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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID B. DURAN,

Plaintiff,

v.

OMAR MANDUJO, et al,

Defendants.

Case No.: 15-CV-2745-DMS-WVG

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

[ECF No. 94]

Pending before the Court is a Motion to Dismiss (“Motion”) Plaintiff David B. Duran’s (“Plaintiff”) Fourth Amended Complaint (“FAC”) for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendants Omar Mandujano, Alfredo Hernandez, Luis Hernandez, and John Seaman (collectively “Defendants”). As explained below, the Court **RECOMMENDS** the Motion be **GRANTED** with prejudice.

I. BACKGROUND

Plaintiff, a state prisoner proceeding *pro se* and *in forma pauperis*, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 on December 7, 2015, alleging Defendants violated his rights guaranteed under the Fourth and Eighth Amendments of the United States Constitution. (ECF No. 1.) On August 2, 2016, Plaintiff filed a Motion for Leave to

1 File an Amended Complaint in order to add two exhibits. (ECF No. 33.) The Court granted
2 the motion and ordered Plaintiff to file his First Amended Complaint by September 2, 2016.
3 (ECF No. 34.) On August 18, 2016, Plaintiff filed a Motion to Amend Document No. 33
4 by Permission of the Court, requesting the Court to construe his previous motion as his
5 First Amended Complaint. (ECF No. 37.) On August 23, 2016, the Court granted the
6 motion and deemed as the First Amended Complaint the complaint and the exhibits filed
7 in the Motion for Leave to File an Amended Complaint. (ECF No. 40.)

8 On September 8, 2016, Defendants filed a motion to dismiss Plaintiff's First
9 Amended Complaint for failure to state a claim. (ECF No. 41.) On January 31, 2017, this
10 Court filed a Report and Recommendation ("R&R"), recommending Defendants' motion
11 be granted in part with leave to amend and granted in part without leave to amend. (R&R,
12 ECF No. 64.) On March 2, 2017, the Honorable Dana M. Sabraw adopted the R&R, granted
13 Defendants' motion, and dismissed Plaintiff's First Amended Complaint with leave to
14 amend. (ECF No. 69.)

15 On April 7, 2017 Plaintiff filed a Second Amended complaint, followed by a Motion
16 to Amend on April 11, 2017. (ECF Nos. 73, 76.) In his Motion, Plaintiff requested leave
17 to amend in order to add newly identified defendants Larry Lewis¹ and Jonta Yancy. (ECF
18 No. 76.) The motion was granted and on April 26, 2017, Plaintiff filed his Third Amended
19 Complaint, naming defendants Lewis and Yancy but omitting defendants Mandujano, A.
20 Hernandez, L. Hernandez, and Seaman. (ECF No. 80.) Defendants filed duplicative
21 motions for entry of judgment in favor of the unnamed defendants on April 27, 2017 and
22 May 11, 2017, arguing their omission was tantamount to voluntary dismissal. (ECF Nos.
23 82, 86.) On May 10, 2017, the Court granted Plaintiff leave to file a Fourth Amended
24 Complaint that includes "all allegations against all defendants in one document no later
25 than June 15, 2017." (ECF No. 85 at 2:1-2.)

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28 ¹ Erroneously sued as "Larry Louis" in both the motion, Third Amended Complaint, and the FAC. (*See*
ECF No. 91 at 2:1-6.)

1 Plaintiff filed his Fourth Amended Complaint on May 19, 2017, naming as
2 defendants Mandujano, A. Hernandez, L. Hernandez, Seaman, Lewis, and Yancy.² (ECF
3 No. 89.) In the Fourth Amended Complaint, Plaintiff alleges the following: (1) violations
4 of his Fourth Amendment rights through the execution of an invalid search warrant; (2) use
5 of excessive force in executing the search warrant in violation of his Eighth Amendment
6 rights; and (3) illegal search and seizure and cruel and unusual punishment in violation of
7 the his Fourth and Eighth Amendment rights.³ (ECF No. 89.)

8 On June 2, 2017, defendants Mandujano, A. Hernandez, L. Hernandez, and Seaman
9 filed a Motion to Dismiss for Failure to State a Claim. (Motion, ECF No. 94.) On July 13,
10 2017, Plaintiff filed a Response in Opposition to the motion.⁴ (Pl. Opp’n., ECF No. 99.)
11 Defendants’ filed a Reply on August 11, 2017. (Reply, ECF No. 101.)

12 **II. LEGAL STANDARD**

13 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
14 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
15 generally referred to as a motion to dismiss. Fed. R. Civ. P. 12(b)(6). The Court evaluates
16 whether a complaint states a cognizable legal theory and sufficient facts in light of Federal
17 Rule of Civil Procedure 8(a), which requires a “short and plain statement of the claim
18 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Although Rule 8 “does
19 not require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned,
20 the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678

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23 ² After receiving Plaintiff’s Fourth Amended Complaint, naming Defendants that were omitted in the
24 Third Amended Complaint, the Court denied Defendants’ motions for an entry of judgment in their
25 favor. (See ECF No. 90.)

26 ³ The third claim is directed at defendants Lewis and Yancy only. (FAC at 33.)

27 ⁴ Plaintiff added numerous additional facts and claims against Defendants in his Response. (See Pl.
28 Opp’n at 11:23-13:25.) However, these facts and claims will not be considered in determining the
present Motion. See *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n. 1 (9th Cir.
1998) (“[N]ew allegations contained in the inmates’ opposition motion, however, are irrelevant for Rule
12(b)(6) purposes. In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look
beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
defendant’s motion to dismiss.” (emphasis in original))

1 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
2 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more
3 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
4 will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286
5 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further
6 factual enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
8 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
9 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
10 when the facts pled “allow [] the court to draw the reasonable inference that the defendant
11 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to
12 say that the claim must be probable, but there must be “more than a sheer possibility that a
13 defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability”
14 fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557).
15 Further, the Court need not accept as true “legal conclusions” contained in the complaint.
16 *Id.* This review requires context-specific analysis involving the Court’s “judicial experience
17 and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-pleaded facts do not
18 permit the court to infer more than the mere possibility of misconduct, the complaint has
19 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* The Court
20 will grant leave to amend unless it determines that no modified contention “consistent with
21 the challenged pleadings ... [will] cure the deficiency.” *DeSoto v. Yello Freight Sys., Inc.*,
22 957 F.2d 655, 658 (9th Cir. 1992) (citation omitted).

23 Where, as here, a plaintiff appears *pro se* in a civil rights suit, the Court also must
24 be careful to construe the pleadings liberally and afford the plaintiff any benefit of the
25 doubt. *Garmon v. Cty. of L.A.*, 828 F.3d 837, 846 (9th Cir. 2016). The rule of liberal
26 construction is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d
27 1258, 1261 (9th Cir. 1992). In construing a *pro se* civil rights complaint liberally, however,
28 a court may not “supply essential elements of the claim that were not initially pleaded.”

1 *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague
2 and conclusory allegations of official participation in civil rights violations are not
3 sufficient to withstand a motion to dismiss.” *Id.* Thus, at a minimum, even the *pro se*
4 plaintiff “must allege with at least some degree of particularity overt acts which defendants
5 engaged in that support [his] claim.” *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646,
6 649 (9th Cir. 1984) (internal quotations and citation omitted).

7 The Court should grant a *pro se* litigant leave to amend his complaint “unless it
8 determines that the pleading could not possibly be cured by the allegation of other facts.”
9 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal quotation omitted). Before
10 dismissing a complaint filed by a *pro se* plaintiff, a court must give some notice of the
11 complaint’s deficiencies. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).
12 Nevertheless, when amendment of a *pro se* litigant’s complaint would be futile, denial of
13 leave to amend is appropriate. *See James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

14 **III. DISCUSSION**

15 **A. Judicial Notice**

16 Defendants request the Court take judicial notice of Plaintiff’s First Amended
17 Complaint and its attached exhibits. (ECF No. 94-2.) The Court declines to do so.

18 “Generally, a court may not consider material beyond the complaint in ruling on a
19 [motion to dismiss].” *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048,
20 1052 (9th Cir. 2007) (citation omitted). A court may “take judicial notice of matters of
21 public record without converting a motion to dismiss into a motion for summary judgment,
22 as long as the facts noticed are not subject to reasonable dispute.” *Id.* “However, it is well-
23 established that an amended complaint supersedes the original, the latter being treated
24 thereafter as non-existent.” *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011)
25 (quotation omitted); *see also Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010)
26 (applying the same standard to a *pro se* prisoner’s second amended complaint made
27 pursuant to § 1983).

28 Had Plaintiff merely filed a Second Amended Complaint, the court would consider

1 the First Amended Complaint as non-existent. In the instant case, Petitioner has filed a
2 *Fourth* Amended Complaint. Even were the Court to disregard Plaintiff’s Third Amended
3 Complaint as mistakenly filed, Plaintiff’s First Amended Complaint is far superseded by
4 subsequently filed complaints and the Court treats it as non-existent. Accordingly, the
5 Court declines to judicially notice the First Amended Complaint and its exhibits.

6 **B. § 1983 Claims**

7 In Plaintiff’s FAC, he states the following claims against Defendants: (1) violations
8 of his Fourth Amendment rights through the execution of an invalid search warrant; and
9 (2) use of excessive force in executing the search warrant in violation of his Fourth and
10 Eighth Amendment rights. (FAC at 4, 16.) Defendants argue the FAC should be dismissed,
11 arguing Plaintiff fails to allege a single claim for relief because Plaintiff “fail[ed] to re-
12 allege the factual allegations concerning the incident which is the subject of this lawsuit.”
13 (P&A at 8:16-17.)

14 **i. Applicable Law**

15 “Section 1983 provides a cause of action for ‘the deprivation of any rights,
16 privileges, or immunities secured by the Constitution and laws’ of the United States.”
17 *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983),
18 *superseded on other grounds by statute*, 42 C.F.R. § 430.0. To prevail on a claim for
19 violation of constitutional rights under 42 U.S.C. § 1983, a plaintiff must prove two
20 elements: (1) that a person acting under the color of state law committed the conduct at
21 issue; and (2) that the conduct deprived the plaintiff of some right, privilege, or immunity
22 conferred by the Constitution or the laws of the United States. *See Nelson v. Campbell*, 541
23 U.S. 637, 643 (2004). “Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is
24 proper if the complaint is devoid of factual allegations that gave rise to a plausible inference
25 of either element.” *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

26 **ii. Invalid Search Warrant**

27 Plaintiff appears to question the validity of a search warrant in his FAC. However, a
28 thorough review of this claim reveals that it is almost entirely devoid of factual allegations.

1 Rather, the claim is merely excerpts of case law mixed with objections to this Court's
2 previous R&R along with requests for explanation from both the Court and Defendants.
3 Plaintiff simply states that "the warrant in question is flawed by defects, more th[a]n
4 harmless error." (FAC at 7:1-3.) After block quoting a portion of a warrant that is attached
5 as an exhibit and block quoting sections of California Vehicle Code, Plaintiff then states
6 "[t]his was infact (sic) an unnecessary blood draw/DNA extraction." (FAC at 7:7-8:15.)
7 However, these are nothing more than "legal conclusion[s]" and the Court need not accept
8 them as true. *Iqbal*, 556 U.S. at 677. Plaintiff then appears to object to this Court's previous
9 R&R. (FAC at 9:15-10:4.) Setting aside the legal conclusions and construing the FAC
10 liberally, Plaintiff's claim does not even reach the point where it could be called a "naked
11 assertion" as it is devoid of any facts. *Iqbal*, 556 U.S. at 677. Furthermore, the claim only
12 mentions defendant Mandujano's name once, merely identifying him as a defendant, and
13 does not mention defendants A. Hernandez, L. Hernandez, or Seaman at all. Thus, Plaintiff
14 has failed to "allege with at least some degree of particularity overt acts which defendants
15 engaged in that support [his] claim." *Jones*, 733 F.2d at 649. Given this, the Court is unable
16 to draw a "reasonable inference" that Defendants are "liable for the misconduct alleged."
17 *Iqbal*, 556 U.S. at 677.

18 Accordingly, the Court **RECOMMENDS** Defendants' Motion be **GRANTED** and
19 Plaintiff's claim that Defendants violated his Fourth Amendment rights by executing an
20 invalid search warrant be **DISMISSED**.

21 **iii. Excessive Force**

22 Plaintiff's second claim is for excessive force in violation of the Fourth and Eighth
23 Amendments. (FAC at 16.) However, there is no factual description of any force, let alone
24 excessive force, in the entire claim. Plaintiff also fails to name a single defendant and
25 identify how any of the defendants engaged in any misconduct.⁵ Similar to the first claim,
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28 ⁵ The Court notes the claim contains the names of defendants Mandujano and Seaman but only in the
context of a block quote of this Court's previous R&R. (See FAC at 18:14-18.) See also *Youngblood v.*

1 Plaintiff spends the majority of the claim for excessive force block quoting and objecting
2 to this Court’s previous R&R. Thus, Plaintiff has failed to “allege with at least some degree
3 of particularity overt acts which defendants engaged in that support [his] claim.” *Jones*,
4 733 F.2d at 649. Given this, the Court is unable to draw a “reasonable inference” that
5 Defendants are “liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677.

6 Accordingly, the Court **RECOMMENDS** Defendants’ Motion be **GRANTED** and
7 Plaintiff’s claim that Defendants violated his Fourth and Eighth Amendment rights by
8 using excessive force be **DISMISSED**.

9 **C. Leave To Amend**

10 Federal Rule of Civil Procedure 15(a)(2) provides that “a party may amend its
11 pleading only with the opposing party's written consent or the court's leave. The court
12 should freely grant leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). When
13 determining whether to grant leave to amend, courts weigh certain factors: “undue delay,
14 bad faith or dilatory motive on the part of [the party who wishes to amend a pleading],
15 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
16 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment
17 [.]” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

18 Although prejudice to the opposing party “carries the greatest weight[.]...a strong
19 showing of any of the remaining *Foman* factors” can justify the denial of leave to amend.
20 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam).
21 Analysis of these factors can overlap. For instance, a party's “repeated failure to cure
22 deficiencies” constitutes “a strong indication that the [party] has no additional facts to
23 plead” and “that any attempt to amend would be futile[.]” *Zucco Partners, LLC v. Digimarc*
24 *Corp.*, 552 F.3d 981, 988, 1007 (9th Cir. 2009) (internal quotation marks omitted)
25 (upholding dismissal of complaint with prejudice when there were “three iterations of [the]

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28 *People*, 2011 WL 5036995, at *1 (C.D. Cal. 2011) (a court need not consider references to previously
filed complaints made in subsequent amended complaints.).

1 allegations—none of which, according to [the district] court, was sufficient to survive a
2 motion to dismiss”); *see also: Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084
3 (9th Cir. 2000) (affirming dismissal without leave to amend where plaintiff failed to correct
4 deficiencies in complaint, where court had afforded plaintiff opportunities to do so, and
5 had discussed with plaintiff the substantive problems with his claims), *amended by* 234
6 F.3d 428, *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th
7 Cir. 2007); *Plumeau v. Sch. Dist. # 40 Cnty. of Yamhill*, 130 F.3d 432, 439 (9th Cir. 1997)
8 (denial of leave to amend appropriate where further amendment would be futile).

9 Including the initial complaint, Plaintiff has now had *five* opportunities to state a
10 claim for which relief could be granted. When recommending dismissal of Plaintiff’s First
11 Amended Complaint, this Court advised Plaintiff of the deficiencies of that complaint for
12 his claims regarding the warrant and excessive force. (*See* R&R at 11:1-14, 11:19-12:7.)
13 In the order adopting the first Report and Recommendation, the Honorable Dana M.
14 Sabraw granted Plaintiff leave to file a second amended complaint and again advised
15 Plaintiff to “cure[] the pleading deficiencies identified in the R&R.” (ECF No. 69 at 2.)
16 When this Court granted Plaintiff’s request to file a Third Amended Complaint, Plaintiff
17 was yet again advised the complaint “must specifically allege facts” and “precisely identify
18 which cause(s) of action are brought against each person.” (ECF No. 77.) Plaintiff failed
19 to heed these warnings when filing his Third and now Fourth Amended Complaint.
20 Plaintiff’s repeated failure to cure deficiencies is a strong indication to the Court that
21 Plaintiff has no additional facts to plead. Given this, the Court finds that any further
22 attempts to amend would be futile. Accordingly, the Court **RECOMMENDS** that
23 defendants Mandujano, A. Hernandez, L. Hernandez, and Seaman be **DISMISSED WITH**
24 **PREJUDICE**.

25 **IV. CONCLUSION**

26 For the reasons set forth herein, it is **RECOMMENDED** that Defendants’ Motion
27 to Dismiss be **GRANTED** and that defendants Mandujano, A. Hernandez, L. Hernandez,
28 and Seaman be **DISMISSED** with prejudice. This Report and Recommendation is

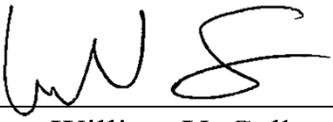
1 submitted to the United States District Judge assigned to this case, pursuant to the
2 provisions of 28 U.S.C. § 636(b)(1)(1988) and Federal Rule of Civil Procedure 72(b).

3 **IT IS ORDERED** that no later than **September 20, 2017**, any party to this action
4 may file written objections with the Court and serve a copy on all parties. The document
5 shall be captioned “Objections to Report and Recommendation.” The parties are advised
6 that failure to file objections within the specified time may waive the right to raise those
7 objections on appeal of the Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

8 **IT IS FURTHER ORDERED** no replies to objections will be accepted, and the
9 motion will be deemed taken under submission on September 20, 2017.

10 **IT IS SO ORDERED.**

11 Dated: August 22, 2017

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14 Hon. William V. Gallo
15 United States Magistrate Judge
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