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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Nick R. Wenzel,
Plaintiff,

vs.

Joseph M. Arpaio, et al.,
Defendants.

) No. CV 09-1927-PHX-MHM (JRI)

) **ORDER**

Plaintiff Nick R. Wenzel, who is now confined in the Arizona State Prison Complex, Gila Unit, in Douglas, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc.# 1, 3.)¹ Plaintiff has also sent a letter to the Court, which has been filed as a notice.² (Doc.# 5.) The Court will dismiss the Complaint with leave to amend.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff’s Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$85.07. The remainder of the fee will be collected monthly in payments of 20% of the previous month’s income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate

¹ “Doc.#” refers to the docket number of filings in this case.

² In the letter, Plaintiff seeks information regarding the assigned case number because his copy of the notice of assignment was apparently misplaced after his transfer to prison. The case number appears above.

1 Order requiring the appropriate government agency to collect and forward the fees according
2 to the statutory formula.

3 **II. Statutory Screening of Prisoner Complaints**

4 The Court is required to screen complaints brought by prisoners seeking relief against
5 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
7 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
8 be granted, or that seek monetary relief from a defendant who is immune from such relief.
9 28 U.S.C. § 1915A(b)(1), (2).

10 A pleading must contain a “short and plain statement of the claim *showing* that the
11 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
12 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
13 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
14 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
15 statements, do not suffice.” Id.

16 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
17 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
18 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
19 that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
21 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
22 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
23 allegations may be consistent with a constitutional claim, a court must assess whether there
24 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

25 If the Court determines that a pleading could be cured by the allegation of other facts,
26 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
27 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
28 should not, however, advise the litigant how to cure the defects. This type of advice “would

1 undermine district judges' role as impartial decisionmakers." Pliler v. Ford, 542 U.S. 225,
2 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
3 required to inform a litigant of deficiencies). Plaintiff's Complaint will be dismissed for
4 failure to state a claim, with leave to amend because the Complaint may possibly be saved
5 by amendment.

6 **III. Complaint**

7 Plaintiff alleges three claims for failure to protect, constitutionally inadequate medical
8 care, and state law negligence regarding events while he was held as a pretrial detainee in
9 Maricopa County's Fourth Avenue Jail. Plaintiff sues Maricopa County Sheriff Joseph M.
10 Arpaio; the Maricopa County Sheriff's Office (MCSO); Maricopa County; Maricopa County
11 Correctional Health Services (CHS); ABC agencies 1-10; ABC Companies 1-10; and Does
12 1 to 20. Plaintiff seeks compensatory relief.

13 Plaintiff alleges the following facts in his Complaint: On November 5, 2008, Plaintiff
14 and 27 other pretrial detainees were to be transported from the Fourth Avenue Jail to court
15 in Glendale. Deputy A handcuffed Plaintiff and chained his legs to several other detainees
16 before putting the detainees into the transport vehicle. Plaintiff and other detainees noticed
17 a strong smell of alcohol from Deputy A. Plaintiff asked Deputy A whether he had arrests
18 for driving under the influence. Deputy A told Plaintiff that he had been arrested at least four
19 times before being hired by MCSO and assigned as a transportation officer and driver.
20 Plaintiff objected to overcrowding and the lack of seats and safety restraints for the detainees,
21 but Deputy A ordered Plaintiff into the vehicle and to sit on the floor. Deputy A drove the
22 vehicle erratically causing the detainees to be shaken, thrown, and buffeted. When they
23 arrived at the Glendale court, Deputy A drove the vehicle into a side wall of the court
24 building, which Plaintiff attributes to being inebriated. Plaintiff's back, neck, and right leg
25 were injured, although Plaintiff does not describe the nature or severity of his injuries.
26 Plaintiff was denied immediate medical attention and Deputy A and other officers refused
27 to call police or emergency medical personnel, but instead forced the detainees into a small
28 holding pen. Plaintiff attempted to inform Deputy A and other officers of his "serious

1 injuries,” but he was “deliberately ignored.” (Doc.# 1 at 3C.)

2 **IV. Failure to State a Claim Under § 1983**

3 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
4 conduct about which he complains was committed by a person acting under the color of state
5 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
6 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
7 suffered a specific injury as a result of the conduct of a particular defendant and he must
8 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
9 Goode, 423 U.S. 362, 371-72, 377 (1976).

10 **A. Fictitious Defendants**

11 Plaintiff sues numerous fictitiously-identified Defendants without alleging how any
12 fictitiously-named Defendant violated his constitutional or statutory rights. Generally, the
13 use of anonymous type appellations to identify defendants is not favored. Rule 10(a) of the
14 Federal Rules of Civil Procedure requires the plaintiff to include the names of the parties in
15 the action. As a practical matter, it is impossible in most instances for the United States
16 Marshal or his designee to serve a summons and complaint or amended complaint upon an
17 anonymous defendant.

18 The Ninth Circuit has held that where identity is unknown prior to the filing of a
19 complaint, the plaintiff should be given an opportunity through discovery to identify the
20 unknown defendants, unless it is clear that discovery would not uncover the identities, or that
21 the complaint would be dismissed on other grounds. Wakefield v. Thompson, 177 F.3d
22 1160, 1163 (9th Cir. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)).
23 Where the names of individual defendants are unknown at the time a complaint is filed, a
24 plaintiff may refer to the individual unknown defendants fictitiously as John Doe 1, John Doe
25 2, John Doe 3, and so on, and allege facts to support how each particular Doe defendant
26 violated the plaintiff’s constitutional rights. Where an unknown defendant is an entity, a
27 plaintiff may refer to that entity as Doe Entity 1, Doe Entity 2 and so. He must also allege
28 facts to support that the entity acted under color of state law and how it violated the

1 plaintiff's constitutional rights. The plaintiff may thereafter use the discovery processes to
2 obtain the names of fictitiously-named defendants whom he believes violated his
3 constitutional rights and seek leave to amend to name those defendants.

4 **B. MCSO**

5 Plaintiff also sues MCSO; however, it is not a proper Defendant. In Arizona, the
6 responsibility for operating jails and caring for prisoners is placed by law upon the sheriff
7 and the County. See A.R.S. §§ 11-251(8), 11-291(A), 11-441(A)(5), 31-101. MCSO is
8 simply an administrative creation of the sheriff to allow him to carry out his statutory duties
9 and is not a "person" amenable to suit pursuant to § 1983. Accordingly, MCSO will be
10 dismissed from this action as a Defendant.

11 **C. Sheriff Arpaio**

12 Plaintiff sues Maricopa County Sheriff Arpaio. Although Arpaio may properly be
13 sued for constitutional violations, Plaintiff fails to state a claim against him. "A plaintiff
14 must allege facts, not simply conclusions, that show that an individual was personally
15 involved in the deprivation of his civil rights." Barren v. Harrington, 152 F.3d 1193, 1194
16 (9th Cir. 1998). For an individual to be liable in his official capacity, a plaintiff must allege
17 that the official acted as a result of a policy, practice, or custom. See Cortez v. County of Los
18 Angeles, 294 F.3d 1186, 1188 (9th Cir. 2001). Further, there is no *respondeat superior*
19 liability under § 1983, so a defendant's position as the supervisor of a someone who
20 allegedly violated a plaintiff's constitutional rights does not make him liable. Monell v.
21 Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
22 1989). A supervisor in his individual capacity, "is only liable for constitutional violations
23 of his subordinates if the supervisor participated in or directed the violations, or knew of the
24 violations and failed to act to prevent them." Taylor, 880 F.2d at 1045.

25 Plaintiff merely makes vague and conclusory assertions that Arpaio was aware of
26 "unlawful conduct" of subordinate staff that violated Plaintiff's constitutional rights. As
27 noted above, *respondeat superior* does not support liability under § 1983 and Plaintiff fails
28 to allege *facts* to support that Arpaio enacted or enforced a policy, custom, or practice that

1 resulted in the denial of Plaintiff's constitutional rights. Plaintiff also fails to allege *facts* to
2 support that Arpaio directly violated his constitutional rights or that he was aware that
3 Plaintiff's rights were being violated but failed to act. Plaintiff therefore fails to state a claim
4 against Arpaio in his Complaint.

5 **D. Maricopa County**

6 Plaintiff also sues Maricopa County. A municipality, such as Maricopa County, may
7 not be held liable unless its policy or custom caused the constitutional injury. See
8 Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163,
9 166 (1993); Monell, 436 U.S. 658, 694 (1978). Thus, a municipality may not be sued solely
10 because an injury was inflicted by one of its employees or agents. Long v. County of Los
11 Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). Rather, the municipality is liable only when
12 the execution of its policy or custom inflicts the constitutional injury. Id.; Miranda v. City
13 of Cornelius, 429 F.3d 858, 868 (9th Cir. 2005). Therefore, a plaintiff cannot state a § 1983
14 claim against a municipal defendant unless he alleges that the municipal defendant
15 maintained a policy or custom pertinent to the plaintiff's alleged injury and explains how
16 such policy or custom caused his injury. Sadoski v. Mosley, 435 F.3d 1076, 1080 (9th Cir.
17 2006) (affirming dismissal of a municipal defendant pursuant to Fed. R. Civ. P. 12(b)(6)).

18 Plaintiff makes only vague and conclusory assertions that Maricopa County has a
19 custom, practice or policy that resulted in a denial of Plaintiff's constitutional rights. He does
20 not allege facts to support that Maricopa County maintains a policy or custom that resulted
21 in the violation of his constitutional rights. Therefore, he fails to state a claim against
22 Maricopa County.

23 **E. Threat to Safety/Failure to Protect**

24 In Count I, Plaintiff alleges a claim for threat to his safety or failure to protect. Jailors
25 are required to take reasonable measures to guarantee the safety of inmates and officials have
26 a duty to protect prisoners from violence at the hands of other prisoners. Farmer v. Brennan,
27 511 U.S. 825, 832-33 (1994); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). To state
28 a claim for threats to safety, an inmate must allege facts to support that he was incarcerated

1 under conditions posing a substantial risk of harm and that prison officials were “deliberately
2 indifferent” to those risks. Id.; Redman v. County of Los Angeles, 942 F.2d 1435, 1443 (9th
3 Cir. 1991) (*en banc*). To adequately allege deliberate indifference, a plaintiff must set forth
4 facts to support that a defendant knew of, but disregarded, an excessive risk to inmate safety.
5 Farmer, 511 U.S. at 837. That is, “the official must both [have been] aware of facts from
6 which the inference could be drawn that a substantial risk of serious harm exist[ed], and he
7 must also [have] draw[n] the inference.” Farmer, 511 U.S. at 837; Frost, 152 F.3d at 1128;
8 Redman, 942 F.2d at 1442.

9 Plaintiff alleges that he smelled alcohol on Deputy A. Plaintiff does not allege facts
10 to support that he reported this to any other officer or facts to support that any officer was
11 aware of facts from which the inference could be drawn that Deputy A was driving under the
12 influence. Plaintiff therefore fails to state a claim for failure to protect or threats to his safety
13 against any Defendant.

14 **F. Medical Care**

15 In Count II, Plaintiff alleges that he received constitutionally inadequate medical care.
16 To state a claim for a constitutional violation regarding medical care, a plaintiff must allege
17 facts to support that he has or had a serious medical need and that a particular defendant
18 acted with deliberate indifference to that need. See Estelle v. Gamble, 429 U.S. 97, 104-05
19 (1976) (Eighth Amendment standard for convicted inmates); Lolli v. County of Orange, 351
20 F.3d 410, 418-19 (9th Cir. 2003) (Fourteenth Amendment standard for unconvicted inmates).
21 To allege a serious medical need, a plaintiff must set forth facts to support that the “failure
22 to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary
23 and wanton infliction of pain.’” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting
24 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds by
25 WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (*en banc*)). Deliberate
26 indifference may occur if “prison officials deny, delay or intentionally interfere with medical
27 treatment.” Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). Mere
28 negligence, however, “in diagnosing or treating a medical condition, without more, does not

1 violate a prisoner's Eighth Amendment rights.'" Lopez, 203 F.3d at 1131 (quoting
2 Hutchinson, 838 F.2d at 394). Further, a delay in receiving medical care, without more, is
3 insufficient to state a claim against a jailor for deliberate indifference unless the plaintiff can
4 show that the delay in treatment harmed him. Shapley v. Nevada Bd. of State Prison
5 Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). In addition, differences in judgment between
6 an inmate and jail medical personnel regarding appropriate medical diagnosis or treatment
7 are not enough to state a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242
8 (9th Cir. 1989).

9 Plaintiff alleges that after arrival at the Glendale court, Deputy A and other officers
10 refused to provide emergency medical attention or to take him to the hospital. Plaintiff was
11 then transported back to the Fourth Avenue Jail, where he was taken to the medical station
12 for transport to the Maricopa County Medical Center. Several hours later, Plaintiff was
13 examined by a doctor and a CAT scan was ordered. The same afternoon, a doctor prescribed
14 pain medication, recommended an MRI, and a follow-up examination. The next day,
15 November 6, 2008, Plaintiff was examined by a doctor at the Fourth Avenue Jail and was
16 prescribed pain medication. On November 20, 2008, Plaintiff was charged \$20 by Maricopa
17 County Correctional Health Services for his medical appointment. Plaintiff contends that he
18 has received no additional follow-up care and that multiple health needs requests have been
19 ignored or denied.

20 Plaintiff does not describe the nature or severity of any injury, nor does he allege facts
21 to support that any injury was readily apparent to staff such that the failure to seek
22 emergency treatment constituted deliberate indifference. Further, while Plaintiff contends
23 that he received no further medical follow-up after an examination the day after the accident,
24 he does not allege what, if any, symptoms he continued to suffer or their severity. For these
25 reasons, Plaintiff fails to state a claim for deliberate indifference to a serious medical need.

26 **V. State Law Claim**

27 In Count III, Plaintiff alleges a state law claim for negligence pursuant to the Court's
28 supplemental jurisdiction. This claim will be dismissed without prejudice. Where a federal

1 court has original jurisdiction over an action, such as a case asserting violations of 42 U.S.C.
2 § 1983, the doctrine of pendent jurisdiction allows a federal court to exercise “pendent” or
3 “supplemental” jurisdiction over closely related state law claims. Bahrampour v. Lampert,
4 356 F.3d 969, 978 (9th Cir. 2004) (citing 28 U.S.C. § 1367(a)). Because Plaintiff has failed
5 to state a federal constitutional claim in his Complaint, the Court declines to exercise
6 jurisdiction over any state law claim and will dismiss such claims without prejudice. 28
7 U.S.C. § 1367(c).

8 **VI. Leave to Amend**

9 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
10 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
11 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
12 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
13 to use the court-approved form, the Court may strike the amended complaint and dismiss this
14 action without further notice to Plaintiff.

15 Plaintiff must clearly designate on the face of the document that it is the “First
16 Amended Complaint.” The first amended complaint must be retyped or rewritten in its
17 entirety on the court-approved form and may not incorporate any part of the original
18 Complaint by reference. Plaintiff may include only one claim per count.

19 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
20 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
21 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
22 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
23 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
24 565, 567 (9th Cir. 1987).

25 **VII. Warnings**

26 **A. Release**

27 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
28 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay

1 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
2 in dismissal of this action.

3 **B. Address Changes**

4 Plaintiff must file and serve a notice of a change of address in accordance with Rule
5 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
6 relief with a notice of change of address. Failure to comply may result in dismissal of this
7 action.

8 **C. Copies**

9 Plaintiff must submit an additional copy of every filing for use by the Court. See
10 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice
11 to Plaintiff.

12 **D. Possible “Strike”**

13 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
14 to file an amended complaint correcting the deficiencies identified in this Order, the
15 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
16 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
17 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
18 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
19 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
20 or fails to state a claim upon which relief may be granted, unless the prisoner is under
21 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

22 **E. Possible Dismissal**

23 If Plaintiff fails to timely comply with every provision of this Order, including these
24 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
25 1260-61 (a district court may dismiss an action for failure to comply with any order of the
26 Court).

27 **IT IS ORDERED:**

28 (1) Plaintiff’s Application to Proceed *In Forma Pauperis*, filed with the Complaint,

1 is **granted**. (Doc.# 3.)

2 (2) As required by the accompanying Order to the appropriate government agency,
3 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$85.07.

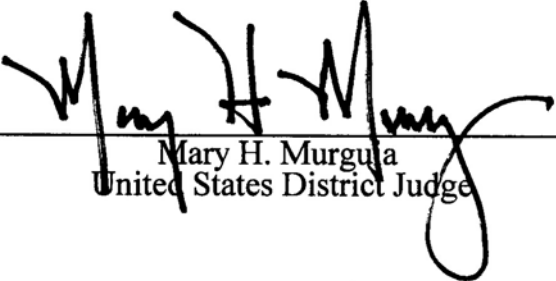
4 (3) The Complaint (doc.# 1) is **dismissed** for failure to state a claim. Plaintiff has
5 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
6 this Order.

7 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
8 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
9 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

10 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
11 rights complaint by a prisoner.

12 DATED this 17th day of November, 2009.

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Mary H. Murgula
United States District Judge