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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARY A. SANDERS,
Plaintiff,

CASE NO. 1:10-cv-02332-LJO-SMS

v.

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL FOR
FAILURE TO STATE A CLAIM

FEDERAL BUREAU OF
INVESTIGATIONS,
JOHN DOES 1 TO 8,

Defendants.

(Doc. 9)

_____ /

Plaintiff Gary A. Sanders, a state prisoner proceeding *pro se* and *in forma pauperis*, initially filed this civil rights action on December 15, 2010, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors. On February 8, March 4, and March 28, 2011, this Court dismissed Plaintiff's complaint for failure to state a claim, in each case granting Plaintiff leave to amend in accordance with the Court's screening order. In each amendment, Plaintiff failed to amend in accordance with the Court's order so that the Third Amended Complaint, filed April 6, 2011, fails to state a claim upon which relief can be granted. Accordingly, this Court recommends that this case be dismissed with prejudice for failure to state a claim.

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1 **I. Pleading Standards and Screening Requirement**

2 The Court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
4 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
8 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
9 claim upon which relief may be granted.” 28 U.S.C. § 915(e)(2)(B)(ii).

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

22 Although accepted as true, “[f]actual allegations must be [sufficient] to raise a right to relief
23 above the speculative level.” *Id.* at 555 (*citations omitted*). A plaintiff must set forth “the grounds
24 of his entitlement to relief,” which “requires more than labels and conclusions, and a formulaic
25 recitation of the elements of a cause of action.” *Id.* at 555-56 (*internal quotation marks and citations*
26 *omitted*). To adequately state a claim against a defendant, a plaintiff must set forth the legal and
27 factual basis for his claim.

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1 **II. Factual and Procedural Background**

2 **A. Initial Complaint**

3 Plaintiff best alleged the facts supporting his claims in his initial complaint. Plaintiff alleged
4 he was arrested on December 23, 2009, by the Kern County Bureau of Investigations, which was
5 assisting the Kern County Violent Crime Task Force. Eight unidentified members of the FBI, who
6 were also members of the Task Force, kicked and beat Plaintiff, until he was unconscious and
7 bleeding from his nose. The assault fractured Plaintiff's back and crushed his skull and face.
8 Plaintiff's dentures were lost during the course of his arrest.

9 Following the assault, Plaintiff was hospitalized and underwent plastic surgery. He continues
10 to experience pain as a result of the assault and anticipates life-long medical issues attributable to his
11 injuries.

12 In its screening order dismissing the initial complaint, the Court noted various deficiencies
13 that precluded the complaint from stating a claim. It found Plaintiff unable to bring a *Bivens* action
14 against federal agencies such as the Federal Bureau of Investigation, which was initially named as a
15 Defendant, and directed Plaintiff to add as defendants law enforcement personnel associated with the
16 "Kern County Violent Crimes Gang task force" or other law enforcement agencies to correspond to
17 facts suggesting that such persons were part of the alleged assault incident to Plaintiff's arrest. The
18 Court discussed federal procedure regarding "John Doe" defendants, finding that the FBI agents
19 named as John Does would be readily identifiable through government records.

20 With regard to Plaintiff's claims of excessive force, the Court briefly discussed applicable law
21 under the Fourth Amendment to the U.S. Constitution and directed Plaintiff to allege additional facts
22 tying each Defendant to the alleged assault in his amended complaint, if he decided to proceed with
23 amendment. The Court explained that, since the alleged assault did not occur in the course of
24 confinement, the Eighth Amendment to the Constitution was not applicable to Plaintiff's claims.

25 In its conclusion and order, the Court provided:

26 Plaintiff's complaint fails to state a claim upon which relief may be granted. The
27 Court will provide Plaintiff with the opportunity to file an amended complaint curing
28 the deficiencies identified by the Court in this order. Plaintiff may not change the
nature of this suit by adding new, unrelated claims in his amended complaint. *George*
v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

1 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state
2 what each named Defendant did that led to the deprivation of Plaintiff's constitutional
3 or other federal rights. *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir. 1988).
4 Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a
5 right to relief above the speculative level" *Twombly*, 550 U.S. at 555 (*citations*
6 *omitted*). Plaintiff should focus on identifying his legal claims and setting forth, as
7 briefly but specifically as possible, the facts linking the defendants he names to the
8 violation of his rights.

9 Finally, Plaintiff is advised that an amended complaint supercedes the original
10 complaint, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *aff'd*, 525
11 U.S. 299 (1999); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), and must be
12 "complete in itself without reference to the prior or superceded pleading," Local Rule
13 15-220. "All causes of action alleged in an original complaint which are not alleged
14 in an amended complaint are waived." *King*, 814 F.2d at 567; *accord Forsyth*, 114
15 F.3d at 1474.

16 **B. First Amended Complaint**

17 Despite the Court's warning that amended complaints supersede all prior complaints, when
18 Plaintiff filed his First Amended Complaint on March 4, 2011, he omitted the well-pleaded facts that
19 he had originally alleged. In its screening order, the Court advised Plaintiff that, if he elected to
20 again amend his complaint, as the order permitted him to do, he should restore the facts setting forth
21 the nature and extent of his injuries as they related to his Fourth Amendment claim of excessive
22 force. The Court again directed Plaintiff to remove the F.B.I. as a defendant since no cause of action
23 under *Bivens* exists against federal agencies and to delineate his John Doe defendants more
24 specifically.

25 The Court's conclusion repeated the advisory language used in its first order and indicated
26 that Plaintiff would be permitted "one additional opportunity to file an amended complaint curing the
27 deficiencies identified by the Court."

28 **C. Second Amended Complaint**

Plaintiff again filed an amended complaint on March 21, 2011. Although the complaint was
substantially changed and barely cognizable, it mistakenly treated Plaintiff's excessive force claim as
arising under the Eighth Amendment to the U.S. Constitution. Accordingly, the Court dismissed the
second amended complaint for failure to state a claim, encouraging Plaintiff to submit a third
amended complaint that was unchanged from the second amended complaint except for references to
his claim's arising under the Eighth Amendment being amended to reflect that they were made under

1 the Fourth Amendment.

2 **D. Third Amended Complaint**

3 On April 6, 2011, Plaintiff filed a third amended complaint that had been completely revised
4 from the second amended complaint. The complaint neither included the detailed factual allegations
5 of the original complaint nor appended the incident reports that supplemented Plaintiff's factual
6 allegations in the second amended complaint. The nature of the claim was recast to allege
7 wrongdoing only by Defendant John Doe Sherman, who allegedly ordered an attack incident to
8 Plaintiff's arrest and refused to provide Plaintiff with medical assistance following the arrest. The
9 statement of claim, set forth in a single brief paragraph was replete with legal conclusions and
10 omitted numerous elements essential to a claim of excessive force incident to an arrest in violation of
11 the Fourth Amendment.

12 **C. Plaintiff's Claims -- Excessive Force**

13 Plaintiff contends that the sole remaining Defendant violated his rights by ordering the use of
14 excessive force in the course of Plaintiff's arrest and by denying Plaintiff medical attention following
15 the assault. Under the Fourth Amendment, made applicable to the states by the Fourteenth
16 Amendment, people are to be secure against unreasonable searches and seizures. *Maryland v.*
17 *Pringle*, 540 U.S. 366, 369 (2003); *Mapp v. Ohio*, 367 U.S. 643 (1961). An officer may arrest a
18 person without a warrant only if there is probable cause to believe that the person has committed or
19 is committing an offense. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). Each case is determined
20 on its specific facts and circumstances. *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996).
21 Those facts and circumstances will determine the Fourth Amendment's reach in a particular case.
22 *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

23 A seizure occurs when the government ends a person's freedom of movement by
24 intentionally applied means. *Scott v. Harris*, 550 U.S. 372, 381 (2007); *Brower v. County of Inyo*,
25 489 U.S. 593, 596-97 (1989). A claim of excessive force in the course of a seizure is properly
26 analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*,
27 490 U.S. 386, 388 (1989). To evaluate a Fourth Amendment claim, this Court must consider
28 whether each Defendant's actions were objectively reasonable in light of the facts of the arrest.

1 *Scott*, 550 U.S. at 381. This means that the Court must consider whether the officer’s actions were
2 objectively reasonable in light of the facts and circumstances of the arrest, without regard to the
3 underlying intent or motivation. *Graham*, 490 U.S. at 387. Reasonableness of the type of force used
4 is evaluated from the perspective of an officer on the scene and must include an allowance for the
5 fact that police officers are often forced to make a split-second determination of the necessary
6 amount of force. *Id.*

7 In his third amended complaint, Plaintiff has not alleged sufficient specific facts to allow the
8 Court to understand the circumstance of the arrest and the specific facts relevant to assessing whether
9 the Defendants’ force was excessive.

10 **IV. Conclusion and Recommendation**

11 Despite multiple screenings and amendments, Plaintiff’s complaint fails to state a claim upon
12 which relief may be granted. In addition, the nature of Plaintiff’s claims has changed substantially
13 from the initial complaint to the third amended complaint. Accordingly, the undersigned **HEREBY**
14 **RECOMMENDS** that this case be dismissed with prejudice.

15 These findings and recommendations are submitted to the Honorable Lawrence J. O’Neill,
16 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule
17 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
18 California. Within thirty (30) days after being served with a copy, Plaintiff may file written
19 objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s
20 Findings and Recommendations.” The Court will then review the Magistrate Judge’s ruling pursuant
21 to 28 U.S.C. § 636(b)(1)(C). Plaintiff advised that failure to file objections within the specified time
22 may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
23 1991).

24 IT IS SO ORDERED.

25 **Dated:** April 8, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE