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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SCOTT DANIELS,
Plaintiff,
v.
CITY AND COUNTY OF SAN
FRANCISCO,
Defendant.

Case No. [17-cv-05914-MEJ](#)

**ORDER SCREENING FIRST
AMENDED COMPLAINT AND
ORDERING ISSUANCE OF SUMMONS
AND SERVICE**

INTRODUCTION

On October 16, 2017, Plaintiff Scott Daniels filed a Complaint and an Application to Proceed In Forma Pauperis. Compl., Dkt. No. 1; Appl., Dkt. No. 3.¹ The Court granted Plaintiff's Application and screened the Complaint, dismissing it with leave to amend. Screening Order, Dkt. No. 5. Plaintiff filed the First Amended Complaint (FAC, Dkt. No. 6), which the Court screens anew pursuant to 28 U.S.C. § 1915(e)(2).

SUA SPONTE SCREENING UNDER 28 U.S.C. § 1915(e)(2)

A. Legal Standard

While the Court has granted Plaintiff's Application to Proceed In Forma Pauperis, it must also review Plaintiff's FAC to determine whether the action may be allowed to proceed. The Court must dismiss the FAC if it is frivolous, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To make this determination, courts assess whether there is a factual and legal basis for the asserted wrong, "however inartfully pleaded." *Franklin v. Murphy*, 745 F.2d 1221,

¹ On October 20, 2017, Plaintiff consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Dkt. No. 4.

1 1227-28 (9th Cir. 1984) (quotation omitted). Pro se pleadings are liberally construed. *Erickson v.*
2 *Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Moreover, the Ninth Circuit has “repeatedly held
3 that a district court should grant leave to amend even if no request to amend the pleading was
4 made, unless it determines that the pleading could not possibly be cured by the allegation of other
5 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Unless it is clear that no amendment
6 can cure the defects of a complaint, a pro se plaintiff proceeding in forma pauperis is entitled to
7 notice and an opportunity to amend before dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th
8 Cir. 1987).

9 Federal Rule of Civil Procedure 8 requires Plaintiff to provide a “short and plain
10 statement” of the claims, but “more than an unadorned, the defendant-unlawfully-harmed-me
11 accusation” to help the Court logically connect how the defendant caused Plaintiff’s injury and
12 show what claims for relief exist. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).
13 “[A] plaintiff’s obligation to provide the ‘grounds’ for . . . ‘entitlement to relief’ requires more
14 than labels and conclusions” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For
15 instance, in *Ashcroft*, the Supreme Court rejected conclusory assertions that “petitioners ‘knew of,
16 condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of
17 confinement ‘as a matter of policy, solely on the account of [his] religion, race, and/or national
18 origin and for no legitimate penological interest.’” 556 U.S. at 680. The Court reasoned that such
19 allegations were akin to the “formulaic recitation of the elements” dismissed in *Twombly*, and
20 therefore, insufficient to meet Rule 8(a). *Id.* In doing so, the Court explained, “[a] claim has
21 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
22 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678.

23 **B. Allegations in the Complaint**

24 Plaintiff asserts a number of claims arising from his arrest by SFPD Officers on or about
25 October 15, 2015. He alleges Does 1-2 are SFPD Officers who acted under color of authority
26 and/or under state law, and committed these acts pursuant to custom or policies adopted by the
27 City and County of San Francisco. FAC ¶¶ 7-9, 11-12, 14, 23. Plaintiff alleges Doe 1 instructed
28 him to stop on the street, but when Plaintiff began to leave after confirming he was not being

1 detained, Doe 1 again instructed him to stop and detained him. *Id.* ¶¶ 15-16. Doe 2 was present;
2 Does 1 and 2 repeatedly verbally admonished Plaintiff; taunted him; used slurs against him; and
3 indicated Plaintiff did not need an attorney, should answer questions, and should submit to
4 detention and questioning. *Id.* ¶ 18. Plaintiff was arrested for asserting his rights; he was
5 handcuffed in an unlawfully tight fashion and left to sit in a hot patrol car for a significant period
6 of time; he also was slammed to the ground, punched, kicked, and placed in debilitating control
7 holds and unnecessary weight was placed on his back and head. *Id.* ¶¶ 19-20, 45.

8 Plaintiff asserts three claims under 42 U.S.C. § 1983: (1) unlawful search and seizure in
9 violation of his rights under the Fourth and Fourteenth Amendments of the United States
10 Constitution; (2) excessive force in violation of his rights under the Fourth and Fourteenth
11 Amendments; and (3) violations of his right to petition the government for a redress of grievances
12 under the First Amendment. Plaintiff also asserts a number of claims under California state law:
13 violation of the Bane Act, Cal. Civ. Code § 52.1; assault; battery; and negligence. Plaintiff names
14 the City and County of San Francisco and Does 1 and 2 as defendants. The caption of the FAC
15 also lists a claim for negligent infliction of emotional distress, but Plaintiff does not actually assert
16 such a claim in the FAC.

17 **C. Analysis and Screening**

18 1. Federal Claims

19 Under Section 1983, “every person who, under color of any statute . . . custom, or usage of
20 any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction of [the
21 United States] to the deprivation of any rights, privileges or immunities secured by the
22 Constitution and laws, shall be liable to the party injured in an action at law.” *Flores v. Cty. of*
23 *L.A.*, 758 F.3d 1154, 1158 (9th Cir. 2014) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694
24 (1978), and other cases). To plead a Section 1983 claim against an individual, Plaintiff must
25 allege (1) the conduct that harmed him was committed under color of state law (i.e., state action),
26 and (2) the conduct deprived him of a constitutional right. *See Ketchum v. Alameda Cty.*, 811 F.2d
27 1243, 1245 (9th Cir. 1987).

28 In dismissing the original Complaint, which asserted claims against officer defendants

1 Does 1-10 as well as against two named individuals, the Court explained Plaintiff must allege how
 2 each Defendant personally participated in the deprivation of his rights and how each acted under
 3 color of state law. *See* First Screening Order at 4, Dkt. No. 5. In the FAC, Plaintiff alleges how
 4 Does 1 and 2 (both police officers) participated in the deprivation of his rights. *See* FAC ¶¶ 7-20,
 5 33, 45. The FAC states facially plausible Section 1983 claims against Does 1 and 2 for
 6 deprivation of Plaintiff’s rights under the First, Fourth, and Fourteenth Amendments.

7 The Court previously explained that “[n]either state officials nor municipalities are
 8 vicariously liable for the deprivation of constitutional rights by employees.” First Screening Order
 9 at 4 (quoting *Flores*, 758 F.3d at 1158). Therefore, to plead a Section 1983 claim against a
 10 municipality for a violation of constitutional rights resulting from governmental inaction or
 11 omission, Plaintiff must allege (1) he possessed a constitutional right of which he was deprived;
 12 (2) the municipality had a policy; (3) this policy amounts to deliberate indifference to Plaintiff’s
 13 constitutional rights; and (4) the policy is the moving force behind the constitutional violation.
 14 *See Plumeau v. Sch. Dist. #40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). A plaintiff may
 15 establish *Monell* liability by “prov[ing] that an officer committed the alleged constitutional
 16 violation pursuant to a formal governmental policy or a longstanding practice or custom which
 17 constitutes the standard operating procedure of the local governmental entity.” *Wilson v. Fla.*
 18 *Dep’t of Revenue*, 2015 WL 136557, at *6 (N.D. Cal. Jan. 8, 2015) (internal quotation marks
 19 omitted). “In the alternative, *Monell* liability may be established where the ‘individual who
 20 committed the constitutional tort was an official with final policy-making authority’ or ‘an official
 21 with final policy-making authority ratified a subordinate’s unconstitutional decision or action and
 22 the basis for it.’” *Id.* (internal citations omitted). But municipalities are not liable under Section
 23 1983 if they do not have the power to remedy the alleged violation. *See Estate of Brooks v. United*
 24 *States*, 197 F.3d 1245, 1248-49 (9th Cir. 1999) (upholding dismissal of § 1983 excessive detention
 25 claim against county because, under state statute, county did not have power either to release
 26 federal detainee or bring him before federal judge).

27 Plaintiff alleges the conduct he complains of was taken due to a custom or policy of the
 28 City and County of San Francisco (FAC ¶¶ 2, 14), and more specifically alleges “policies and

1 customs to allow officers to detain persons such as plaintiff without probable cause or reasonable
2 suspicion for failing to give ‘proper deference’ to police officers” (*id.* ¶ 23). “In order to
3 withstand a motion to dismiss for failure to state a claim, a *Monell* claim must consist of more than
4 mere ‘formulaic recitations of the existence of unlawful policies, conducts or habits.’” *Bedford v.*
5 *City of Hayward*, 2012 WL 4901434, at *12 (N.D. Cal. Oct. 15, 2012) (quoting *Warner v. Cty. of*
6 *San Diego*, 2011 WL 662993, at *4 (S.D. Cal. Feb. 14, 2011)). Plaintiff sufficiently alleges for
7 purposes of screening that a specific City and County policy was the moving force behind the
8 violation of Plaintiff’s rights to be free from unreasonable search and seizure under the Fourth and
9 Fourteenth Amendment, and to be free from retaliation for exercising free speech under the First
10 Amendment: the City’s policy and custom of allowing its officers to detain persons such as
11 Plaintiff under the circumstances alleged in the FAC. Plaintiff, however, does not identify any
12 policy or custom pertaining to the violation of his right to be free from excessive force under the
13 Fourth and Fourteenth Amendments.

14 For purposes of screening, the FAC states federal claims upon which relief can be granted
15 as to Does 1 and 2, and the City and County of San Francisco.

16 2. State Law Claims

17 The Bane Act prohibits “a person or persons, whether or not acting under color of law,
18 [from] interfere[ing] by threats, intimidation, or coercion, or [from] attempt[ing] to interfere by
19 threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals
20 of rights secured by the Constitution or laws of the United States, or of the rights secured by the
21 Constitution or laws of this state. . . .” Cal. Civ. Code § 52.1. Because Plaintiff plausibly alleges
22 violations of his rights under the United States Constitution (*see supra*), and that Does 1 and 2
23 used threats, intimidation, and coercion to interfere with those rights (FAC ¶¶ 17-18, 45), the FAC
24 plausibly alleges the elements of a Bane Act claim. The City and County of San Francisco may be
25 held vicariously liable for its police officers’ violations of the Bane Act. *See D.V. v. City of*
26 *Sunnyvale*, 65 F. Supp. 3d 782, 787 (N.D. Cal. 2014) (citing cases holding cities liable under
27 respondeat superior for Bane Act violations of police officers). The allegations of the FAC are
28 sufficient to show for screening purposes the City and County of San Francisco is a proper

1 defendant to the Bane Act claim here.

2 To state a battery claim under California law, Plaintiff must allege: (1) Defendants
3 intentionally did an act that resulted in harmful or offensive contact with his person; (2) he did not
4 consent to the contact; and (3) the contact caused him injury, damage, loss or harm. *See Tekle v.*
5 *United States*, 511 F.3d 839, 855 (9th Cir. 2007). Plaintiff sufficiently alleges these elements as to
6 Does 1 and 2 for screening purposes. *See* FAC ¶¶ 45-47. California police officers who use
7 unreasonable force to make an arrest are not immune from liability. *See Robinson v. Solano Cty.*,
8 278 F.3d 1007, 1016 (9th Cir. 2002) (police officers not immune from suit under California law
9 for using excessive force in arresting a suspect). Although the battery claim alleges “Does 1-10”
10 battered Plaintiff, the FAC alleges no facts regarding the conduct or position of any individual
11 defendant other than Does 1 and 2. The FAC accordingly does not state a battery claim against
12 any individual defendant other than Does 1 and 2.

13 To state an assault claim under California law, Plaintiff must allege: “(1) that Defendants
14 intended to cause harmful or offensive contact, or the imminent apprehension of such contact, and
15 (2) that Plaintiff was put in imminent apprehension of such contact.” *Brooks v. United States*, 29
16 F. Supp. 2d 613, 617 (N.D. Cal. 1998). Plaintiff alleges that Defendants 1 and 2 intentionally
17 caused harmful contact (FAC ¶¶ 41, 45), and that Plaintiff was placed in fear of an immediate
18 harmful offensive touching (*id.* ¶ 42). For purposes of screening pursuant to Section 1915(e)(2),
19 the FAC states an assault claim against Does 1 and 2.

20 To state a negligence claim under California law, Plaintiff must allege (1) a legal duty to
21 use due care; (2) a breach of that duty; and (3) an injury that was proximately caused by the
22 breach. *See Ladd v. Cty. of San Mateo*, 12 Cal. 4th 913, 917 (1996). Police officers have a duty
23 not to use excessive force (*Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1101 (2004)),
24 and have a duty to intercede when their fellow officers violate the constitutional rights of a citizen
25 (*Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000)). The FAC alleges Does 1 and 2
26 breached that duty by using excessive force. Plaintiff alleges he was harmed by that conduct. The
27 FAC thus plausibly states a negligence claim against Does 1 and 2.

28 The City and County of San Francisco may be vicariously liable for Plaintiff’s common

1 law claims based on excessive force. *See Robinson*, 278 F.3d at 1016 (governmental entity
2 employing police officers can be held vicariously liable when officers use excessive force in the
3 course and scope of employment). The FAC also alleges a claim was filed pursuant to the
4 California Government Tort Claims Act. FAC ¶ 3. Thus, Plaintiff plausibly states claims against
5 the City and County of San Francisco based on its vicarious liability for assault, battery, and
6 negligence by Does 1 and 2.

7 **CONCLUSION**

8 The Court finds that, liberally construed, the FAC plausibly alleges claims that are not
9 frivolous and that do not seek relief against immune defendants:

10 (1) Section 1983 claims against Does 1 and 2 for violations of Plaintiff's Constitutional
11 rights to free speech, to be free from unlawful search and seizure, and to be free from use of
12 excessive force against Does 1 and 2.

13 (2) *Monell* claims against the City and County of San Francisco for violations of
14 Plaintiff's right to free speech and to be free from unlawful search and seizure.

15 (3) A Bane Act claim against Does 1 and 2 and the City and County of San Francisco.

16 (4) Assault, battery, and negligence claims against Does 1 and 2 and the City and
17 County of San Francisco.

18 The Clerk of Court shall issue the summons, and the U.S. Marshal for the Northern District
19 of California shall serve, without prepayment of fees, a copy of the FAC, any amendments or
20 attachments thereto, Plaintiff's affidavit, and this order upon Defendants.

21 In addition, the Clerk of Court shall mail a Notice of Lawsuit and Request for Waiver of
22 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint
23 and all attachments thereto, a magistrate judge consent form, and a copy of this order to the named
24 Defendants. If this case involves federal defendants, the Clerk shall also mail a courtesy copy of
25 the complaint and a copy of this order to the U.S. Attorney's Office in San Francisco.

26 Defendants are cautioned that Federal Rule of Civil Procedure 4 requires them to cooperate
27 in saving unnecessary costs of service of the summons and complaint. Pursuant to Rule 4, if
28 Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to

1 waive service of the summons, fails to do so, they will be required to bear the cost of such service
2 unless good cause be shown for their failure to sign and return the waiver form. If service is
3 waived, this action will proceed as if Defendants had been served on the date the waiver is filed,
4 and Defendants will not be required to serve and file an answer before sixty (60) days from the
5 date on which the request for waiver was sent. Defendants are asked to read the statement set
6 forth at the bottom of the waiver form that more completely describes the duties of the parties with
7 regard to waiver of service of the summons. If service is waived after the date provided in the
8 Notice but before Defendants are personally served, the Answer shall be due sixty (60) days from
9 the date on which the request for waiver was sent or twenty (20) days from the date the waiver
10 form is filed, whichever is later.

11 **IT IS SO ORDERED.**

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13 Dated: December 7, 2017

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16 MARIA-ELENA JAMES
17 United States Magistrate Judge
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