

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

BARRY G. INGRAM,

No. C 13-0224 CW

Plaintiff,

ORDER GRANTING  
MOTIONS TO DISMISS  
(Docket Nos. 12 &  
19)

v.

SAN FRANCISCO POLICE DEP'T, et  
al.,

Defendants.

United States District Court  
For the Northern District of California

Plaintiff Barry G. Ingram, proceeding pro se, brings this action against Defendant San Francisco Police Department (SFPD) and three of its employees, Sgt. Frazer, Officer Jennifer Fiorello, and Officer Khmarskiy.<sup>1</sup> Defendant SFPD moves to dismiss Plaintiff's first amended complaint (1AC) for failure to state a claim. Defendants Frazer, Fiorello, and Khmarskiy (Individual Defendants) move separately to dismiss for insufficient service of process. Plaintiff opposes both motions. The Court took the motions under submission on the papers and now grants both motions.

BACKGROUND

The following facts are taken from Plaintiff's 1AC. During a routine traffic stop on October 7, 2010, Individual Defendants cited Plaintiff for driving with a suspended license and impounded his 1990 Ford Bronco. Docket No. 1, Ex. A, 1AC at 2:11-:12, :26-:27, :15-:16. Plaintiff subsequently obtained DMV records showing

<sup>1</sup> The complaint does not include first names for Officers Frazer and Khmarskiy.

1 that his driver's license had been restored in May 2010, five  
2 months before he received the citation. Id. at 2:13-:14. In  
3 light of this information, SFPD dismissed the citation in May  
4 2011. Id. at 2:15-:16. It did not, however, return Plaintiff's  
5 vehicle. Id. at 3:3-:4. Although Plaintiff acknowledges that the  
6 City of San Francisco later compensated him for the truck, he does  
7 not specify how much compensation he ultimately received. Id. at  
8 2:16-:17. Nevertheless, he now asserts that he has not been  
9 "justly compensated" for the loss of his vehicle. Id. at 3:3-:4

10 Plaintiff's 1AC alleges that SFPD's impoundment of his  
11 vehicle has caused him severe "mental anguish and emotional  
12 distress." Id. at 3:5-:6. He brings a variety of state and  
13 federal claims and seeks more than one hundred million dollars in  
14 personal injury and punitive damages. Id. at 3:13-:16.

#### 15 LEGAL STANDARDS

##### 16 I. Failure to State a Claim

17 A complaint must contain a "short and plain statement of the  
18 claim showing that the pleader is entitled to relief." Fed. R.  
19 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
20 state a claim, dismissal is appropriate only when the complaint  
21 does not give the defendant fair notice of a legally cognizable  
22 claim and the grounds on which it rests. Bell Atl. Corp. v.  
23 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
24 complaint is sufficient to state a claim, the court will take all  
25 material allegations as true and construe them in the light most  
26 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
27 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
28 to legal conclusions; "threadbare recitals of the elements of a

1 cause of action, supported by mere conclusory statements," are not  
2 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
3 (citing Twombly, 550 U.S. at 555).

4 When granting a motion to dismiss, the court is generally  
5 required to grant the plaintiff leave to amend, even if no request  
6 to amend the pleading was made, unless amendment would be futile.  
7 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
8 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
9 amendment would be futile, the court examines whether the  
10 complaint could be amended to cure the defect requiring dismissal  
11 "without contradicting any of the allegations of [the] original  
12 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
13 Cir. 1990).

14 II. Insufficient Service of Process

15 A federal court lacks personal jurisdiction over a defendant  
16 if service of process is insufficient. Omni Capital Int'l v.  
17 Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). A court may dismiss  
18 the action without prejudice pursuant to Rule 12(b)(5). "Once  
19 service is challenged, plaintiffs bear the burden of establishing  
20 that service was valid under Rule 4." Brockmeyer v. May, 383 F.3d  
21 798, 801 (9th Cir. 2004) (citing 4A Charles A. Wright & Arthur R.  
22 Miller, Federal Practice and Procedure § 1083 (3d ed. 2002 & Supp.  
23 2003)).

24 "So long as a party receives sufficient notice of the  
25 complaint, Rule 4 is to be 'liberally construed' to uphold  
26 service." Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d  
27 1132, 1135 (9th Cir. 2009) (quoting Chan v. Soc'y Expeditions,  
28 Inc., 39 F.3d 1398, 1404 (9th Cir. 1994)). However, "neither

1 actual notice nor simply naming the defendant in the complaint  
2 will provide personal jurisdiction absent 'substantial compliance  
3 with Rule 4.'" Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986).

4 Federal Rule of Civil Procedure 4(c)(2) provides, "Any person  
5 who is at least 18 years old and not a party may serve a summons  
6 and complaint." It may be carried out by "(A) delivering a copy  
7 of the summons and of the complaint to the individual personally;  
8 (B) leaving a copy of each at the individual's dwelling or usual  
9 place of abode with someone of suitable age and discretion who  
10 resides there; or (C) delivering a copy of each to an agent  
11 authorized by appointment or by law to receive service of  
12 process." Fed. R. Civ. P. 4(e)(2). Rule 4(e)(2) does not  
13 authorize service by mail. Service may also be carried out in any  
14 manner allowed by state law. Fed. R. Civ. P. 4(e)(1).

15 DISCUSSION

16 I. Failure to State a Claim

17 Plaintiff appears to bring claims under 42 U.S.C. §§ 1981 and  
18 1983; article 1, section 7 of the California Constitution; and  
19 sections 43 and 51 of the California Civil Code. For the reasons  
20 set forth below, each of these claims must be dismissed.<sup>2</sup>

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23 \_\_\_\_\_  
24 <sup>2</sup> Individual Defendants have not joined SFPD's motion to dismiss  
25 under Rule 12(b)(6) nor have they moved separately to dismiss on this  
26 basis. However, because most of SFPD's arguments apply with equal force  
27 to Individual Defendants, the Court dismisses the claims against them  
28 for failure to state a claim, as well. See Silverton v. Department of  
Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court may  
properly on its own motion dismiss an action as to defendants who have  
not moved to dismiss where such defendants are in a position similar to  
that of moving defendants or where claims against such defendants are  
integrally related.").

1           A.     § 1981 Claim

2           Title 42 U.S.C. § 1981 provides, in relevant part: "All  
3 persons in the United States shall have the same right in every  
4 State and Territory to make and enforce contracts." 42 U.S.C.  
5 § 1981(a). To "make and enforce contracts," in this context,  
6 refers to "the making, performance, modification, and termination  
7 of contracts, and the enjoyment of all benefits, privileges,  
8 terms, and conditions of the contractual relationship." Id.  
9 § 1981(b).

10           Because Plaintiff has not alleged the existence of any  
11 contract with SFPD or Individual Defendants here, he has failed to  
12 state a claim under § 1981. Plaintiff's assertion that police  
13 officers owe a general duty to the public that "essentially  
14 establishes a binding contractual relation" with him, Opp. SFPD's  
15 Mot. Dismiss 2, does not provide a valid basis for his § 1981  
16 claim. See Castenada v. City of Napa, 1996 WL 241818, at \*2 (N.D.  
17 Cal.) (dismissing § 1981 claims against police officers because  
18 the plaintiff failed to allege the existence of any contract with  
19 the officers). Furthermore, even if Plaintiff had plead the  
20 existence of a binding contract, he has not alleged that  
21 Defendants' conduct was racially motivated. Parks School of  
22 Business, Inc. v. Symington, 51 F.3d 1480, 1487 (9th Cir. 1995)  
23 ("In order to withstand a motion to dismiss for failure to state a  
24 claim, a § 1981 cause of action need only allege 'that plaintiff  
25 suffered discrimination . . . on the basis of race.'" (citations  
26 omitted; alterations in original)). This claim must therefore be  
27 dismissed.  
28

1           Because Plaintiff concedes in his sworn opposition that "no  
2 contract exists" between him and Defendants, Plaintiff cannot cure  
3 this claim by amending his complaint. Opp. SFPD's Mot. Dismiss 2.  
4 Accordingly, his § 1981 claim is dismissed with prejudice.

5           B.    § 1983 Claim

6           Municipalities cannot be held vicariously liable under § 1983  
7 for the actions of their employees. Monell v. N.Y. City Dep't of  
8 Soc. Servs., 436 U.S. 658, 691 (1978). "Instead, it is when  
9 execution of a government's policy or custom, whether made by its  
10 lawmakers or by those whose edicts or acts may fairly be said to  
11 represent official policy, inflicts the injury that the government  
12 as an entity is responsible under § 1983." Id. at 694.

13           Here, Plaintiff has failed to state a § 1983 claim against  
14 SFPD because he has not alleged that his car was impounded  
15 pursuant to an official policy or custom. He has also failed to  
16 specify which of his federal rights Defendants allegedly violated.  
17 Albright v. Oliver, 510 U.S. 266, 269 (1994) ("The first step in  
18 any [§ 1983] claim is to identify the specific constitutional  
19 right allegedly infringed."). Accordingly, Plaintiff has failed  
20 to state a valid § 1983 claim.

21           Plaintiff is granted leave to amend his § 1983 claim if he  
22 can identify a specific federal right that Individual Defendants  
23 violated by seizing his vehicle. Plaintiff may also amend his  
24 § 1983 claim against SFPD, but only if he can truthfully allege  
25 facts showing that his vehicle was seized pursuant to a specific  
26 unlawful policy or custom.

1 C. Claims under the California Constitution

2 Article 1, section 7 of the California Constitution provides  
3 that a "person may not be deprived of life, liberty, or property  
4 without due process of law or denied equal protection of the law."  
5 Although Plaintiff invokes this language in his 1AC, he does not  
6 explain how his rights to due process or equal protection were  
7 actually infringed by Defendants. Thus, he has not stated a claim  
8 under this provision of the State Constitution.

9 Even if Plaintiff had clearly identified a due process or  
10 equal protection violation here, he still could not recover the  
11 monetary damages he seeks. California courts have repeatedly held  
12 that plaintiffs do not enjoy "a right to monetary relief" under  
13 article 1, section 7 of the California Constitution. Carlsbad  
14 Aquafarm, Inc. v. State Dep't Health Services, 83 Cal. App. 4th  
15 809, 815-23 (2000) (citing Gates v. Superior Court, 32 Cal. App.  
16 4th 481, 516-24 (1995)). Because Plaintiff seeks exclusively  
17 monetary relief here, his article 1, section 7 claim must be  
18 dismissed on this basis, as well.

19 Plaintiff is granted leave to amend this claim if he can  
20 truthfully allege specific facts showing that Defendants committed  
21 a due process or equal protection violation that supports a claim  
22 for declaratory or injunctive relief.

23 D. Claims under the California Civil Code

24 Under section 43 of the Civil Code, a plaintiff may bring a  
25 claim to assert his or her "right of protection from bodily  
26 restraint or harm, from personal insult, from defamation, and from  
27 injury to his personal relations." This provision effectively  
28 codifies causes of action for various common law torts, such as

1 assault and battery. Rhodes v. Placer County, 2011 WL 1302264, at  
2 \*12 n.11 (E.D. Cal.). Because Plaintiff has not alleged any facts  
3 to support this claim, it must be dismissed.

4 So, too, must Plaintiff's claim under section 51 of the Civil  
5 Code. Section 51 prohibits "business establishments" from  
6 discriminating against patrons on the basis of "sex, race, color,  
7 religion, ancestry, national origin, disability, medical  
8 condition, genetic information, marital status, or sexual  
9 orientation." Cal. Civ. Code § 51. Plaintiff here has not plead  
10 that Defendants are part of any "business establishment" nor that  
11 they discriminated against him on some impermissible basis. He  
12 has therefore failed to state a claim under this provision, as  
13 well.

14 Plaintiff is granted leave to amend his section 43 claim if  
15 he can truthfully allege sufficient facts to show that the seizure  
16 of his vehicle caused him bodily harm, personal insult, or injury  
17 to his personal relations. Because Plaintiff cannot truthfully  
18 allege that any Defendant in this case is a "business  
19 establishment," his section 51 claim is dismissed with prejudice.

20 E. Punitive Damages

21 In addition to the above claims, Plaintiff seeks punitive  
22 damages under section 3294 of the Civil Code. State law expressly  
23 bars Plaintiff from recovering damages from SFPD under this  
24 provision on any of his state law claims. Cal. Gov't Code § 818  
25 ("Notwithstanding any other provision of law, a public entity is  
26 not liable for damages awarded under Section 3294 of the Civil  
27 Code or other damages imposed primarily for the sake of example  
28 and by way of punishing the defendant."). He is similarly barred

1 from recovering punitive damages from SFPD on his federal claims.  
2 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981)  
3 ("[B]ecause that immunity is compatible with both the purposes of  
4 § 1983 and general principles of public policy, we hold that a  
5 municipality is immune from punitive damages under 42 U.S.C.  
6 § 1983.").

7 Although Plaintiff is not barred from recovering punitive  
8 damages from Individual Defendants on his § 1983 claims, to do so  
9 he must ultimately establish that the officers' conduct "involves  
10 reckless or callous indifference to the federally protected rights  
11 of others." Smith v. Wade, 461 U.S. 30, 56 (1983). Thus, if  
12 Plaintiff wishes to pursue punitive damages against Individual  
13 Defendants in a future pleading, he must truthfully allege facts  
14 showing that they acted with reckless or callous indifference to  
15 his federally protected rights.

16 F. Qualified Immunity

17 Because all of Plaintiff's claims must be dismissed, the  
18 Court need not address Defendants' qualified immunity defense. In  
19 any event, Plaintiff has not plead sufficient facts here to  
20 determine whether Defendants' conduct violates "clearly  
21 established statutory or constitutional rights of which a  
22 reasonable person would have known." Harlow v. Fitzgerald, 457  
23 U.S. 800, 818 (1982).

24 II. Insufficient Service

25 In addition to failing to state a claim against Individual  
26 Defendants, Plaintiff has failed to serve them properly with the  
27 summons and complaint in this action. Plaintiff contends that he  
28 attempted to effect service on Individual Defendants by delivering

1 the summons and complaint to an assistant in the Mayor's office.  
2 Because that assistant was not authorized to accept service on  
3 behalf of Individual Defendants, Plaintiff's attempt to serve  
4 Individual Defendants is insufficient and his claims against them  
5 must be dismissed on this ground, as well.

6 CONCLUSION

7 For the reasons set forth above, SFPD's motion to dismiss  
8 (Docket No. 12) and Individual Defendants' motion to dismiss  
9 (Docket No. 19) are both GRANTED. Plaintiff's claims under 42  
10 U.S.C. § 1981 and section 51 of the California Civil Code are  
11 dismissed with prejudice. Plaintiff may amend his other claims,  
12 pursuant to the instructions above, by filing a second amended  
13 complaint within twenty-one days of this order.

14 The second amended complaint and summons must be served on  
15 all Defendants. For rules and instructions on how to serve these  
16 documents properly, Plaintiff should consult the Court's guide for  
17 pro se litigants, Representing Yourself in Federal Court: A  
18 Handbook for Pro Se Litigants, which is available free of charge  
19 from the Clerk's office and may be downloaded from the Court's  
20 website at <http://www.cand.uscourts.gov/prosehandbook>.

21 IT IS SO ORDERED.

22  
23 Dated: 4/18/2013

24   
25 CLAUDIA WILKEN  
26 United States District Judge  
27  
28