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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID WILSON,

Plaintiff,

v.

GARDINER, et al.,

Defendants.

Case No.: 17cv469-JLS-MDD

**REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE
RE: DEFENDANTS' MOTION TO
DISMISS**

[ECF No. 7]

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** that Defendants' Partial Motion to Dismiss be **GRANTED IN PART AND DENIED IN PART**.

I. PROCEDURAL HISTORY

Plaintiff David Wilson ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis*. (ECF Nos. 1, 3). On March 6, 2017, Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). The Complaint sets

1 forth various claims against six individuals working at the San Diego Central
2 Jail Facility (“Central Jail”) alleging that they violated his civil rights by: (1)
3 retaliating against him in violation of the First and Eighth Amendment; (2)
4 imposing cruel and unusual punishment against him in violation of the
5 Eighth Amendment; (3) failing to provide Plaintiff his due process rights in
6 violation of the Fourteenth Amendment; (4) intentionally inflicting emotional
7 distress on him; and (5) negligently disregarding their duty owed to Plaintiff.
8 (*See Id.*).

9 On August 21, 2017, Defendants Gardiner and Poirier filed a Motion to
10 Dismiss the Complaint. (ECF No. 7). Defendants contend that: (1) Plaintiff’s
11 state tort claims must be dismissed because Plaintiff failed to submit a
12 California Government Code damage claim before bringing his lawsuit; (2)
13 Plaintiff’s claims against Defendant Poirier must be dismissed because she
14 had no personal involvement in any alleged violation; (3) Plaintiff’s First
15 Amendment claim must be dismissed because “the complaint does not allege
16 any facts showing that [P]laintiff was engaged in a protected activity[;]” (4)
17 Plaintiff’s Fourteenth Amendment claim is precluded because it should have
18 been brought under the Fourth Amendment; (5) Plaintiff’s Eighth
19 Amendment claim must be dismissed because Plaintiff did not allege that
20 Defendants use of force was objectively unreasonable; and (6) the entire
21 Complaint fails because Plaintiff did not first exhaust his administrative
22 remedies, which is clear on the face of the Complaint. (ECF No. 7-1).

23 Plaintiff opposes the Motion to Dismiss on the grounds that: (1) he did
24 file a claim with the Government Claims Board on September 3, 2016; (2)
25 Defendant Poirier was the responding supervisor to the events giving rise to
26 the lawsuit; (3) Plaintiff was engaged in his right to peacefully advocate for
27 soup as a “necessity to Plaintiff’s health and wellbeing[;]” (4) as a pretrial

1 detainee, Plaintiff may present a claim for excessive force during an unlawful
2 cell extraction; (5) Defendants were malicious and sadistic in their use of
3 excessive force; and (6) Plaintiff filed a complaint with the Citizen Law
4 Enforcement Review Board (“CLERB”), who told Plaintiff they would file an
5 administrative complaint on his behalf and any failure to exhaust his
6 administrative remedies was due to state created impediment.

7 Defendants reply that Plaintiff’s Complaint should be dismissed
8 because: (1) Plaintiff brought his state tort claims up with the wrong entity;
9 (2) the claims against Defendant Poirier do not allege she had direct
10 involvement or issued direct orders during the incident; (3) no Doe
11 defendants were named with respect to Plaintiff’s Eighth Amendment claims;
12 (4) the Fourteenth Amendment is unavailable to Plaintiff; (5) Plaintiff
13 concedes that there is no excessive force claim in his Complaint; and (6) the
14 CLERB is a board of volunteers unaffiliated with the County of San Diego.
15 (ECF No. 21).

16 II. BACKGROUND FACTS

17 The facts are taken from Plaintiff’s Complaint and are not to be
18 construed as findings of fact by the Court.

19 Plaintiff, at the time of the incidents giving rise to the Complaint, was
20 an inmate at the San Diego County Central Jail Facility. (*See* ECF No. 1 at
21 3-5). Plaintiff states that he suffers from a psychiatric disability. (*Id.* at 5).
22 Plaintiff’s claims arise from a series of events that occurred on April 5, 2016,
23 while he was a pretrial detainee. (ECF Nos. 1 at 2, 20 at 7). Plaintiff alleges
24 that that day’s lunch was served to inmates in their cells because the jail
25 facility was on lockdown. (ECF No. 1 at 6). After Plaintiff received his sack
26 lunch, he asked Defendant Gardiner if there was any soup available, to which
27 Gardiner replied, “[t]here ain’t no soup dumb-ass.” (*Id.*). Plaintiff then

1 challenged Gardiner, both on being called a “dumb-ass” and because Plaintiff
2 contended that there was available soup in the dayroom. (*Id.* at 7). Gardiner
3 then placed a radio call to have Plaintiff’s cell door opened and instructed
4 Plaintiff to “[g]o down stairs and look in the soup container fuckin’ stupid-
5 ass!” Plaintiff declined the invitation. (*Id.*).

6 Plaintiff then alleges that Defendant Gardiner entered Plaintiff’s cell
7 and grabbed Plaintiff by his shirt collar with both hands in attempt to
8 remove Plaintiff from the cell to verify that it was empty. (*Id.*). Plaintiff
9 stepped back into the cell and asked “What’s wrong with you?” Gardiner
10 continued pursuing Plaintiff, throwing punches in Plaintiff’s general
11 direction. Plaintiff was struck in the eye, neck, and upper torso. (*Id.*).

12 Defendant then removed Plaintiff from his cell and handcuffed him.
13 (*Id.*). Defendant Gardiner, while walking Plaintiff out of the housing unit
14 and into the rotunda, began kicking Plaintiff in the calf and stepping on his
15 heels and pant leg, forcing Plaintiff’s pants to fall down. (*Id.* at 8). Because
16 Plaintiff was unable to stop walking, and because he did not want to appear
17 to be resisting Defendant Gardiner, Plaintiff was forced to walk out of his
18 pants entirely. (*Id.*). Plaintiff was waked through the jail, wearing a torn
19 shirt and no pants, to the medical unit where he was given a blood pressure
20 test. Guards at the medical unit laughed at Plaintiff’s state of undress. (*Id.*).
21 Plaintiff asked Gardiner why he did this to Plaintiff, to which Gardiner
22 responded “[i]t’s not like I’m going to lose my job.” (*Id.*).

23 Plaintiff was then taken to a dirty cell on the fourth floor. (*Id.* at 9).
24 Plaintiff was still partially undressed and without shoes, and this new room
25 had feces smeared on the wall and trash on the floor. Plaintiff had no bed
26 linens or cleaning supplies. (*Id.*). Plaintiff asked passing guards for cleaning
27 supplies, replacement clothes, and linens, all of which were refused.

1 Plaintiff alleges that at this time he began experiencing a great deal of
2 physical anxiety and psychiatric post-traumatic and emotional distress, as
3 well as nausea. (*Id.*). Plaintiff began sweating and experienced an elevated
4 heart rate and rapid breathing. (*Id.*). After being held in the dirty cell for
5 over two hours, Plaintiff stopped Defendant Joe Doe #1 and again requested
6 clothing and supplies, saying “I[‘d] rather be dead than live like this.” (*Id.* at
7 10). Joe Doe #1 immediately ordered Plaintiff to “cuff up” telling Plaintiff
8 that he interpreted Plaintiff’s statement as a suicidal declaration. (*Id.*).
9 Plaintiff repeatedly told Doe #1 that he did not want to kill himself, that he
10 simply did not want to be housed in unsanitary conditions.

11 Plaintiff then turned around and put his wrists outside of the still-
12 closed and locked cell to be cuffed. (*Id.*). As Doe #1 was cuffing Plaintiff, he
13 dug the jagged edge of the handcuff into Plaintiff’s right hand above his
14 thumb, causing excruciating pain and instant bruising. Plaintiff then asked
15 for a sergeant. Doe #1 refused Plaintiff’s request and pepper sprayed
16 Plaintiff, causing him to choke and gag. (*Id.*). Plaintiff was told to cuff up
17 again while he repeatedly asked for a sergeant. (*Id.*). Plaintiff was then
18 pepper sprayed a second time causing Plaintiff’s skin and eyes to burn. (*Id.*).

19 Defendant Poirier arrived, stating “[t]hat’s a hell-of-a-lot of pepper
20 spray, and it’s making me choke.” (*Id.* at 11). Poirier then told Plaintiff that
21 he had better exit his cell, or corrections officers were going to have to extract
22 him. Plaintiff explained that he was being falsely accused of being suicidal
23 and that he simply did not want to be housed in a filthy cell. Defendant
24 Poirier told Plaintiff to exit the cell and that the two of them would then talk
25 about it. (*Id.*). Plaintiff left the cell without further incident and was
26 immediately transported to a suicide/safety cell, while still covered in pepper
27 spray. (*Id.* at 12). Plaintiff was released by a psychiatric doctor within

1 twenty-four hours. Plaintiff reported experiencing burning for several days
2 after the incident. (*Id.*).

3 III. LEGAL STANDARD

4 “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro*
5 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under Federal Rule of Civil
6 Procedure 8(a)(2), a pleading must contain a short and plain statement of the
7 claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556
8 U.S. 662, 677-78 (2009) (internal quotations omitted). The pleader must
9 provide the Court with “more than an un-adorned, the-defendant-unlawfully
10 harmed-me accusation.” *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550
11 U.S. 544, 555 (2007)). “Threadbare recitals of the elements of a cause of
12 action, supported by mere conclusory statements will not suffice.” *Id.*
13 “Although for the purposes of a motion to dismiss [a court] must take all of
14 the factual allegations in the complaint as true, [a court is] not bound to
15 accept as true a legal conclusion couched as a factual allegation.” *Id.*
16 (internal quotations omitted).

17 A *pro se* pleading is construed liberally on a defendant’s motion to
18 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895
19 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir.
20 1996)). The *pro se* pleader must still set out facts in his complaint that bring
21 his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S.
22 at 570.

23 A court “may not supply essential elements of the claim that were not
24 initially pled.” *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Nor
25 may a plaintiff supply missing elements in his opposition. *See Schneider v.*
26 *Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining
27 the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the

1 complaint to a plaintiff's moving papers, such as a memorandum in
2 opposition to a defendant's motion to dismiss.") (emphasis in original).

3 A *pro se* litigant is entitled to notice of the deficiencies in the complaint
4 and an opportunity to amend, unless the deficiencies cannot be cured by
5 amendment. See *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

6 IV. DISCUSSION

7 A. State Tort Claims

8 Defendants argue that Plaintiff's state law claims for assault and
9 battery, intentional infliction of emotional distress, and negligence are barred
10 because Plaintiff failed to submit a California Government Code damages
11 claim before bringing his lawsuit. (ECF No. 7-1 at 3-4). Plaintiff argues that
12 he filed a Government Board claim on September 3, 2016, and has not yet
13 received a response. (ECF No. 20 at 4). Plaintiff attached his Government
14 Claims Form with the California Victim Compensation and Government
15 Claims Board as an attachment in his opposition to Defendants' Motion to
16 Dismiss. (*Id.* at 21-36).

17 Compliance with California's Government Tort Claims Act ("the Act") is
18 a prerequisite to filing a state law claim against a state official. A claim
19 under the Act must be presented to the Victim Compensation and
20 Government Claims Board (Board) within six months of the alleged tortious
21 conduct. CAL. GOV'T CODE §911.2. Compliance with the Tort Claims Act is an
22 element of the cause of action, *State of Cal. V. Superior Court (Bodde)*, 32 Cal.
23 4th 1234, 1240 (2010), is required, *Mangold v. California Public Utilities*
24 *Com'n*, 67 F.3d 1470, 1477 (9th Cir. 1995), and "failure to file a claim is fatal
25 to a cause of action." *Hacienda La Puente Unified School Dist. of Los Angeles*
26 *v. Honig*, 976 F.2d 487, 495 (9th Cir. 1992).

27 Here, Defendants argue that Plaintiff's obligation was not met because

1 he failed to bring his government claim to the County. In their Motion,
2 misidentified the claim Plaintiff filed as a complaint with the Law
3 Enforcement Review Board. (ECF No. 7-1 at 4). Defendants corrected this
4 error in their reply. (ECF No. 21 at 2-3). Defendants, however, point to no
5 law requiring Plaintiff to file his claims with the county. Further,
6 Defendants do not outline the procedure available to Plaintiff in order to file
7 a claim with the county, merely arguing that the state tort claims must be
8 dismissed.

9 Defendants argue that Plaintiff's supporting library log entry dated
10 September, 2017 contradicts Plaintiff's contention that he filed his
11 government claim in September of 2016, however that is insufficient grounds
12 on which to dismiss Plaintiff's state tort claims, at this stage in the
13 proceedings. The Court **RECOMMENDS** Defendants' Motion to Dismiss the
14 state tort claims of Plaintiff's Complaint be **DENIED**.

15 **B. Claims Against Defendant Poirier**

16 Defendants contend that the claims against Sgt. Alma Poirier (sued as
17 "Sergeant Poiter") should be dismissed because she had no personal
18 involvement in any alleged violation of Plaintiff's constitutional rights. (ECF
19 No. 7-1 at 4-5). Plaintiff argues that as the responding supervisor, it was
20 Defendant Poirier's responsibility to ensure that Plaintiff was properly
21 decontaminated after Plaintiff was pepper sprayed. (ECF No. 20 at 5).
22 Defendants argue Defendant Poirier cannot be held personally liable under §
23 1983 for alleged violations caused by a subordinate absent her direct
24 participation or specifically issuing directions to a subordinate regarding the
25 alleged deprivation. (ECF No. 21 at 3).

26 To be liable under § 1983, a person acting under color of state law must
27 cause the plaintiff to suffer the violation of a constitutional right. 42 U.S.C.A.

1 § 1983. “A person ‘subjects’ another to the deprivation of a constitutional
2 right ... if he does an affirmative act, participates in another’s affirmative
3 acts, or omits to perform an act which he is legally required to do that causes
4 the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740,
5 743 (9th Cir. 1978) (citing *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976)).
6 Thus, the plaintiff must allege that each of the defendants committed some
7 act, or failed to act in a particular way, that was the cause of the purported
8 constitutional injury. *Williams v. Bennett*, 689 F.2d 1370, 1385 (11th Cir.
9 1982). “The inquiry into causation must be individualized and focus on the
10 duties and responsibilities of each individual defendant whose acts or
11 omissions are alleged to have caused a constitutional deprivation.” *Leer v.*
12 *Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

13 Section 1983 of the Civil Rights Act does not authorize a plaintiff to
14 bring a cause of action based on respondeat superior liability. *Monell v. Dep’t*
15 *of Soc. Servs.*, 436 U.S. 658, 692 (1978) (“[T]he fact that Congress did
16 specifically provide that A’s tort became B’s liability if B ‘caused’ A to subject
17 another to a tort suggests that Congress did not intend § 1983 liability to
18 attach where such causation was absent.”). State officials are subject to suit
19 in their personal capacity if “they play an affirmative part in the alleged
20 deprivation of constitutional rights.” *King v. Atiyeh*, 814 F.2d 565, 568 (9th
21 Cir. 1987), overruled on other grounds by *Lacey v. Maricopa Cty.*, 693 F.3d
22 896, 925 (9th Cir. 2012). “A plaintiff must allege facts, not simply
23 conclusions, that show that an individual was personally involved in the
24 deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194
25 (9th Cir. 1998).

26 “The required causal connection between supervisor conduct and the
27 deprivation of a constitutional right is established either by direct personal

1 participation or by setting in motion a ‘series of acts by others which the actor
2 knows or reasonably should know would cause others to inflict constitutional
3 injury.’” *Little v. Pena*, No. C 94-0671 MHP, 1994 U.S. Dist. LEXIS 9068, at
4 *9 (N.D. Cal. June 29, 1994) (quoting *Bergquist v. Cty. of Cochise*, 806 F.2d
5 1364, 1370 (9th Cir. 1986)); see *K’Napp v. Adams*, CASE NO. 1:06-cv-01701-
6 LJO-GSA (PC), 2009 U.S. Dist. LEXIS 38682, at *9 (E.D. Cal. May 7, 2009).

7 Here, Plaintiff’s Complaint does not allege sufficient factual allegations
8 against Defendant Poirier to survive a motion to dismiss. The Complaint
9 alleges that Poirier’s involvement began after Plaintiff had been pepper
10 sprayed. Plaintiff then indicates that Poirier advised Plaintiff that he would
11 be wise to cooperate with the correctional officers and gave Plaintiff an
12 opportunity to discuss his concerns. The Complaint does not allege any
13 personal involvement in the pepper spraying incident by Defendant Poirier,
14 or any personal involvement in the deprivation of Plaintiff’s constitutional
15 rights, other than asserting a theory of respondeat superior with respect to
16 Defendant Gardiner and Doe #1. Further, Plaintiff does not plead any facts
17 that indicate Poirier knew of or acquiesced to the wrongful conduct of others.
18 Therefore, Plaintiff states no claim to which he can receive relief against
19 Defendant Poirier and the Court **RECOMMENDS** Defendants’ Motion to
20 Dismiss be **GRANTED** without prejudice as to Defendant Poirier.

21 **C. First Amendment Retaliation Claim**

22 In claim one, Plaintiff alleges that Defendant Gardiner retaliated
23 against Plaintiff in violation of the First Amendment. (ECF No. 1 at 15). In
24 the Motion to Dismiss, Defendants argue Plaintiff fails to state a claim for a
25 First Amendment violation because Plaintiff does not sufficiently allege facts
26 demonstrating that Plaintiff was engaged in a protected activity. (ECF No. 7-
27 1 at 6). In his objection, Plaintiff argues that he was “engaged in his First

1 Amendment right of advocating peacefully” in inquiring about soup and that
2 Defendants’ actions “chilled” Plaintiff’s action. (ECF No. 20 at 6-7).

3 The First Amendment protects against “deliberate retaliation” by prison
4 officials against an inmate’s exercise of his right to petition for redress of
5 grievances. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.
6 1989). Such conduct is actionable even if it would not otherwise rise to the
7 level of a constitutional violation because retaliation by prison officials may
8 chill an inmate’s exercise of legitimate First Amendment rights. *Thomas v.*
9 *Carpenter*, 881 F.2d 828, 830 (9th Cir. 1989). A prisoner suing prison officials
10 for retaliation must allege that he was retaliated against for exercising his
11 constitutional rights and that the retaliatory action did not advance
12 legitimate penological goals. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir.
13 1995); *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994); *Rizzo v.*
14 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985).

15 The Ninth Circuit has set forth five basic elements for a viable claim of
16 First Amendment retaliation: “(1) [a]n assertion that a state actor took some
17 adverse action against an inmate (2) because of (3) that prisoner’s protected
18 conduct, and that such action (4) chilled the inmate’s exercise of his First
19 Amendment rights, and (5) the action did not reasonably advance a
20 legitimate correctional goal.” *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir.
21 2009) (citing *Rhodes v. Robinson*, 408 F.3d 559, 567-68 n.11 (9th Cir. 2005)).

22 Here, the Court finds that Plaintiff’s Complaint fails to allege that he
23 was engaged in protected conduct. Plaintiff did not allege that his soup
24 request was due to a specific religious meal plan or approved medical
25 treatment, for example. Plaintiff may be correct in his assertion that he was
26 “peacefully advocating” for soup as part of his lunch, however, this does not
27 establish that eating soup or inquiring about soup is protected conduct giving

1 rise to a First Amendment retaliation claim. For this basic reason, the Court
2 **RECOMMENDS** Defendants' Motion to Dismiss claim one of Plaintiff's
3 Complaint be **GRANTED** without prejudice.

4 **D. Excessive Force Claims**

5 In claims one and two, Plaintiff alleges that Defendant Gardiner
6 subjected Plaintiff to cruel and unusual punishment in violation of Plaintiff's
7 Eighth Amendment rights. (ECF No. 1 at 15-16.) In claim three, Plaintiff
8 alleges the same events deprived Plaintiff of his rights without due process in
9 violation of the Fourteenth Amendment as to all Defendants. (*Id.* at 16).

10 Defendants argue that the Complaint fails to state an excessive force
11 claim under the Eighth Amendment because the allegations do not indicate
12 that Defendants' behavior was objectively unreasonable. (ECF No. 7-1 at 7).
13 Further, Defendants argue that Plaintiff's Fourteenth Amendment claim is
14 duplicative, as Plaintiff's claims of excessive force are properly pled under
15 Fourth Amendment. (ECF No, 7-1 at 6).

16 In addressing an excessive force claim brought under § 1983, the
17 analysis begins by identifying the specific constitutional right allegedly
18 infringed by the challenged application of force. *Graham v. Connor*, 109 S.
19 Ct. 1865, 1871 (1989). The specific constitutional right is determined by the
20 plaintiff's custodial status. *Pierce v. Multnomah County*, 76 F.3d 1032, 1042
21 (9th Cir. 1996). The Fourth Amendment governs claims of excessive force
22 during a seizure of a free citizen. *Graham*, 109 S. Ct. at 1871. In the Ninth
23 Circuit, this protection lasts until arraignment. *Pierce*, 76 F.3d at 1043. The
24 Due Process Clause of the Fourteenth Amendment protects pretrial detainees
25 from excessive force that amounts to punishment. *Graham*, 109 S. Ct. at
26 n.10 (citing *Bell v. Wolfish*, 99 S. Ct. 1861, 1871-74 (1979)). After conviction,
27 the Cruel and Unusual Punishment Clause of the Eighth Amendment

1 governs the use of force against a prisoner. *Whitley v. Albers*, 106 S. Ct. 1078,
2 1084 (1986).

3 In *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court
4 clarified the applicable standards governing pretrial detainees' excessive
5 force claims under the Fourteenth Amendment. The Supreme Court granted
6 certiorari in that case to resolve a disagreement among the circuits regarding
7 whether § 1983 claims brought by pretrial detainees must satisfy a subjective
8 standard, that takes into account the defendant's state of mind, or only an
9 objective reasonableness standard. *Id.* at 2471-72. The Supreme Court held
10 that “the appropriate standard for a pretrial detainee's excessive force claim
11 is solely an objective one.” *Id.* at 2473. “[A] pretrial detainee must show only
12 that the force purposely or knowingly used against him was objectively
13 unreasonable.” *Id.*

14 “[O]bjective reasonableness turns on the ‘facts and circumstances of
15 each particular case.’” *Kingsley*, 135 S. Ct. at 2473 (quoting *Graham*, 109 S.
16 Ct. at 1872). Objective reasonableness must be assessed from the perspective
17 of a reasonable officer on the scene, including what the officer knew at the
18 time, not with the 20/20 vision of hindsight. *Id.* The court must also account
19 for the legitimate interests that stem from the government's need to manage
20 the facility in which the individual is detained. *Id.* The following non-
21 exclusive factors “may bear on the reasonableness or unreasonableness of the
22 force used: the relationship between the need for the use of force and the
23 amount of force used; the extent of the plaintiff's injury; any effort made by
24 the officer to temper or to limit the amount of force; the severity of the
25 security problem at issue; the threat reasonably perceived by the officer; and
26 whether the plaintiff was actively resisting.” *Id.* However, unlike a convicted
27 prisoner proceeding under the Eighth Amendment, a pretrial detainee does

1 not need to show that the force was applied maliciously and sadistically for
2 the purpose of causing harm. *Id.* at 2475-76.

3 At this stage in the proceedings, Plaintiff's well-pleaded allegations
4 must be viewed in the light most favorable to him. He alleges that he was
5 challenging Defendant Gardiner's name calling when Gardiner grabbed
6 Plaintiff by the collar and attempted to force Plaintiff to verify for himself
7 that there was no soup, and then began punching him. He alleges that he
8 was repeatedly kicked and forced to jettison his pants because he was unable
9 to continue being escorted by Gardiner with his pants falling down.
10 Additionally, he indicates that Doe #1, without provocation, twice pepper
11 sprayed Plaintiff while he was complying with a request to cuff up. Plaintiff
12 asserts that this incident caused high levels of stress and anxiety,
13 exacerbating his already present mental health issues, humiliation, and
14 physical pain.

15 Plaintiff's allegations are sufficient to support a plausible inference that
16 Defendant Gardiner used force for the malicious and sadistic purpose of
17 causing harm, rather than for the purpose of maintaining or restoring
18 discipline, because, if taken as true, Plaintiff's allegations establish that at
19 the time force was applied, Plaintiff could not reasonably be perceived as a
20 threat. Defendants' counter that Plaintiff was confrontational about soup
21 availability and that his behavior "adversely impacted management of the
22 facility." (ECF No. 7-1 at 7). Defendants do not indicate how Plaintiff's soup
23 request was disruptive or how pepper spraying Plaintiff twice while he was
24 complying with an order was in furtherance of maintaining or restoring
25 discipline. As stated above, at this stage in the proceedings Plaintiff's
26 allegations must viewed in the light most favorable to him. When these
27 allegations are taken as true, there was no justification for the use of any

1 force – let alone justification for Defendant Gardiner to enter his cell and
2 repeatedly hit Plaintiff – over a soup request, or for Doe #1 to twice pepper
3 spray Plaintiff while he was complying with the order to cuff up.

4 Accordingly, Plaintiff's allegations establish beyond a speculative level
5 that the force applied by Defendant Gardiner was not de minimis. Plaintiff
6 therefore states a cognizable claim and the Court **RECOMMENDS** that the
7 Motion to Dismiss claims one and two for excessive force under the Eighth
8 Amendment be **GRANTED** with prejudice and claim three for excessive force
9 under the Fourteenth Amendment **DENIED** as to Defendant Gardiner.

10 **E. Failure to Exhaust Administrative Remedies**

11 Defendants argue Plaintiff's failure to exhaust his administrative
12 remedies is clear on the face of the Complaint and therefore Plaintiff is
13 precluded from bringing this lawsuit in its entirety. (ECF No. 7-1 at 8-9).

14 The Prison Litigation Reform Act ("PLRA") provides that "[n]o action
15 shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or
16 any other Federal law, by a prisoner confined in any jail, prison, or other
17 correctional facility until such administrative remedies as are available are
18 exhausted." 42 U.S.C. § 1997e(a). Exhaustion is "mandatory." *Porter v.*
19 *Nussle*, 534 U.S. 516, 524 (2002) (citing *Booth v. Churner*, 532 U.S. 731, 739
20 (2001)); *McKinney v. Carey*, 311 F.3d 1198, 1200–01 (9th Cir.2002). Failure
21 to exhaust is "an affirmative defense the defendant must plead and prove."
22 *Jones v. Bock*, 549 U.S. 199, 204 (2007). "In a typical PLRA case, a defendant
23 will have to present probative evidence [in a Rule 56 motion for summary
24 judgment] ... that the prisoner has failed to exhaust administrative remedies
25 under § 1997e(a)." *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir.2014) (en
26 banc). However, "in ... rare cases where a failure to exhaust is clear from the
27 face of the complaint, a defendant may successfully move to dismiss under

1 Rule 12(b)(6) for failure to state a claim.” *Albino*, 747 F.3d at 1169 (citing
2 *Jones*, 549 U.S. at 215–16; *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th
3 Cir.1984) (per curiam) (“[A]ffirmative defenses may not be raised by motion
4 to dismiss, but this is not true when, as here, the defense raises no disputed
5 issues of fact.”); *Aquilar–Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th
6 Cir.2007) (“[O]nly in rare cases will a district court be able to conclude from
7 the face of the complaint that a prisoner has not exhausted his
8 administrative remedies and that he is without a valid excuse.”)).

9 Here, Defendants argue that is it clear from the face of the Complaint
10 that Petitioner has not exhausted his administrative remedies. Therefore,
11 Defendants move to dismiss pursuant to Rule 12(b)(6). However, Plaintiff
12 alleges that he “has satisfied all exhaustions required for issues raised in this
13 lawsuit.” (ECF No. 1 at 15.) Thus, it is not evident from the face of the
14 Complaint that Plaintiff failed to exhaust his administrative remedies.
15 Moreover, the Court cannot consider the evidence Plaintiff presented in his
16 opposition to the Motion to Dismiss to find a failure to exhaust. (ECF No.
17 20at 15-16). *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197
18 (9th Cir.1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a
19 court may not look beyond the Complaint to a plaintiff’s moving papers, such
20 as a memorandum in opposition to a defendants’ motion to dismiss.”).
21 Therefore, the Court finds this case is not among the “rare cases” where
22 dismissal for failure to exhaust is appropriate under Rule 12(b)(6), and would
23 be more proper as a Rule 56 motion for summary judgment. Accordingly, the
24 Court **RECOMMENDS** that Defendant's Motion to Dismiss for failure to
25 exhaust administrative remedies be **DENIED**.

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1 V. CONCLUSION

2 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that:

3 1) Defendants' Motion be **DENIED** as to Plaintiff's state tort claims
4 (claims four and five);

5 2) Defendants' Motion be **GRANTED** without prejudice as to all claims
6 against Defendant Poirier (claims three and five);

7 3) Defendants' Motion be **GRANTED** without prejudice as to Plaintiff's
8 First Amendment Retaliation claim against all Defendants (claim one);

9 4) Defendants' Motion be **GRANTED** with prejudice as to Plaintiff's
10 Eighth Amendment claims against all Defendants (claims one and two);

11 5) Defendants' Motion be **DENIED** as to Plaintiff's Fourteenth
12 Amendment Claim (claim three); and

13 6) Defendants' Motion be **DENIED** as to Plaintiff's failure to exhaust
14 his administrative remedies.

15 This Report and Recommendation will be submitted to the United
16 States District Judge assigned to this case, pursuant to the provisions of 28
17 U.S.C. §636(b)(1). Any party may file written objections with the court and
18 serve a copy on all parties by **February 26, 2018**. The document shall be
19 captioned "Objections to Report and Recommendation." Any reply to the
20 objections shall be served and filed by **March 5, 2018**.

21 The parties are advised that failure to file objections within the
22 specified time may waive the right to raise those objections on appeal of the
23 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

24 **IT IS SO ORDERED.**

25 Dated: February 12, 2018

26 
27 Hon. Mitchell D. Dembin
United States Magistrate Judge