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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MANUEL REYNA CHAVEZ,

Plaintiff,

v.

COUNTY JAIL OF SAN BERNARDINO  
ET. AL.,

Defendants.

) Case No. EDCV 14-02378-MMM (KK)

) **ORDER DISMISSING SECOND**  
) **AMENDED COMPLAINT WITH**  
) **LEAVE TO AMEND**

This is a *pro se* inmate civil rights case. On April 7, 2015, Plaintiff Manuel Reyna Chavez (“Plaintiff”) filed a Second Amended Complaint (“SAC”). For the reasons that follow, the Court hereby orders it dismissed with leave to amend.

**I.**

**PROCEDURAL BACKGROUND**

On November 18, 2014, Plaintiff, proceeding pro se and in forma pauperis, lodged a civil rights complaint pursuant to 42 U.S.C. § 1983 (“Complaint”). ECF 1-1. The Complaint alleged Plaintiff was the victim of excessive force, in violation of the Eighth Amendment, by three individual defendant San Bernardino Sheriff Deputies – [FNU] Sanchez, [FNU] Reynoso, and [FNU] Ungureanu – while an

1 inmate at the West Valley Detention Center. Id. at 3-5. The Complaint also named  
2 San Bernardino Sheriff John McMahon, who was alleged to be “the head sheriff of  
3 S.B.S.D. that’s accountable, liable, and responsible for these ‘3 deputies’ actions  
4 and misconduct.” Id. at 3. The Complaint sued all four defendants in both their  
5 individual and official capacities. Although not clear, the Complaint appeared to  
6 also name the County Jail of San Bernardino as a defendant. On November 21,  
7 2014, the Court dismissed the Complaint with leave to amend. ECF 2. Among  
8 other things, the Court found the Complaint failed to state a claim against any entity  
9 defendant or any defendant in his official capacity, and failed to state a claim  
10 against Sheriff McMahon in his individual capacity, as well. Id. at 3-6. The Court,  
11 however, ordered dismissal with leave to amend. Id. at 6-7.

12 On December 17, 2014, Plaintiff filed a First Amended Complaint. ECF 8.  
13 The First Amended Complaint named seven defendants: (1) the County of San  
14 Bernardino, (2) San Bernardino County Jail, (3) the Head Sheriff of West Valley  
15 Detention Center, (4) Captain Jeff Rose of the San Bernardino County Jail, (5)  
16 Deputy Sanchez, (6) Deputy Reynoso, and (7) Deputy Ungureanu. Id. at 3-4. All  
17 defendants were sued in both their individual and official capacities. Id. at 1-6. On  
18 January 8, 2015, the Court dismissed the First Amended Complaint with leave to  
19 amend. ECF 9. The Court found the First Amended Complaint failed to state  
20 viable official capacity claims against the individual defendants and municipal  
21 liability claims against the County of San Bernardino and San Bernardino County  
22 Jail. Id. at 3-5. The Court also found Plaintiff failed to state viable individual  
23 capacity claims against defendants Reynoso, Head Sheriff of West Valley Detention  
24 Center, and Captain Jeff Rose. Id. at 5-6.

25 On April 7, 2015, Plaintiff filed the instant SAC, again asserting the same  
26 central Eighth Amendment claim. ECF 18. The SAC names three defendants: (1)

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1 Deputy Ungreanu; (2) Deputy Reynoso; and (3) Deputy Sanchez. *Id.* at 3. As in  
2 his prior complaints, Plaintiff checks boxes on the third page of the SAC indicating  
3 he sues all three defendants in their individual *and* official capacities. *Id.*

4 While Plaintiff has addressed the First Amended Complaint’s deficiencies  
5 with respect to defendants County of San Bernardino, San Bernardino County Jail,  
6 Head Sheriff of West Valley Detention Center, and Captain Jeff Rose, the Court  
7 finds the SAC is still subject to dismissal because of its failure to: (1) allege  
8 plausible official capacity claims against all three named defendants; and (2) allege  
9 a plausible individual capacity claim against defendant Reynoso. However,  
10 dismissal will be with leave to amend.

## 11 II.

### 12 LEGAL STANDARD

13 The Prison Litigation Reform Act of 1996 obligates the court to review  
14 complaints filed by all persons proceeding in forma pauperis, and by all prisoners  
15 seeking redress from government entities. *See* 28 U.S.C. §§ 1915(e)(2), 1915A.  
16 Under these provisions, the court may sua sponte dismiss, “at any time,” any  
17 prisoner civil rights action and all other in forma pauperis complaints that are  
18 frivolous or malicious, fail to state a claim, or seek damages from defendants who  
19 are immune. *Id.*, *see also Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)  
20 (en banc).

21 The dismissal for failure to state a claim “can be based on the lack of a  
22 cognizable legal theory or the absence of sufficient facts alleged under a cognizable  
23 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
24 1990). In making such a determination, a complaint’s allegations must be accepted  
25 as true and construed in the light most favorable to the plaintiff. *Love v. United*  
26 *States*, 915 F.2d 1242, 1245 (9th Cir. 1990). Further, because Plaintiff is appearing  
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1 pro se, the court must construe the allegations of the complaint liberally and must  
2 afford Plaintiff the benefit of any doubt. *Karim-Panahi v. L.A. Police Dep't*, 839  
3 F.2d 621, 623 (9th Cir. 1988). But the “[f]actual allegations must be enough to  
4 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550  
5 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Thus, a complaint must  
6 contain “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
7 570. “A claim has facial plausibility when the plaintiff pleads enough factual  
8 content that allows the court to draw the reasonable inference that the defendant is  
9 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct.  
10 1937, 173 L. Ed. 2d 868 (2009).

### 11 III.

### 12 DISCUSSION

#### 13 A. The Complaint Fails to State a Claim Against the Defendants in Their 14 Official Capacities

15 In order to state a claim for a civil rights violation under 42 U.S.C. section  
16 1983, a plaintiff must allege that a particular defendant, acting under color of state  
17 law, deprived plaintiff of a right guaranteed under the U.S. Constitution or a federal  
18 statute. 42 U.S.C. § 1983; *see West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101  
19 L. Ed. 2d 40 (1988).

20 Suits against governmental officers in their official capacities are subject to  
21 the same requirements as *Monell* claims against local government entities. *See*  
22 *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)  
23 (“[A]n official-capacity suit is, in all respects other than name, to be treated as a suit  
24 against the entity of which an officer is an agent.”) (internal citation omitted); *see*  
25 *also Monell v. Dep’t of Soc. Serv. of City of New York*, 436 U.S. 658, 691, 98 S. Ct.  
26 2018, 56 L. Ed. 2d 611 (1978). Indeed, despite naming individual governmental  
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1 officials, “[o]fficial-capacity suits . . . ‘generally represent only another way of  
2 pleading an action against an entity of which an officer is an agent.’” *Graham*, 473  
3 U.S. at 166 (quoting *Monell*, 436 U.S. at 691). Hence, as with claims against local  
4 governments under *Monell*, to impose liability against officials acting in their  
5 official capacity, “the entity’s ‘policy or custom’ must have played a part in the  
6 violation of federal law.” *Id.* (internal citations omitted); *Gibson v. Cnty. of*  
7 *Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002) (describing “two routes” to municipal  
8 liability: (1) where municipality’s official policy, regulation, or decision violated  
9 plaintiff’s rights, or (2) alternatively where municipality failed to act under  
10 circumstances showing its deliberate indifference to plaintiff’s rights). Under  
11 certain circumstances, a single act, when carried out by a municipal “policymaker,”  
12 may also give rise to *Monell* liability, even in the absence of a municipal policy or  
13 custom. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S. Ct. 1292,  
14 89 L. Ed. 2d 452 (1986) (“[Section 1983] municipal liability may be imposed for a  
15 single decision by municipal policymakers under appropriate circumstances.”).

16 An unwritten custom may give rise to *Monell* liability when it becomes “so  
17 ‘persistent and widespread’ that it constitutes a ‘permanent and well settled  
18 [municipal] policy.’” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (quoting  
19 *Monell*, 436 U.S. at 691); *see Thomas v. Baca*, 514 F. Supp. 2d 1201, 1212 (C.D.  
20 Cal. 2007) (“A custom is a ‘longstanding practice . . . which constitutes the standard  
21 operating procedure of the local government entity.’”) (quoting *Menotti v. City of*  
22 *Seattle*, 409 F.3d 1113, 1151 (9th Cir. 2005)). “Isolated or sporadic incidents” are  
23 insufficient to establish an improper municipal custom. *Trevino*, 99 F.3d at 918  
24 (“Liability for improper custom may not be predicated on isolated or sporadic  
25 incidents; it must be founded upon practices of sufficient duration, frequency and  
26 consistency that the conduct has become a traditional method of carrying out

1 policy.”) (internal citations omitted).

2 Here, the SAC has failed to correct the deficiencies identified by the Court in its  
3 previous orders. Plaintiff has again failed to show the alleged misconduct by  
4 defendants Ungureanu, Reynoso, and Sanchez was committed pursuant to any official  
5 government policy or custom. Rather, the alleged misconduct Plaintiff complains of  
6 was committed by individual officers *not* acting pursuant to any identifiable  
7 governmental policy or custom. Furthermore, Plaintiff does not allege that any of the  
8 individual defendants was a municipal “policymaker,” such that a single act by such  
9 officials would give rise to *Monell* liability. Because of the lack of an identifiable  
10 policy or custom involved in the constitutional violation Plaintiff complains of,  
11 Plaintiff fails to state a claim under *Monell* against the three individual defendants in  
12 their official capacities.

13 Accordingly, Plaintiff’s official capacity claims against the three defendants  
14 must be dismissed. If Plaintiff wishes to proceed against any of these defendants in  
15 their *official* capacities, he must (1) specify an unconstitutional policy or custom, (2)  
16 allege facts supporting the existence of that policy or custom, and (3) explain how that  
17 policy or custom was the “moving force” behind his injury. Alternatively, Plaintiff  
18 may simply not check the boxes on the third page of his complaint labeled “official  
19 capacity” and proceed *solely* on his *individual* capacity claims against the three  
20 defendants.

21 **B. The SAC Fails to State a Claim Against Deputy Reynoso in His Individual**  
22 **Capacity**

23 The SAC alleges Deputy Reynoso is liable for civil rights violations because he  
24 “threatened” Plaintiff’s life by stating “if [Plaintiff] didn’t shut the F— up! He was  
25 going to push [Plaintiff’s] glasses into [his] face” and the “glasses are going to become  
26 [Plaintiff]s eyeballs.” SAC at 3. As the Court noted when dismissing Plaintiff’s First  
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1 Amended Complaint, allegations of verbal harassment and embarrassment fail to state  
2 a cognizable claim under section 1983. Rutledge v. Arizona Bd. of Regents, 660 F.2d  
3 1345, 1353 (9th Cir. 1981). Allegations of mere threats are also not cognizable under  
4 section 1983. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987). Thus, the SAC  
5 fails to state a claim against Deputy Reynoso in his individual capacity.

6 If Plaintiff wishes to proceed against defendant Reynoso, he must allege facts  
7 showing Reynoso's involvement in a constitutional violation. Alternatively, Plaintiff  
8 may simply omit Reynoso from any future amended complaint.

9 **IV.**

10 **LEAVE TO FILE A THIRD AMENDED COMPLAINT**

11 For the foregoing reasons, the SAC is subject to dismissal. As the court is  
12 unable to determine whether amendment would be futile, leave to amend is granted.  
13 *See Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam).

14 Accordingly, **IT IS ORDERED THAT:**

- 15 1) Within 14 days of the date of this order, or by **April 22, 2015**, Plaintiff  
16 may file a Third Amended Complaint to attempt to cure the deficiencies  
17 discussed above. The Clerk of Court is directed to mail Plaintiff a blank  
18 Central District civil rights complaint form to use for filing the Third  
19 Amended Complaint, and a copy of Plaintiff's deficient Second Amended  
20 Complaint.
- 21 2) If Plaintiff chooses to file a Third Amended Complaint, Plaintiff must  
22 clearly designate on the face of the document that it is the "Third  
23 Amended Complaint," it must bear the docket number assigned to this  
24 case, and it must be retyped or rewritten in its entirety, preferably on the  
25 court-approved form. The Third Amended Complaint must be complete  
26 in and of itself, without reference to the original complaint or any other  
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1 pleading, attachment or document.

2 An amended complaint supersedes the preceding complaint. *Ferdik v. Bonzelet*,  
3 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the court will treat all  
4 preceding complaints as nonexistent. *Id.* Because the court grants Plaintiff leave to  
5 amend as to all his claims raised here, any claim that was raised in a preceding  
6 complaint is waived if it is not raised again in the Third Amended Complaint. *Lacey*  
7 *v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012).

8 Because any Third Amended Complaint will be plaintiff's **third** opportunity to  
9 amend his complaint to rectify pleading deficiencies, the Court advises plaintiff that  
10 it will not be disposed toward another dismissal without prejudice and with leave to  
11 amend. "[A] district court's discretion over amendments is especially broad 'where  
12 the court has already given a plaintiff one or more opportunities to amend his  
13 complaint.'" *Ismail v. County of Orange*, 917 F. Supp. 2d 1060, 1066 (C.D. Cal. 2012)  
14 (Valerie Baker Fairbank, J.) (quoting *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,  
15 186 n.3 (9th Cir. 1987)); *see also Zavala v. Bartnik*, 348 F. App'x 211, 213 (9th Cir.  
16 2009) ("Dismissal with prejudice was proper because Zavala was given two prior  
17 opportunities to amend his complaint in order to correct the deficiencies identified by  
18 the district court but failed to do so.").

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1           **Plaintiff is admonished he has failed to remedy the deficiencies identified**  
2 **by the Court in its Order dismissing his First Amended Complaint. If Plaintiff**  
3 **again fails to comply with the Court's instructions, the Court may recommend**  
4 **this action be dismissed with prejudice.**

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8 DATED: April 8, 2015

9 HON. KENLY KIYA KATO  
United States Magistrate Judge

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