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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAUL WELDON,

Plaintiff,

v.

JERRY DYER, et al.,

Defendants.

Case No. 1:13-cv-00540-LJO-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT DEFENDANT’S
MOTION TO STRIKE BE DENIED

ECF NO. 79

OBJECTIONS DUE WITHIN THIRTY (30)
DAYS

On September 19, 2014, Defendant John Conlee filed a motion to strike portions of Plaintiff’s Fourth Amended Complaint. (ECF No. 79.) The motion was referred to the undersigned magistrate judge for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72. (ECF No. 81.)

The Court finds it appropriate for the present motion to be submitted upon the record and briefs on file without need for oral argument. See Local Rule 230(g). Accordingly, the Court will vacate the hearing scheduled on October 29, 2014. For the reasons set forth below, the Court recommends that Defendant’s motion to strike be denied.

I.

BACKGROUND

The operative complaint in this matter is the Fourth Amended Complaint filed on September 2, 2014. (ECF No. 77.) Plaintiff names Jerry Dyer, John Conlee, Econo Towing

1 Company, Marty Kodman, Robert Kodman and Beryle Dodson as defendants in this action
2 (“Defendants”).

3 Prior to the filing of the Fourth Amended Complaint, Plaintiff filed complaints in two
4 separate actions, one in this action and the other in Paul Weldon v. Economy Towing, et al., Case
5 No. 1:14-cv-00549-LJO-SAB. These two actions were consolidated by court order on June 12,
6 2014. (ECF No. 56.) Plaintiff subsequently filed a motion to amend his complaint to
7 consolidate his claims in the two separate actions into one pleading. (ECF Nos. 68, 69.) The
8 Court granted Plaintiff’s motion on July 30, 2014. (ECF No. 76.) In so doing, the Court
9 informed Plaintiff that he “may not assert any new claims in the amended complaint beyond
10 those asserted in the [prior complaints]” and “may not allege facts materially different from those
11 already alleged in the prior pleadings.” (Order Granting Plaintiff’s Motion to Amend 4:13-16.)

12 Plaintiff’s claims arise from an incident on April 18, 2011. Plaintiff alleges that he was
13 pulled over while driving a van by Defendant John Conlee. Plaintiff alleges that Conlee was
14 impersonating a Fresno Police Officer because he never took a proper oath of office. Plaintiff
15 further alleges that Conlee was rude to Plaintiff and eventually ordered Plaintiff out of the van
16 and assaulted Plaintiff by twisting his arms behind his back to handcuff him. Plaintiff further
17 alleges that, although the van was properly registered, Conlee ripped the registration tab off of
18 the license plate and called Econo Towing Company to tow the car away. The towing truck was
19 operated by Defendant Beryle Dodson. Econo Towing Company is owned by Defendants Marty
20 Kodman and Robert Kodman.

21 The Court has construed Plaintiff’s Fourth Amended Complaint as asserting claims under
22 Section 1983 for the use of excessive force in violation of the Fourth Amendment, unreasonable
23 search and seizure in violation of the Fourth Amendment, failure to provide sufficient notice
24 regarding a seizure in violation of the Fourteenth Amendment, and for conversion.

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1 **II.**

2 **LEGAL STANDARDS FOR MOTIONS TO STRIKE**

3 Motions to strike are governed by Federal Rule of Civil Procedure 12(f), which states:

4 **(f) Motion to Strike.** The court may strike from a pleading an
5 insufficient defense or any redundant, immaterial, impertinent, or
6 scandalous matter. The court may act:

7 **(1)** on its own; or

8 **(2)** on motion made by a party either before responding to the
9 pleading or, if a response is not allowed, within 21 days after being
10 served with the pleading.

11 “Motions to strike are disfavored an[d] infrequently granted. A motion to strike should not be
12 granted unless it is clear that the matter to be stricken could have no possible bearing on the
13 subject matter of the litigation.” Contreras, ex rel. Contreras v. County of Glenn, 725 F. Supp.
14 2d 1157, 1159 (E.D. Cal. 2010) (quoting Bassett v. Ruggles, No. CV-F-09-528 OWW/SMS,
15 2009 WL 2982895 at *24 (E.D. Cal. Sept. 14, 2009)). “Courts will not grant motions to strike
16 unless ‘convinced that there are no questions of fact, that any questions of law are clear and not
17 in dispute, and that under no set of circumstances could the claim or defense succeed.’” Novick
18 v. UNUM Life Ins. Co. of America, 570 F. Supp. 2d 1207, 1208 (C.D. Cal. 2008) (quoting RDF
19 Media Ltd. v. Fox Broad. Co., 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005). “When ruling on a
20 motion to strike, this Court ‘must view the pleading under attack in the light most favorable to
21 the pleader.’” Id. (citing RDF Media Ltd., 372 F. Supp. 2d at 561).

22 **III.**

23 **DISCUSSION**

24 Defendant argues that certain passages from Plaintiff’s Fourth Amended Complaint
25 should be stricken because the inclusion of those passages violated the Court’s order to Plaintiff
26 that he refrain from allege new claims or materially different factual allegations from those
27 already alleged in Plaintiff’s prior pleadings. The passages quoted by Defendant are:

- 28 • Page 4, lines 8-13: “Conlee has never taken an oath of office that comports with the
minimum requirements of the United States Constitution and the California Constitution.
In other words, Conlee was unlawfully impersonating a police officer.”

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1 • Page 6, lines 8:24-9:2: “there never existed a warrant from a court of competent
2 jurisdiction authorizing any of the Defendants to remove Plaintiff Weldon’s van from the
3 private property that it was parked upon.”

4 • Title Block of Fourth Amended Complaint: “Fresno Police Department”

5 Defendant Conlee’s alleged failure to take an oath of office has been alleged in a prior
6 pleading. (See First Amended Complaint, at pg. 3-6.) Further this allegation could have
7 possible bearing on this litigation. If Defendant Conlee is not actually a police officer, Section
8 1983 may not apply to his actions because he was not acting under color of law.

9 The absence of a warrant has also been alleged in a prior pleading. (See First Amended
10 Complaint, at pg. 7-8, 10-11, 17; Complaint, at pg. 2.) This allegation is also material to
11 Plaintiff’s claims for unlawful search and seizure, as Plaintiff contends that the seizure was
12 unlawful due to the absence of a warrant.

13 Finally, Defendant argues that Plaintiff improperly added Fresno Police Department as a
14 new defendant in this action. However, Plaintiff’s references to “Fresno Police Department” in
15 the caption of the Fourth Amended Complaint appears to be for the purpose of identifying Jerry
16 Dyer and John Conlee as employees/agents of the Fresno Police Department, not to name
17 “Fresno Police Department” as a separate defendant. The caption reads as follows:

18 JERRY DYER, CHIEF,
19 FRESNO POLICE DEPARTMENT;
20 JOHN CONLEE POLICEMAN,
21 FRESNO POLICE DEPARTMENT;
22 ECONO TOWING;
23 MS. MARTY KODMAN, Proprietress of
ECONO TOWING;
ROBERT KODMAN, Proprietor of
ECONO TOWING; and,
BERYLE DODSON, Employee of
ECONO TOWING,

24 (Fourth Amended Compl.; at pg. 1.)

25 The defendant entities appear to be separated by semicolon and Fresno Police
26 Department appears twice, leading credence to the Court’s interpretation that Fresno Police
27 Department is provided as a means of identifying Defendants Dyer and Conlee—i.e., Defendant
28 Jerry Dyer, Chief of the Fresno Police Department. Further, in the body of the Fourth Amended

1 Complaint, Plaintiff expressly lists the six defendants in this action, and none of the six are
2 “Fresno Police Department.” (See Fourth Amended Complaint ¶¶ 3-9.) Accordingly, there’s no
3 indication that Plaintiff was attempting to add a new defendant in his Fourth Amended
4 Complaint.

5 **IV.**

6 **CONCLUSION AND ORDER**

7 Based upon the foregoing, it is HEREBY RECOMMENDED that Defendant’s motion to
8 strike be DENIED.

9 Further it is HEREBY ORDERED that the hearing scheduled on October 29, 2014 at
10 10:00 a.m. in Courtroom 9 (SAB) before United States Magistrate Judge Stanley A. Boone is
11 VACATED and the parties are not required to appear at that time.

12 These Findings and Recommendations are submitted to the United States District Judge
13 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
14 Local Rules of Practice for the United States District Court, Eastern District of California.
15 Within thirty (30) days after being served with a copy, any party may file written objections with
16 the court and serve a copy on all parties. Such a document should be captioned “Objections to
17 Magistrate Judge’s Findings and Recommendation.” The Court will then review the Magistrate
18 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
19 objections within the specified time may waive the right to appeal the District Court’s order.
20 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 IT IS SO ORDERED.

22 Dated: October 23, 2014

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25 UNITED STATES MAGISTRATE JUDGE
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