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

LEROY WALLACE, III,

Plaintiff,

No. CIV S-09-3204 FCD EFB P

vs.

FAIRFIELD POLICE DEPARTMENT;  
OFFICER, CAJ #1302; DETECTIVE FOK;  
OFFICER JIMENEZ;

Defendants.

ORDER

Plaintiff is confined in a county jail and is proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(a). This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, the request to proceed *in forma pauperis* will be granted. 28 U.S.C. § 1915(a). By separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

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1 The court has reviewed plaintiff's complaint and, for the limited purposes of § 1915A  
2 screening, finds that it states cognizable Fourth Amendment claims of excessive force against  
3 Detective Fok and Officer Jimenez.<sup>1</sup> See 28 U.S.C. § 1915A.

4 For the reasons stated below, the complaint does not state a cognizable claim against the  
5 Fairfield Police Department. That defendant will therefore be dismissed with leave to amend.

6 A district court must construe a pro se pleading "liberally" to determine if it states a  
7 claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
8 opportunity to cure them. See *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). While  
9 detailed factual allegations are not required, "[t]hreadbare recitals of the elements of a cause of  
10 action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct.  
11 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff  
12 must set forth "sufficient factual matter, accepted as true, to 'state a claim to relief that is  
13 plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

14 A claim has facial plausibility when the plaintiff pleads factual  
15 content that allows the court to draw the reasonable inference that  
16 the defendant is liable for the misconduct alleged. The plausibility  
17 standard is not akin to a "probability requirement," but it asks for  
18 more than a sheer possibility that a defendant has acted unlawfully.  
Where a complaint 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.

19 *Id.* (citations and quotation marks omitted). Although legal conclusions can provide the  
20 framework of a complaint, they must be supported by factual allegations, and are not entitled to  
21 the assumption of truth. *Id.* at 1950.

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24 <sup>1</sup> Defendant "Officer, CAJ #1302," who plaintiff alleges was in the vehicle that "ran  
25 over" plaintiff, appears to be the same as defendant "Officer Jimenez." See Dckt. No. 1 at 1, 3.  
26 Therefore, defendant "Officer, CAJ #1302" will be dismissed. However, to the extent that  
defendant can allege separate claims against "Officer, CAJ #1302" and "Officer Jimenez,"  
plaintiff will be granted leave to do so.

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
2 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
3 the alleged violation was committed by a person acting under the color of state law. *West v.*  
4 *Atkins*, 487 U.S. 42, 48 (1988). An individual defendant is not liable on a civil rights claim  
5 unless the facts establish the defendant’s personal involvement in the constitutional deprivation  
6 or a causal connection between the defendant’s wrongful conduct and the alleged constitutional  
7 deprivation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d  
8 740, 743-44 (9th Cir. 1978).

9 Since there is no respondeat superior liability under § 1983, municipalities (and their  
10 departments) may be sued under § 1983 only upon a showing that an official policy or custom  
11 caused the constitutional tort. *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274,  
12 280 (1977); *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Haugen v.*  
13 *Brosseau*, 351 F.3d 372, 393 (9th Cir. 2003) (granting summary judgment to city and city police  
14 department under *Monell*). “A local government entity cannot be held liable under § 1983 unless  
15 the plaintiff alleges that the action inflicting injury flowed from either an explicitly adopted or a  
16 tacitly authorized [governmental] policy.” *Ortez v. Washington County*, 88 F.3d 804, 811 (9th  
17 Cir. 1996) (citation and quotations omitted) (alteration in original). “[L]ocal governments, like  
18 any other § 1983 ‘person,’ . . . may be sued for constitutional deprivations visited pursuant to  
19 governmental ‘custom’ even though such a custom has not received formal approval through the  
20 body’s official decisionmaking channels.”<sup>2</sup> *Monell*, 436 U.S. at 690-91. Because plaintiff has  
21 not alleged any official policy or custom by the Fairfield Police Department, plaintiff has not

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22  
23 <sup>2</sup> “The custom must be so “persistent and widespread” that it constitutes a “permanent  
24 and well settled city policy.” *Monell*, 436 U.S. at 691. Liability for improper custom may not be  
25 predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient  
26 duration, frequency and consistency that the conduct has become a traditional method of  
carrying out policy. *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984); *see also*  
*Meehan v. Los Angeles County*, 856 F.2d 102 (9th Cir. 1988) (two incidents not sufficient to  
establish custom); *Davis v. Ellensburg*, 869 F.2d 1230 (9th Cir. 1989) (manner of one arrest  
insufficient to establish policy).

1 stated a claim against that defendant. Therefore, plaintiff's claims against the Fairfield Police  
2 Department will be dismissed with leave to amend.

3 Plaintiff may proceed forthwith to serve defendants Fok and Jimenez and pursue his  
4 claims against only those defendants or he may delay serving any defendant and attempt to state  
5 a cognizable claim against the Fairfield Police Department.

6 If plaintiff elects to attempt to amend his complaint to state a cognizable claim against  
7 the Fairfield Police Department, he has 30 days so to do. If plaintiff elects to proceed forthwith  
8 against defendants Fok and Jimenez, against whom he has stated a cognizable claim for relief,  
9 then within 30 days he must return materials for service of process enclosed herewith. In this  
10 event, the court will construe plaintiff's election as consent to dismissal of all claims against the  
11 Fairfield Police Department, without prejudice.

12 Any amended complaint must adhere to the following requirements:

13 It must be complete in itself without reference to any prior pleading. E.D. Cal. Local  
14 Rule 220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended  
15 complaint, the original pleading is superseded.

16 It must show that the federal court has jurisdiction and that plaintiff's action is brought in  
17 the right place, that plaintiff is entitled to relief if plaintiff's allegations are true, and must  
18 contain a request for particular relief. Plaintiff must identify as a defendant only persons who  
19 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.  
20 *Johnson*, 588 F.2d at 743 (a person subjects another to the deprivation of a constitutional right if  
21 he does an act, participates in another's act or omits to perform an act he is legally required to do  
22 that causes the alleged deprivation).

23 It must contain a caption including the name of the court and the names of all parties.  
24 Fed. R. Civ. P. 10(a).

25 Plaintiff may join multiple claims if they are all against a single defendant. Fed. R. Civ.  
26 P. 18(a). If plaintiff has more than one claim based upon separate transactions or occurrences,

1 the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b). Plaintiff may join  
2 multiple claims if they are all against a single defendant. Fed. R. Civ. P. 18(a). Unrelated claims  
3 against different defendants must be pursued in multiple lawsuits. “The controlling principle  
4 appears in Fed. R. Civ. P. 18(a): ‘A party asserting a claim . . . may join, [] as independent or as  
5 alternate claims, as many claims . . . as the party has against an opposing party.’ Thus multiple  
6 claims against a single party are fine, but Claim A against Defendant 1 should not be joined with  
7 unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in  
8 different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit  
9 produce[s], but also to ensure that prisoners pay the required filing fees-for the Prison Litigation  
10 Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file  
11 without prepayment of the required fees. 28 U.S.C. § 1915(g).” *George v. Smith*, 507 F.3d 605,  
12 607 (7th Cir. 2007); *see also* Fed. R. Civ. P. 20(a)(2) (joinder of defendants not permitted unless  
13 both commonality and same transaction requirements are satisfied).

14 The allegations must be short and plain, simple and direct and describe the relief plaintiff  
15 seeks. Fed. R. Civ. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v.*  
16 *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). A long, rambling pleading,  
17 including many defendants with unexplained, tenuous or implausible connection to the alleged  
18 constitutional injury or joining a series of unrelated claims against many defendants very likely  
19 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing  
20 plaintiff’s action pursuant to Rule 41 of the Federal Rules of Civil Procedure for violation of  
21 these instructions.

22 Plaintiff must sign the complaint. Fed. R. Civ. P. 11(a). By signing an amended  
23 complaint, plaintiff certifies he has made reasonable inquiry and has evidentiary support for his  
24 allegations and that for violation of this rule the court may impose sanctions sufficient to deter  
25 repetition by plaintiff or others. Fed. R. Civ. P. 11.

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1 A prisoner may bring no § 1983 action until he has exhausted such administrative  
2 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. *Booth*  
3 *v. Churner*, 532 U.S. 731, 741 (2001). By signing an amended complaint plaintiff certifies his  
4 claims are warranted by existing law, including the law that he exhaust administrative remedies,  
5 and that for violation of this rule plaintiff risks dismissal of his entire action, including his claims  
6 against defendants Fok and Jimenez.

7 Accordingly, the court hereby orders that:

8 1. Plaintiff's request to proceed in forma pauperis is granted.

9 2. Plaintiff must pay the statutory filing fee of \$350 for this action. All payments shall  
10 be collected and paid in accordance with the notice to the Solano County Sheriff filed  
11 concurrently herewith.


12 3. Plaintiff's claims against the Fairfield Police Department and Officer, CAJ #1302 are  
13 dismissed with leave to amend. Within 30 days of service of this order, plaintiff may amend his  
14 complaint to attempt to state cognizable claims against these defendants. Plaintiff is not  
15 obligated to amend his complaint.

16 4. The allegations in the pleading are sufficient at least to state cognizable claims against  
17 defendants Fok and Jimenez. *See* 28 U.S.C. § 1915A. With this order the Clerk of the Court  
18 shall provide to plaintiff a blank summons, a copy of the complaint filed November 17, 2009,  
19 two USM-285 forms and instructions for service of process on defendants Fok and Jimenez.  
20 Within 30 days of service of this order, plaintiff may return the attached Notice of Submission of  
21 Documents with the completed summons, the completed USM-285 forms, and three copies of  
22 the November 17, 2009 complaint. The court will transmit them to the United States Marshal for  
23 service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure. Defendants Fok  
24 and Jimenez will be required to respond to plaintiff's allegations within the deadlines stated in  
25 Rule 12(a)(1) of the Federal Rules of Civil Procedure. In this event, the court will construe  
26 plaintiff's election to proceed forthwith as consent to an order dismissing his defective claims

1 against the Fairfield Police Department and Officer, CAJ #1302 without prejudice.

2 5. Failure to comply with this order will result in a recommendation that this action be  
3 dismissed.

4 Dated: April 22, 2010.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE

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LEROY WALLACE, III,

Plaintiff,

No. CIV S-09-3204 FCD EFB P

vs.

FAIRFIELD POLICE DEPARTMENT;  
OFFICER, CAJ #1302; DETECTIVE FOK;  
OFFICER JIMENEZ,

Defendants.

NOTICE OF SUBMISSION OF DOCUMENTS

\_\_\_\_\_ /

In accordance with the court's order filed \_\_\_\_\_, plaintiff hereby elects to:

(1) \_\_\_\_\_ consent to the dismissal of defendants Fairfield Police Department and Officer, CAJ #1302 without prejudice, and submits the following documents:

  1   completed summons form

  2   completed forms USM-285

  3   copies of the Complaint

**OR**

(2) \_\_\_\_\_ delay serving any defendant and files an amended complaint in an attempt to state cognizable claims against Fairfield Police Department and Officer, CAJ #1302.

Dated:

\_\_\_\_\_  
Plaintiff