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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Naiel Ammari and Turlock RV
Center, INC., dba Best RV,

Plaintiffs,

v.

State of California, Eugene
Brathwaite, Sylvia C. Thomas, and
DOES 1 - 20,

Defendants.

1:11-cv-0867 OWW DLB

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COMPLAINT
(DOC. 8)

I. INTRODUCTION.

Defendants State of California, by and through Department of Motor Vehicles ("DMV"); Sylvia C. Thomas ("Thomas") and Eugene Brathwaite ("Brathwaite"), collectively ("Defendants") move to dismiss Plaintiffs' complaint ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Naiel Ammari and Turlock RV Center, INC., dba Best RV ("Plaintiffs") responded with a statement of non-opposition filed with a proposed First Amended Complaint ("Proposed FAC").

Defendants contend that Plaintiffs' Proposed FAC fails to

1 cure most the defects of the Complaint: The Proposed FAC (1)
2 continues to name the State of California as a defendant,
3 although Defendants argue such a suit against the state is barred
4 by the Eleventh Amendment (2) continues to request both equitable
5 and declaratory relief, though no facts are alleged showing that
6 the *Ex Parte Young* doctrine applies to allow such a claim for
7 relief (3) continues to name Defendant Thomas in her individual
8 capacity pursuant to a section 1983 claim, though the facts do
9 not allege a sufficient connection between her and the alleged
10 wrongful act, and (4) Plaintiffs attempt to allege a claim of a
11 Fourteenth Amendment violation on facts concerning the execution
12 of a search and accompanying seizure which only implicate the
13 Fourth Amendment.
14

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16 Defendants contend that in the interest of judicial economy,
17 Plaintiff should not be allowed to file their Proposed FAC until
18 a ruling is made on the pending motion to dismiss, and any FAC
19 should be required to conform to that ruling. Otherwise, if
20 Plaintiff is allowed to file their Proposed FAC "as is,"
21 Defendants will file a very similar motion to dismiss.
22

23 II. PROCEDURAL HISTORY.

24 Plaintiffs filed this action on May 27, 2011. (Doc. 1.)
25 Defendants' filed a motion to dismiss Plaintiffs' Complaint on
26 July 15, 2011. (Doc. 8.) In response, Plaintiffs filed a non-
27 opposition with an attached Proposed FAC on August 8, 2011.
28

1 Defendants replied on August 12, 2011. (Doc. 10.)

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4 III. BACKGROUND.

5 Plaintiff Ammari is the owner of an RV dealership licensed
6 by Defendant State of California. Plaintiffs allege that on July
7 13, 2010, Defendant Braithwaite, a DMV employee, led a search of
8 Plaintiffs' place of business. Plaintiffs contend that Defendant
9 Thomas, Braithwaite's supervisor at the DMV, authorized the
10 search, which was conducted pursuant to a "fraudulent" warrant.
11 The search team allegedly seized, *inter alia*, Plaintiffs'
12 business records, a computer, and a computer network server.

13
14 After the search, Plaintiffs moved in California Superior
15 Court for an order to restore their seized property, pursuant to
16 Cal. Penal Code section 1540. Plaintiffs' 1540 motion was granted
17 based on a finding that the court would not have found probable
18 cause to issue the warrant investigating alleged violations of
19 Penal Code sections 487 and 532(a) had Brathwaite disclosed
20 additional facts set out by Plaintiffs in their 1540 motion.

21
22 Plaintiffs allege that Brathwaite and Thomas fraudulently
23 obtained a search warrant for Plaintiffs' business based on
24 falsified evidence of probable cause. They also claim that
25 Brathwaite, executed the fradulent search warrant with the
26 knowledge that the search warrant was defective and lacked
27 sufficient evidence of probable cause to justify the search and
28

1 seizure.

2 Plaintiffs sue under 42 U.S.C. section 1983 for alleged
3 unlawful search and seizures in violation of their Fourth and
4 Fourteenth Amendment rights. They seek damages, declaratory and
5 injunctive relief.
6

7 IV. STANDARD OF DECISION

8 A motion to dismiss brought under Federal Rule of Civil
9 Procedure 12(b)(6) "tests the legal sufficiency of a claim."
10 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). In deciding
11 whether to grant a motion to dismiss, the court "accept[s] all
12 factual allegations of the complaint as true and draw[s] all
13 reasonable inferences" in the light most favorable to the
14 nonmoving party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th
15 Cir.2002). To survive a motion to dismiss, a complaint must
16 "contain sufficient factual matter, accepted as true, to 'state a
17 claim to relief that is plausible on its face.'" *Ashcroft v.*
18 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 570 (2007)).
20
21

22 A claim has facial plausibility when the plaintiff pleads
23 factual content that allows the court to draw the reasonable
24 inference that the defendant is liable for the misconduct
25 alleged. The plausibility standard "is not akin to a 'probability
26 requirement,' but it asks for more than a sheer possibility that
27 defendant has acted unlawfully. Where a complaint pleads facts
28

1 that are 'merely consistent with' a defendant's liability, it
2 'stops short of the line between possibility and plausibility of
3 entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. 556-57).

4 Nevertheless, the court "need not assume the truth of legal
5 conclusions cast in the form of factual allegations." *United*
6 *States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th
7 Cir. 1986). While the standard does not require detailed factual
8 allegations, "it demands more than an unadorned, the defendant-
9 unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. A
10 pleading is insufficient if it offers mere "labels and
11 conclusions" or "a formulaic recitation of the elements of a
12 cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at
13 1950 ("Threadbare recitals of the elements of a cause of action,
14 supported by mere conclusory statements, do not suffice.").

15
16
17 In ruling upon a motion to dismiss, the court may consider
18 only the complaint, any exhibits thereto, and matters which may
19 be judicially noticed pursuant to Federal Rule of Evidence 201.
20 See *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.
21 1988).

22 23 V. DISCUSSION

24 A. Original Complaint.

25 Plaintiffs filed a non-opposition to Defendants motion to
26 dismiss. Defendants' motion to dismiss Plaintiffs' Complaint is
27 GRANTED. The issue is whether to dismiss Plaintiff's claims with
28

1 or without leave to amend, especially in light of the Proposed
2 FAC, i.e., does the Proposed FAC demonstrate that the
3 deficiencies in the Complaint can be cured?
4

5 B. Should The Complaint's Claims Be Dismissed With Or Without
6 Leave to Amend?

7 Defendants contend that Plaintiff should not be allowed to
8 file their Proposed FAC because it is equally deficient to the
9 Complaint. Defendants argue the Complaint should be dismissed in
10 its entirety without leave to amend, or alternatively, the
11 deficiencies of the Proposed FAC should be explained in order
12 that Plaintiff may correct and file a FAC which properly alleges
13 their claims.
14

15 1. Claims Against the State in Light of Eleventh Amendment
16 Immunity.

17 Plaintiffs allege, pursuant to 42 U.S.C. section 1983, that
18 Defendants conducted an illegal search of their RV Dealership and
19 seizure of their property by using an invalid warrant. They have
20 named as a defendant the State of California. Defendants argue
21 that the Eleventh Amendment bars suits in federal court or under
22 federal law against the state.

23 The Eleventh Amendment prohibits suits against a state or
24 its agencies or departments for legal or equitable relief.
25 *Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst State*
26 *School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).
27 Specifically, the Eleventh Amendment bars civil rights actions by
28

1 a citizen against a state or its agencies unless the state has
2 waived its immunity or Congress has overridden that immunity.
3 *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989);
4 *Stivers v. Pierce*, 71 F.3d 732, 749 (9th Cir. 1995). Neither has
5 occurred here.

6
7 The Eleventh Amendment bars Plaintiffs' first and second
8 causes of action against Defendant DMV, a state agency. *Id.* at
9 1026; *Sykes v. State of California (Dep't of Motor Vehicles)*, 497
10 F.2d 197, 201-02 (9th Cir. 1974) ("a civil rights action under
11 Sections 1983 or 1985 will not lie against an administrative
12 agency of a state, such as the Department of Motor Vehicles.").¹

13
14 Defendants' motion to dismiss claims against the state of
15 California is GRANTED WITHOUT LEAVE TO AMEND.

16 2. Claims Against Defendant Brathwaite and Thomas in Light
17 of Eleventh Amendment Immunity and the *Ex Parte Young*
18 Doctrine.

19 Plaintiff further alleges a § 1983 claim for unlawful search
20 and seizure against that Defendants Brathwaite and Thomas, in
21 their official capacities. (Proposed FAC ¶ 39.) Defendants
22 correctly argue that a suit against a public employee in his/her
23 official capacity is equivalent to a claim against his/her
24 employer. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Butler v.*
25 *Elle*, 281 F.3d 1014, 1023 n. 8 (9th Cir. 2002). Plaintiffs admit

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27 ¹ Plaintiff agreed at the August 22, 2011 hearing the State of California is
28 not a proper Defendant here and represented that the Complaint would be
amended to exclude the State of California as a Defendant.

1 in their Proposed FAC that "Eugene Brathwaite, Sylvia Thomas, and
2 Does 1-20 were acting in their capacities as officers and
3 employees of Defendant State of California and within the course
4 and scope of such employment." (Proposed FAC ¶ 12.) "Defendants
5 and each of them all committed under color of their authority as
6 DMV officers" unlawful acts in violation of Plaintiff's rights
7 under the laws and Constitution of the United States. (Proposed
8 FAC ¶ 37.)

10 A suit for prospective injunctive relief, however, provides
11 a narrow, but well-established, exception to Eleventh Amendment
12 immunity. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).
13 When sued for prospective injunctive relief, a state official in
14 his official capacity is considered a "person" for § 1983
15 purposes under the *Ex Parte Young* doctrine. *Will v. Michigan*
16 *Dept. of State Police*, 491 U.S. 58, 71 n. 10 (1989) ("Of course a
17 state official in his or her official capacity, when sued for
18 injunctive relief, would be a person under § 1983 because
19 'official-capacity actions for prospective relief are not treated
20 as actions against the State.'").

22 Under the *Ex Parte Young* doctrine, a plaintiff may sue state
23 officials acting in their individual capacities when: "a
24 'straightforward inquiry [is done] into whether [the] complaint
25 alleges an ongoing violation of federal law and seeks relief
26 properly characterized as prospective.'" *Miranda B. v.*

1 *Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) (*quoting Verizon*
2 *Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S.
3 635, 645 (2002)). “[W]hen considering the applicability of the *Ex*
4 *Parte Young* doctrine, the proper focus of the inquiry is whether
5 the relief the plaintiffs seek is prospective, aimed at remedying
6 an ongoing violation of federal law, as opposed to retrospective,
7 aimed at remedying a past violation of the law. *Cardenas v.*
8 *Anzai*, 311 F.3d 929, 935 (9th Cir. 2002).

10 Defendants assert that an injunctive relief claim against
11 Defendants Thomas and Brathwaite in their individual capacities
12 has not been sufficiently alleged in the Complaint and the
13 deficiency remains in the Proposed FAC.

14 Plaintiffs do not specifically allege in either the
15 Complaint or Proposed FAC that Brathwaite and Thomas, acting in
16 the capacities as officers and employees of the State of
17 California, will continue to violate the law. Plaintiff’s
18 Complaint seeks only retrospective relief, and does not allege
19 facts that Defendants actions are an ongoing violation. Plaintiff
20 asserts that the search and seizure of his documents based on
21 Defendants “fraudulent” warrant was the one-time, past violation
22 which this action is based on. (Compl. ¶ 46.)

23 Plaintiffs’ Proposed FAC alleges that the “highly-publicized
24 search” continues to and presently causes economic and
25 reputational harm to Plaintiffs. (Proposed FAC ¶ 56.) This claim
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1 of damages does not properly meet *Ex Parte Young*'s exception
2 because even if the alleged repercussions of the search are
3 currently causing Plaintiff harm, this does not mean the
4 violation; i.e., search which concluded on July 13, 2010, is on-
5 going. The court is powerless to go back in time and stop the
6 alleged wrongful search from happening. *Compare Flint*, 488 F.3d
7 at 825 (finding a university's refusal to expunge plaintiff's
8 negative school records, which were based on a constitutional
9 violation, was "on-going" because the court was capable of
10 ordering the school to expunge the records and doing so would
11 cease the plaintiff's current and future harm.)

12
13 If Plaintiff wishes to move forward against the individual
14 Defendants for injunctive relief pursuant to the Eleventh
15 Amendment exception under the *Ex Parte Young* doctrine, Plaintiff
16 must properly allege an on-going violation in its FAC.²

17
18 Defendants' motion to dismiss declaratory relief claims
19 against Brathwaite and Thomas is GRANTED WITH LEAVE TO AMEND. No
20 further relief will be given.

21
22 3. Section 1983 Suit For Liability Against Individual
23 Defendants.

24 Plaintiffs sue Defendants Brathwaite and Thomas in their
25 individual capacities for liability under § 1983.

26 Individual defendants, when sued in their personal

27
28 ² At the August 22, 2011 hearing Plaintiffs' counsel acknowledged that an on-
going harm based on the currently set-out facts does not exist and will amend
Plaintiffs' Complaint accordingly.

1 capacities, are "persons" under § 1983, and Eleventh Amendment
2 immunity does not attach to such claims. *Porter v. Jones*, 319
3 F.3d 483, 491 (9th Cir. 2003). To establish liability under §
4 1983, a plaintiff must allege that the individual defendant
5 deprived the plaintiff of a right secured by the United States
6 Constitution or a federal law. *S. Cal. Gas Co. v. City of Santa*
7 *Ana*, 336 F.3d 885, 887 (9th Cir. 2003)

9 "Section 1983 provides for liability against any person
10 acting under color of law who deprives another 'of any rights,
11 privileges, or immunities secured by the Constitution and laws'
12 of the United States." *Id.* (quoting 42 U.S.C. § 1983). "The
13 rights guaranteed by section 1983 are 'liberally and beneficently
14 construed.'" *Id.* (quoting *Dennis v. Higgins*, 498 U.S. 439, 443
15 (1991)). Section 1983 authorizes a civil action for deprivation
16 of rights under the following circumstances:

18 Every person who, under color of any statute, ordinance,
19 regulation, custom, or usage, of any State or Territory or
20 the District of Columbia, subjects, or causes to be
21 subjected, any citizen of the United States or other person
22 within the jurisdiction thereof to the deprivation of any
23 rights, privileges, or immunities secured by the
24 Constitution and laws, shall be liable to the party injured
25 in an action at law, suit in equity, or other proper
26 proceeding for redress, except that in any action brought
27 against a judicial officer for an act or omission taken in
28 such officer's judicial capacity, injunctive relief shall
not be granted unless a declaratory decree was violated or
declaratory relief was unavailable. For the purposes of this
section, any Act of Congress applicable exclusively to the
District of Columbia shall be considered to be a statute of
the District of Columbia.

To establish liability under § 1983, a plaintiff must show

1 (1) that he was deprived of a right secured by the United States
2 Constitution or a federal law and (2) that the deprivation was
3 effected "under color of state law." *Broam v. Bogan*, 320 F.3d
4 1023, 1028 (9th Cir. 2003).

5
6 a. Deprived of a Right.

7 Plaintiffs claim a right to be free from unreasonable search
8 and seizure. Plaintiffs contend the unreasonable search and
9 seizure is a result of Defendants Brathwaite and Thomas obtaining
10 a fraudulent warrant to search Plaintiff's business. (Comp. ¶ 45;
11 Proposed FAC ¶ 47.) The Proposed FAC specifically alleges that
12 Defendant Thomas participated in the preparation of the search
13 and knew at the time she was preparing the warrant that it was
14 fraudulent. (Proposed FAC ¶ 23.) Also, that Defendant
15 Brathwaite's affidavit supported the warrant and Brathwaite spoke
16 to Thomas regarding the search warrant and obtained her approval
17 prior to submitting it to the magistrate judge. (*Id.* at ¶ 23,
18 28.) The warrant was approved. A search of Plaintiff's business
19 took place and various documents were seized. After the search,
20 Plaintiff filed a motion to restore its property under California
21 Penal Code 1540. The California Superior Court determined that
22 Defendants had presented false information in order to obtain the
23 warrant and as such the warrant was not based on probable cause.
24 Plaintiff's 1540 motion was granted. (*Id.* at Ex. 1.)

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27 Plaintiff sufficiently alleges a deprivation of a right.
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b. Color of Law.

A person acts under color of law for purposes of 42 U.S.C. § 1983 if he "exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Employment by the state is relevant, but not conclusive, to the question of color of law. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (public defenders not acting under color of law when lawyering, because function performed serves interests of client rather than state). For that reason, the Ninth Circuit looks to the nature of the conduct involved, as well as the surrounding circumstances, and not simply to the defendant's official capacity. See e.g., *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001) (looking to the circumstances to determine whether a police officer's threats of a lawsuit which arose from his on-the-job conduct were part of his public employer's work, or a private pursuit.) "Whether a government employee is acting under color of law is not always an easy call, especially when the conduct is novel. 'It is ... a truism by now that there is no rigid formula for measuring state action for purposes of section 1983 liability. Rather, it is a process of 'sifting facts and weighing circumstances' which must lead us to

1 a correct determination." *McDade v. West*, 223 F.3d 1135, 1139
2 (9th Cir. 2000).

3 Plaintiffs conclusorily assert that Defendants Brathwaite
4 and Thomas were acting under color of law. Defendants have not
5 taken issue with this; however, in order to survive a motion to
6 dismiss, Plaintiff's FAC must allege facts to show how the
7 wrongful act related to the duties and powers incidental to the
8 job of a DMV employee.

10
11 c. Sufficient connection of Thomas to the Wrongful
12 Act.

12 Defendants assert that Plaintiff does not sufficiently plead
13 a connection between Thomas and the wrongful act.³

14 In order to state a cause of action under section 1983
15 against a defendant in his or her individual capacity, a
16 plaintiff must allege specific facts linking the individual
17 defendant to a constitutional violation personal to him. *Ortez v.*
18 *Washington County*, 88 F. 3d 804, 809 (9th Cir. 1996). Individual
19 capacity liability under section 1983 is triggered only when the
20 plaintiff pleads and proves that each individual defendant acted
21 in some way to cause the alleged constitutional deprivation,
22 either by "personal participation in the deprivation," or "by
23 setting in motion a series of acts by others which the actor
24 knows or reasonably should know would cause others to inflict the
25 constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44

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27
28 ³ Defendants do not assert the same regarding Defendant Brathwaite.

1 (9th Cir. 1978).

2 In the Complaint, Plaintiff only alleges that Thomas is
3 Brathwaite's supervisor and authorized the search of Plaintiff's
4 business premises. Pursuant to *Monnell v. Department of Social*
5 *Services*, 436 U.S. 658, 691 (1978), there is no respondeat
6 superior liability under § 1983. The Complaint also alleges no
7 facts which demonstrate Thomas' involvement or participation in
8 preparing the fraudulent search warrant. The Proposed FAC,
9 alleges that Thomas participated in preparing the search warrant,
10 spoke to Brathwaite regarding the search warrant, gave her
11 approval to submit it and knew at the time she was preparing the
12 warrant that it was fraudulent. This is sufficient to allege
13 that Defendant Thomas set in motion a series of acts which Thomas
14 knew or reasonably should have known would cause others to
15 inflict the constitutional injury and that she had direct
16 participation in the events.
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20 d. Conclusion Re: Section 1983 Claim Against Thomas
21 In Her Individual Capacity.

22 If Plaintiffs can sufficiently plead "under color of law" in
23 their FAC, then a claim against Defendant Thomas in her
24 individual capacity can survive a motion to dismiss. Defendants'
25 motion to dismiss Thomas as a Defendant is GRANTED WITH LEAVE TO
26 AMEND.

27 ///

1 4. Fourteenth Amendment Claims.

2 Defendants argue that Plaintiffs fail to allege facts
3 demonstrating a violation of its Fourteenth Amendment rights
4 because a claim arising from an illegal search and seizure
5 implicates the Fourth Amendment, not the Fourteenth Amendment,
6 citing *Albright v. Oliver*, 510 U.S. 266, 273-274 (1994).

7
8 *Albright* states that "[w]here a particular Amendment
9 'provides an explicit textual source of constitutional
10 protection' against a particular sort of government behavior,
11 'that Amendment, not the more generalized notion of 'substantive
12 due process,' must be the guide for analyzing these claims.'" 510
13 U.S. at 273-274; see also *United States v. Lanier*, 520 U.S. 259,
14 272 n.7 (1997) ("if a constitutional claim is covered by a
15 specific constitutional provision, such as the Fourth or Eighth
16 Amendment, the claim must be analyzed under the standard
17 appropriate to that specific provision, not under the rubric of
18 substantive due process.").

19
20 Both the Complaint and the Proposed FAC allege claims
21 arising solely from alleged acts of wrongful search and seizure.
22 Such allegations are contained entirely within the ambit of
23 Fourth Amendment protections and do not extend to those of the
24 Fourteenth Amendment. Moreover, the Fourteenth Amendment requires
25 a different standard of conduct, not identified in the Complaint.
26 See e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998)

1 ("for half a century now we have spoken of the cognizable level
2 of executive abuse of power [under the Fourteenth Amendment] as
3 that which shocks the conscience.").

4 In an abundance of caution, Defendants' motion to dismiss
5 Plaintiff's Fourteenth Amendment claim is GRANTED WITH LEAVE TO
6 AMEND to properly allege a Fourteenth Amendment claim if one
7 exists that is not encompassed by the Fourth Amendment.
8

9
10
11 VI. CONCLUSION.

12 For the reasons cited above:

- 13 1. Defendants' motion to dismiss the State of California
14 from this action pursuant to Eleventh Amendment
15 immunity is GRANTED WITHOUT LEAVE TO AMEND.
16
- 17 2. Defendants' motion to dismiss Plaintiff's injunctive
18 relief claims against Brathwaite and Thomas pursuant to
19 the *Ex Parte Young* doctrine is GRANTED WITH LEAVE TO
20 AMEND.
21
- 22 3. Defendants' motion to dismiss Thomas as a Defendant for
23 liability in her individual capacity under § 1983 is
24 GRANTED WITH LEAVE TO AMEND.
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- 26 4. Defendants' motion to dismiss Plaintiff's Fourteenth
27 Amendment claim is GRANTED WITH LEAVE TO AMEND to
28 properly allege a Fourteenth Amendment claim if one

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exists that is not encompassed by the Fourth Amendment.

Plaintiff must file a FAC in conformity with this Order within ten (10) days following electronic service of this Order. Defendants shall submit a form of judgment consistent with this decision within five (5) days following electronic service of this decision.

SO ORDERED.

Dated: August 25, 2011

/s/ Oliver W. Wanger

Oliver W. Wanger
United States District Judge