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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Rafael Cezar Danam,
10 Plaintiff,

No. CV-18-1493-PHX-DGC

ORDER

11 v.

12 Arizona Board of Education, as individual
13 members of the Arizona Board of Education,
14 Defendants.

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16 Pro se plaintiff Rafael Cezar Danam filed this action against the 18 members of the
17 Arizona Board of Education, asserting various state and federal claims and seeking more
18 than \$2 million in damages. Doc. 25. Defendants have moved to dismiss Plaintiff's first
19 amended complaint on several grounds. Doc. 36. The motion is fully briefed. Docs. 37,
20 39. As explained below, Plaintiff must respond to this order by July 16, 2019.

21 **I. Background.**

22 Neither Plaintiff's first amended complaint nor his response to Defendant's motion
23 clearly explain the relevant factual background for his claims. Defendant notes that
24 Plaintiff's "claims appear to arise out of the Board's investigation and subsequent
25 revocation of Plaintiff's teaching license." Doc. 36 at 2. An exhibit attached to Plaintiff's
26 original complaint also refers to his termination and the revocation of his substitute teacher
27 certification. Doc. 1 at 9.

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1 **II. Discussion.**

2 Defendants assert that Plaintiff failed to properly serve all Defendants; Plaintiff fails
3 to state a claim under Rule 12(b)(6); any defamation claims based on events before
4 May 16, 2017 are barred by the statute of limitations in A.R.S. § 12-541; Defendants have
5 absolute immunity pursuant to A.R.S. § 12-820.01 for state law claims against them; and
6 Defendants are not liable for punitive damages.

7 **A. Failure to Serve all Defendants.**

8 Rule 4 governs service of the complaint and summons on parties. Rule 4(m)
9 provides that if “a defendant is not served within 90 days after the complaint is filed, the
10 court – on motion or on its own after notice to the plaintiff – must dismiss the action without
11 prejudice against that defendant or order that service be made within a specified time. But
12 if the plaintiff shows good cause for the failure, the court must extend the time for service
13 for an appropriate period.” Fed. R. Civ. P. 4(m). Thus, “Rule 4(m) requires a two-step
14 analysis in deciding whether or not to extend the prescribed time period for the service of
15 a complaint.” *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). “First, upon a showing
16 of good cause for the defective service, the court must extend the time period. Second, if
17 there is no good cause, the court has the discretion to dismiss without prejudice or to extend
18 the time period.” *Id.*; *see also Tagata v. Schwarz Pharma, Inc.*, No. CV 14-2238-TUC-
19 JAS, 2014 WL 12642791, at *1 (D. Ariz. Dec. 8, 2014).

20 Defendants assert that the Court must dismiss this action because Plaintiff failed to
21 serve a summons on Defendant Douglass and failed to personally serve the remaining 17
22 Defendants within 90 days of filing his complaint on May 16, 2018. Doc. 36 at 3-4.
23 Plaintiff has not filed notices of service as required by Rule 4(l), and his response to the
24 motion is unclear. He states that the record shows “obstruction of justice” by Defendants
25 in receiving service, but he also seems to argue that he executed proper service. Doc. 37
26 at 8-9. Plaintiff also requests an “extension for confirmation of service by Fed. R. Civ. P
27 (m)” without explanation. *Id.* at 9. Plaintiff has failed to show that he properly served
28 Defendants under Rule 4, and the Court will order Plaintiff to show good cause why an

1 extension should be granted and this action should not be dismissed for lack of service.
2 Doc. 37 at 8-9.

3 One of Plaintiff's pending motions states that he is now out of the country for the
4 month of June 2019 on active military duty, and the Court will not require Plaintiff's
5 showing of good cause during that time. But the Court notes that this is the third time
6 Plaintiff has filed a notice of active military service for the U.S. Air Force Reserve since
7 the beginning of this case. *See* Doc. 7 (orders from May 17, 2018 to October 15, 2018);
8 Doc. 21 (November 4, 2018 to March 30, 2019).

9 The Court has taken several steps to confirm that Plaintiff currently is a reserve
10 member of the U.S. Armed Forces. Between April 26 and May 2, 2019, the Court's staff
11 placed 15 calls to various numbers at Nellis Air Force Base. Five calls were placed to
12 Chief Master Sergeant Andy Weeks, as identified in the letter filed by Plaintiff at Doc. 7,
13 page 5. The Court also attempted to locate Colonel Raymond Tsui, whose signature
14 appears on the same letter, but no number was available for him. Phone calls were made
15 to and messages left for the First Sergeant of the 555 RHS, and no call was returned. Phone
16 calls were made to and messages left for the First Sergeant of the 820th (the public affairs
17 office and the base operator at Nellis Air Force Base identified the 820th as the unit to
18 which the 555 RHS was assigned), and no call was returned. The individual answering the
19 phone at the main number for the 820th had no knowledge of anyone with the last name of
20 Danam currently assigned to the 555 RHS. Another person at the 820th, apparently named
21 "Snyder," also confirmed no knowledge of a current member by the name of Danam. Calls
22 were placed to the Legal Office at Nellis Air Force Base as well as the Reserve Legal Office
23 at Nellis Air Force Base, but were not returned.

24 Other than Plaintiff's own assertions and the letter he filed, the Court has no clear
25 evidence, and has been unable to confirm, that he is on reserve status or is deployed.
26 Absent such evidence, the Court will not continue to prolong this litigation, especially
27 given that Plaintiff has failed to show that Defendants have been served and are properly
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1 parties to this case. By Tuesday, **July 16, 2019**, Plaintiff must provide proof that he is on
2 reserve status and has been deployed during the periods he has stated to the Court.

3 **B. Dismissal Under Rule 12(b)(6).**

4 A successful motion to dismiss under Rule 12(b)(6) must show either that the
5 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its
6 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint
7 that sets forth a cognizable legal theory will survive a motion to dismiss as long as it
8 contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
9 plausible on its face.’” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.
10 544, 570 (2007)). A claim has facial plausibility when “the plaintiff pleads factual content
11 that allows the court to draw the reasonable inference that the defendant is liable for the
12 misconduct alleged.” *Id.*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

13 **1. Failure to State a Claim.**

14 Defendants assert that Plaintiff’s complaint fails to identify specific factual bases
15 that Defendants could admit or deny, and only lists legal conclusions. Doc. 36 at 3. The
16 Court agrees. Plaintiff’s first amended complaint includes almost no factual allegations
17 related to his claims. *See* Doc. 25. Rather than setting out a “short and plain statement of
18 the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(1), Plaintiff’s
19 14-page complaint quotes extensively from various federal, state, and international law
20 sources, but fails to plead specific factual allegations supporting his claims.

21 The caption and substance of Plaintiff’s complaint seem to identify 42 U.S.C.
22 § 1983, federal and state defamation statutes, and the First, Fifth, Sixth, and Fourteenth
23 Amendments as the principal bases for his action. Doc. 25 at 1-5, 7-10. He also cites
24 Article 2, §§ 4-6 and 32 of the Arizona Constitution. *Id.* at 2-3.

25 To state a claim under § 1983, Plaintiff must allege that an individual acting under
26 color of state law violated his constitutional rights or a federal law. To the extent Plaintiff
27 brings claims against the Board as an entity, a local governmental entity cannot be liable
28 under § 1983 on a respondeat superior theory. *Monell v. Dep’t of Soc. Servs.*, 436 U.S.

1 658, 694 (1978). Plaintiff must show a policy, practice, or custom by the entity which
2 permitted the alleged constitutional violation to occur. *See Christie v. Iopa*, 176 F.3d 1231,
3 1234-35 (9th Cir. 1999). Alternatively, Plaintiff can show that a government official
4 “(1) had final policymaking authority concerning the action alleged to have caused the
5 particular constitutional or statutory violation at issue and (2) was the policymaker for the
6 local governing body for the purposes of the particular act.” *Cortez v. Cty. of Los Angeles*,
7 294 F.3d 1186, 1189 (9th Cir. 2002) (internal quotations and citation omitted).

8 Plaintiff alleges no specific facts supporting a violation of constitutional rights or
9 federal law by Defendants, nor a policy, custom, or practice of the Board that violated his
10 rights. The Court cannot discern the basis for Plaintiff’s other claims. The Sixth
11 Amendment is inapplicable to this civil action, and his other asserted violations include
12 numerous citations to legal sources with no factual support. Doc. 25 at 6-11. Plaintiff
13 generally asserts that his complaint is sufficient, Doc. 37 at 5, but points to no factual
14 content that allows the court to draw the reasonable inference that Defendants are liable for
15 the misconduct alleged. *Twombly*, 550 U.S. at 556.

16 Plaintiff’s response to Defendants’ motion cites additional legal authority, but fails
17 to shed light on the nature of his claims by identifying specific claims for relief and their
18 factual support. *See* Doc. 37. He asserts that he “listed all Defendants and causes of
19 violations” in pages 7-10 of his complaint (*id.* at 5), but those pages include only threadbare
20 assertions that various Defendants failed to provide evidence, interview witnesses,
21 thoroughly review law and documents, and failed to be impartial, without linking the
22 allegations to specific causes of action. Doc. 25 at 7-10.

23 With dozens of legal citations and only minimal factual allegations, Plaintiff’s
24 complaint identifies no cognizable legal theory supported by “sufficient factual matter,
25 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S.
26 at 678 (citing *Twombly*, 550 U.S. at 570). The Court cannot write Plaintiff’s complaint for
27 him. *Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1131 (9th Cir. 2008) (“The
28 court may dismiss a complaint for failure to satisfy Rule 8 if it is so confusing that its ‘true

1 substance, if any, is well disguised.”); *see also McHenry v. Renne*, 84 F.3d 1172, 1180
2 (9th Cir. 1996) (complaint “without simplicity, conciseness and clarity as to whom
3 plaintiffs are suing for what wrongs, fails to perform the essential functions of a
4 complaint.”).

5 **2. Leave to Amend.**

6 In the Ninth Circuit, “[a] pro se litigant must be given leave to amend his or her
7 complaint unless it is absolutely clear that the deficiencies of the complaint could not be
8 cured by amendment.” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th
9 Cir.1988) (citing *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)); *Waters v. Young*,
10 100 F.3d 1437, 1441 (9th Cir. 1996) (“As a general matter, this court has long sought to
11 ensure that pro se litigants do not unwittingly fall victim to procedural requirements that
12 they may, with some assistance from the court, be able to satisfy.”).

13 Plaintiff has filed one amended complaint as a matter of course, but Defendants do
14 not argue that permitting another amendment would result in prejudice, undue delay, or be
15 futile. *See* Doc. 36 at 5. Plaintiff may still be able to craft a second amended complaint
16 that alleges sufficient factual support for his claims. If Plaintiff satisfies the Court’s
17 requirements as set forth above, the Court will grant Plaintiff leave to amend.¹

18 **III. Conclusion.**

19 In conclusion, by **Tuesday, July 16, 2019**, Plaintiff must (1) show good cause why
20 the Court should grant an extension to serve all 18 Defendants under Rule 4, and
21 (2) provide proof that he is in fact a reserve member of the U.S. Armed Forces and has
22 been deployed during the times averred to the Court. If Plaintiff satisfies these
23 requirements, the Court will permit additional time to serve, and, if service is completed,
24 will dismiss Plaintiff’s first amended complaint for failure to state a claim and will grant
25 him leave to amend. If Plaintiff does not make the good cause showing explained above,
26 the Court will dismiss this action for lack of service. If Plaintiff fails to provide clear

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28 ¹ Defendants make various other arguments, but the Court cannot address them in
the absence of a clear complaint.

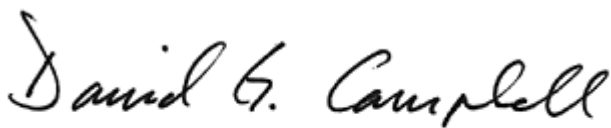
1 evidence that he is in fact a reserve member of the U.S. Armed Forces and has been
2 deployed during the times averred to the Court, the Court likely will dismiss this case for
3 failure to prosecute.

4 Plaintiff has filed motions to Amend/Correct Caption of Complaint, Amend/Correct
5 Monetary Damage of Complaint, and Authorize Case Management Order. Docs. 31-33.
6 These motions will be denied as moot in light of this order.

7 **IT IS ORDERED:**

- 8 1. Defendant's motion to dismiss (**Doc. 36**) is **granted in part and denied in**
9 **part**. Dismissal for failure to state a claim under Rule 12(b)(6) will be
10 granted, with leave to amend, if Defendants are properly served.
- 11 2. Plaintiff's pending motions (Docs. 31, 32, 33) are **denied** as moot.
- 12 3. By **July 16, 2019**, Plaintiff must (1) show good cause why the Court should
13 grant an extension to serve all 18 Defendants under Rule 4, and (2) provide
14 proof that he is in fact a reserve member of the U.S. Armed Forces and has
15 been deployed during the times averred to the Court.

16 Dated this 30th day of May, 2019.

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David G. Campbell
21 Senior United States District Judge
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