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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TODD ROBBEN,

 Plaintiff,

 v.

GLENN NORLING,

 Defendant.

No. 2:16-cv-2699-WBS-EFB P

ORDER

Plaintiff is a county inmate proceeding without counsel in an action brought for alleged violations of his civil rights. He seeks leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and requests the appointment of counsel. He also requests to withdraw his consent to the jurisdiction of a magistrate judge,¹ and requests permission to electronically file with the court.²

I. Request to Proceed In Forma Pauperis

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).

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¹ Plaintiff previously submitted to the court the form choosing to decline the jurisdiction of the magistrate judge and requesting reassignment to a district judge. The matter has since been assigned to a district judge. Accordingly, plaintiff’s request to withdraw his consent (ECF No. 15) is denied as moot.

² This request (ECF No. 16) is denied pursuant to Local Rule 133(a), which provides that pro se parties, such as plaintiff, shall file and serve paper documents.

1 Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect
2 and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C.
3 § 1915(b)(1) and (2).

4 **II. Screening Requirement and Standards**

5 Federal courts must engage in a preliminary screening of cases in which prisoners seek
6 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
7 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion
8 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
9 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
10 relief.” *Id.* § 1915A(b).

11 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
12 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
13 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
14 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
16 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
17 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
18 U.S. 662, 679 (2009).

19 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
20 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
21 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
22 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
23 678.

24 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
25 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
26 content that allows the court to draw the reasonable inference that the defendant is liable for the
27 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
28 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*

1 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
2 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

3 **III. Screening Order**

4 The court has reviewed plaintiff's complaint (ECF No. 1) pursuant to § 1915A and finds
5 that it must be dismissed with leave to amend for failure to state a claim. The complaint alleges
6 that defendant Norling, an FBI agent, called 911 and claimed that plaintiff was driving on a
7 suspended license, even though he knew that the DMV had not served plaintiff with a notice of
8 the suspension. According to the complaint, plaintiff was pulled over, arrested, convicted, and
9 jailed. The complaint seeks damages and injunctive relief, and lists the following claims for
10 relief: Fourth Amendment, Fifth Amendment, Fourteenth Amendment, *Monell*, RICO,
11 conspiracy, fraud, infliction of mental duress, and loss of income and property. Although the
12 Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the
13 elements of the claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646,
14 649 (9th Cir. 1984). Here, the allegations are too vague and conclusory to state a cognizable
15 claim for relief. The complaint will be dismissed with leave to amend.

16 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
17 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
18 alleged violation was committed by a person acting under the color of state law. *West v. Atkins*,
19 487 U.S. 42, 48 (1988). Alternatively, *Bivens v. Six Unknown Named Agents of Federal Bureau*
20 *of Narcotics*, 403 U.S. 388 (1971), provides a remedy for violation of civil rights by federal
21 actors. *Bivens* established that "compensable injury to a constitutionally protected interest [by
22 federal officials alleged to have acted under color of federal law] could be vindicated by a suit for
23 damages invoking the general federal question jurisdiction of the federal courts [pursuant to 28
24 U.S.C. § 1331]." *Butz v. Economou*, 438 U.S. 478, 486 (1978). "Actions under [42 U.S.C.] §
25 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983
26 by a federal actor under *Bivens*." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). An
27 individual defendant is not liable on a civil rights claim unless the facts establish the defendant's
28 personal involvement in the constitutional deprivation or a causal connection between the

1 defendant's wrongful conduct and the alleged constitutional deprivation. *See Hansen v. Black*,
2 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

3 As a general rule, a challenge in federal court to the fact of conviction or the length of
4 confinement must be raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
5 *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Where success in a section 1983 or *Bivens* action
6 would implicitly question the validity of confinement or its duration, the plaintiff must first show
7 that the underlying conviction was reversed on direct appeal, expunged by executive order,
8 declared invalid by a state tribunal, or questioned by the grant of a writ of habeas corpus. *Heck v.*
9 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Muhammad v. Close*, 540 U.S. 749, 751 (2004).
10 Plaintiff is claiming that his federal constitutional rights were violated and as a result he was
11 arrested, convicted, and incarcerated. By the terms of *Heck*, plaintiff is barred from collaterally
12 challenging this underlying criminal conviction in this civil rights action.

13 Moreover, the complaint improperly asserts a *Monell* claim for relief because it neither
14 names a municipality as a defendant nor alleges that plaintiff was injured as a result of employees
15 acting pursuant to any policy or custom of a municipality. A municipal entity or its departments
16 is liable under section 1983 only if plaintiff shows that his constitutional injury was caused by
17 employees acting pursuant to the municipality's policy or custom. *Mt. Healthy City Sch. Dist.*
18 *Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977); *Monell v. New York City Dep't of Soc. Servs.*, 436
19 U.S. 658, 691 (1978); *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 964 (9th Cir. 2008).
20 Local government entities may not be held vicariously liable under section 1983 for the
21 unconstitutional acts of its employees under a theory of respondeat superior. *See Board of Cty.*
22 *Comm'rs. v. Brown*, 520 U.S. 397, 403 (1997).

23 In addition, the complaint fails to plead sufficient facts to state a Racketeering Influenced
24 and Corrupt Organization Act ("RICO") claim. To state a civil RICO claim, a plaintiff must
25 allege: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known
26 as "predicate acts"), (5) causing injury to plaintiff's business or property. *Sanford v.*
27 *Memberworks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010); *Walter v. Drayson*, 538 F.3d 1244, 1247
28 (9th Cir. 2008); *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996). A "pattern of racketeering

1 activity” means at least two criminal acts enumerated by statute. 18 U.S.C. § 1961(1), (5)
2 (including, among many others, mail fraud, wire fraud, and financial institution fraud). Those so-
3 called “predicate acts” under RICO, if based on a theory of fraudulent conduct, must be alleged
4 with specificity in compliance with Rule 9(b) of the Federal Rules of Civil Procedure. *Schreiber*
5 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-01 (9th Cir. 2004).

6 Further, the complaint cannot support any claim based on a conspiracy, which requires
7 allegations of specific facts showing that two or more persons intended to accomplish an unlawful
8 objective of causing plaintiff harm and took some concerted action in furtherance thereof.
9 *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-57 (9th Cir. 1999); *Margolis v. Ryan*, 140
10 F.3d 850, 853 (9th Cir. 1998) (to state claim for conspiracy under § 1983, plaintiff must allege
11 facts showing an agreement among the alleged conspirators to deprive him of his rights); *Delew*
12 *v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998) (to state claim for conspiracy under § 1983,
13 plaintiff must allege at least facts from which such an agreement to deprive him of rights may be
14 inferred); *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (per curiam) (conclusory
15 allegations of conspiracy insufficient to state a valid § 1983 claim); *Karim-Panahi v. Los Angeles*
16 *Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988).

17 Likewise, the allegations in the complaint are not sufficient to demonstrate fraud. When a
18 plaintiff raises claims of fraud, “the circumstances constituting fraud . . . shall be stated with
19 particularity.” Fed. R. Civ. P. 9(b). “Rule 9(b) serves not only to give notice to defendants of the
20 specific fraudulent conduct against which they must defend, but also ‘to deter the filing of
21 complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the
22 harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally
23 imposing upon the court, the parties and society enormous social and economic costs absent some
24 factual basis.’” *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (quoting *In re Stac*
25 *Elects. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir.1996)). Pursuant to Rule 9(b), a plaintiff alleging
26 fraud at a minimum must plead evidentiary facts such as the time, place, persons, statements and
27 explanations of why allegedly misleading statements are misleading. *In re GlenFed, Inc. Sec.*

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1 *Litig.*, 42 F.3d 1541, 1547 n. 7 (9th Cir. 1994); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
2 1097, 1106 (9th Cir. 2003); *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995).

3 Lastly, plaintiff's remaining claims appear to be brought under state tort law, which do not
4 come within the jurisdiction of the federal courts. Regardless, the complaint does not properly
5 allege any such claims because it does not plead compliance with the California Torts Claims Act
6 ("Act"). The Act requires that a party seeking to recover money damages from a public entity or
7 its employees submit a claim to the entity *before* filing suit in court, generally no later than six
8 months after the cause of action accrues. Cal. Gov't Code §§ 905, 911.2, 945, 950.2 (emphasis
9 added). Timely claim presentation is not merely a procedural requirement of the Act but is an
10 element of a plaintiff's cause of action. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th 201, 209
11 (2007). Thus, when a plaintiff asserts a claim subject to the Act, he must affirmatively allege
12 compliance with the claim presentation procedure, or circumstances excusing such compliance, in
13 his complaint. *Id.* The requirement that a plaintiff asserting claims subject to the Act must
14 affirmatively allege compliance with the claims filing requirement applies in federal court as
15 well. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir. 1988).

16 For these reasons, plaintiff's complaint must be dismissed. Plaintiff will be granted leave
17 to file an amended complaint, if he can allege a cognizable legal theory against a proper
18 defendant and sufficient facts in support of that cognizable legal theory. *Lopez v. Smith*, 203 F.3d
19 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must afford pro se litigants an opportunity
20 to amend to correct any deficiency in their complaints). Should plaintiff choose to file an
21 amended complaint, the amended complaint shall clearly set forth the claims and allegations
22 against each defendant. Any amended complaint must cure the deficiencies identified above and
23 also adhere to the following requirements:

24 Any amended complaint must identify as a defendant only persons who personally
25 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
26 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
27 constitutional right if he does an act, participates in another's act or omits to perform an act he is
28 legally required to do that causes the alleged deprivation).

1 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).
2 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*
3 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

4 Any amended complaint must be written or typed so that it so that it is complete in itself
5 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
6 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
7 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
8 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
9 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
10 1967)).

11 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
12 Procedure, this court’s Local Rules, or any court order may result in this action being dismissed.
13 *See* E.D. Cal. L.R. 110.

14 **IV. Request for Appointment of Counsel**

15 Plaintiff requests that the court appoint counsel. District courts lack authority to require
16 counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States Dist.*
17 *Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney
18 to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935
19 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
20 When determining whether “exceptional circumstances” exist, the court must consider the
21 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
22 se in light of the complexity of the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970
23 (9th Cir. 2009). Having considered those factors, the court finds there are no exceptional
24 circumstances in this case.

25 **V. Summary of Order**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 13) is granted.

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- 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the Sacramento County Sheriff filed concurrently herewith.
- 3. Plaintiff's request for the appointment of counsel (ECF No. 9) is denied.
- 4. Plaintiff's request to withdraw his consent to the jurisdiction of the magistrate judge (ECF No. 15) is denied as moot.
- 5. The complaint is dismissed with leave to amend within 30 days. The complaint must bear the docket number assigned to this case and be titled "Amended Complaint." Failure to comply with this order may result in dismissal of this action for failure to prosecute and failure to state a claim. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.

Dated: August 2, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE