. Fair Notice of Basis for Claims**

24 Defendants additionally assert that Plaintiff's Complaint is deficient for failing to
25 allege the dates when Plaintiff was allegedly placed on the special diet. (Mot. at 5-6.)
26 They explain that it is impossible for Defendants to assess whether Plaintiff exhausted his
27 administrative remedies or if Plaintiff's claims may be barred by a statute of limitations
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1 without knowing when the conduct alleged occurred.⁴ (*Id.*) Plaintiff is not required to
2 plead around anticipated affirmative defenses. *U.S. v. McGee*, 993 F.2d 184, 187 (9th
3 Cir. 1993); *see also Abbas v. Dixon*, 480 F.3d 636, 640 (2nd Cir. 2007); *Xechem, Inc. v.*
4 *Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004). However, allegations in a
5 complaint “must contain sufficient allegations of underlying facts to give fair notice and
6 to enable the opposing party to defend itself effectively.” *Star v. Baca*, 652 F.3d 1202,
7 1216 (9th Cir. 2011). Plaintiff has not even alleged the year in which this happened.
8 Defendants are entitled to know when the events described occurred to effectively defend
9 themselves against Plaintiff’s claim. Plaintiff must allege the dates when the events
10 allegedly occurred.⁵

11 **D. Exhaustion of Administrative Remedies**

12 Defendants argue Plaintiff failed to exhaust his administrative remedies pursuant
13 to 42 U.S.C. § 1997e(a), the Prison Litigation Reform Act (“PLRA”), as to the claim he
14 asserts in this case. (Mot. at 4-5.) However, “[f]ailure to exhaust under the PLRA is ‘an
15 affirmative defense the defendant must plead and prove.’” *Albino v. Baca*, 747 F.3d
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20 ⁴ Defendants also argue Plaintiff’s claim “[m]ay be barred by the statute of limitations.”
21 (Mot. at 6 (emphasis added).) However, “[a] claim may be dismissed under Rule
22 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when
23 ‘the running of the statute is apparent on the face of the complaint.’” *Von Saher v.*
24 *Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting
25 *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). That is not the
26 case here because there are not dates to disclose it on the face of the Complaint.

27 ⁵ As explained below in considering leave to amend, Plaintiff includes new allegations in
28 his Opposition. As Defendants accurately point out in their Reply, one of those
allegations suggests that Plaintiff may not have been on the diet for 9 days, but rather was
on it, taken off it at the demand of a trial judge, and then put back on it. Given this
apparent inconsistency with the existing allegations, dates when the events alleged
occurred are particularly important.

1 1162, 1166 (9th Cir. 2014) (en banc) (quoting *Jones v. Block*, 549 U.S. 199, 204 (2007)).⁶
2 It should normally be raised through a summary judgment motion under Rule 56. *Id.* “In
3 the rare event that a failure to exhaust is clear on the face of the complaint, a defendant
4 may move for dismissal under Rule 12(b)(6).” *Id.*

5 Here, Plaintiff’s Complaint checks off a box for “No” in response to the question,
6 “have you previously sought and exhausted all forms of available relief from the proper
7 administrative officials regarding the acts alleged in Part C above?” (Compl. at 6.)
8 However, the Complaint goes on to explain, in response to the same question just below
9 this box, that when Plaintiff tried to exhaust his claim, he was told there was nothing
10 anybody could do, that Melendez had placed Plaintiff on the diet, and that he was the
11 only one that could take him off of it. (*Id.*) Plaintiff additionally alleges when he tried to
12 reach out to Melendez he responded “deal with it.” (*Id.*)

13 “[T]he PLRA requires only that a prisoner exhaust available administrative
14 remedies, and that a failure to exhaust a remedy that is effectively unavailable does not
15 bar a claim from being hearing in federal court.” *McBride v. Lopez*, 807 F.3d 982, 986
16 (9th Cir. 2015). Administrative remedies have been found effectively unavailable based
17 on the mistake of a Warden, improper screening of a grievance, where a jail did not
18 inform a prisoner of the process to file a complaint even after repeated requests, and
19 based on a threat of retaliation for reporting an incident. *Id.* at 986-87 (summarizing
20 cases).

21 Although it is not entirely clear under the precedent set forth above that Plaintiff’s
22 current allegations would render administrative remedies effectively unavailable, this is
23 not one of the rare instances when failure to exhaust is clear on the face of the Complaint.
24 Defendants are not entitled to dismissal under Rule 12(b)(6) based on failure to exhaust
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27 ⁶ *Albino v. Baca* was a significant change in the law in this Circuit. The en banc court
28 rejected the “unenumerated 12(b) motion” previously used to raise exhaustion, describing
it as “an ‘unenumerated’ (that is, non-existent) rule.” 747 F.3d at 1166.

1 administrative remedies. However, the Court recommends that denial be without
2 prejudice to raising the issue in a motion for summary judgment under Rule 56.

3 **E. Qualified Immunity**

4 Defendants argue they are entitled to qualified immunity because the Disciplinary
5 Separation Diet Plaintiff was served was authorized under California Code of
6 Regulations, Title 15 section 1247 and Plaintiff's allegations are consistent with such a
7 diet. (Mot. at 9.) However, as explained above, while the Court can take judicial notice
8 of the existence of that regulation, the Court cannot find the food Plaintiff was actually
9 served conformed to this regulation at this stage of the case. The substance of the food
10 actually served is currently beyond the four corners of the complaint. *Lee*, 250 F.3d at
11 688 (finding court's review on a motion to dismiss under Rule 12(b)(6) is limited to the
12 allegations of the complaint); *see also Foster*, 554 F.3d at 813 n.2 (presuming the
13 prisoner's single meals were inadequate on summary judgment when the nutritional
14 values of the meals was not in the record). Defendants are not entitled to qualified
15 immunity at this stage on this basis, however, that does not preclude Defendants from
16 raising it in response to an amended pleading or on summary judgment.

17 **F. Conclusion**

18 The Court finds Plaintiff's Complaint fails to state a claim under § 1983. As pled,
19 Plaintiff has not alleged facts from which the Court can infer he suffered a serious
20 deprivation or that Defendants were aware of a substantial risk of harm to Plaintiff.
21 Additionally, Plaintiff has failed to identify when the events described in the Complaint
22 occurred specifically enough for Defendants to effectively defend themselves.

23 **II. Leave to Amend**

24 Under Federal Rule of Civil Procedure 15(a)(2), leave to amend shall be freely
25 given when justice so requires. "In deciding whether justice requires granting leave to
26 amend, factors to be considered include the presence or absence of undue delay, bad
27 faith, dilatory motive, repeated failure to cure deficiencies by previous amendments,
28 undue prejudice to the opposing party and futility of the proposed amendment." *Moore v.*

1 *Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v.*
2 *Davis*, 371 U.S. 178, 182 (1962) and *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186
3 (9th Cir. 1987)).

4 Here, there has been no undue delay, bad faith, or dilatory motive. It does not
5 appear there would be any undue prejudice to any defendants. And, there have been no
6 repeated failures to cure deficiencies by previous amendments. This would be Plaintiff's
7 first attempt to amend his Complaint. The only basis for denying leave to amend would
8 be the futility of amendment.

9 Plaintiff asserts new allegations in his Opposition to the Motion to Dismiss. He
10 claims that he tried to eat the food, but "could not keep it down. I would throw it back
11 up." (Opp'n at 1.) He also alleges that he could not sleep and his condition "got so bad
12 Judge Raymond [illegible] my trial. Judge called the jail. They put me back on normal
13 food and as soon as my trial was done, I went right back on the brick diet." (*Id.*) Plaintiff
14 also alleges his food "was not even cooked" and "served raw." (*Id.* at 2.)

15 As noted above, to the extent Plaintiff is only alleging he was placed on a
16 disciplinary diet that he did not like by a rude correctional officer, he is not likely to
17 succeed in amending. Additionally, the Court cannot say that the addition of only the
18 allegations set forth in Plaintiff's Opposition would save Plaintiff's claim, particularly as
19 to the subjective prong of the § 1983 analysis. However, Plaintiff has not had any
20 opportunity to address any deficiencies identified by the Court. Given all the other
21 factors weigh in favor of amendment and it is not clear that amendment would be futile,
22 the Court **RECOMMENDS** Plaintiff be given leave to file an amended complaint.

23 **CONCLUSION**

24 The Court submits this Report and Recommendation to United States District
25 Judge John A. Houston. For the reasons outlined above, **IT IS RECOMMENDED** that
26 the Court **GRANT** Defendants' Motion to Dismiss and **GRANT** Plaintiff leave to file an
27 amended complaint.

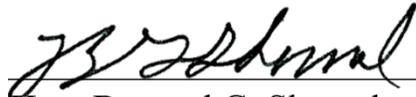
28 **IT IS HEREBY ORDERED** that any party to this action may file written

1 objections with the Court and serve a copy on all parties **no later than February 27,**
2 **2018.** The document should be captioned “Objections to Report and Recommendation.”

3 **IT IS FURTHER ORDERED** that any Reply to the Objections shall be filed with
4 the Court and served on all parties **no later than March 6, 2018.** The parties are advised
5 that failure to file objections within the specified time may waive the right to
6 raise those objections on appeal of the Court’s Order. *See Turner v. Duncan*, 158 F.3d
7 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

8 **IT IS SO ORDERED.**

9 Dated: February 8, 2018

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11 Hon. Bernard G. Skomal
12 United States Magistrate Judge
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