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

MARK MCAFEE,

Plaintiff,

v.

**STATE OF CALIFORNIA, CALIFORNIA
HIGHWAY PATROL, CHP OFFICER
GREG MAKEL, CHP OFFICER SALCIDO,
CHP CAPT. G.L. FIEF, CALIFORNIA
DEPARTMENT OF MOTOR VEHICLES,
HEARING OFFICER G. VERDUGO, and
DOES 1 through 10, inclusive,**

Defendants.

1:07-CV-00577-OWW-NEW

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS (Doc. 7),
STRIKING THIRD AMENDED
COMPLAINT AS PREMATURE
(Doc. 15) AND DIRECTING
PLAINTIFF TO AMEND AND FILE
THIRD AMENDED COMPLAINT**

Plaintiff Mark McAfee filed an Amended Complaint on April 13, 2007 (Doc. 4). On May 29, 2007, Defendants filed a motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. The motion to dismiss sets forth three grounds:

1. The Court lacks subject matter jurisdiction because the claims against the State of California by and through the Department of Motor Vehicles and against California Highway Patrol Captain Fief and DMV Hearing Officer Verdugo are barred by the Eleventh Amendment to the U.S. Constitution.
2. The claims against DMV Hearing Officer Verdugo are barred by the doctrine of judicial immunity.

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Order granting in part and denying in part defendants' motion to dismiss and striking third amended complaint as premature.

1 3.Plaintiff has failed to allege facts to support the Third, Fourth and Sixth
2 Causes of Action of the First Amended Complaint.

3 On June 8, 2007, Plaintiff, without first obtaining leave of court or consent of Defendants as
4 required by Rule 15(a), Federal Rules of Civil Procedure, filed a Second Amended Complaint
5 (Doc. 10). Then, on June 17, 2007, Plaintiff filed a memorandum in opposition to the motion to
6 dismiss to which is attached a proposed Third Amended Complaint. Plaintiff's opposition to the
7 motion to dismiss in its entirety states:

8 ~~the motion to dismiss~~ Plaintiff proposes to amend the complaint to satisfy

9 Specifically Plaintiff will dismiss DMV Hearing Officer Verdugo and the
10 Department of Motor Vehicles from the entire complaint. Plaintiff will also dismiss the
conspiracy claim and the claim based on the Tom Bane Act.

11 Plaintiff will amend the complaint to allege that Captain Fief was aware of
12 previous complaints against the arresting officers and acted with deliberate indifference in
finding that no abuse of constitutional rights had occurred.

13 The proposed Third Amended Complaint is an action for damages pursuant to 42 U.S.C. §
14 1983.^{1/} The proposed Third Amended Complaint names as defendants CHP Officers Makel and
15 Salcido and CHP Captain Fief, all sued in their official and individual capacities. Although the
16 proposed Third Amended Complaint does not set forth a claim for conspiracy, Paragraph 13
17 alleges that each of the Defendants was, *inter alia*, a co-conspirator.

18 A. GOVERNING STANDARDS.

19 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Novarro v.*
20 *Black*, 250 F.3d 729, 732 (9th Cir.2001). Dismissal of a claim under Rule 12(b)(6) is appropriate
21 only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his
22 claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
23 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory
24 or where the complaint presents a cognizable legal theory yet fails to plead essential facts under
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27 1. On July 4, 2007, Plaintiff filed the proposed Third Amended Complaint as the Third
28 Amended Complaint. Plaintiff's action was premature. The Third Amended Complaint filed on July
4, 2007 is stricken on that ground.

Order granting in part and denying in part defendants' motion to dismiss
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1 that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In
2 reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual
3 allegations and must construe all inferences from them in the light most favorable to the
4 nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). However, legal
5 conclusions need not be taken as true merely because they are cast in the form of factual
6 allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003).

7 B. MERITS OF MOTION TO DISMISS.

8 Defendants' motion to dismiss was directed to the allegations and causes of action in the
9 First Amended Complaint.

10 The motion to dismiss sought dismissal of claims against the State of California, the
11 California Highway Patrol and DMV Hearing Officer Verdugo based on the Eleventh
12 Amendment. Although Plaintiff's opposition states that Plaintiff will dismiss DMV Hearing
13 Officer Verdugo and the Department of Motor Vehicles from the entire complaint, the proposed
14 Third Amended Complaint still names as defendants the State of California, the California
15 Highway Patrol and paragraphs 25 and 27 refer to "defendant" Verdugo.

16 The motion to dismiss against the State of California, the California Highway Patrol and
17 DMV Hearing Officer Verdugo is GRANTED WITHOUT LEAVE TO AMEND.

18 The motion to dismiss asserted that insufficient facts were alleged to state a claim in the
19 Third Cause of Action for "4th Amendment: Policy and Custom", the Fourth Cause of Action
20 pursuant to 42 U.S.C. § 1985(3) and the Sixth Causes of Action for violation of California Civil
21 Code §§ 51, 51.5 and 51.7 and the Unruh and Tom Bane civil rights acts.

22 In the proposed Third Amended Complaint, the causes of action for violation of Section
23 1985(3) and the California civil rights acts provisions have been deleted. Although mooted by
24 the proposed Third Amended Complaint, the motion to dismiss these causes of action is
25 GRANTED.

26 In the proposed Third Amended Complaint, the Third Cause of Action is captioned "4th
27 Amendment: Policy and Custom". The proposed Third Cause of Action alleges:

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1 44. Defendant CAPTAIN FIEF and the HIGHWAY PATROL have, under
2 color of law, violated Plaintiff's rights, privileges and immunities secured by
the United States Constitution in violation of Section 1983 of Title 42 of
the United States Code.

3 45. The above described customs, practices and policies demonstrate a
4 deliberate indifference on the part of the Defendants, and each of them, to the
5 constitutional rights of persons with the Eastern District of California and
were the cause of the violations of Plaintiff's rights alleged herein

6 46. During all relevant times, one or more of the Defendants, and particularly
7 Defendant Captain FIEF [sic] established, maintained, encouraged, allowed
and/or ratified a custom, practice or policy of providing inadequate training,
8 supervision, instruction, oversight, and discipline to HIGHWAY PATROL
9 officers, including those mentioned above, thereby failing to adequately
discourage constitutional violations and tacitly agreeing to violate Plaintiff's
constitutional rights.

10 47. The above described customs, practices and policies demonstrate a
11 deliberate indifference on the part of Defendants, and each of them, and
particularly Defendant Captain FIEF to the constitutional rights of persons
12 within the Eastern District of California, and were the cause of the violations
of Plaintiff's rights alleged herein. Plaintiff was unlawfully seized,
13 arrested/detained by Defendants without warrant or order or commitment or
any other legal authority of any kind as Plaintiff had not committed any
14 crime or public offense.

15 48. As a proximate result of the acts of Defendants, and each of them, as
herein alleged, Plaintiff was compelled to expend money all to his damage in
an amount according to proof.

16 49. As a proximate result of the acts of Defendants, and each of them,
17 Plaintiff has suffered damage to his reputation and shame, humiliation and
embarrassment in the community.

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19 Plaintiff's use of "custom or policy" terminology in this cause of action is confusing and
20 somewhat misleading. The "custom or policy" terminology derives from *Monell v. New York*
21 *Dept. of Social Servs.*, 436 U.S. 658 (1978). *Monell* instructed

22 that a local government may not be sued under § 1983 for an injury inflicted
solely by its employees or agents. Instead, it is when execution of a government's policy or
23 custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to
represent official policy, inflicts the injury that the government as an entity is responsible under §
24 1983.

25 436 U.S. at 694. *Monell* expressly limited its holding "to local government units which are not
26 considered part of the State for Eleventh Amendment purposes." *Id.* at 690 n.54.

27 In the motion to dismiss, Defendants argued that the claim against Defendant Fief does not
28 state a claim because there are no allegations of any personal involvement by Defendant Fief in

1 the deprivation of Plaintiff's constitutional rights.

2 As explained in *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989):

3 Liability under section 1983 arises only upon a showing of personal
4 participation by the defendant ... A supervisor is only liable for constitutional
5 violations of his subordinates if the supervisor participated in or directed the
violations, or knew of the violations and failed to act to prevent them. There
is no respondeat superior liability under section 1983.

6 "It is well established that a governmental officer may be held liable for damages for his failure
7 to adequately supervise or train his subordinates." *Ting v. United States*, 927 F.2d 1504, 1512
8 (9th Cir. 1991).

9 Given the standards governing resolution of a motion to dismiss for failure to state a claim,
10 Defendants' motion to dismiss on this ground is GRANTED WITH LEAVE TO AMEND.

11 The basis of the claim against Defendant Fief is sufficiently alleged so that it does not
12 appear beyond doubt that the plaintiff cannot prove facts in support of his claim which
13 would entitle him to relief against Defendant Fief.

14 Defendants also move to dismiss this cause of action on the ground that "[a]lthough plaintiff
15 purports to sue Captain Fief in his individual capacity, the only allegations regarding Captain Fief
16 concern the establishment of policy and custom which could only be done in an official
17 capacity." Defendants contend that Plaintiff has not alleged any facts which would support a
18 finding that Captain Fief acted in anything other than his official capacity and that "[t]he nature
19 of his alleged activity (establishment of policy and custom) could only be construed as conduct in
20 an official capacity as a Captain of the California Highway Patrol."

21 As explained in *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985):

22 Personal-capacity suits seek to impose personal liability upon a government
23 official for actions he takes under color of state law ... Official-capacity suits,
24 in contrast, 'generally represent only another way of pleading an action
25 against an entity of which an officer is an agent.' ... As long as the
26 government entity receives notice and an opportunity to respond, an
27 official-capacity suit is, in all respects other than name, to be treated as a suit
against the entity ... It is not a suit against the official personally, for the real
party in interest is the entity. Thus, while an award of damages against an
official in his personal capacity can be executed only against the official's
personal assets, a plaintiff seeking to recover on a damages judgment in an
official-capacity suit must look to the government entity itself.

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1 On the merits, to establish personal liability in a § 1983 action, it is enough
2 to show that the official, acting under color of state law, caused the
3 deprivation of a federal right ... More is required in an official-capacity
4 action, however, for a governmental entity is liable under § 1983 only when
the entity itself is a “moving force” behind the deprivation ...; thus, in an
official-capacity suit the entity’s ‘policy or custom’ must have played a part
in the violation of federal law.

5 The Amended Complaint and the proposed Third Amended Complaint sue the individual
6 defendants in both capacities. Because of Eleventh Amendment immunity of the State of
7 California, Plaintiff cannot proceed against the individual defendants in their official capacities.
8 *Pena v. Gardner*, 976 F.2d 469, 472-473 (9th Cir.1992) (“[T]he eleventh amendment will bar
9 Pena from bringing his claims in federal court against the state officials in their official
10 capacities”). However, to the extent that Captain Fief is sued in his individual capacity for
11 acts taken under color of state law, the motion to dismiss is without merit. In *Hafer v. Melo*, 502
12 U.S. 21, 25 (1991), the Supreme Court explained:

13 Personal-capacity suits ... seek to impose personal liability upon a
14 government officer for actions taken under color of state law. Thus, ‘[o]n the
15 merits, to establish *personal* liability in a § 1983 action, it is enough to show
16 that the official, acting under color of state law, caused the deprivation of a
17 federal right.’ ... While the plaintiff in a personal-capacity suit need not
establish a connection to governmental ‘policy or custom,’ officials sued in
their personal capacities, unlike those sued in their official capacities, may
assert personal immunity defenses

18 Defendants’ contention that the alleged acts of Defendant Fief could only have occurred in
19 his official capacity misunderstands the distinction between official capacity and individual
20 capacity suits and negates the requirement for an individual capacity suit that the defendant be
21 acting under color of state law.

22 Defendants’ motion to dismiss the cause of action against Defendant Fief is DENIED.

23 However, because the proposed Third Amended Complaint includes defendants and
24 allegations that are improper because of the Eleventh Amendment, Plaintiff is ordered to delete
25 the State of California, the California Highway Patrol, and CHP Hearing Officer Verdugo as

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Order granting in part and denying in part defendants' motion to dismiss
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1 defendants and to delete all references to defendants in their official capacities before filing the
2 Third Amended Complaint.^{2/}

3 CONCLUSION

4 For the reasons stated above:

- 5 1. Defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART.
6 2. The Third Amended Complaint filed on July 4, 2007 is stricken.
7 3. Plaintiff is ordered to amend the proposed Third Amended Complaint as stated above and
8 file the Third Amended Complaint within twenty (20) days of the filing date of this Order.^{3/}

9 IT IS SO ORDERED.

10 **Dated:** July 11, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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26 2. Plaintiff's counsel is also directed to familiarize himself and comply with the Federal
27 Rules of Civil Procedure and the Local Rules of Practice.

28 3. Defendants shall have the opportunity, if appropriate, to challenge the averments in the
Third Amended Complaint when filed.

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and striking third amended complaint as premature.