

1 **II. Factual Summary**

2 On July 30, 2008, Plaintiff was tazed and then shot three times in his legs and buttocks.
3 Plaintiff contends the California Highway Patrol Officers, Defendants Eli Dillion, who fired the
4 gun, and Scott Taylor, who fired the Tazer, violated Plaintiff’s rights under the Fourteenth
5 Amendment to the United States Constitution and under the California Constitution, and gave rise
6 to various tort law claims. Plaintiff also alleges that Defendant California Highway Patrol (“CHP”)
7 is liable for certain claims under the doctrine of *respondeat superior*.¹ Plaintiff seeks monetary
8 damages.

9 **III. Pleading Standards**

10 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
11 exceptions,” none of which applies to § 1983 actions. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506,
12 512 (2002). Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the
13 claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a). “Such a statement
14 must simply give the defendant fair notice of what the plaintiff’s claim is and the grounds upon
15 which it rests.” *Swierkiewicz*, 534 U.S. at 512. Detailed factual allegations are not required, but
16 “[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory
17 statements, do not suffice.” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009), *citing*
18 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Plaintiff must set forth sufficient
19 factual matter accepted as true, to ‘state a claim that is plausible on its face.’” *Iqbal*, 129 S.Ct. at
20 1949, *quoting Twombly*, 550 U.S. at 555. While factual allegations are accepted as true, legal
21 conclusions are not. *Iqbal*, 129 S.Ct. at 1949.

22 Although accepted as true, “[f]actual allegations must be [sufficient] to raise a right to relief
23 above the speculative level.” *Twombly*, 550 U.S. at 555 (*citations omitted*). A plaintiff must set
24 forth “the grounds of his entitlement to relief,” which “requires more than labels and conclusions,
25 and a formulaic recitation of the elements of a cause of action.” *Id.* at 555-56 (*internal quotation*
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27 ¹ Although California Highway Patrol is not included as a defendant in the caption, the complaint’s
28 allegations clearly express Plaintiff’s intent to name CHP as a defendant.

1 *marks and citations omitted*). To adequately state a claim against a defendant, a plaintiff must set
2 forth the legal and factual basis for his claim.

3 **IV. Constitutional Claim--Fourth and Fourteenth Amendments**

4 **B. Eleventh Amendment Immunity**

5 The Eleventh Amendment bars suits for money damages in federal court against a state, its
6 agencies, and state officials in their official capacities.” *Aholelei v. Dept. of Public Safety*, 488 F.3d
7 1144, 1147 (9th Cir.), *cert. denied*, 128 S.Ct. 441 (2007)(*citations omitted*). Because CHP is a state
8 agency entitled to Eleventh Amendment immunity, Plaintiff may not sue it for damages in federal
9 court. *Ibid.* See also *Natural Resources Defense Council v. California Dep’t of Transp.*, 96 F.3d
10 420, 421 (9th Cir. 1996); *Brooks v. Sulphur Spring Valley Elec. Co-op*, 951 F.2d 1050, 1053 (9th Cir.
11 1991), *cert. denied*, 503 U.S. 938 (1992); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

12 **B. Due Process Claim**

13 Plaintiff alleges that Defendants Dillion and Taylor used excessive force in effectuating his
14 arrest. Under the Fourth Amendment, made applicable to the states by the Fourteenth Amendment,
15 people are to be secure against unreasonable searches and seizures. *Maryland v. Pringle*, 540 U.S.
16 366, 369 (2003); *Mapp v. Ohio*, 367 U.S. 643 (1961). Each case is determined on its specific facts
17 and circumstances. *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996). Those facts and
18 circumstances will determine the Fourth Amendment’s reach in a particular case. *Terry v. Ohio*,
19 392 U.S. 1, 29 (1968).

20 A seizure occurs when the government ends a person’s freedom of movement by
21 intentionally applied means. *Scott v. Harris*, 550 U.S. 372, 381 (2007); *Brower v. County of Inyo*,
22 489 U.S. 593, 596-97 (1989). A claim of excessive force in the course of a seizure is properly
23 analyzed under the Fourth Amendment’s “objective reasonableness” standard. *Id.*; *Graham v.*
24 *Connor*, 490 U.S. 386, 388 (1989). To meet applicable pleading requirements, Plaintiff must allege
25 facts supporting his allegations that each Defendant acted unreasonably with regard to his use of
26 force in the course of Plaintiff’s arrest.

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1 Despite two attempts to amend his complaint, Plaintiff has failed to allege a plausible factual
2 basis by which a fact finder could conclude that Defendants' actions in arresting Plaintiff were
3 objectively unreasonable. Instead, Plaintiff has merely removed from his amended complaints an
4 earlier allegation that he was wounded while fleeing the convenience store that he attempted to rob.
5 He now alleges no more than that he was tazed and shot from behind as he fled the crime scene.

6 Although Plaintiff's serious injuries are unfortunate, he has failed to allege any facts
7 sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. As with
8 his prior complaints, Plaintiff's second amended complaint provides no grounds for the relief that
9 he seeks, alleging only "labels and conclusions, and a formulaic recitation of the elements of [the
10 causes] of action." *Id.* at 555-56. Because Plaintiff does not set fully forth a legal and factual basis
11 for his claim, he fails to state a cognizable federal constitutional claim against Defendants.

12 **E. State Claims**

13 Plaintiff also alleges numerous claims under California law: (1) assault and battery by
14 Defendants Dillion and Taylor; (2) negligence and careless handling of a firearm by Defendants
15 Dillion and Taylor; (3) gross negligence and recklessness by Defendants Dillion and Taylor; (4)
16 violation of article I, section 7 of the California Constitution by Defendants Dillion and Taylor; (5)
17 attribution of the negligence of Defendants Dillion and Taylor to Defendant CHP (two counts); (6)
18 attribution of the gross negligence and recklessness of Defendants Dillion and Taylor to Defendant
19 CHP; (7) attribution of Defendants Dillion and Taylor's violation of article I, section 13 of the
20 California Constitution to Defendant CHP; and (8) intentional infliction of emotional distress by
21 Defendants Dillion and Taylor.

22 Section 1983 does not provide a cause of action for violations of state law. *See Weilburg v.*
23 *Shapiro*, 488 F.3d 1202, 1207 (9th Cir. 2007); *Galen v. County of Los Angeles*, 477 F.3d 652, 662
24 (9th Cir. 2007); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001); *Sweaney v. Ada County, Idaho*,
25 119 F.3d 1385, 1391 (9th Cir. 1997); *Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 370 (9th
26 Cir. 1996); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986); *Ybarra v. Bastian*, 647 F.2d 891,
27 892 (9th Cir.), *cert. denied*, 454 U.S. 857 (1981). Pursuant to 28 U.S.C. § 1367(a), however, in any
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1 civil action in which the district court has original jurisdiction, the district court “shall have
2 supplemental jurisdiction over all other claims in the action within such original jurisdiction that
3 they form part of the same case or controversy under Article III,” except as provided in subsections
4 (b) and (c).

5 “[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over
6 state law claims under 1367(c) is discretionary.” *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000
7 (9th Cir. 1997). “The district court may decline to exercise supplemental jurisdiction over a claim
8 under subsection (a) if . . . the district court has dismissed all claims over which it has original
9 jurisdiction.” 28 U.S.C. § 1367 (c)(3). The Supreme Court has cautioned that “if the federal claims
10 are dismissed before trial . . . the state claims should be dismissed as well.” *United Mine Workers
11 of Amer. v. Gibbs*, 383 U.S. 715, 726 (1966). Since Plaintiff has failed to allege a cognizable
12 federal claim, this Court recommends that the District Court decline to exercise jurisdiction over
13 Plaintiff’s state claims.

14 This Court also notes multiple matters that will require resolution before Plaintiff can
15 proceed on his state claims in any jurisdiction. First, no private cause of action exists for damages
16 under Article I of the California Constitution. *Giraldo v. California Dept. of Corr. and Rehab.*, 85
17 Cal.Rptr.3d 371, 389-90 (Cal. Ct. App. 2008). Accordingly, Plaintiff may not proceed with the
18 California constitutional claims set forth in counts five and ten.

19 Second, because Plaintiff failed to allege that he provided notice of claim as required by the
20 California Tort Claims Act (“CTCA”), his ability to proceed with his numerous tort claims is
21 doubtful. The CTCA requires that a tort claim against a public entity or its employees be presented
22 to the California Victim Compensation and Government Claims Board no more than six months
23 after the cause of action accrues. Cal. Gov’t Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West
24 2009). Presentation of a written claim, and action on or rejection of the claim are conditions
25 precedent to suit. *State v. Superior Court of Kings County (Bodde)*, 32 Cal.4th 1234, 1245 (2004);
26 *Mangold v. California Pub. Utils. Comm’n*, 67 F.3d 1470, 1477 (9th Cir. 1995). To state a tort
27 claim against a public employee, a plaintiff must allege compliance with the CTCA. *State v.*
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1 *Superior Court*, 32 Cal.4th at 1245; *Mangold*, 67 F.3d at 1477; *Karim-Panahi v. Los Angeles Police*
2 *Dept.*, 839 F.2d 621, 627 (9th Cir. 1988).

3 Plaintiff alleges that the Victim Compensation and Government Claims Board denied his
4 CTCA claim as untimely but contends that his medical condition excused compliance. Plaintiff
5 does not, however, allege the circumstance or timing of his filing the CTCA notice or set forth what
6 steps, if any, he took to appeal the board's decision. California law generally precludes late claims,
7 unless they are presented within one year after the cause of action accrued and are attributable to
8 certain limited circumstances, such as mental incapacity without a guardian or conservator. Cal.
9 Gov't Code § 911.4.

10 **III. Conclusion and Recommendation**

11 Plaintiff's complaint fails to state a claim upon which relief may be granted under federal
12 law. Because amending the complaint will not cure the deficiency, the Court hereby recommends
13 that this action be dismissed, with prejudice, for failure to state a claim.

14 These Findings and Recommendations will be submitted to Hon. Lawrence J. O'Neill, the
15 United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C §
16 636(b)(1). Within **thirty (30) days** after being served with these Findings and Recommendations,
17 Plaintiff may file written objections with the Court. The document should be captioned "Objections
18 to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that, by failing to file
19 objections within the specified time, he may waive the right to appeal the District Court's order.
20 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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23 IT IS SO ORDERED.

24 **Dated: April 21, 2010**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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