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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRENTALAN BRIGNER,

Plaintiff,

v.

JOH NICK KAPETAN, et al.,

Defendants.

Case No. 1:16-cv-01431-DAD-SAB

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSING ACTION
FOR FAILURE TO STATE A CLAIM

(ECF No. 8)

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

Plaintiff Brentalan Brigner, proceeding pro se and in forma pauperis filed a complaint in this action which was dismissed with leave to amend on October 28, 2016. Currently before the Court is Plaintiff’s first amended complaint, filed November 28, 2016.

I.

SCREENING REQUIREMENT

The district court must perform a preliminary screening and must dismiss a case if at any time the Court determines that the complaint fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2); see Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (section 1915(e) applies to all in forma pauperis complaints, not just those filed by prisoners). In determining whether a complaint fails to state a claim, the Court uses the same pleading standard used under Federal Rule of Civil Procedure 8(a). A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2).

1 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause
2 of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
3 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

4 In reviewing the pro se complaint, the Court is to liberally construe the pleadings and
5 accept as true all factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89,
6 94 (2007). Although a court must accept as true all factual allegations contained in a complaint,
7 a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 556 U.S. at 678. “[A]
8 complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops
9 short of the line between possibility and plausibility of entitlement to relief.’” Iqbal, 556 U.S. at
10 678 (quoting Twombly, 550 U.S. at 557). Therefore, the complaint must contain sufficient
11 factual content for the court to draw the reasonable conclusion that the defendant is liable for the
12 misconduct alleged. Iqbal, 556 U.S. at 678.

13 Similarly, the court may dismiss a claim as factually frivolous when the facts alleged lack
14 an arguable basis in law or in fact or embraces fanciful factual allegations. Neitzke v. Williams,
15 490 U.S. 319, 325 (1989). Further, a claim can be dismissed where a complete defense is
16 obvious on the face of the complaint. Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984).

17 II.

18 FIRST AMENDED COMPLAINT ALLEGATIONS

19 To the extent that the Court is able to decipher the rambling allegations in the first
20 amended complaint, Plaintiff contends that his due process rights were violated when he
21 appeared before Commissioner Heather Mardel Jones and Judge Jon Nick Kapetan because they
22 refused to correct his name and dismiss the suit against him on the basis of no probable cause.
23 (First. Am. Compl. 4,¹ ECF No. 8.) Plaintiff alleges that the prosecution has failed to prove that
24 he is a corporation, and the district attorney Vanessa Wong, and Ms. Spurling should have
25 immediately dismissed the charges against him. (Id.) Plaintiff appears to allege that the District
26 Attorney is committing a crime of treason and admitted that her client is the Fresno County

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28 ¹ All references to pagination of specific documents pertain to those as indicated on the upper right corners via the
CM/ECF electronic court docketing system.

1 Sheriff Department which proves that she is working with Commissioner Mardel Jones in
2 committing fraud by forging tickets that create the appearance that a crime has been committed.

3 (Id.)

4 Plaintiff states that he was arrested, incarcerated and thrown into the street in the pouring
5 rain by Fresno Superior Court Judges, the District Attorney’s Office, the Fresno County Sheriff’s
6 Department, and California Highway Patrol Officer Arcelus who cut, copied, and pasted his
7 signature onto a ticket. (Id.) Plaintiff contends that Commissioner Mardel Jones, Judge
8 Kapetan, District Attorney Gamoian, Spurling, Vanessa Wong, Kimberly Gaab, Sheri Edmonds,
9 and the Fresno County Sheriff Department failed to do their jobs correctly and he had to walk in
10 the freezing cold streets for six months; survive in the streets of Fresno with major medical
11 conditions; and took pictures of employees of Brian Angus, the Director of the Fresno Economic
12 Opportunity Commission, throwing and breaking his personal belongings. (Id. at 5.)

13 Plaintiff alleges that Commissioner Mardel Jones and her accomplices Judge Kapetan,
14 and District Attorney Gamoian denied five restraining orders. Commissioner Mardel Jones
15 usurped the power of the people by stating that she can do whatever she wants in her courtroom.
16 (Id. at 5.) Plaintiff is requesting a firing squad for each of the defendants for their constant abuse
17 of sovereigns and free people they attack. (Id. at 8.) Plaintiff is seeking \$150 billion for the
18 “Terroristic Barbaric Attack repetitively by” Commissioner Mardel Jones, District Attorney
19 Gamoian, and Judge Kapetan. (Id. at 9.)

20 **III.**
21 **DISCUSSION**

22 Plaintiff has failed to state a cognizable claim for relief. As Plaintiff was advised in the
23 previous order dismissing his complaint with leave to amend, “[i]n his amended complaint,
24 Plaintiff is required to set forth the specific claim including the basis for federal jurisdiction and
25 the specific acts of the named defendants that demonstrate a violation of his federal rights.”
26 (ECF No. 7 at 8:6-8.)

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1 **A. Judicial and Prosecutorial Immunity**

2 1. Judicial Immunity

3 Plaintiff alleges that Commissioner Mardel Jones and Judge Kapetan violated his due
4 process rights by refusing to correct his name and dismiss the charges against him. Absolute
5 judicial immunity is afforded to judges for acts performed by the judge that relate to the judicial
6 process. In re Castillo, 297 F.3d 940, 947 (9th Cir. 2002), as amended (Sept. 6, 2002). “This
7 immunity reflects the long-standing ‘general principle of the highest importance to the proper
8 administration of justice that a judicial officer, in exercising the authority vested in him, shall be
9 free to act upon his own convictions, without apprehension of personal consequences to himself.’
10 ” Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004) (quoting Bradley v.
11 Fisher, 13 Wall. 335, 347 (1871)). This judicial immunity insulates judges from suits brought
12 under section 1983. Olsen, 363 F.3d at 932.

13 Absolute judicial immunity insulates the judge from actions for damages due to judicial
14 acts taken within the jurisdiction of the judge’s court. Ashelman v. Pope, 793 F.2d 1072, 1075
15 (9th Cir. 1986). “Judicial immunity applies ‘however erroneous the act may have been, and
16 however injurious in its consequences it may have proved to the plaintiff.’ ” Id. (quoting
17 Cleavinger v. Saxner, 474 U.S. 193 (1985)). However a judge is not immune where he acts in
18 the clear absence of jurisdiction or for acts that are not judicial in nature. Ashelman, 793 F.2d at
19 1075. Judicial conduct falls within “clear absence of all jurisdiction,” where the judge “acted
20 with clear lack of all subject matter jurisdiction.” Stone v. Baum, 409 F. Supp. 2d 1164, 1174
21 (D. Ariz. 2005).

22 To determine if an act is judicial in nature, the court considers whether (1) the precise act
23 is a normal judicial function; (2) the events occurred in the judge’s chambers; (3) the controversy
24 centered around a case then pending before the judge; and (4) the events at issue arose directly
25 and immediately out of a confrontation with the judge in his or her official capacity. Duvall v.
26 Cty. of Kitsap, 260 F.3d 1124, 1133 (9th Cir. 2001), as amended on denial of reh’g (Oct. 11,
27 2001) (quoting Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir.1999)).

28 Here, the actions alleged in the complaint would entitle the judges to judicial immunity.

1 Plaintiff contends that the judges refused to change his name on the case and dismiss the charges
2 and refused to issue a restraining order. Plaintiff states that the judicial officials failed to
3 perform their jobs correctly. Plaintiff's allegations in the complaint against the Fresno Superior
4 Court judges are for actions taken by the judges in their judicial capacity for a cases or cases that
5 were before the judge. Therefore, the named individuals are entitled to judicial immunity.
6 Plaintiff fails to state a cognizable complaint against any judicial officer named in the first
7 amended complaint.

8 2. Prosecutorial Immunity

9 Similarly, prosecutors are immune from liability under 42 U.S.C. § 1983. See Imbler v.
10 Pactman, 424 U.S. 409, 427 (1976); see also Olsen, 363 F.3d at 922 (“Absolute immunity is
11 generally accorded to judges and prosecutors functioning in their official capacities”); Ashelman,
12 793 F.2d at 1075 (holding that judges and prosecutors are immune from liability for damages
13 under section 1983). Where a prosecutor acts within his authority “ ‘in initiating a prosecution
14 and in presenting the state’s case,’ absolute immunity applies.” Ashelman, 793 F.2d at 1076
15 (quoting Imbler, 424 U.S. at 431).

16 While Plaintiff claims that the district attorney refused to dismiss the charges against him
17 or refused to have a restraining order granted, such decisions by the district attorney fall within
18 those actions that are entitled to absolute immunity. Plaintiff fails to state a cognizable claim
19 against any employee of Office of the District Attorney.

20 3. Injunctive Relief

21 Plaintiff seeks to have the judicial officers and district attorney employees brought before
22 a firing squad for their alleged abuse against him. (ECF No. 8 at 8.) “A preliminary injunction
23 is an extraordinary remedy never awarded as of right.” Winter v. Natural Resources Defense
24 Council, Inc., 555 U.S. 7, 24 (2008) (citation omitted). “A court may grant a preliminary
25 injunction only if the plaintiff establishes four elements: (1) likelihood of success on the merits;
26 (2) likelihood of suffering irreparable harm absent a preliminary injunction; (3) the balance of
27 equities tips in plaintiff’s favor; and (4) injunctive relief is in the public interest.” Leigh v.
28 Salazar, 677 F.3d 892, 896 (2012); Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1049

1 (9th Cir. 2010). An injunction may only be awarded upon a *clear showing* that the plaintiff is
2 entitled to relief. Winter, 555 U.S. at 22 (citation omitted) (emphasis added).

3 Here, even if Plaintiff was able to meet the requirements to obtain injunctive relief, the
4 Court could not grant the relief requested. This Court does not have the authority to order that
5 civil litigants be executed even where the plaintiff shows a violation of his federal rights.
6 Accordingly, Plaintiff's request to have the defendants brought before a firing squad should be
7 dismissed without leave to amend.

8 **B. Fraud**

9 Plaintiff alleges that Commissioner Mardel Jones conspired with other individuals to
10 commit fraud against him. (ECF No. 8 at 4.) "A plaintiff alleging fraud must overcome a
11 heightened pleading standard under Rule 9(b)." ESG Capital Partners, LP v. Stratos, 828 F.3d
12 1023, 1031 (9th Cir. 2016). To state a claim for fraud, a plaintiff "must state with particularity
13 the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Conclusory allegations of
14 fraud are not enough and the allegations must be specific enough to provide the defendants with
15 notice of the particular conduct which is alleged to constitute the fraud charged. Semegen v.
16 Weidner, 780 F.2d 727, 731 (9th Cir. 1985). This requires the pleadings to set forth the time,
17 place, and nature of the specific acts of fraud. S. Union Co. v. Sw. Gas Corp., 165 F. Supp. 2d
18 1010, 1018 (D. Ariz. 2001).

19 Here, while Plaintiff makes general references to the Uniform Commercial Code,
20 Sherman Anti-Trust Act, Security Act of 1933, Federal Trade Commission, and allegations of a
21 racketeering scheme and municipal bond fraud, the first amended complaint is devoid of any
22 factual allegations to support such violations.

23 Plaintiff generally alleges that the defendants conspired to falsify a citation against him to
24 have him arrested and are continuing to make false entries into the State criminal database.
25 However, Plaintiff has not pled factual allegations to meet the requirements of Rule 9(b). The
26 conclusory allegations contained in the first amended complaint fail to state a cognizable claim
27 for conspiracy to commit fraud.

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1 **C. Officer Arcelus**

2 Plaintiff alleges that California Highway Patrol Officer Arcelus cut, copied, and pasted
3 Plaintiff's signature onto a ticket. However, even if the officer falsified Plaintiff's signature on a
4 ticket, Plaintiff has not identified, nor does the Court find, any violation of Plaintiff's federal
5 rights from this act. Plaintiff fails to state a cognizable claim against Officer Arcelus.

6 **D. Removal of State Criminal Actions**

7 Plaintiff contends that he is being prosecuted for a crime that he did not commit and
8 therefore it is "imperative" that the actions be removed from state court. (ECF No. 8 at 8.)
9 Federal courts are courts of limited jurisdiction. U.S. v. Sumner, 226 F.3d 1005, 1009 (9th Cir.
10 2000); Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 552 (2005). As discussed in
11 the October 28, 2016 order dismissing Plaintiff's complaint, "[t]here are only narrow and limited
12 grounds upon which a state prosecution can be removed to federal court." (ECF No. 7 at 4.) Under
13 28 U.S.C. §§ 1442(a) and 1442a, any officer of the United States or its courts, any officer of either
14 House of Congress, or any member of the U.S. armed forces that is subject to criminal prosecution
15 may remove such an action that arises from acts done under color of such office or status. 28 U.S.C.
16 §§ 1442(a), 1442a. Additionally, a defendant who is being prosecuted in state court may remove an
17 action to federal court if he seeks to assert a defense based upon federal laws protecting equal civil
18 rights but is unable to because of state law. 28 U.S.C. § 1443.

19 Plaintiff was informed of the circumstances under which this Court could assume
20 jurisdiction of his criminal prosecution and the first amended complaint does not demonstrate
21 any ground to provide for removal of his criminal prosecution.

22 **E. Leave to Amend**

23 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's
24 pleading once as a matter of course at any time before a responsive pleading is served. Fed. R. Civ.
25 P. 15(a)(1). Otherwise, a party may amend only by leave of the court or by written consent of the
26 adverse party, and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). In
27 determining whether to grant leave to amend, the court considers five factors: "(1) bad faith; (2)
28 undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the

1 plaintiff has previously amended his complaint.” Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir.
2 2004). The factors are not given equal weight and futility alone is sufficient to justify the denial
3 of a motion to amend. Washington v. Lowe’s HIW Inc., 75 F. Supp. 3d 1240, 1245 (N.D. Cal.
4 2014), appeal dismissed (Feb. 25, 2015).

5 In the order dismissing the complaint with leave to amend, Plaintiff was advised that his
6 amended complaint must

7 set forth the specific claim including the basis for federal jurisdiction and the specific
8 acts of the named defendants that demonstrate a violation of his federal rights.
9 **Plaintiff’s complaint may not contain any citation to case law or legal argument.**
10 The only statutory references shall be for the specific claims alleged and must include
sufficient factual allegations to demonstrate a violation of the statute. If Plaintiff fails
to do, so this action will be dismissed without leave to amend.

11 (ECF No. 7 at 8:6-12.) Additionally, Plaintiff was required to comply with Rule 10 which
12 requires that his claims must be set forth in numbered paragraphs and each claim must be stated
13 in a separate count. (Id. at 7:26-4.) Plaintiff has failed to comply with the requirements set forth
14 in the October 28, 2016 order granting him leave to file an amended complaint.

15 In this instance, the Court finds that Plaintiff’s failure to comply with the prior order and
16 failure to correct the deficiencies identified in the original complaint demonstrate that it would be
17 futile to grant further leave to amend. Accordingly, Plaintiff’s complaint should be dismissed for
18 failure to state a claim without further leave to file an amended complaint.

19 IV.

20 CONCLUSION AND RECOMMENDATION

21 Based upon the foregoing, IT IS HEREBY RECOMMENDED that Plaintiff’s complaint,
22 filed October 28, 2016, be DISMISSED without leave to amend for failure to state a claim.

23 These findings and recommendations are submitted to the district judge assigned to this
24 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within fourteen
25 (14) days of service of this recommendation, Plaintiff may file written objections to these
26 findings and recommendations with the Court. Such a document should be captioned
27 “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge will
28 review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. §

1 636(b)(1)(C). Plaintiff is advised that failure to file objections within the specified time may
2 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
3 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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5 IT IS SO ORDERED.

6 Dated: December 1, 2016


UNITED STATES MAGISTRATE JUDGE

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