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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FREDERICK MARCELES COOLEY,  
Plaintiff,  
v.  
CITY OF VALLEJO, et al.,  
Defendants.

No. 2:14-cv-0620 TLN KJN PS

ORDER

INTRODUCTION

Plaintiff Frederick Marceles Cooley, proceeding without counsel and *in forma pauperis*, commenced this action on March 6, 2014. (ECF No. 1.)<sup>1</sup> Subsequently, on March 28, 2014, all named defendants (the City of Vallejo, sergeant Brett Clark, and officer Dustin Joseph) filed the instant motion to dismiss plaintiff’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), which was noticed for hearing on May 8, 2014. (ECF No. 9.) On April 7, 2014, plaintiff filed an opposition to the motion to dismiss, as well as a motion for sanctions under Federal Rule of Civil Procedure 11 to be imposed on defendants’ counsel. (ECF Nos. 12, 13.) Thereafter, on May 1, 2014, defendants filed a reply brief in support of their motion to dismiss, and an opposition to plaintiff’s motion for Rule 11 sanctions. (ECF Nos. 15.) Then, on May 8,

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<sup>1</sup> This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 2014, plaintiff filed an additional, unauthorized brief approximately 30 minutes prior to the  
2 hearing. (ECF No. 17.)<sup>2</sup>

3 At the hearing, plaintiff appeared representing himself,<sup>3</sup> and attorney Furah Faruqui  
4 appeared on behalf of defendants. After considering the parties' briefing, the parties' oral  
5 argument, and the applicable law, the court grants defendants' motion to dismiss, but with leave  
6 to amend.

### 7 BACKGROUND

8 The background facts are taken from plaintiff's complaint, unless otherwise noted. (See  
9 ECF No. 1.) Plaintiff alleges that on September 5, 2011, plaintiff, an unarmed 20-year old  
10 African-American male, was visiting his friends' house. The small group of friends gathering at  
11 the house eventually turned into a "full blown house party," and at 11:20 p.m., defendant Vallejo  
12 Police Department sergeant Brett Clark ordered several officers to force their way into the  
13 residence. Officers apparently entered the residence, yelling "get down." Although plaintiff was  
14 purportedly complying with the officers' orders to get down, defendant Vallejo Police  
15 Department officer Dustin Joseph, without warning, deployed his taser in dart mode into  
16 plaintiff's forehead just inches away from plaintiff's left eye. Plaintiff allegedly experienced  
17 excruciating pain, blurred vision, intense headaches, dizziness, and other substantial injuries.

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19 <sup>2</sup> In light of plaintiff's *pro se* status, and in this one instance only, the court has considered  
20 plaintiff's additional, unauthorized brief. However, plaintiff is cautioned that any future brief or  
21 other document not filed in accordance with the court's Local Rules, including the briefing  
22 deadlines of Local Rule 230, may be summarily stricken. Although the court is sympathetic to  
23 the difficulties faced by a *pro se* litigant in representing himself in federal court, plaintiff is  
24 expected to review and comply with the Federal Rules of Civil Procedure and the court's Local  
25 Rules. Failure to do so may result in the imposition of sanctions, including potential dismissal of  
26 plaintiff's case. A copy of the court's Local Rules may be obtained from the Clerk of Court or  
27 online at <http://www.caed.uscourts.gov/caednew/index.cfm/rules/local-rules/>.

28  
29 <sup>3</sup> At the hearing, plaintiff Frederick Marceles Cooley was accompanied by his father, Frederick  
30 Marc Cooley, who plaintiff claims acts as his legal assistant. (See ECF No. 17 at 4.) Plaintiff  
31 orally requested that his father, a non-attorney, be allowed to represent him in this matter. The  
32 court denies plaintiff's request, because non-attorneys are not permitted to represent litigants  
33 other than themselves in federal court. Thus, although plaintiff's father may accompany plaintiff  
34 to court hearings and provide moral assistance, plaintiff must sign his own pleadings and filings,  
35 and must present his own oral argument at any court hearings.

1 Defendant Joseph then arrested plaintiff for a violation of California Penal Code section 148  
2 (which criminalizes, *inter alia*, resisting, delaying or obstructing a police officer).

3 Liberally construed, plaintiff's complaint asserts 42 U.S.C. § 1983 claims for excessive  
4 force in violation of the Fourth Amendment against officers Clark and Joseph, as well as a Monell  
5 claim against the City of Vallejo, based on plaintiff's allegation that defendants Clark and  
6 Joseph's actions reflect a longstanding municipal practice, policy, or custom of allowing police  
7 officers to use excessive force. Plaintiff seeks \$20,000,000.00 in compensatory and punitive  
8 damages, including damages for emotional distress.

### 9 LEGAL STANDARD

10 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
11 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase  
12 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard  
13 of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and  
14 plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see  
15 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss,  
16 a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that  
17 is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.  
18 Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads  
19 factual content that allows the court to draw the reasonable inference that the defendant is liable  
20 for the misconduct alleged." Id.

21 In considering a motion to dismiss for failure to state a claim, the court accepts all of the  
22 facts alleged in the complaint as true and construes them in the light most favorable to the  
23 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not,  
24 however, required to accept as true conclusory allegations that are contradicted by documents  
25 referred to in the complaint, and [the court does] not necessarily assume the truth of legal  
26 conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at  
27 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and,  
28 prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity

1 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.  
2 Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police  
3 Dep't, 901 F.2d 696, 699 (9th Cir. 1990); see also Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th  
4 Cir. 2010) (stating that courts continue to construe *pro se* filings liberally even when evaluating  
5 them under the standard announced in Iqbal).

6 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally  
7 consider only allegations contained in the pleadings, exhibits attached to the complaint, and  
8 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506  
9 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not  
10 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the  
11 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,  
12 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding  
13 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.  
14 2003).

## 15 DISCUSSION

16 Defendants’ motion to dismiss presently before the court does not challenge the  
17 substantive adequacy of plaintiff’s claims. Instead, defendants argue that plaintiff’s claims are  
18 time barred under the applicable statute of limitations.

19 “In determining the proper statute of limitations for actions brought under 42 U.S.C. §  
20 1983, we look to the statute of limitations for personal injury actions in the forum state.”  
21 Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004). As of January 1, 2003, California’s  
22 limitations period for personal injury actions is two (2) years. Cal. Civ. Proc. Code § 335.1;  
23 Maldonado, 370 F.3d at 954-55. Federal law determines when a section 1983 claim accrues and  
24 the applicable limitations period begins to run. Maldonado, 370 F.3d at 955. “Under federal law,  
25 a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of  
26 the action.” Id. For purposes of a claim that police officers used excessive force during an arrest  
27 or detention, the claim accrues on the date of the arrest or detention. Cabrera v. City of  
28 Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998).

1 In this case, plaintiff's excessive force claims (and related Monell claim) accrued on  
2 September 5, 2011, the day that he was allegedly tased and arrested, because plaintiff knew or  
3 had reason to know of the purportedly unconstitutional conduct on that date. However, plaintiff  
4 did not commence this action until March 6, 2014. (ECF No. 1.) Under the applicable two-year  
5 statute of limitations, plaintiff's claims are therefore time barred, unless the statute of limitations  
6 was tolled.

7 State law governs the application of tolling doctrines. Torres v. City of Santa Ana, 108  
8 F.3d 224, 226 (9th Cir. 1997). In his opposition to defendants' motion to dismiss, plaintiff  
9 contends that the statute of limitations was tolled by California Government Code section 945.3.  
10 That statute provides, in part, that:

11 No person charged by indictment, information, complaint, or other  
12 accusatory pleading charging a criminal offense may bring a civil  
13 action for money or damages against a peace officer or the public  
14 entity employing a peace officer based upon conduct of the peace  
15 officer relating to the offense for which the accused is charged,  
including an act or omission in investigating or reporting the  
offense or arresting or detaining the accused, while the charges  
against the accused are pending before a superior court.

16 Any applicable statute of limitations for filing and prosecuting these  
17 actions shall be tolled during the period that the charges are pending  
before a superior court.

18 Cal. Gov't Code § 945.3. The Ninth Circuit has recognized that “[i]n California, the statute of  
19 limitations for section 1983 actions is tolled by Cal. Gov't Code § 945.3 while criminal charges  
20 are pending.” Torres, 108 F.3d at 226 (citation omitted). Criminal charges are “pending” from  
21 the date that the criminal charges are filed in court until the date of judgment. Id. at 226-27.

22 In his opposition, plaintiff states, and attaches documentation showing, that the Solano  
23 County District Attorney filed a felony complaint against plaintiff for possession for sale of  
24 cocaine base on September 15, 2011,<sup>4</sup> and that judgment pursuant to a plea of no contest (along

25 \_\_\_\_\_  
26 <sup>4</sup> According to the exhibit attached to plaintiff's opposition, the felony complaint was signed on  
27 September 15, 2011, and actually filed with the superior court on September 16, 2011. (ECF No.  
28 12 at 6-7.) Although, as noted above, it is the date of *filing the charges with the court* that  
matters for purposes of California Government Code section 945.3, the discrepancy of one day  
has no significance in this case.

1 with a reservation of plaintiff's right to appeal the denial of a motion to suppress evidence) in that  
2 criminal case was entered on January 24, 2014. (ECF No. 12 at 2-3, 6-7, 12.) As such, plaintiff  
3 argues that the statute of limitations was tolled from September 15, 2011, to January 24, 2014,  
4 rendering his March 6, 2014 action timely. Plaintiff further claims that defendants knew about  
5 the criminal charges, because the City of Vallejo sought and obtained a protective order in the  
6 criminal case concerning police officer records. (ECF No. 12 at 9-10.) Plaintiff thus contends  
7 that defendants' counsel should be sanctioned pursuant to Federal Rule of Civil Procedure 11 for  
8 filing a frivolous motion to dismiss. (ECF No. 13.)

9 In their reply brief, defendants primarily rely on the Ninth Circuit's above-cited Cabrera  
10 decision to argue that section 945.3 tolling does not apply to plaintiff's excessive force claims. In  
11 Cabrera, police officers responded to a call concerning a fight between the plaintiff's brother and  
12 the brother's girlfriend on August 7, 1992. Cabrera, 159 F.3d at 377. The plaintiff claimed that,  
13 although his only role was as a peacemaker, the police officers assaulted and battered him, and  
14 then falsely arrested and prosecuted him on charges of disturbing the peace and resisting arrest.  
15 Id. The next day, on August 8, 1992, plaintiff was released pursuant to a notice to appear, and on  
16 August 25, 1992, criminal charges were filed against him in state court for resisting arrest and  
17 disturbing the peace. Id. The resisting arrest charge was dismissed prior to trial, and on April 27,  
18 1994, the plaintiff was convicted of disturbing the peace and sentenced. Id. Thereafter, on April  
19 12, 1995, the plaintiff filed a section 1983 action in federal district court against the city and  
20 police officers, alleging claims for false arrest, false imprisonment, excessive force, and official  
21 cover-up of Fourth Amendment violations resulting in obstruction of justice. Id. at 377, 380.  
22 While the civil action was pending, the plaintiff's conviction was overturned, and on September  
23 14, 1995, he was acquitted. Id. at 377. The district court ultimately dismissed the plaintiff's  
24 section 1983 claims as barred by the then-applicable one-year statute of limitations. Id.

25 On appeal, the Ninth Circuit concluded that, pursuant to Heck v. Humphrey, 512 U.S. 477  
26 (1994), the plaintiff's false arrest and false imprisonment claims did not accrue until his  
27 conviction was invalidated on September 14, 1995, because a judgment for the plaintiff on those  
28 claims would necessarily imply the invalidity of his conviction and sentence. Cabrera, 159 F.3d

1 at 380. As such, the Ninth Circuit found that these claims were not time barred. Id. at 381. By  
2 contrast, the Ninth Circuit noted that the plaintiff’s claims for excessive force and official cover-  
3 up of the alleged Fourth Amendment violations, “if successful, would not necessarily imply the  
4 invalidity of his conviction. Therefore, the general rule applies: These claims accrued when  
5 Cabrera knew or had reason to know of the injury.” Id. at 380-81. Accordingly, the Ninth Circuit  
6 found that the excessive force and official cover-up claims were barred by the statute of  
7 limitations.

8 Relying on Cabrera, defendants argue that section 945.3 tolling does not apply to  
9 plaintiff’s excessive force claims. Defendants misinterpret Cabrera, because the Ninth Circuit did  
10 not hold that section 945.3 tolling was inapplicable to the Cabrera plaintiff’s excessive force  
11 claim—the Ninth Circuit instead focused on when the Cabrera plaintiff’s different types of claims  
12 *accrued* under the Ninth Circuit’s interpretation of Heck. Another district court in the Ninth  
13 Circuit rejected a similar argument to the one made by defendants here:

14 Defendants argue that plaintiff is not entitled to tolling under  
15 Section 945.3 for his excessive force claim. They contend that, in  
16 Cabrera v. Huntington, the Ninth Circuit held that the plaintiff was  
17 not entitled to Section 945.3 tolling on his excessive force claim,  
18 because the claim accrued on the date of the arrest. Defendants  
19 misconstrue the holding of Cabrera. The Ninth Circuit in Cabrera  
20 concluded that Cabrera’s excessive force claim was time-barred not  
21 because Section 945.3 tolling was inapplicable, but because it was  
22 insufficient to render the claim timely. Cabrera, 159 F.3d at 381.  
23 Cabrera’s excessive force claim accrued on August 7, 1992; he was  
24 released, pursuant to a notice to appear, on August 8, 1992; a  
25 criminal complaint was filed on August 25, 1992; he was convicted  
26 and sentenced on April 27, 1994; and he filed suit on April 12,  
27 1995. Cabrera, 159 F.3d at 377. The Ninth Circuit held that  
28 Section 945.3 tolled the statute of limitations as of August 25, 1992,  
the day the criminal complaint was filed. Id. at 379. Because the  
statute of limitations ran from August 8, 1992 to August 25, 1992,  
and commenced running again on April 28, 1994, plaintiff’s  
excessive force claim was untimely by one day. Id. at 377, 381.

24 Hill v. City of Los Angeles, 2009 WL 2601250, at \*4 (C.D. Cal. Aug. 21, 2009) (unpublished).

25 Indeed, as Hill points out, the Ninth Circuit specifically stated that section 945.3 tolling  
26 applied in the Cabrera case: “Therefore, because the criminal complaint was not filed until  
27 August 25, 1992, the district court *properly tolled the statute at that time.*” Cabrera, 159 F.3d at  
28 379; see also Torres v. City of Santa Ana, 108 F.3d 224 (9th Cir. 1997) (finding excessive force

1 claim time barred, but only after applying section 945.3 tolling for period during which related  
2 criminal charges for prowling and resisting an officer were pending before the state court).  
3 Accordingly, the court rejects defendants' argument that section 945.3 tolling does not apply to  
4 plaintiff's excessive force claims in light of Cabrera.<sup>5</sup>

5 Nevertheless, there appeared to be another reason why section 945.3 tolling might not  
6 apply to plaintiff's claims. As noted above, plaintiff's complaint alleges that he was tasered at a  
7 party and arrested for violation of California Penal Code section 148 (resisting or obstructing a  
8 police officer) on September 5, 2011. (ECF No. 1.) However, in his opposition, plaintiff  
9 attempted to invoke section 945.3 tolling based on a felony complaint filed on September 16,  
10 2011, which relates to a charge of possession for sale of cocaine base in violation of Section  
11 11351.5 of the California Health and Safety Code, and which states that that drug crime was  
12 committed on September 3, 2011. (ECF No. 12 at 2-3, 6-7.) Based on the different dates and the  
13 different nature of the offenses, it appeared to the court that two separate, unrelated incidents  
14 were involved. If that were the case, plaintiff could not use his drug charge to toll the statute of  
15 limitations for his excessive force claims, because the excessive force claims would not arise out  
16 of the incident related to the drug charge. Cal. Gov't Code § 945.3 (statute of limitations tolled  
17 for a civil action against a peace officer where that action is "based upon conduct of the peace  
18 officer *relating to the offense for which the accused is charged*") (emphasis added); see also  
19 Torres, 108 F.3d at 227-28.

20 However, in his additional brief filed on May 8, 2014, and upon further questioning at the  
21 hearing, plaintiff represented that his excessive force claims and drug charge actually derive from  
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23 <sup>5</sup> Regardless, the court finds that there is not a sufficient basis to conclude that the imposition of  
24 Rule 11 sanctions against defendants' counsel is warranted. As an initial matter, plaintiff's  
25 complaint on its face is time barred, because plaintiff's complaint did not include sufficient  
26 factual allegations to invoke section 945.3 tolling. Moreover, while the court ultimately  
27 concludes that defendants' counsel misinterpreted Cabrera in its reply to plaintiff's opposition,  
28 the court is not persuaded that defendants' argument was presented for an improper purpose. The  
questions of tolling presented in this case were not necessarily straightforward, and, as discussed  
below, plaintiff himself injected some confusion into the matter by his pleading of different dates  
for the alleged drug crime and the taser incident. Consequently, the court denies plaintiff's  
motion for Rule 11 sanctions.



1 the same incident, i.e., that he was tasered, arrested, and that drugs were then allegedly found on  
2 his person, which was the basis for the felony drug charge. (See ECF No. 17.) Thus, it appears  
3 that plaintiff had inaccurately alleged the date of the taser incident, resulting in the above-  
4 mentioned confusion as to whether two separate incidents were involved.

5 In light of plaintiff's *pro se* status, the fact that he has not previously amended his  
6 complaint, and because it appears at least possible that plaintiff can correct the identified defects  
7 in an amended complaint, the court finds it appropriate to grant plaintiff leave to file an amended  
8 complaint.

9 If plaintiff elects to file an amended complaint, it shall comply with the following  
10 conditions and instructions:

- 11 (a) The amended complaint shall be captioned "First Amended Complaint" and shall not  
12 exceed 20 pages.
- 13 (b) The first amended complaint shall be limited to asserting claims for excessive force in  
14 violation of the Fourth Amendment under 42 U.S.C. § 1983 against defendant Clark  
15 and defendant Joseph, as well as a corresponding Monell claim against defendant City  
16 of Vallejo.
- 17 (c) In addition to alleging the necessary facts in support of the above-mentioned claims,  
18 the first amended complaint shall set forth sufficient factual allegations plausibly  
19 showing that plaintiff's claims are not time barred, and that tolling under California  
20 Government Code section 945.3 applied to plaintiff's claims. In particular, plaintiff  
21 shall clarify (i) the exact date of the taser incident and alleged discovery of drugs  
22 on plaintiff's person; (ii) what criminal charges were subsequently filed against  
23 plaintiff in state court; (iii) when those charges were filed in state court; (iv) out of  
24 which incident those charges arose; and (v) when judgment was entered in plaintiff's  
25 criminal case.

26 Plaintiff is informed that the court cannot refer to a prior complaint, brief, exhibits, or  
27 other filing to make plaintiff's first amended complaint complete. Local Rule 220 requires that  
28 an amended complaint be complete in itself without reference to any prior pleading. Thus, once

1 the first amended complaint is filed, it supersedes the original complaint, which no longer serves  
2 any function in the case.

3           Importantly, nothing in this order requires plaintiff to file a first amended complaint. If  
4 plaintiff determines that he does not wish to pursue the action at this juncture, he may instead file  
5 a request for voluntary dismissal of the action without prejudice pursuant to Federal Rule of Civil  
6 Procedure 41(a)(1)(A)(i).<sup>6</sup>


7 CONCLUSION

8           For the reasons outlined above, IT IS HEREBY ORDERED that:

- 9           1. Plaintiff's motion for Rule 11 sanctions (ECF No. 13) is denied.
- 10           2. Defendants' motion to dismiss plaintiff's complaint (ECF No. 9) is granted, but with  
11           leave to amend.
- 12           3. Within 30 days of this order, plaintiff shall file either (a) a first amended complaint in  
13           compliance with this order or (b) a request for voluntary dismissal of the action  
14           without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).
- 15           4. Defendants shall file a response to any first amended complaint within 30 days of  
16           service with that pleading.
- 17           5. Failure to file either a first amended complaint or a request for voluntary dismissal by  
18           the required deadline may result in the imposition of any appropriate sanctions,  
19           including monetary sanctions and/or potential dismissal of the action with prejudice  
20           pursuant to Federal Rule of Civil Procedure 41(b).

21           IT IS SO ORDERED.

22           Dated: May 12, 2014

23             
24           \_\_\_\_\_  
25           KENDALL J. NEWMAN  
26           UNITED STATES MAGISTRATE JUDGE

27           <sup>6</sup> At the hearing, the question of whether plaintiff's claims in this action, if not untimely, may be  
28           Heck barred was briefly raised. Because that issue is not presently briefed before the court, and  
the court's record is inadequate to make such a determination, the court expresses no opinion on  
the matter at this time.