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

8 Kent Maerki,

9 Plaintiff,

10 v.

11 Arthur Anderson; Edward O. Burke; Dennis
12 I. Wilenchik; Thomas E. Lordan; Rob
13 Somers; Carole Downs; Shannon Downs;
Joseph M. Arpaio,

14 Defendants.

No. CV-13-01466-PHX-GMS

ORDER

15 Pending before the Court are Defendants Arthur Anderson and Edward O Burke's
16 Motion to Dismiss (Doc. 18), Defendant Sheriff Joseph M. Arpaio's Motion to Dismiss
17 (Doc. 19), and Defendants Dennis I. Wilenchik, Thomas E. Lordan, Rob Somers, Carole
18 Downs, and Shannon Downs' Motion to Dismiss (Doc. 20). Also pending are Plaintiff's
19 Motions to Strike Anderson and Burke's Motion to Dismiss (Doc. 23) and Motion to
20 Strike Defendants Wilenchik, Lordan, Somers, Downs, and Downs' Motion to Dismiss
21 (Doc. 24). For the following reasons, Defendants' Motions to Dismiss are granted and
22 Plaintiff's Motions to Strike are denied.

23 **BACKGROUND**

24 This case arises from an action alleging trade secret violations brought against
25 Plaintiff by Smartcomm License Services, L.L.C., and Smartcomm, L.L.C. in Maricopa
26 County Superior Court (the "underlying action"). Smartcomm filed the underlying action
27 against Maerki on November 15, 2010 and the action, CV 2010-032209, is ongoing at the
28 time of this Order. Maerki asserts that in the course of litigating the underlying action,

1 Defendants conspired to deprive him of a variety of constitutional rights. He brings the
2 present action against Maricopa County Superior Court Judge Arthur Anderson, the judge
3 in the underlying case, Maricopa County Sheriff Joseph Arpaio, Edward O. Burke, the
4 Special Master appointed in the underlying action, Dennis I. Wilenchik, Thomas E.
5 Lordan, and Rob Somers, three attorneys for the Plaintiff companies in the underlying
6 action, and Carole Downs and Shannon Downs, two Smartcomm employees. (Doc. 4
7 (“Amended Complaint”).) Plaintiff claims that Defendants have conspired to deprive him
8 of due process in the underlying action by pursuing improper discovery, limiting his
9 ability to speak, and arresting him pursuant to a contempt order. Plaintiff asserts a variety
10 of constitutional claims against defendants under 42 U.S.C. § 1983. These claims include
11 alleged violations of Plaintiff’s Fourth, Fifth, and Fourteenth Amendment rights. Plaintiff
12 seeks damages. Defendants now move to dismiss Plaintiff’s Amended Complaint. (Docs.
13 18, 19, 20.) In response, Plaintiff moves to strike two of these Motions to Dismiss (Doc.
14 23, 24.)

15 ANALYSIS

16 I. Legal Standard

17 Rule 12(b)(6) is designed to “test the legal sufficiency of a claim.” *Navarro v.*
18 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim
19 pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain more than
20 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action”;
21 it must contain factual allegations sufficient to “raise a right to relief above the
22 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a
23 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to
24 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,
25 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has
26 facial plausibility when the plaintiff pleads factual content that allows the court to draw
27 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
28 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility

1 requires “more than a sheer possibility that a defendant has acted unlawfully.” *Twombly*,
2 550 U.S. at 555. Accordingly, a plaintiff must do more than employ “labels,”
3 “conclusions,” or a “formulaic recitation of the elements of a cause of action.” *Id.*

4 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
5 allegations of material fact are taken as true and construed in the light most favorable to
6 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,
7 legal conclusions couched as factual allegations are not given a presumption of
8 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
9 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
10 1998).

11 **II. Defendants Anderson and Burke**

12 Defendants Maricopa Superior Court Judge Arthur Anderson and Edward O.
13 Burke, appointed as a special master in the underlying action, move to dismiss all claims
14 against them on the grounds of absolute judicial immunity or due to the failure to state a
15 claim. (Doc. 18.) Plaintiff alleges that Defendants Anderson and Burke engaged in
16 assorted misconduct in their roles as Judge and special master in the underlying action.
17 Plaintiff’s allegations against Anderson solely concern acts that are clearly judicial in
18 nature. These allegations appear to include that Judge Anderson made rulings during the
19 underlying action that Plaintiff found to be improper, that he appointed a criminal defense
20 attorney for Plaintiff during the course of that action without Plaintiff’s permission, and
21 that Anderson permitted discovery that Plaintiff argues violated his constitutional rights.
22 (Doc. 4 at 7–8.) These are all acts normally performed by a judge and occurred when
23 Judge Anderson acted in his judicial capacity. As such, the allegations against Anderson
24 involve judicial action and are barred by absolute judicial immunity. *Stump v. Sparkman*,
25 435 U.S. 349, 362 (1978). Such immunity applies even in the event that a judge is
26 accused of acting maliciously or corruptly. *Pierson v. Ray*, 386 U.S. 547 (1967).

27 Plaintiff further alleges that, in his capacity as special master, Burke persuaded
28 Judge Anderson to sign the Show Cause Order before Anderson had the opportunity for

1 thorough review, thus leading to Anderson’s allegedly improper ruling regarding that
2 order. (Doc. 4 at 7–8.) This allegation, without any further detail, fails to establish a
3 cognizable constitutional claim against Burke. Thus, all claims against Defendants
4 Anderson and Burke are dismissed.

5 Plaintiff moves to strike Anderson and Burke’s Motion to Dismiss on the grounds
6 that the Arizona Attorney General lacked standing to file the Motion to Dismiss on behalf
7 of Anderson and Burke because Plaintiff is suing Anderson and Burke in their individual
8 capacity. (Doc. 23.) However, Plaintiff provides no valid basis for these claims and the
9 Motion to Strike is denied.

10 **III. Defendant Arpaio**

11 Defendant Maricopa County Sheriff Joseph M. Arpaio moves to dismiss on the
12 grounds that Plaintiff has failed to plead any cognizable claims against him. Plaintiff does
13 not allege that Sheriff Arpaio personally participated in any aspect of the underlying
14 action. Instead, it appears that a deputy within Sheriff Arpaio’s department arrested
15 Plaintiff in compliance with Judge Anderson’s contempt order during the underlying
16 action. (Doc. 19 at 3–4.) Plaintiff concedes that Sheriff Arpaio was not personally
17 involved in this arrest or otherwise directly involved with any scheme to deprive Plaintiff
18 of any rights. (Doc. 25 at 1.)

19 A supervisor is only liable for violations of his subordinates under Section 1983 if
20 he “participated in or directed the violations, or knew of the violations and failed to act to
21 prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). There is no
22 *respondeat superior* liability under the statute. Plaintiff alleges no facts to suggest that
23 Sheriff Arpaio directed the deputy to arrest Plaintiff or even knew of the allegedly
24 improper arrest. Plaintiff thus fails to state a claim against Sheriff Arpaio and all such
25 claims are dismissed.

26 **IV. The Private Defendants**

27 Defendants Dennis I. Wilenchik, Thomas E. Lordan, Rob Somers, Carole Downs,
28 and Shannon Downs (the “Private Defendants”), move to dismiss all claims against them

1 on the grounds that Plaintiff fails to plead any facts to demonstrate that they engaged in
2 state action, and thus may be liable under 42 U.S.C. § 1983. (Doc. 20.) Plaintiff alleges
3 that Defendants Wilenchik and Lordan are outside counsel for Smartcomm in the
4 underlying action, Defendant Somers is internal counsel for Smartcomm in that action,
5 and both Defendants Carole and Shannon downs are employees of Smartcomm. (Doc. 4
6 at 3–4.) In his Amended Complaint, Plaintiff concedes that these defendants are private
7 actors, but states that they were “acting in concert as joint participants with state officials
8 in the seizure of the Plaintiff’s property” and thus “sufficient grounds exist to
9 characterize them as being clothed as ‘state actors.’” (Doc. 4 at 8.) Plaintiff notes
10 throughout his Amended Complaint that the Private Defendants were in a conspiracy
11 with the government defendants and “participated in the conspiracy by aiding and
12 abetting the principle conspirators under color of state law and have become state actors
13 in the process.” (*Id.* at 11.) However, Plaintiff pleads no facts to establish such a
14 conspiracy.

15 The only specific allegation Plaintiff asserts against any of the Private Defendants
16 is that Defendant Wilenchik, along with a number of the government defendants,
17 “persuaded [Judge Anderson] to sign a Show Cause Order . . . without his thorough
18 review,” thus causing him to overlook provisions of the order making Plaintiff’s hard
19 drives discoverable in the action. (*Id.* at 7–8.) This allegation, without any additional
20 facts, does not rise to the level of a plausible constitutional violation. Apart from this
21 allegation, Plaintiff pleads no facts regarding the alleged conspiracy or joint action
22 between the Private Defendants and government defendants. In his Response, Plaintiff
23 notes assorted allegations made in his Amended Complaint against Defendant Anderson,
24 but these allegations do not connect such alleged conduct to any conduct by the Private
25 Defendants. (Doc. 29 at 4–7.) As such, Plaintiff fails to state any cognizable claims
26 against the Private Defendants and all such claims are dismissed.

27 Plaintiff moves to strike the Private Defendants’ Motion to Dismiss on the grounds
28 that the Wilenchik & Bartness law firm representing the Private Defendants in this action

1 lacks standing to file a Motion to Dismiss as a Private Corporation. (Doc. 24.) This
2 argument is without any basis in the law and the Motion to Strike is denied.

3 **V. Dismissal of Amended Complaint Without Leave to Amend**

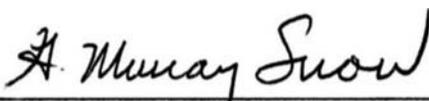
4 “Leave to amend need not be given if a complaint, as amended, is subject to
5 dismissal.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).
6 The Court's discretion to deny leave to amend is particularly broad where Plaintiff has
7 previously been permitted to amend his complaint. *Sisseton–Wahpeton Sioux Tribe v.*
8 *United States*, 90 F.3d 351, 355 (9th Cir. 1996). Repeated failure to cure deficiencies is
9 one of the factors to be considered in deciding whether justice requires granting leave to
10 amend. *Moore*, 885 F.2d at 538.

11 The Court has already provided Plaintiff the opportunity to amend his complaint
12 and finds that a further opportunity to amend would be futile. Therefore, the Court, in its
13 discretion, will dismiss Plaintiff's Amended Complaint without leave to amend.

14 **THEREFORE IT IS ORDERED** that Defendants' Motions to Dismiss (Docs. 18,
15 19, 20) are **granted**.

16 **IT IS FURTHER ORDERED** that Plaintiff's Motions to Strike (Docs. 23, 24)
17 are **denied**. The Clerk of Court is directed to terminate this action and enter judgment
18 accordingly.

19 Dated this 5th day of December, 2013.

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23 |G. Murray Snow
24 United States District Judge
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