

1 earlier date, but which it did not sufficiently express or did not accomplish due to some error or
2 inadvertence.” *United States v. Sumner*, 226 F.3d 1005, 1009-10 (9th Cir. 2000) (citing *Martin v.*
3 *Henley*, 452 F.2d 295, 299 (9th Cir. 1971)); *see also U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d
4 1091, 1094 (9th Cir. 2010) (quoting *Sumner*, 226 F.3d at 1009-10 (“[T]he power [of a *nunc pro tunc*
5 order] is a limited one, and may be used only where necessary to correct a clear mistake and
6 prevent injustice. It does not imply the ability to alter the substance of that which actually
7 transpired or to backdate events to serve some other purpose.”)). *Nunc pro tunc* relief “should be
8 granted or refused as justice may require.” *Mitchell v. Overman*, 103 U.S. 62, 65 (1882).

9 Having considered the record in this case, the parties’ briefing, and the relevant law, the
10 Court will grant Defendants’ motion because doing so clarifies the record. Defendants are correct
11 that the Court previously dismissed without leave to amend Plaintiff’s Section 1986 action and all
12 claims against Chief Jerry Dyer in the Court’s July 9, 2013 Order (*see* Doc. 14); and, that the Court
13 granted Plaintiff leave to amend the complaint for the sole purpose of substituting three Doe
14 defendants with proper names. *See* Doc. 37. This Court rendered an Order on July 9, 2013 (Doc.
15 14), in which it adopted in full the Findings and Recommendations of the Magistrate Judge (*see*
16 Doc. 12), and explicitly ordered that:

17 2. Plaintiff’s claims against Defendant Jerry Dyer and Plaintiff’s claims under 42 U.S.C. §
18 1986 are DISMISSED, without leave to amend; and

19 3. This action shall proceed on Plaintiff’s claims against Defendants Conlee, Econo Towing
20 and John Doe #1-3 under the Fourth Amendment (excessive force, unreasonable search and
21 unreasonable seizure) and under the Fourteenth Amendment (failure to provide sufficient
22 notice regarding the seizure of Plaintiff’s vehicle).

23 In Plaintiff’s Third Amended Complaint, lodged March 17, 2014 (Doc. 36), he properly
24 substituted Marty Kodman and Robert Kodman, owners of Econo Towing, and Beryle Dodson, an
25 employee at Econo Towing, for the Doe Defendants. Contrary to the Court’s July 2013 Order,
26 however, Plaintiff failed to remove Jerry Dyer as a Defendant and continued to assert the same
27 claims against Dyer. *See* Doc. 36, ¶ 28, and prayer for relief ¶ 1. This Court also observes that
28 although the Magistrate Judge’s more recent Findings & Recommendations, rendered October 23,
2014 (Doc. 86), referred to Plaintiff’s Fourth Amended Complaint (“FAC,” Doc. 77) as the
“Operative Complaint,” the mistakes in the pleading persist. Notwithstanding the Magistrate

1 Judge's October 2014 reference to the FAC, such a reference did nothing to legitimize Plaintiff's
2 inclusion of a terminated defendant or dismissed claims. The FAC plainly conflicts with the
3 Court's July 2013 Order. Plaintiff again names Jerry Dyer as a defendant, asserts the same
4 previously dismissed claims against Dyer, and maintains the previously dismissed section 1986
5 action. *See* Doc. 77. It is therefore necessary to correct Plaintiff's clear mistakes, correct the
6 inadvertent oversight of these errors, and clarify the record so that it aligns with what the Court
7 actually intended to do previously. *See Sumner*, 226 F.3d at 1009-10. Accordingly,

8 **IT IS HEREBY ORDERED** that Defendants' Motion a for Nunc Pro Tunc Order(Doc.
9 94), is **GRANTED**. The Court specifically acknowledges that it proceeds according to its July 9,
10 2013 Order (Doc. 14), that Plaintiff's Section 1986 action and all claims against Jerry Dyer have
11 been dismissed, and **ORDERS** the parties to comply with the Court's July 2013 Order dismissing
12 such claims and terminating such defendants. Plaintiffs' failure to comply with the July 2013
13 Order, the instant Order, or any of the Court's orders will result in the dismissal of this action
14 without further notice. Parties are advised to note well that the Court has discretion to impose any
15 and all sanctions authorized by statute or Rule or within the inherent power of the Court, including
16 dismissal of an action, based on Plaintiff's failure to comply with a court order. Fed. R. Civ. P. 11;
17 Local Rule 110.

18 In light of the previous dismissal, the Clerk and the parties **SHALL** use the modified style
19 for all future pleadings in the case.

20
21 IT IS SO ORDERED.

22 Dated: March 18, 2015

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE