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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Blake Smalley,

10 Plaintiff,

11 v.

12 Officer C. Contino, in his individual
13 capacity, "Unknown Officer #1," in his
14 individual capacity, Joseph M. Arpaio, in
15 his individual capacity as sheriff of
16 Maricopa County, Maricopa County
17 Sheriff's Office, and Maricopa County,

18 Defendants.

No. CV12-2524-PHX-DGC

ORDER

19 Defendants filed a motion to dismiss and motion to strike. Doc. 10. The motion is
20 fully briefed. No party has requested oral argument. For the reasons stated below, the
21 Court will grant the motion to dismiss in part and deny the motion to strike.

I. Background.

22 On November 26, 2012, Plaintiff Blake Smalley, who is represented by counsel,
23 filed a complaint against Maricopa County, The Maricopa County Sheriff's Office
24 ("MCSO"), Sheriff Arpaio in his individual capacity, Deputy C. Contino in his individual
25 capacity, and Unknown Officer #1 ("Unknown Deputy") in his individual capacity.
26 Doc. 1. The complaint alleges that on September 22, 2012, MCSO deputies, acting under
27 color of state law, unlawfully arrested Plaintiff, an African American male, in Cave
28 Creek, Arizona. Doc. 1 at 5-9. According to the Plaintiff's complaint, Unknown Deputy
and Deputy Contino approached him at a convenience store where he was seeking

1 assistance after his car ran out of gas. *Id.* at 5. Plaintiff’s car was not near the store
2 during the encounter. *Id.* Deputy Contino questioned Plaintiff about the location of his
3 car, then conducted a search of his person. *Id.* at 5-6. During the search, Unknown
4 Deputy was “yelling and screaming at the plaintiff, telling him that it was part of the
5 officers’ jobs to ‘keep pieces of shit like you off the street.’” *Id.* at 6. Deputy Contino
6 then handcuffed Plaintiff and, with Unknown Deputy, assaulted Plaintiff by throwing him
7 to the ground and then against a patrol car. *Id.* According to Plaintiff, Unknown Deputy
8 yelled that “people like him” did not belong in the area. *Id.* Plaintiff believes the
9 statement referred to him being an African American in a predominantly Caucasian
10 neighborhood. *Id.* Plaintiff was arrested and charged with resisting arrest and
11 maintaining an open container of alcohol in his car. *Id.* at 7. Plaintiff was then
12 transported to a detention facility and held for 15 hours. *Id.* Plaintiff contends that he
13 was never formally charged or convicted of any crime in relation to the arrest. *Id.* at 8.

14 As a result of Plaintiff’s alleged unlawful arrest, he claims to have suffered
15 injuries and damages in violation of his Fourth and Fourteenth Amendment constitutional
16 rights, and 42 U.S.C. § 1983. Doc. 1. at 9.

17 **II. Legal Standard.**

18 When analyzing a complaint for failure to state a claim for relief under Rule
19 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
20 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
21 Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations are not
22 entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and
23 therefore are insufficient to defeat a motion to dismiss for failure to state a claim. *In re*
24 *Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a
25 Rule 12(b)(6) dismissal, the complaint must plead enough facts to state a claim to relief
26 that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
27 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than
28 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678

1 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the
2 court to infer more than the mere possibility of misconduct, the complaint has alleged –
3 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed.
4 R. Civ. P. 8(a)(2)).

5 **III. Analysis.**

6 **A. Plaintiff’s Standing.**

7 Defendants allege Plaintiff has no standing to bring this suit because he has not
8 proven that he suffered a specific injury, nor shown an affirmative link between an injury
9 and the conduct of any Defendant. Doc. 10 at 7, Doc. 16 at 9. To satisfy Article III
10 standing, Plaintiff must show (1) he has suffered an “injury in fact” that is concrete and
11 particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is
12 fairly traceable to the challenged action of Defendants; and (3) it is likely, as opposed to
13 merely speculative, that the injury will be redressed by a favorable decision. *Braunstein*
14 *v. Arizona Dept. of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012) (quoting *Bernhardt v.*
15 *County. of L.A.*, 279 F.3d 862, 868–69 (9th Cir. 2002)). Plaintiff bears the burden of
16 establishing these elements. Although general allegations of injury can suffice at the
17 pleading stage, a plaintiff must set forth “specific facts” to survive a motion for summary
18 judgment based on lack of standing. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504
19 U.S. 555, 561 (1992)).

20 Plaintiff alleges that he suffered injuries due to excessive force from Unknown
21 Deputy and Deputy Contino during his arrest. Doc. 1 at 9. Plaintiff also alleges that he
22 was detained for 15 hours as a direct result of the arrest. Doc. 1 at 8. Plaintiff alleges
23 that these injuries were a direct result of the actions or policies of Defendants in this case,
24 and those allegations are sufficient to establish standing at this pleading stage.

25 **B. Unknown Deputy and Deputy Contino.**

26 Count one of Plaintiff’s complaint alleges that he is entitled to damages from
27 Unknown Deputy and Deputy Contino under 42 U.S.C. § 1983 for violation his Fourth
28 and Fourteenth Amendment constitutional rights. Doc. 1 at 9-10.

1 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
2 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
3 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163–64 (9th
4 Cir. 2005) (quoting *Shoshone–Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d
5 1278, 1284 (9th Cir.1994)). “Section 1983 ‘is not itself a source of substantive rights,’
6 but merely provides ‘a method for vindicating federal rights elsewhere conferred.’”
7 *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137,
8 144, n. 3 (1979)). It is well settled that § 1983 imposes liability for violations of rights
9 protected by the Constitution, not for violations of duties of care arising out of tort law.
10 *Johnson v. Barker*, 799 F.2d 1396, 1399 (9th Cir.1986); *Baker*, 443 U.S. at 146. Mere
11 negligence is not sufficient to support a § 1983 claim. *Daniels v. Williams*, 474 U.S. 327,
12 330–331 (1986).

13 Plaintiff has sufficiently pled a § 1983 claim against the deputies in this case.
14 Plaintiff alleges that Unknown Deputy and Deputy Contino, acting under the color of
15 state law, racially discriminated against him and violated his right to be free from
16 unreasonable searches and seizures. Doc. 1 at 9. Plaintiff also alleges that they used
17 excessive, unreasonable, and unjustified force during his arrest. *Id.* Defendants do not
18 specifically refute any of Plaintiff’s allegations with regard to Unknown Deputy and
19 Deputy Contino in their motion to dismiss. Because the Court must accept Plaintiff’s
20 allegations as true at this point in the proceedings, Defendants’ motion to dismiss with
21 regard to Unknown Deputy and Deputy Contino will be denied. *See Lockyer*, 568 F.3d at
22 1067.

23 **C. MCSO.**

24 “Governmental entities have no inherent power and possess only those powers and
25 duties delegated to them by their enabling statutes. Thus, a governmental entity may be
26 sued only if the legislature has so provided.” *Brailard v. Maricopa County*, 232 P.3d
27 1263, 1269 (Ariz. Ct. App. 2010) (citations omitted). “Although A.R.S. § 11-201(A)(1)
28 provides that counties have the power to sue and be sued through their boards of

1 supervisors, no Arizona statute confers such power on MCSO as a separate legal entity.”
2 *Id.* Plaintiff, nonetheless, claims MCSO is a proper defendant, citing *Maricopa County*
3 *Sheriff’s Office v. Greer*, 1 CA-CV 09-0255, 2010 WL 1779349 (Ariz. Ct. App. 2010).
4 That decision was issued prior to *Brillard*, which resolved the issue of MCSO’s non-
5 jural status.

6 MCSO is a non-jural entity and lacks capacity to be sued. Accordingly, all claims
7 asserted against MCSO will be dismissed with prejudice.

8 **D. Sheriff Arpaio.**

9 Plaintiff alleges that Sheriff Arpaio is responsible for Plaintiff’s injuries in his
10 individual capacity under direct supervisor liability. Doc. 1 at 10, Doc. 15 at 11. In the
11 Ninth Circuit, a defendant may be held liable as a supervisor under § 1983 “if there exists
12 either (1) his or her personal involvement in the constitutional deprivation, or (2) a
13 sufficient causal connection between the supervisor’s wrongful conduct and the
14 constitutional violation.” *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011), *cert.*
15 *denied*, 132 S. Ct. 2101 (2012) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th
16 Cir.1989)). “[A] plaintiff must show the supervisor breached a duty to plaintiff which
17 was the proximate cause of the injury. The law clearly allows actions against supervisors
18 under section 1983 as long as a sufficient causal connection is present and the plaintiff
19 was deprived under color of law of a federally secured right.” *Id.* (quoting *Redman v.*
20 *County of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991) (internal quotation marks
21 omitted)).

22 The requisite causal connection can be established by setting in motion a series of
23 acts by others, or by knowingly refusing to terminate a series of acts by others, which the
24 supervisor knew or reasonably should have known would cause others to inflict a
25 constitutional injury. *Id.* (internal citation and quotation marks omitted). “A supervisor
26 can be liable in his individual capacity for his own culpable action or inaction in the
27 training, supervision, or control of his subordinates; for his acquiescence in the
28 constitutional deprivation; or for conduct that showed a reckless or callous indifference to

1 the rights of others.” *Id.* (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th
2 Cir.1998)).

3 Plaintiff claims that Sheriff Arpaio has a policy “of acquiescence in letting
4 subordinates violate federally secured constitutional rights by failing to follow proper
5 police procedures as required by . . . the United States Constitution.” Doc. 1 at 10.
6 Specifically, Plaintiff contends and individually addresses claims that Arpaio promotes
7 “policies, customs, practices, and procedures that allow unconstitutional or
8 discriminatory policing, as demonstrated by inadequate policies, ineffective training,
9 virtually non-existent accountability measures, poor supervision, scant data collection
10 measures, distorted enforcement priorities, an ineffective complaint and disciplinary
11 system, and dramatic departures from proper law enforcement procedures.” *Id.* Plaintiff
12 claims that Sheriff Arpaio is aware that his office’s deficiencies create a risk of
13 unconstitutional or discriminatory policing, yet fails to remedy the situation. Doc. 1 at
14 10-13. Plaintiff further alleges that because of the Sheriff’s policies, Unknown Deputy
15 and Deputy Contino believed their actions against Plaintiff would not be monitored or
16 investigated and, indeed, would be tolerated. Doc. 1 at 13.

17 Plaintiff has met his pleading burden under relevant Ninth Circuit law.
18 Defendant’s motion to dismiss Sheriff Arpaio will be denied.

19 **E. Maricopa County.**

20 Plaintiff argues that the County is liable for constitutional violations of MCSO
21 deputies because they occurred as a result of the policies, practices, and customs
22 promulgated and ratified by Sheriff Arpaio, and because the County failed to remedy
23 allegations of misconduct within MCSO. Doc. 1 at 14.

24 Municipalities and other local government units are among those persons to whom
25 § 1983 applies. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). A “[c]ounty is
26 liable only for the actions of ‘its lawmakers or by those whose edicts or acts may fairly be
27 said to represent official policy.’” *Cortez v. County of L.A.*, 294 F.3d 1186, 1189 (9th
28 Cir. 2002) (quoting *Monell*, 436 U.S. at 694). “To hold a local government liable for an

1 official's conduct, a plaintiff must first establish that the official (1) had final
2 policymaking authority 'concerning the action alleged to have caused the particular
3 constitutional or statutory violation at issue' and (2) was the policymaker for the local
4 governing body for the purposes of the particular act." *Id.* (quoting *Weiner v. San Diego*
5 *County*, 210 F.3d 1025, 1028 (9th Cir. 2000)). "Whether a particular official has 'final
6 policy making authority' is a question of state law." *Lytle v. Carl*, 382 F.3d 978, 982 (9th
7 Cir. 2004) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

8 "It is well settled that 'Sheriff Arpaio is a final policymaker for Maricopa County
9 in the context of criminal law enforcement.'" *Mora v. Arpaio*, CV-09-1719-PHX-DGC,
10 2011 WL 1562443 at *7 (D. Ariz. 2011) (quoting *Lovejoy v. Arpaio*, CV09-1912-PHX-
11 NVW, 2010 WL 466010 at *12 (D. Ariz. 2010)). The Sheriff's authority is statutorily
12 prescribed and vested in the State Constitution. *See*, Ariz. Const. art. XII, §§ 3, 4. A.R.S.
13 § 11-441 empowers the Sheriff, among other things, to preserve the peace and make
14 arrests of persons committing crimes. In his official capacity, the Sheriff's acts "surely
15 represent an act of official government 'policy'" of Maricopa County. *Lovejoy*, 2010 WL
16 466010, at * 13 (citations omitted). Indeed, there "may be no 'clearer case of county
17 liability' than for the policies of a sheriff charged by law with responsibility for a
18 county's [law enforcement]." *Flanders v. Maricopa County*, 54 P.3d 837, 847 (Ariz. Ct.
19 App. 2002) (citation omitted).

20 Under *Monell*, therefore, Maricopa County is subject to § 1983 liability for the
21 Sheriff's policies, customs, and practices if they deprived Plaintiff of his constitutional
22 rights. *See id.* ("Because the judgment against the Sheriff was for constitutional
23 violations committed in his official capacity, the County is liable as a matter of law.");
24 *Martin v. Arpaio*, No. CV 06-2423-PHX-DGC (DKD), 2006 WL 3313950, at *2 (D.
25 Ariz. 2006) ("Regarding Arpaio in his official capacity, a suit against him officially is
26 equivalent to a suit brought against . . . Maricopa County") (citations omitted); *see also*
27 *Cortez v. County of L.A.*, 294 F.3d 1186, 1188-92 (9th Cir. 2001) (county subject to
28 § 1983 liability where the sheriff acted as an official for the county); *Pembaur v. City of*

1 *Cincinnati*, 475 U.S. 469, 483 n. 12 (1986) (noting that while the sheriff’s employment
2 decisions would not result in municipal liability where employment policy was set by the
3 county board, “decisions with respect to law enforcement practices, over which the
4 [s]heriff is the official policymaker, *would* give rise to municipal liability”) (emphasis in
5 original).

6 It is undisputed that Deputy Contino and Unknown Deputy were engaged in
7 official law enforcement duties at the time of Plaintiff’s arrest. Doc. 10 at 6. Plaintiff
8 alleges that his arrest and the related violations of his constitutional rights were a direct
9 result of the Sheriff’s longstanding policies, customs, practices, and procedures. Doc. 1
10 at 14. Plaintiff’s factual allegations plausibly state a claim against the County.

11 **F. Motion to Strike.**

12 Defendants bring a motion to strike paragraphs 58-61 of Plaintiff’s complaint.
13 Doc. 10 at 8-9. The Court “may strike from a pleading an insufficient defense or any
14 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

15 Defendants claim paragraphs 58-61 “consist of pure political commentary” and
16 must be stricken as immaterial and impertinent. Doc. 10 at 8-9. The Court disagrees.
17 Plaintiff has alleged his constitutional rights were violated by MCSO deputies who were
18 empowered to act by the Sheriff’s policies of encouraging, or at least condoning, racial
19 discrimination in law enforcement. Plaintiff alleges both the County and the Sheriff were
20 aware of institutional deficiencies in MCSO that could lead to such racially motivated
21 policing, but failed to take corrective action. Paragraphs 58-61 of Plaintiff’s complaint
22 point to factual evidence that the United States Department of Justice has recently
23 attempted to engage the Sheriff regarding constitutional violations of his deputies.
24 Doc. 1 at 12-13. The Court cannot conclude that such allegations are immaterial or
25 impertinent to the Plaintiff’s claim that his own constitutional rights were violated by
26 MCSO deputies. Defendants’ motion to strike will be denied.

27 **IT IS ORDERED:**

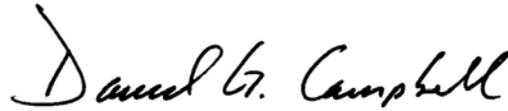
- 28 1. Defendants’ motion to dismiss (Doc. 10) is **granted in part and**

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denied in part as set forth above.

2. Defendants' motion to strike (Doc. 10) is **denied**.

Dated this 7th day of March, 2013.



David G. Campbell
United States District Judge