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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUPE NIETO, JR.,)	Case No. 1:10-cv-01397-AWI-JLT
)	
Plaintiff,)	ORDER DISMISSING COMPLAINT WITH
vs.)	LEAVE TO AMEND
)	
CLOVIS POLICE OFFICER DRAKE)	
HODGE, sued in his individual and official)	
capacity, CLOVIS POLICE)	
DEPARTMENT, and COUNTY OF)	
FRESNO,)	
)	
Defendants.)	
_____)	

Plaintiff Lupe Nieto, Jr., (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this action. On August 4, 2010, Plaintiff filed this action. (Doc. 1). Plaintiff asserts this civil rights action against Clovis Police Officer Drake Hodge in his individual and official capacity, the Clovis Police Department, and the County of Fresno (collectively, “Defendants”) pursuant to 42 U.S.C. § 1983.

I. Screening Requirement

Where a prisoner seeks relief against “a governmental entity or officer or employee of a governmental entity,” the Court is required to review the complaint and identify “cognizable claims.” 28 U.S.C § 1915(a)-(b). The Court must dismiss a complaint, or portion of the complaint, if it is “frivolous, malicious or fails to state a claim upon which relief may be granted;

1 or...seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. §
2 1915A(b); 28 U.S.C. § 1915(e)(2). A claim is frivolous “when the facts alleged rise to the level
3 of the irrational or the wholly incredible, whether or not there are judicially noticeable facts
4 available to contradict them.” Denton v. Hernandez, 504 U.S. 25, 32-33 (1992). In determining
5 malice, the Court examines whether the claims are pled in good faith. Kinney v. Plymouth Rock
6 Squab Co., 236 U.S. 43, 46 (1915).

7 **II. Pleading Standards**

8 General rules for pleading complaints are governed by the Federal Rules of Civil
9 Procedure. A pleading stating a claim for relief must include a statement affirming the court’s
10 jurisdiction, “a short and plain statement of the claim showing the pleader is entitled to relief;
11 and...a demand for the relief sought, which may include relief in the alternative or different types
12 of relief.” Fed.R.Civ.P. 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se*
13 pleadings are held to “less stringent standards” than pleadings drafted by attorneys. Haines v.
14 Kerner, 404 U.S. 519, 520-21 (1972).

15 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain
16 and succinct manner. Jones v. Cmty Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).
17 The purpose of the complaint is to give the defendant fair notice of the claims against him, and
18 the grounds upon which the complaint stands. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512
19 (2002). The Supreme Court noted,

20 Rule 8 does not require detailed factual allegations, but it demands more than an
21 unadorned, the-defendant-unlawfully-harmed-me unlawfully accusation. A pleading
22 that offers labels and conclusions or a formulaic recitation of the elements of a cause
of action will not do. Nor does a complaint suffice if it tenders naked assertions
devoid of further factual enhancement.

23 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (internal quotation marks and citations omitted).
24 Conclusory and vague allegations do not support a cause of action. Ivey v. Board of Regents,
25 673 F.2d 266, 268 (9th Cir. 1982). The Court clarified further that,

26 [A] complaint must contain sufficient factual matter, accepted as true, to “state a
27 claim to relief that is plausible on its face.” [Citation]. A claim has facial
plausibility when the plaintiff pleads factual content that allows the court to draw
the reasonable inference that the defendant is liable for the misconduct alleged.
28 [Citation]. The plausibility standard is not akin to a “probability requirement,” but

1 it asks for more than a sheer possibility that a defendant has acted unlawfully.
2 [Citation]. Where a complaint pleads facts that are “merely consistent with” a
3 defendant’s liability, it “stops short of the line between possibility and plausibility
4 of ‘entitlement to relief.’”

5 Iqbal, 129 S.Ct. at 1949. Where the factual allegations are well-pled, a court should assume their
6 truth and determine whether the facts would make the plaintiff entitled to relief; conclusions in
7 the pleading are not entitled to the same assumption of truth. Id. If the Court determines that
8 the complaint fails to state a cognizable claim, the Court may grant leave to amend to the extent
9 that deficiencies of the complaint can be cured by an amendment. Lopez v. Smith, 203 F.3d
10 1122, 1127-28 (9th Cir. 2000) (en banc).

11 **III. § 1983 Claims**

12 Section 1983 of title 42 of the United States Code does not provide for substantive rights;
13 it is “a method for vindicating federal rights elsewhere conferred.” Albright v. Oliver, 510 U.S.
14 266, 271 (1994). An individual may bring an action for the deprivation of civil rights pursuant to
15 42 U.S.C. § 1983, which states in pertinent part:

16 Every person who, under color of any statute, ordinance, regulation, custom, or
17 usage, of any State or Territory or the District of Columbia, subjects, or causes to be
18 subjected, any citizen of the United States or other person within the jurisdiction
19 thereof to the deprivation of any rights, privileges, or immunities secured by the
20 Constitution and laws, shall be liable to the party injured in an action at law, suit in
21 equity, or other proper proceeding for redress. . . .

22 42 U.S.C. § 1983. To plead a § 1983 violation, a plaintiff must allege facts from which it may be
23 inferred that (1) he was deprived of a federal right, and (2) a person or entity who committed the
24 alleged violation acted under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988);
25 Williams v. Gorton, 529 F.2d 668, 670 (9th Cir. 1976).

26 A plaintiff must allege that he suffered a specific injury and show causal relationship
27 between the defendant’s conduct and the injury suffered by the plaintiff. See Rizzo v. Goode,
28 423 U.S. 362, 371-72, 377 (1976); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person
deprives another of a federal right “if he does an affirmative act, participates in another’s
affirmative acts, or omits to perform an act which he is legally required to do so that it causes the
deprivation of which complaint is made”). There is no respondeat superior liability under §

1 1983, and the supervisor of an individual who allegedly violated a plaintiff's constitutional rights
2 is not made liable for the violation simply by virtue of that role. Monell v. Dep't. of Soc. Servs.,
3 436 U.S. 658, 691 (1978). "A supervisor is only liable for constitutional violations of his
4 subordinates if the supervisor participated in or directed the violations, or knew of the violations
5 and failed to act to prevent them." Taylor v. List, 880 F.2d, 1040, 1045 (9th Cir. 1989).

6 Finally, as with other complaints, conclusory allegations unsupported by facts are
7 insufficient to state a civil rights claim under § 1983. Sherman v. Yakahi, 549 F.2d 1287, 1290
8 (9th Cir. 1977).

9 **IV. Discussion and Analysis**

10 The first cause of action Plaintiff alleges that Defendants denied him his rights secured by
11 the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.
12 (Doc. 1 at 6) Specifically, Plaintiff argues that each of the defendants deprived him of his rights
13 to "due process of law, equal protection of the law, freedom from cruel and unusual punishment,
14 and from state occasioned harm, injury, damage to bodily integrity, and emotional pain." Id. In
15 the second cause of action, Plaintiff alleges defendants Clovis Police Department and County of
16 Fresno violated § 1983 through failure to properly train, supervise, and discipline employees. Id.
17 at 8. Plaintiff asserts the two causes of action arise from an incident on November 19, 2009:

18 [W]hile plaintiff Lupe Nieto, Jr. was under arrest and/or in the custody of Clovis
19 Police Department with both his hands visibly held above his head, Clovis Police
20 Officers positioned behind the Plaintiff fired approximately three rounds at Plaintiff
21 and Police Officer Drake Hodge, who was also positioned in back of Mr. Nieto, Jr.
22 fired his weapon causing the bullet to directly impact upon [P]laintiff's hand.
Despite the fact that Plaintiff had surrendered and visibly had no weapon which
obviously posed no threat to the officer's safety, a total of three live rounds were
aimed at him with one actually injuring (sic) him.

23 Id. at 5. Also, Plaintiff states that defendant County of Fresno failed to meet statutory obligations
24 under California Government Code § 815.6, but did not incorporate this argument into a cause of
25 action. Id. at 3.

26 A. Liability of Defendant Clovis Police Department

27 Under § 1983, a "person" may be sued for the deprivation of federal rights, and
28 municipalities or other governmental bodies may be sued as a "person." Monell, 436 U.S. at

1 690. However, the Ninth Circuit has held that these governmental bodies do not include police
2 departments, as “municipal police departments and bureaus are generally not considered
3 ‘persons’ within the meaning of 42 U.S.C. § 1983.” United States v. Kama, 394 F.3d 1236, 1240
4 (9th Cir. 2005). In Morris v. State Bar, the Court considered whether the City of Fresno Fire
5 Department was amenable to suit, and held,

6 Municipal police departments and bureaus are generally not considered “persons”
7 within the meaning of 42 U.S.C. § 1983. Hervey v. Estes, 65 F.3d 782, 791 (9th Cir.
8 1995). Other types of governmental associations are only subject to suit under
9 Section 1983 if the parties that created them intended to create a separate legal entity.
10 Hervey, 65 F.3d at 792 (intergovernmental narcotics team is not subject to suit). See
11 also Sanders v. Aranas, 2008 U.S. Dist. LEXIS 6042, 2008 WL 268972, 3 (E.D. Cal.
12 2008) (the Fresno Police Department is not a proper defendant because it is a sub-
13 division of the City of Fresno).

14 ...The City of Fresno is the proper party because it is the governmental entity
15 considered a “person” under § 1983. The Fresno Fire Department is a “sub-unit” of
16 the City of Fresno and is not a person under § 1983.

17 Morris v. State Bar, 2010 U.S. Dist. LEXIS 36945, at *6-7 (E.D. Cal. Mar. 10, 2010). Notably,
18 several recent decisions in the Eastern District held police departments are not “persons” under §
19 1983. See, e.g., Navarro v. California, 2010 U.S. Dist. LEXIS 5388, at *18 (E.D. Cal. June 25,
20 2010); Wade v. Fresno Police Dep’t, 2010 U.S. Dist. LEXIS 57093, at *10-11 (E.D. Cal. June 8,
21 2010); Abeytia v. Fresno Police Dep’t, 2009 U.S. Dist. LEXIS 49500, at *25 (E.D. Cal. June 12,
22 2009). Furthermore, this rationale is followed by other districts within the Ninth Circuit as well.
23 See, e.g., Vance v. County of Santa Clara, 928 F. Supp 993, 996 (N.D. Cal. 1996) (“[T]he term
24 ‘persons’ does not encompass municipal departments.”); Ortega v. Chula Vista Police Dep’t,
25 2010 U.S. Dist. LEXIS 66960, at *2 (S.D. Cal. June 29, 2010) (The Court found the “Chula
26 Vista Police Department lacks capacity to be sued under Section 1983. . .”); Moreno-Garcia v.
27 Yakima Police Dep’t, 2010 U.S. Dist. LEXIS 69213, at *5-6 (E.D. Wash. July 9, 2010) (“The
28 Yakima Police Department is not a legal entity separate from the City of Yakima, and it lacks
capacity to be sued.”). Moreover, not only is a municipal department not a proper defendant to a
§ 1983 claim, but also “naming a municipal department as a defendant is not an appropriate
means of pleading a § 1983 action against a municipality. Stumps v. Gates, 777 F.Supp. 808,
816 (D. Colo. 1991).

1 Given its status as a municipal department, Clovis Police Department is not the proper
2 defendant to Plaintiff's claim. Rather, the proper defendant would be the City of Clovis.
3 Therefore, the Court will address the liability of the City of Clovis below.

4 B. Liability of Defendant County of Fresno

5 Plaintiff seems to allege that the County of Fresno is responsible for the actions of the
6 City of Clovis. However, as noted above, the City of Clovis Police Department is an agency of
7 the City of Clovis. The County of Fresno is responsible *only* for its own agencies and
8 departments. Therefore, the complaint as to the County of Fresno, is **DISMISSED**.

9 C. Liability of City of Clovis

10 A local governmental entity may be sued where governmental policy or custom are the
11 cause of a deprivation of federal rights. Monell, 436 U.S. at 694. To establish liability, Plaintiff
12 must show: (1) he was deprived of a constitutional right; (2) the City of Clovis had a policy; (3)
13 that this policy amounted to a deliberate indifference to the his constitutional right; and (4) the
14 policy was "the moving force behind the constitutional violation." See Oviatt v. Pearce, 954
15 F.2d 1470, 1474 (9th Cir. 1992), quoting City of Canton, Ohio v. Harris, 489 U.S. at 378, 388
16 (1989); see also, Monell at 690-92. There are three ways to show the policy or custom of a
17 government:

18 (1) By showing a longstanding practice or custom which constitutes the standard
19 operating procedure of the local government entity;

20 (2) By showing that the decision-making official was, as a matter of state law, a
21 final policy making authority whose edicts or acts may fairly be said to represent
22 official policy in the area of decision or

23 (3) By showing that an official which final policymaking authority either
24 delegated that authority to, or ratified the decision of, a subordinate.

25 Menotti v. City of Seattle, 409 F.3d 1113, 1147 (9th Cir. 2005) (internal quotation marks and
26 citations omitted), citing Ulrich v. City & County of San Francisco, 308 F.3d 968, 985 (9th Cir.
27 2002). Furthermore, a governmental policy may be inferred where there is evidence of repeated
28 constitutional violations for which the officers were not reprimanded. Menotti, 409 F.3d at 1147.

 Relevant to his claims of municipal liability, Plaintiff asserts defendants Clovis Police
Department was charged "by law, custom, and regulation with the hiring, supervision, and

1 training of staff and employees of the Clovis Police Department.” (Doc. 1 at 8) Plaintiff
2 contends the policies and practices of defendants “are devoid of legitimate purpose, and are
3 deliberately indifferent to human safety,” and that the defendants failed “to hire competent
4 people. . .[and] to provide training and supervision regarding the health and safety of detainees.”
5 Id. at 7. Plaintiff concludes, “The direct and immediate result of these systematic failures to
6 properly hire, train, and supervise has been the unlawful infliction of physical injury, emotional
7 anguish, and pain and suffering to plaintiff Lupe Nieto, Jr.” Id. at 9.

8 1. Failure to Train

9 The Supreme Court has held that “the inadequacy of police training may serve as the
10 basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the
11 rights of persons with whom the police come into contact.” Canton, 489 U.S. at 388. The
12 omission of training must reflect a “deliberate or conscious choice by a municipality” for the city
13 to be liable for its failure under § 1983. Id. “[T]he need to train officers in the constitutional
14 limitations on the use of deadly force, can be said to be so obvious that the failure to do so could
15 be characterized as deliberate indifference to constitutional rights.” Id. at 390, n. 10 (internal
16 quotation marks and citation omitted). Therefore, the defendants would be liable under §1983 if
17 Plaintiff can show a failure to train or supervise the officer that amounted to deliberate
18 indifference, and a causal connection existed between the failure to train and the injuries Plaintiff
19 claims.

20 Plaintiff argues that the defendants “were responsible for the training of employees as to
21 lawful conduct toward detainees... including the wrongfulness of intentional physical abuse,”
22 and that the defendants “failed to properly train themselves and their staffs on the law governing
23 their conduct.” (Doc. 1 at 9) In addition, Plaintiff asserted the policies were “deliberately
24 indifferent” as to the rights of the detainees or arrestees, and caused him personal injury. Id. at 7,
25 9. However, the recitation of the required elements of a claim, even where supplemented with
26 legal conclusions, is not sufficient to state a claim. See Iqbal, 129 S.Ct. at 1949. Plaintiff has
27 failed to provide any supporting factual allegations, or any allegations as to what the policies or
28

1 customs are of the defendants with regard to training. Therefore, the complaint as to the City of
2 Clovis on this basis, is **DISMISSED**.

3 2. Failure to Supervise

4 The failure to supervise employees can lead to § 1983 liability where there is a history of
5 wide-spread abuse. Abeytia, 2009 U.S. Dist. LEXIS 49500, at *23. To prevail on a claim that
6 the defendants had a policy or custom of inadequately supervising its police officers, Plaintiff
7 must establish that this policy caused a constitutional deprivation of his rights. See Hammond v.
8 County of Madera, 859 F.2d 797, 801-02 (9th Cir. 1988); Van Ort v. Estate of Stanewich, 92
9 F3d. 831, 837 (9th Cir. 1996). Similar to a failure to adequately train, a constitutional violation
10 may arise from a failure to supervise where the failure amounts to a “deliberate indifference.”
11 Canton, 489 U.S. at 388; Davis v. Ellensburg, 869 F.2d 1230, 1235 (9th Cir. 1989).

12 As before, the Plaintiff recited the elements of for a “failure to supervise” claim by stating
13 the defendants failed in their responsibilities to supervise and that this caused him an injury.
14 However, Plaintiff has failed to point to specific factual allegation that shows the inadequacy or
15 failure to supervise, or show how this caused the constitutional violations alleged in his
16 Complaint. Therefore, the complaint as to the City of Clovis on this basis, is **DISMISSED**.

17 3. Failure to Discipline

18 Beyond listing failure to properly discipline under his “Second Cause of Action,” Plaintiff
19 does not mention the failure to discipline again. Notably, Plaintiff makes no allegations
20 regarding whether the officers involved were disciplined or what the policy of defendants is in
21 relation to disciplining officers. Therefore, the complaint as to the City of Clovis on this basis, is
22 **DISMISSED**.

23 4. Use of Excessive Force

24 Plaintiff alleges that the Clovis Police Department “continue to subject detainees and/or
25 arrestees to physical abuse in retaliation for surrendering . . . and/or [their failure] to comply with
26 lawful requests and/or demands . . .” (Doc. 1 at 5) However, Plaintiff offers no factual basis to
27 support his claim of having information and/or a belief on this topic. He is required to plead
28

1 facts to support these conclusions, rather than simply noting the elements of the tort. Therefore,
2 the complaint as to the City of Clovis on this basis, is **DISMISSED**.

3 C. Fifth Amendment

4 Plaintiff alleges a due process violation under the Fifth Amendment. However, the Fifth
5 Amendment applies only to actions by the federal government, and not to the actions of private
6 actors. Rank v. Nimmo, 677 F.2d 692, 701 (9th Cir. 1982). There must be a “significantly close
7 nexus” between the federal government and the actor for the Fifth Amendment to apply to non-
8 federal entities. Id. Therefore, Plaintiff cannot make a cognizable claim against Defendants on
9 Fifth Amendment grounds and the complaint, on these grounds, is **DISMISSED**.

10 D. Sixth Amendment

11 The Sixth Amendment provides a right to a speedy trial, and the rights of a defendant “to
12 be informed of the nature and cause of the accusation; to be confronted with the witnesses
13 against him,” and to the assistance of counsel. U.S. Constitution, amend. VI. However, other
14 than listing the Sixth Amendment among the rights violated by Defendants, Plaintiff makes no
15 factual statements regarding Sixth Amendment rights. Consequently, the Court is unable to infer
16 that Plaintiff was denied a right arising under the Sixth Amendment. Plaintiff is unable to make
17 a cognizable claim against Defendants on Sixth Amendment grounds and the complaint on these
18 grounds, is **DISMISSED**.

19 E. Eighth Amendment

20 The Eighth Amendment proscribes a freedom from cruel and unusual punishment. U.S.
21 Constitution, amend. VIII. Plaintiff alleges a violation of these rights, arguing that the policies
22 and practices of Defendants “demonstrate an intent to inflict unnecessary and wanton pain, in
23 violation of the Eighth (sic) Amendment....” (Doc. at 7) However, only after conviction and
24 sentence does the prohibition of cruel and unusual punishment take effect. Lee v. City of Los
25 Angeles, 250 F.3d 668, 868 (9th Cir. 2001). Plaintiff’s claims are based upon an incident at the
26 time of his arrest, and Plaintiff had not been convicted of a crime. Thus, the Eighth Amendment
27 is not applicable and the complaint, on these grounds, is **DISMISSED**.

28 F. Fourth & Fourteenth Amendment

1 1. Fourth Amendment

2 Plaintiff alleges violations of his right to due process of law and that Defendants had
3 “deliberate indifference to [his] equal protection rights.” (Doc. 1 at 6-7) The Fourth Amendment
4 prohibits arrests without probable cause or other justification, and provides: “The right of the
5 people to be secure in their persons. . . against unreasonable searches and seizures, shall not be
6 violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
7 and particularly describing . . . the persons or things to be seized.” U.S. Constitution, amend. IV.
8 A claim for unlawful arrest is cognizable when the arrest is alleged to have been made without
9 probable cause or justification. Dubner v. City & County of San Francisco, 266 F.3d 959, 964
10 (9th Cir. 2001). In addition, allegations of excessive force during an arrest are analyzed under a
11 Fourth Amendment standard. Graham v. Connor, 490 U.S. 386, 388 (1989) (“claim[s] that law
12 enforcement officials used excessive force in the course of making an arrest, investigatory stop,
13 or other ‘seizure’ . . . are properly analyzed under the Fourth Amendment’s ‘objective
14 reasonableness’ standard”); Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994) (“the use of force
15 to effect an arrest is subject to the Fourth Amendment’s prohibition on unreasonable seizures”).

16 2. Due Process Clause of the Fourteenth Amendment

17 The Due Process Clause of the Fourteenth Amendment provides, “No State shall . . .
18 deprive any person of life, liberty, or property, without due process of law.” U.S. Constitution,
19 amend. XIV §1. This clause guarantees both procedural and substantive due process. The
20 procedural due process component protects individuals against the deprivation of liberty or
21 property by the government, while substantive due process protects individuals from the arbitrary
22 deprivation of liberty by the government. Portman v. County of Santa Clara, 995 F.2d 898, 904
23 (9th Cir. 1993); Brittain v. Hansen, 451 F.3d 982, 991 (9th Cir. 2006). “A § 1983 claim based
24 upon procedural due process has three elements: (1) a liberty or property or property interest
25 protected by the Constitution; (2) a deprivation of the interest by the government, and (3) lack of
26 process. Portman, 995 F.2d at 904.

27 Here, Plaintiff alleges Defendants violated his rights under the Constitution and the
28 Fourteenth Amendment “by refusing to honor his surrender to law enforcement” at the time of

1 his arrest and shooting him in the hand. (Doc. 1 at 5, 7) As such, the gravamen of Plaintiff's
2 Complaint is the amount of force used during the course of his arrest and after his surrender. The
3 Supreme Court held in Graham,

4 *[A]ll* claims that law enforcement officers have used excessive force – deadly
5 or not – in the course of an arrest, investigatory stop, or other “seizure” of a
6 free citizen should be analyzed under the Fourth Amendment and its
7 “reasonableness” standard, rather than under a “substantive due process”
8 approach. Because the Fourth Amendment provides an explicit textual
9 source of constitutional protection against this sort of physically intrusive
10 governmental conduct, that Amendment, not the more generalized notion of
11 “substantive due process,” must be the guide for analyzing these claims.

12 Graham, 490 U.S. at 395. Graham continued, “Our cases have not resolved the question whether
13 the Fourth Amendment continues to provide individuals with protection against the deliberate
14 use of excessive physical force beyond the point at which arrest ends and pretrial detention
15 begins, and we do not attempt to answer that question today. It is clear, however, that the Due
16 Process Clause protects a pretrial detainee from the use of excessive force that amounts to
17 punishment. See Bell v. Wolfish, 441 U.S. 520, 535-539 (1979).”

18 Therefore, as to pretrial detainees, it is the Fourteenth Amendment’s Due Process Clause
19 that protects against excessive force that amounts to punishment. Graham, 490 U.S. at 395 n. 10;
20 Gibson v. County of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002). However, on this basis, the
21 Ninth Circuit has determined that the Fourth Amendment’s standards set the applicable
22 constitutional limitations for considering claims of excessive force. Gibson, 290 F.3d at 1197;
23 Short v. Sanzberro, 2009 U.S. Dist. LEXIS 122519 at *8 (E.D. Cal. 2009).

24 Plaintiff claims that he was subjected to excessive force due to the “unlawful shooting
25 and injury” inflicted by Officer Hodge that took place after his surrender. (Doc. 1 at 3, 5)
26 Therefore, Plaintiff has stated a cognizable claim against Defendant Hodge. However, as
27 discussed above, Plaintiff has failed to set forth facts to link any of the other defendants to the
28 alleged violation of these rights. See West, 487 U.S. at 28.

2. Equal Protection

The Equal Protection Clause states that “no state shall... deny to any person within its
jurisdiction the equal protection of the laws.” U.S. Constitution, amend. XIV §1. In essence, this

1 commands that all persons who are similarly situated be treated alike. City of Cleburne v.
2 Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

3 A plaintiff can establish an equal protection claim in two ways. First, a plaintiff may
4 allege “the defendants acted with an intent or purpose to discriminate against the plaintiff based
5 upon membership in a protected class. Lee, 25, F.3d at 686. Second, where the acts in question
6 do not involve a protected class, a plaintiff can establish a “class of one” claim by alleging that
7 he “has been intentionally treated differently from others similarly situated and that there is no
8 rational basis for the difference in treatment.” Village of Willowbrook v. Olech, 528 U.S. 562,
9 564 (2000).

10 Even when viewed liberally, Plaintiff’s Complaint fails to state an equal protection
11 violation. The Complaint summarily states Defendants was deprived of “equal protection of the
12 law.” (Doc. 1 at 6) However, this conclusion is not sufficient to state a claim. See Iqbal, 129
13 S.Ct. at 1949; see also Papasan v. Allain, 478 U.S. 265, 286 (the court is “not bound to accept as
14 true a legal conclusion couched as a factual allegation”). Plaintiff does not contend that
15 Defendants discriminated against him in violation of equal protection rights or that he was
16 treated differently from other similarly situated individuals. Therefore, Plaintiff failed to state a
17 cause of action for an equal protection violation and the complaint, on Fifth Amendment
18 grounds, is **DISMISSED**.

19 **V. Conclusion**

20 Plaintiff’s complaint states a claim under section 1983 against Defendant Hodge for
21 violation of his Fourth and Fourteenth Amendment rights. He fails to state causes of action
22 under the Fifth, Sixth or Eighth Amendments or a cause of action against Defendants, City of
23 Clovis or the County of Fresno. The Court will provide Plaintiff with the opportunity to file an
24 amended complaint curing the deficiencies identified by the Court in this order. Noll v. Carlson,
25 809 F.2d 1446, 1448-49 (9th Cir. 1987).

26 If Plaintiff does not wish to file an amended complaint and is agreeable to proceeding
27 only against Defendant Hodge on his Fourth and Fourteenth Amendment claims, Plaintiff may
28 notify the Court in writing, and the Court will dismiss Defendants City of Clovis and the County

1 of Fresno. At that time, the Court will forward Plaintiff three summonses and three USM-285
2 forms for completion and return. Upon receipt of the forms, the Court will direct the United
3 States Marshal to initiate service of process. If Plaintiff opts to amend, his amended complaint
4 should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the
5 deprivation of Plaintiff's constitutional or other federal rights. Iqbal, 129 S.Ct. at 1948-49; Jones
6 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Although accepted as true, the "[f]actual
7 allegations must be [sufficient] to raise a right to relief above the speculative level. . . ." Bell
8 Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007) (citations omitted).

9 Finally, Plaintiff is advised that an amended complaint supercedes the original complaint,
10 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567
11 (9th Cir. 1987), and must be "complete in itself without reference to the prior or superceded
12 pleading," Local Rule 220. Plaintiff is warned that "[a]ll causes of action alleged in an original
13 complaint which are not alleged in an amended complaint are waived." King, 814 F.2d at 567
14 (citing London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114
15 F.3d at 1474.

16 Based on the foregoing, it is **HEREBY ORDERED** that:

17 1. Within 20 days from the date of service of this order, Plaintiff must either:

18 a. File an amended complaint curing the deficiencies identified by the Court in this
19 order, or

20 b. Notify the Court in writing that he is willing to proceed only against Defendant
21 Hodge on his Fourth and Fourteenth Amendment claims related to the use of force and
22 that he does not want to file an amended complaint; and

23 2. If Plaintiff fails to comply with this order, this action will be dismissed for failure
24 to obey a court order.

25 IT IS SO ORDERED.

26 Dated: September 30, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE