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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Carmine Micolo,
10 Plaintiff,
11 v.
12 County of Pinal, et al.,
13 Defendants.

No. CV-14-02649-PHX-DGC

ORDER

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16 Defendants Pinal County and Officer Stacy Sherwood move to dismiss Plaintiff
17 Michael Micolo's third amended complaint.¹ Doc. 63. The issues are fully briefed
18 (Docs. 64, 65), and no party has requested oral argument. For the following reasons, the
19 Court will grant Defendants' motion, with prejudice.

20 **I. Background.**

21 On November 17, 2014, Plaintiff filed his initial complaint in Pinal County
22 Superior Court. Doc. 1-1 at 9-10. Defendants removed the case to this Court. Doc. 1.

23 On December 31, 2014, Plaintiff filed his first amended complaint. Doc. 10. The
24 Court dismissed all claims against the Pinal County Sherriff's Department and all of
25 Plaintiff's state law claims. Doc. 24. The remaining claims were stayed pending the
26 state court criminal proceedings against Plaintiff. Docs. 38, 40, 42, 44, 47. On

27 _____
28 ¹ Defendants refer to this as Plaintiff's second amended complaint in their motion
to dismiss. This is actually Plaintiff's third amended complaint. *See* Docs. 10, 60, 62.

1 February 16, 2016, the Court dismissed Plaintiff's excessive force claim against
2 Defendant Sherwood pertaining to conduct that occurred during the arrest as barred by
3 *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), but permitted Plaintiff leave to amend his
4 complaint to address conduct occurring after the arrest. Doc. 56 at 3-6. The Court also
5 dismissed Plaintiff's claim against Pinal County under *Monell v. Department of Social*
6 *Services*, 436 U.S. 658 (1978), but granted leave to amend. Doc. 56 at 6.

7 On March 11, 2016, Plaintiff filed his second amended complaint. Doc. 60. The
8 Court dismissed the complaint because he failed to allege sufficient facts to state an
9 excessive force claim relating to post-arrest conduct. Doc. 61 at 1. The Court dismissed
10 Plaintiff's malicious prosecution claims as barred by *Heck*, and again dismissed
11 Plaintiff's state law claims. *Id.* at 2. The Court granted leave to amend. *Id.*

12 On April 13, 2016, Plaintiff filed his third amended complaint. Doc. 62. This
13 complaint contains an excessive force claim pertaining to conduct that occurred after the
14 arrest, as well as several state law claims.

15 **II. Legal Standard.**

16 A successful 12(b)(6) motion must show either that the complaint lacks a
17 cognizable legal theory or fails to allege facts sufficient to support its theory. *Balistreri*
18 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint that sets forth a
19 cognizable legal theory will survive a motion to dismiss as long as it contains "sufficient
20 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550
21 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual
22 content that allows the court to draw the reasonable inference that the defendant is liable
23 for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
24 "The plausibility standard is not akin to a 'probability requirement,' but it asks for more
25 than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550
26 U.S. at 556).
27

28 Pro se litigants are subject to the same pleading requirements as everyone else.

1 *Calugay v. GMAC Mortg.*, No. CV-09-1947-PHX-LOA, 2009 WL 3872356, at *2 (D.
2 Ariz. Nov. 18, 2009) (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986)). But
3 courts have an obligation “to construe [pro se] pleadings liberally and to afford the
4 petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)
5 (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). If a pro se
6 complaint does not state a claim upon which relief can be granted, the court must grant
7 leave to amend “unless it determines that the pleading could not possibly be cured by the
8 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc)
9 (quotation marks and citation omitted).

10 **III. Analysis.**

11 **A. Excessive Force Claim.**

12 A successful excessive force claim must show that the officers’ use of force was
13 objectively unreasonable in light of the facts and circumstances confronting them.
14 *Graham v. Connor*, 490 U.S. 386, 397 (1989). “Whether a particular use of force was
15 ‘objectively unreasonable’ depends on several factors, including the severity of the crime
16 that prompted the use of force, the threat posed by a suspect to the police or to others, and
17 whether the suspect was resisting arrest.” *Tatum v. City & Cty. of S.F.*, 441 F.3d 1090,
18 1095 (9th Cir. 2006).

19 Plaintiff was arrested for assaulting a police officer, resisting arrest, and
20 trespassing. Doc. 62 at 3, ¶ 10. Plaintiff admits to resisting arrest.² *Id.* at ¶ 12. Plaintiff
21 alleges that Defendant Sherwood handcuffed him and, as a result of Plaintiff’s continuing
22 to resist arrest, placed leg restraints on Plaintiff. *Id.* All of these actions presumably
23 occurred as part of the Plaintiff’s arrest, and any claim based on them is barred by *Heck*.

24 Plaintiff alleges that he suffered injuries from a lack of treatment during his
25 transport to the hospital. *Id.* at 3-4, ¶ 15. He appears to claim that these injuries resulted
26 from the inability of medical personnel to treat him due to his restraints. *Id.* But Plaintiff
27 makes no allegations against Defendant Sherwood related to these post-arrest incidents.

28 ² Plaintiff pleaded guilty to resisting arrest. *See* Doc. 47 at 1.

1 He does not allege that Defendant Sherwood was present during his transport to the
2 hospital, nor does he provide facts from which the Court could conclude that Defendant
3 Sherwood’s restraints were excessive when applied or during transport. To the contrary,
4 Plaintiff alleges that he was “actively resisting arrest” when the restraints were applied
5 (*id.* at ¶ 12), and that a “fellow officer” – apparently someone other than Defendant
6 Sherwood – concluded during transport “that he needed to be restrained again” (*id.* at ¶ 15).
7 These facts do not show that Defendant Sherwood engaged in any unconstitutional
8 conduct after Plaintiff’s arrest, nor do they provide a basis for concluding that Plaintiff’s
9 treatment during transport, apparently by another officer, was improper given his
10 continued resistance and need for restraint. What is more, Plaintiff admits that he has no
11 independent memory of any of these events. *Id.* at ¶ 16.

12 Plaintiff’s other allegations regarding Defendant Sherwood, contained mostly in
13 his state law claims, include mere conclusions that Sherwood acted improperly. They
14 provide no additional factual support for the excessive force claim. *Id.* at ¶¶ 23-48.

15 Plaintiff has again failed to allege sufficient facts to state an excessive force claim
16 against Defendant Sherwood based on post-arrest conduct. This is Plaintiff’s third
17 attempt to allege such a claim. The Court is convinced that Plaintiff’s complaint could
18 not be cured by further amendments. The Court will therefore dismiss the excessive
19 force claim with prejudice.

20 **B State Law Claims.**

21 The Court has dismissed Plaintiff’s state law claims on multiple occasions. *See*
22 Docs. 24, 30, 61. Although Plaintiff has been granted leave to amend his complaint more
23 than once, the Court never granted Plaintiff leave to amend or reassert his state law
24 claims. For the reasons previously stated (*see* Doc. 30), and because his state law claims
25 continue to contain only conclusions and virtually no facts, the Court will dismiss the
26 state law claims with prejudice.

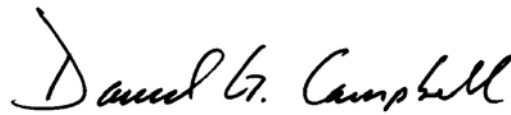
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IT IS ORDERED:

1. Defendants' motion to dismiss for failure to state a claim (Doc. 63) is **granted.**

2. Plaintiff's second amended complaint (Doc. 62) is **dismissed with prejudice.** Plaintiff may not file another complaint in this case. The Clerk of the Court shall terminate this action.

Dated this 20th day of June, 2016.



David G. Campbell
United States District Judge