

1 **II. Screening Requirement**

2 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and
3 shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the
4 action or appeal is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . .
5 seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A
6 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,
7 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,
8 504 U.S. 25, 32-33 (1992).

9 **III. Pleading Standards**

10 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A
11 pleading stating a claim for relief must include a statement affirming the court’s jurisdiction, “a short
12 and plain statement of the claim showing the pleader is entitled to relief; and . . . a demand for the
13 relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P.
14 8(a). The Federal Rules adopt a flexible pleading policy, and *pro se* pleadings are held to “less
15 stringent standards” than pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

16 A complaint must give fair notice and state the elements of the plaintiff’s claim in a plain and
17 succinct manner, and identify the grounds upon which the complaint stands. *Swierkiewicz v. Sorema*
18 *N.A.*, 534 U.S. 506, 512 (2002); *Jones v. Cmty Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir.
19 1984). 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 accusation. A pleading that offers
22 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*, 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted).

24 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d
25 266, 268 (9th Cir. 1982). The Court clarified further,

26 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim
27 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
28 inference that the defendant is liable for the misconduct alleged. [Citation]. The
plausibility standard is not akin to a “probability requirement,” but it asks for more than

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

3 *Iqbal*, 566 U.S. at 678 (citations omitted). When factual allegations in a complaint are well-pled, a
4 court should assume their truth and determine whether the facts would make the plaintiff entitled to
5 relief. *Id.* However, legal conclusions are not entitled to the same assumption of truth. *Id.* Leave to
6 amend a complaint may be granted when its deficiencies can be cured by an amendment. *Lopez v.*
7 *Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

8 **IV. Section 1983 Claims**

9 Plaintiff seeks to proceed in this action under 42 U.S.C. § 1983 (“Section 1983”), which “is a
10 method for vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271
11 (1994). Thus, an individual may bring an action for the deprivation of civil rights pursuant to Section
12 1983, which states in relevant part:

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

17 42 U.S.C. § 1983. To state a cognizable claim under Section 1983, a plaintiff must allege facts from
18 which it may be inferred (1) he was deprived of a federal right, and (2) a person or entity who
19 committed the alleged violation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988);
20 *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976).

21 **V. Factual Allegations**

22 Plaintiff alleges Bakersfield Police Department officers were dispatched to his residence on
23 April 10, 2014. (Doc. 1 at 3.) Plaintiff alleges that he was “walk[ing] toward a neighbor’s house”
24 holding “a flashlight and table leg” in his hands when two officers told him place the items on the curb
25 and lie down. (*Id.*) According to Plaintiff, he got down in a prone position and was handcuffed by the
26 two officers who then “backed away.” (*Id.*) He alleges other officers arrived after he was handcuffed,
27 and Plaintiff “heard the sound of metal being dragged” and coming toward him. (*Id.*) Plaintiff asserts
28 the sound scared him, and he “rolled over to see what that sound coming towards [him] was plus what

1 was taking place.” (*Id.*) Plaintiff alleges he was unable to see because of the lights on a patrol car, but
2 he heard a neighbor yell: “You better roll Pete they’re coming.” (*Id.*) Plaintiff reports that he then
3 “rolled more,” and “rolled into a female officer who immediately yelled, ‘hit him, hit him.’” (*Id.*)

4 Plaintiff asserts that, at that point, he “was between [the officer’s] feet and grabbed on her
5 ankles to use her as a shield, and she fell on top of [his] back.” (Doc. 1 at 3-4.) He alleges the officer
6 attempted to roll off him, and he “held on and went with her to avoid getting hit.” (*Id.* at 4.) Plaintiff
7 maintains that he “never ran, or threw a punch or grabbed the officer in a threatening manner.” (*Id.*)

8 According to Plaintiff, the officers hit him “all over” his body despite his “advanced age” until
9 he was unconscious. (*Id.*) He alleges that he work up at Mercy Hospital with injuries including head
10 trauma that required staples, a broken left forearm, broken hand, a crushed vertebrae, fractured pelvis,
11 and fractures in both legs. (*Id.*) Plaintiff asserts he “was hospitalized for nearly 5 days and left in the
12 jail’s infirmary for 2 weeks.” (*Id.*)

13 Based upon these facts, Plaintiff asserts the defendants are liable for the “violation of [his] civil
14 rights under the Fifth and Fourteenth amendments of the U.S. Constitution.” (Doc. 1 at 3.)

15 **VI. Discussion and Analysis**

16 **A. Liability of the Bakersfield Police Department**

17 A municipality or other governmental body may be sued as a “person” under Section 1983 for
18 the deprivation of federal rights. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). However,
19 the Ninth Circuit has determined “municipal police departments and bureaus are generally not
20 considered ‘persons’ within the meaning of 42 U.S.C. § 1983.” *United States v. Kama*, 394 F.3d
21 1236, 1240 (9th Cir. 2005). In *Morris v. State Bar*, this Court considered whether the City of Fresno
22 Fire Department was amenable to suit and held:

23 Municipal police departments and bureaus are generally not considered “persons” within
24 the meaning of 42 U.S.C. § 1983. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995).
25 Other types of governmental associations are only subject to suit under Section 1983 if
26 the parties that created them intended to create a separate legal entity. *Hervey*, 65 F.3d at
27 792 (intergovernmental narcotics team is not subject to suit). *See also Sanders v. Aranas*,
28 2008 U.S. Dist. LEXIS 6402, 2008 WL 268972, 3 (E.D. Cal. 2008) (the Fresno Police
Department is not a proper defendant because it is a sub-division of the City of Fresno).

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

1 *Morris v. State Bar*, 2010 U.S. Dist. LEXIS 36945, at *6-7 (E.D. Cal. Mar. 10, 2010). Notably, several
2 decisions in the Eastern District held sheriff and police departments are not “persons” under Section
3 1983. *See, e.g., Gonzales v. City of Clovis*, 2013 U.S. Dist. LEXIS 12719 (E.D. Cal. Jan. 30, 2013)
4 (holding that the Clovis Police Department is not a “person” for purposes of Section 1983); *Alston v.*
5 *County of Sacramento*, 2012 U.S. Dist. LEXIS 95494, at *6-7 (E.D. Cal. July 10, 2012); *Pellum v.*
6 *Fresno Police Dep’t*, 2011 U.S. Dist. LEXIS 10698, at *6 (E.D. Cal. Feb. 2, 2011).¹ Given its status
7 as a municipal department, the Bakersfield Police Department is not a proper defendant to Plaintiff’s
8 Section 1983 claims.

9 **B. Fifth Amendment**

10 Plaintiff alleges a violation of his civil rights under the Fifth Amendment. However, the Fifth
11 Amendment applies only to actions by the federal government. *Rank v. Nimmo*, 677 F.2d 692, 701
12 (9th Cir. 1982). There must be a “significantly close nexus” between the federal government and the
13 actor for the Fifth Amendment to apply to nonfederal entities or individuals. *Id.* Here, Plaintiff has
14 not made any factual allegations regarding the police officers’ connections to the federal government.
15 Thus, Plaintiff fails to state cognizable claim for a Fifth Amendment violation, and the claim is
16 **DISMISSED.**

17 **C. Fourteenth Amendment**

18 The Supreme Court of the United States has determined that the Due Process Clause of the
19 Fourteenth Amendment protects individuals who have not yet been convicted of a crime “from the use
20 of excessive force that amounts to punishment.” *Graham v. Connor*, 490 U.S. 386, 388 (1989).
21 However, allegations of excessive force during the course of an arrest are analyzed under the Fourth
22 Amendment, which prohibits arrests without probable cause or other justification. *Id.* (“claim[s] that
23 law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or
24 other ‘seizure’ ... are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’
25 standard”); *see also Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) (“the use of force to effect an
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27 ¹ Moreover, this rationale is followed by other districts within the Ninth Circuit as well. *See, e.g., Vance v. County*
28 *of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) (“the term ‘persons’ does not encompass municipal departments”);
Ortega v. Chula Vista Police Dep’t, 2010 U.S. Dist. LEXIS 66960, at *2 (S.D. Cal. June 29, 2010) (finding the “Chula
Vista Police Department lacks capacity to be sued under Section 1983...”).

1 arrest is subject to the Fourth Amendment’s prohibition on unreasonable seizures”).

2 Here, Plaintiff asserts officers of the Bakersfield Police Department used force upon him after
3 he was handcuffed, and that the use of force continued to the point that he lost consciousness. The
4 Ninth Circuit has determined the use of force upon a person after surrender may constitute excessive
5 force. *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000). Importantly, however, it is
6 not clear that Plaintiff had surrendered to the officers, because he admits that he attempted to roll away
7 and to use the officer as a shield from being beating with a baton. Further, the Court is unable to
8 determine which defendants may be held liable for the use of excessive force. Although Plaintiff
9 names eight “Doe” defendants (Doc. 1 at 1), he fails to fails to identify the two officers who
10 handcuffed him, or explain whether these two officers were among those who hit him with batons.

11 To state a claim under Section 1983, a plaintiff must allege specifically how each defendant
12 violated his rights, and link each defendant’s actions to a violation of his rights. *See West*, 487 U.S. at
13 48; *Johnson v. Duffy*, 588 F.2d 740, 742 (9th Cir. 1978). In other words, Plaintiff must distinguish the
14 individuals who beat him for the Court to determine whether or not Plaintiff can state a cognizable
15 claim for the use of excessive force against each individual defendant. Because Plaintiff has failed to
16 specifically link any of the defendants to his claim for excessive force, he has failed to state a
17 cognizable claim. Accordingly, Plaintiff’s claim for a violation of the Fourteenth Amendment is
18 **DISMISSED.**

19 **VII. Conclusion and Order**

20 A plaintiff should be granted leave to amend when the deficiencies of the complaint can be
21 cured by amendment. *Lopez*, 203 F.3d at 1130. A complaint, or a portion thereof, should only be
22 dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that
23 the Plaintiff can prove no set of facts, consistent with the allegations, in support of the claim or claims
24 that would entitle her to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley*
25 *v. Gibson*, 355 U.S. 41, 45-46 (1957)).

26 In this case, it is unclear whether Plaintiff may allege facts supporting his claim for violations
27 of the Fourteenth Amendment. Therefore, the Court will grant leave for Plaintiff to cure the
28 deficiencies identified above by stating facts sufficient to support claims against the individual “Doe”

1 defendants by linking each of the defendants to his alleged injuries. The amended pleading must bear
2 the docket number assigned this case and must be labeled “First Amended Complaint.”

3 Plaintiff is advised that the Court cannot refer to a prior pleading in order to make an amended
4 complaint complete. Local Rule 220 requires and amended complaint be “complete in itself without
5 reference to the prior or superseded pleading.” As a general rule, an amended complaint supersedes
6 the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Thus, once Plaintiff files a
7 First Amended Complaint, the original complaint no longer serves any function in the case. Finally,
8 Plaintiff is warned that “[a]ll causes of action alleged in an original complaint which are not alleged in
9 an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citation
10 omitted).

11 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 12 1. Plaintiff’s Complaint is **DISMISSED** with leave to amend;
- 13 2. Plaintiff **SHALL** file a First Amended Complaint within thirty days from the date of
14 service of this Order; and
- 15 3. Plaintiff is advised that the action may be dismissed for failure to comply with this
16 Order. *See e.g. Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissing
17 the action for failure to comply with an order requiring amendment of complaint).

18
19 IT IS SO ORDERED.

20 Dated: June 25, 2014

/s/ Jennifer L. Thurston
21 UNITED STATES MAGISTRATE JUDGE