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

BARTLEY S. BACKUS,

Plaintiff,

No. 2:11-cv-01672 JAM KJN PS

v.

STATE OF CALIFORNIA,

Defendant.

ORDER & FINDINGS AND
RECOMMENDATIONS

_____/

Plaintiff is proceeding without counsel and filed his operative complaint against defendant State of California on June 21, 2011.¹ (Dkt. No. 1.) Presently before the court is plaintiff’s application to proceed in forma pauperis. (Dkt. No. 2.) For the reasons stated below, the undersigned grants plaintiff’s application to proceed in forma pauperis, but recommends that all of plaintiff’s claims against defendant the State of California be dismissed with prejudice. The State of California is the only named defendant in plaintiff’s complaint. Accordingly, the undersigned recommends that the entire action be dismissed with prejudice.

I. Plaintiff’s Application to Proceed In Forma Pauperis

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C.

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 § 1915. (Dkt. No. 2.) His application and declaration make the showing required by 28 U.S.C.
2 § 1915(a)(1) and (2). (See id.) Accordingly, the undersigned grants plaintiff’s request to proceed
3 in forma pauperis.

4 The determination that a plaintiff may proceed in forma pauperis does not
5 complete the required inquiry. The court is also required to screen complaints brought by parties
6 proceeding in forma pauperis. See 28 U.S.C. § 1915(e)(2); see also Lopez v. Smith, 203 F.3d
7 1122, 1129 (9th Cir. 2000) (en banc). Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to
8 dismiss a case filed pursuant to the in forma pauperis statute if, at any time, it determines that the
9 allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on
10 which relief may be granted, or seeks monetary relief against an immune defendant.

11 Within his complaint, plaintiff succinctly states, “I want to sue the State of
12 California for \$50 million dollars and I want a trial by jury.” (Compl. at 3.) The bases for
13 plaintiff’s claims are far less succinct, however, as plaintiff attaches over fifty pages of exhibits
14 to his complaint, ranging from what appear to be plaintiff’s credit card bills to various letters
15 from plaintiff and court transcripts in unrelated legal proceedings.²

16 Generally, plaintiff’s allegations appear to be that he has been “stalked” and
17 “assaulted” by “steady and pulsating signals from the cell phone towers and other systems” and
18 “cyber attacks using the cell phone system” in “violation of his civil rights,” and that he has
19 repeatedly complained to various entities and individuals in efforts to curtail such “attacks” upon
20 him. (Id. at 2-3.) Plaintiff seeks \$50 million in monetary damages from the State of California,
21 and also asks that the State of California remove all “these illegal weapons of invisible warfare.”
22 (Id. at 2-3.)

23 The undersigned will not order service on the State of California because that
24

25 ² The foregoing is not a comprehensive recitation of the factual allegations contained in
26 the operative complaint. As reflected by the discussion below, a detailed factual summary is not
required for the court’s screening of the complaint.

1 defendant is, as discussed below, immune from suit. Accordingly, the undersigned recommends
2 that this action be dismissed with prejudice.

3 A. Eleventh Amendment Immunity

4 Plaintiff's claims are alleged as against one defendant: the State of California.
5 (Compl. at 1, 3; 55 (civil case cover sheet).) Because of the immunity from suit provided by the
6 Eleventh Amendment to the United States Constitution, the undersigned recommends that
7 plaintiff's claims against the State of California be dismissed with prejudice. Because plaintiff's
8 suit names only the State of California as a defendant and seeks monetary and injunctive relief
9 against only the State of California, the undersigned thus recommends that this entire action be
10 dismissed with prejudice.

11 The Eleventh Amendment prohibits federal courts from hearing suits brought
12 against a state by its own citizens or citizens of other states. Brooks v. Sulphur Springs Valley
13 Elec. Coop., 951 F.2d 1050, 1053 (9th Cir. 1991). The Eleventh Amendment also "bars suits for
14 money damages in federal court against a state, its agencies, and state officials acting in their
15 official capacities." Alolelei v. Dep't of Pub. Safety, 488 F.3d 1144, 1146 (9th Cir. 2007);
16 accord Flint v. Dennison, 488 F.3d 816, 824-25 (9th Cir. 2007); Simmons v. Sacramento County
17 Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) (holding that damages claims alleged
18 against the Superior Court and its employees barred by Eleventh Amendment immunity); see also
19 Hafer v. Melo, 502 U.S. 21, 25 (1991) ("Although state officials literally are persons, an
20 official-capacity suit against a state officer is not a suit against the official but rather is a suit
21 against the official's office. As such it is no different from a suit against the State itself."
22 (citation and quotation marks omitted).)³

23
24 ³ State officials sued in their individual capacities, as opposed to their official capacities
25 do not enjoy Eleventh Amendment immunity from damages claims brought pursuant to 42
26 U.S.C. § 1983 in federal court. Hafer, 502 U.S. at 30-31 ("[T]he Eleventh Amendment does not
erect a barrier against suits to impose 'individual and personal liability' on state officials under §
1983" (citation omitted).); accord Suever v. Connell, 579 F.3d 1047, 1061 (9th Cir. 2009).

1 Here, plaintiff's "civil rights" claims (Compl. at 1) against the State of California
2 are barred by the Eleventh Amendment.⁴ The Ninth Circuit Court of Appeals has recognized that
3 "[t]he State of California has not waived its Eleventh Amendment immunity with respect to
4 claims brought under § 1983 in federal court, and the Supreme Court has held that § 1983 was
5 not intended to abrogate a State's Eleventh Amendment immunity." Dittman v. California, 191
6 F.3d 1020, 1025-26 (9th Cir. 1999) (citations and quotation marks omitted). As a suit against the
7 State of California, plaintiff's constitutional claims against this defendant are barred by Eleventh
8 Amendment immunity.

9 Plaintiff's allegations are less than clear, but to the extent plaintiff intends to
10 allege a statewide conspiracy in connection with "cyber attacks" upon him (Compl. at 1),
11 plaintiff's would-be conspiracy claims against the State of California are also barred by Eleventh
12 Amendment immunity. A plaintiff cannot state a conspiracy claim under 42 U.S.C. § 1985 in the
13 absence of a claim for deprivation of rights under 42 U.S.C. § 1983. See Caldeira v. County of
14 Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) (holding that "the absence of a section 1983
15 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same
16 allegations"), cert. denied, 493 U.S. 817 (1989); see also Goethe v. California, No.
17 2:07-cv-01945-MCE-GGH, 2008 WL 3863601, at *5 (E.D. Cal. Aug. 19, 2008) (concluding that
18 Section 1985 claim failed because sovereign immunity barred plaintiff's Section 1983 claim);
19 Vaughn v. Regents of Univ. of Cal., 504 F. Supp. 1349, 1352 (E.D. Cal. 1981) (concluding that

20 _____
21 Moreover, the Eleventh Amendment does not bar supplemental state law claims seeking damages
22 against a state official sued in his or her individual capacity. Ashker v. Cal. Dep't of Corrections,
23 112 F.3d 392, 394-95 (9th Cir. 1997) (citing Pena v. Gardner, 976 F.2d 469, 473-74 (9th Cir.
1992) (per curiam)). However, plaintiff has not named any State of California officials in his
lawsuit and has not alleged that any particular actions were taken by such officials.

24 ⁴ Plaintiff's reference to "civil rights" and having been "discriminated against" in
25 connection with alleged assaults upon him by "steady and pulsating signals from the cell phone
26 towers and other systems" (Compl. at 1-2) suggests that plaintiff intends to allege that his
constitutional rights have been violated and thus the undersigned will construe plaintiff's "civil
rights" claims as claims made pursuant to 42 U.S.C. § 1983.

1 plaintiff's damages claims for past wrongful conduct brought pursuant to 42 U.S.C. §§ 1981,
2 1983, 1985, and 1986 were barred by Eleventh Amendment immunity). Moreover, because a
3 plaintiff can only state a claim under 42 U.S.C. § 1986 if the operative complaint contains a valid
4 claim brought pursuant to 42 U.S.C. § 1985, to the extent plaintiff's claims could be construed as
5 made pursuant to 42 U.S.C. § 1986, such claims are likewise barred. Sanchez v. City of Santa
6 Ana, 936 F.2d 1027, 1040 (9th Cir. 1990) (citing Trerice v. Pedersen, 769 F.2d 1398, 1403 (9th
7 Cir. 1985)); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988).

8 Further, to the extent plaintiff seeks to recover upon state law tort claims against
9 the State of California, such as a claim for "assault" (Compl. at 1), such claims are also barred by
10 Eleventh Amendment immunity.⁵ Although the State of California has waived its sovereign
11 immunity through the California Tort Claims Act with respect to tort actions brought in state
12 court, see Cal. Gov't Code § 945, that waiver does not effectuate a waiver of the state's Eleventh
13 Amendment immunity from tort suits in federal court. BV Eng'g v. Univ. of Cal., L.A., 858 F.2d
14 1394, 1396 (9th Cir. 1988) (holding that the waiver of sovereign immunity in the California Tort
15 Claims Act does not constitute a waiver of Eleventh Amendment immunity in federal court),
16 cert. denied, 489 U.S. 1090 (1989); see also Guzman v. Van Demark, 651 F. Supp. 1180,
17 1183-84 (C.D. Cal. 1987) ("It has long been recognized that a state may waive its state sovereign
18 immunity without relinquishing its eleventh amendment immunity."); accord Kirchmann v. Lake
19 Elsinore Unified Sch. Dist., 83 Cal. App. 4th 1098, 1103 (2000) ("Tort actions may be brought
20 against the state or its agencies in state court under the California Tort Claims Act (Gov. Code,
21 §§ 810 et seq.) but may not be brought in federal court, because the consent to suit contained in
22 the act (Gov. Code, § 945) is not a waiver of Eleventh Amendment immunity.").

23
24 ⁵ To the extent that subject matter jurisdiction over plaintiff's state law tort claims is
25 premised on the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, the Ninth Circuit
26 Court of Appeals has held that "28 U.S.C. § 1367 does not abrogate state sovereign immunity for
supplemental state law claims." Stanley v. Trustees of Cal. State Univ., 433 F.3d 1129, 1133-34
(9th Cir. 2006).

1 II. CONCLUSION

2 For the foregoing reasons, IT IS HEREBY ORDERED that:

3 1. Plaintiff's request to proceed in forma pauperis (Dkt. No. 2) is granted.


4 However, for the reasons set forth above, it is FURTHER RECOMMENDED
5 that:

6 1. Plaintiff's claims alleged against the State of California be dismissed with
7 prejudice as barred by Eleventh Amendment immunity, that the State of California dismissed
8 from this action, and accordingly, because the State of California is the only defendant, that the
9 entire action be dismissed with prejudice.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
15 within the specified time may waive the right to appeal the District Court's order. Turner v.
16 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir.
17 1991).

18 IT IS SO ORDERED AND RECOMMENDED.

19 DATED: June 28, 2011

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22 KENDALL J. NEWMAN
23 UNITED STATES MAGISTRATE JUDGE
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