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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

PAUL WELDON,

Plaintiff,

v.

**JONATHAN NICHOLAS KAPETAN,
FRESNO SUPERIOR COURT, DOES 1-100,**

Defendants.

Case No. 1:17-cv-01536-LJO-SKO

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS IN PART, AND
DISMISSING ENTIRE COMPLAINT
WITHOUT LEAVE TO AMEND**

(Doc. 4)

I. BACKGROUND

On November 17, 2017, Plaintiff Paul Weldon (“Plaintiff”), proceeding *pro se* and *in forma pauperis*, filed a complaint against the Fresno Superior Court and Fresno Superior Court Judge Jonathan Nicholas Kapetan, alleging violations of 42 U.S.C. §§ 1983, 1985, and 1986. Doc. 1 (the “Complaint”).

The Complaint concerns Plaintiff’s appearance before Judge Kapetan in November 2015 for arraignment on misdemeanor charges of driving under the influence (“DUI”). *See generally* Compl. at 2-5; Transcript of November 18, 2015 Hearing (“Tr.”) (attached to Complaint). Plaintiff appeared *in propria persona*. Tr. at 1. While Judge Kapetan was informing Plaintiff of the charges filed against him and the attendant penalties, Plaintiff stated, “Well, actually I’m here to challenge jurisdiction . . . ,” and “I’ll need all the elements to the arraignment” *Id.* at 4. At Judge Kapetan’s direction, the courtroom

1 deputy handed Plaintiff a copy of the criminal complaint. *Id.* at 5-6. An exchange occurred in which
2 Plaintiff demanded the name of the deputy clerk who signed the criminal complaint. *Id.* at 6-7. Plaintiff
3 refused to enter a plea, so Judge Kapetan entered a plea of not guilty on Plaintiff's behalf and set bond at
4 \$10,000. *Id.* at 8. At this point, realizing he would be remanded into custody pending his next court date
5 or his ability to post bond, Plaintiff indicated his intent to consider a plea. *Id.* at 9. Judge Kapetan then
6 took the matter off the record, and, as Plaintiff alleges, kept Plaintiff handcuffed while a public defender
7 was summoned to the courtroom. *See* Compl. at ¶ 7. Later, Judge Kapetan recalled the case, Plaintiff
8 withdrew his plea, and then accepted a no contest plea. Tr. at 17-18.

9 Plaintiff claims that he was denied due process of law during the arraignment and plea because
10 Judge Kapetan did not provide him a true copy of the complaint and the name of the person who signed
11 it. Compl. at. ¶¶ 2-3. Second, Plaintiff alleges that he was falsely imprisoned when Judge Kapetan kept
12 him handcuffed for the period of time during the arraignment while a public defender was summoned to
13 the courtroom to represent Plaintiff. *Id.* ¶¶ 5, 7-8. Third, Plaintiff alleges that he was coerced to plead
14 guilty because he faced a Hobson's choice between pleading guilty or remaining in custody until his
15 trial. *See Id.* Plaintiff's complaint also alleges "breach of contract" in that that Judge Kapetan is in
16 "breach of trust and public contract" and has "abandon[ed] his oath of office," by virtue of violating
17 Plaintiff's constitutional rights and subjecting him to public ridicule, humiliation, and embarrassment.
18 *Id.* ¶¶ 6, 10, 14. Plaintiff appears to be asserting that this last allegation states a claim under 42 U.S.C.
19 §§ 1981, 1985 and/or 1986. *Id.* at Caption & ¶ 12. The Complaint seeks judgment against Judge Kapetan
20 and Fresno Superior Court, money damages and fines, and an order "remand[ing] and remov[ing] [Judge
21 Kapetan] from office pursuant to 18 U.S.C. § 1918." *Id.* ¶ 14.

22 On February 20, 2018, the assigned magistrate judge issued findings and recommendations
23 ("F&Rs") that the Complaint be dismissed with prejudice and without leave to amend, in part, as to all
24 of Plaintiff's claims against Fresno Superior Court and as to Plaintiff's claims for declaratory relief and
25 money damages against Judge Kapetan. ECF No. 4. The assigned magistrate judge further

1 recommended that the Complaint be dismissed without prejudice and with leave to amend, in part, as to
2 Plaintiff's claims for prospective injunctive relief against Judge Kapetan. *Id.* The F&Rs recommended
3 that Plaintiff be granted thirty (30) days leave to file an amended complaint. *Id.* Plaintiff was served with
4 the F&Rs by mail, and was granted twenty-one (21) days in which to file objections to the findings and
5 recommendations. *Id.* On March 13, 2018, Plaintiff filed objections, stating only, "Plaintiff Paul Weldon
6 . . . submits this Objection to Magistrate[] Judge's Findings and [R]ecommendations." ECF No. 5.¹

7 On April 10, 2018, this Court issued an order indicating that it intended to dismiss the entire
8 Complaint without leave to amend, and, in an effort to give Plaintiff an opportunity to be heard on newly
9 raised issues, ordered Plaintiff to show cause ("OSC") why the Court should not dismiss the Complaint
10 without leave to amend. ECF No. 8. Plaintiff filed a response to the OSC. ECF No. 9. In accordance
11 with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has conducted a *de novo* review of the
12 case. Having carefully reviewed the entire file, including Plaintiff's objections to the F&Rs and response
13 to the OSC, the Court adopts the recommendations of the F&Rs in part and modifies and/or clarifies
14 other parts as follows.

15 **II. SCREENING STANDARD**

16 The F&Rs correctly set forth the applicable screening standard. Critically, if a court determines
17 that a pleading could be cured by the allegation of other facts, a pro se litigant is entitled to an
18 opportunity to amend a complaint before dismissal of the action. *See Lopez v. Smith*, 203 F.3d 1122,
19 1127-29 (9th Cir. 2000) (en banc). However, a complaint may be dismissed without leave to amend if
20 amendment will be futile. *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) ("A district court
21 should not dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C. §
22 1915(e)(2)(B)(ii)] unless 'it is absolutely clear that the deficiencies of the complaint could not be cured

23
24 ¹ Possibly believing that the F&Rs set a deadline for the filing of an amended complaint, Plaintiff filed a first amended
25 complaint on March 21, 2018. ECF No. 6. Because the district court had yet to adopt or otherwise address the F&Rs'
recommendation regarding amendment, the lodged amended complaint was stricken. ECF No. 7. Plaintiff's response to the
Court's order to show cause, ECF No. 9, demonstrates that he continues to misunderstand the nature of the F&Rs, which
were only recommendations to the district judge about whether to grant Plaintiff leave to amend.

1 by amendment.”)(internal quotation omitted).

2 **III. DISCUSSION**

3 **A. Claims Against Fresno Superior Court**

4 The Court agrees with the F&Rs that Defendant Fresno Superior Court must be DISMISSED
5 WITHOUT LEAVE TO AMEND based upon Eleventh Amendment Immunity. This defect cannot be
6 cured on amendment.

7 **B. Claims Arising Under 42 U.S.C. §§ 1981, 1985 and/or 1986.**

8 The F&Rs do not address directly Plaintiffs allegations regarding 42 U.S.C. §§ 1981, 1985
9 and/or 1986. Section 1981 provides:

10 (a) Statement of equal rights.

11 All persons within the jurisdiction of the United States shall have the
12 same right in every State and Territory to make and enforce contracts, to
13 sue, be parties, give evidence, and to the full and equal benefit of all laws
14 and proceedings for the security of persons and property as is enjoyed by
15 white citizens, and shall be subject to like punishment, pains, penalties,
16 taxes, licenses, and exactions of every kind, and to no other.

15 (b) “Make and enforce contracts” defined

16 For purposes of this section, the term “make and enforce contracts”
17 includes the making, performance, modification, and termination of
18 contracts, and the enjoyment of all benefits, privileges, terms, and
19 conditions of the contractual relationship.

18 (c) Protection against impairment

19 The rights protected by this section are protected against impairment by
20 nongovernmental discrimination and impairment under color of State
21 law.

21 42 U.S.C. § 1981. This provision prohibits private individuals as well as state actors from discriminating
22 against an individual on the basis of his or her race with respect to that individual’s right “to sue, be
23 parties, give evidence, and to the full and equal benefit of all laws ...” *See General Bldg. Contractors*
24 *Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). “Section 1981 cannot be construed as a general
25 proscription of racial discrimination . . . for it expressly prohibits discrimination only in the making and

1 enforcement of contracts.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (emphasis
2 added); *see also Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (“The legislative history of the 1866 Act
3 clearly indicates that Congress intended to protect a limited category of rights”):

4 In this respect, [Section 1981] prohibits discrimination that infects the
5 legal process in ways that prevent one from enforcing contract rights, by
6 reason of his or her race, and this is so whether this discrimination is
7 attributed to a statute or simply to existing practices. It also covers
8 wholly private efforts to impede access to the courts or obstruct
9 nonjudicial methods of adjudicating disputes about the force of binding
10 obligations, as well as discrimination by private entities, such as labor
11 unions, in enforcing the terms of a contract.

12 *Patterson*, 491 U.S. at 177. As mentioned in the Court’s previous order, section 1981 is simply not
13 relevant to any claim Plaintiff raises in this case.

14 42 U.S.C. § 1985 is likewise not relevant to Plaintiff’s factual allegations. That provision applies
15 to conspiracies by “two or more persons” to interfere with civil rights. Plaintiff does not allege claims
16 based on action by anyone other than Judge Kapetan, so does not allege a conspiracy, let alone one that
17 would trigger the other requirements of Section 1985.

18 Finally, 42 U.S.C. § 1986 provides a cause of action against any person having knowledge of a
19 conspiracy prohibited by Section 1985. Plaintiff has alleged no Section 1985 conspiracy, so Section
20 1986 is inapplicable as well. *See Abeytia v. Fresno Police Dep’t*, No. 1:08-CV-01528OWWGSA, 2009
21 WL 1674568, at *6 (E.D. Cal. June 12, 2009) (Section 1986 claim dependent on Section 1985 claim)

22 Plaintiff has offered no argument to suggest that he has alleged (or can allege) any non-futile
23 claim under 42 U.S.C. §§ 1981, 1985 and/or 1986. Therefore, any such claims are DISMISSED
24 WITHOUT LEAVE TO AMEND.

25 **C. Section 1983 Claims for Money Damages against Judge Kapetan**

The Court agrees with the F&Rs that any remaining claims pursuant to 42 U.S.C. § 1983 for
money damages against Defendant Judge Jonathan Nicholas Kapetan must be DISMISSED WITHOUT
LEAVE TO AMEND based upon *Heck v. Humphrey*, 512 U.S. 477 (1994). As the F&Rs explained, any

1 action that would call into question the lawfulness of a plaintiff's conviction or confinement is not
2 cognizable outside the context of a habeas corpus claim. *See Harvey v. Waldron*, 210 F.3d 1008, 1013
3 (9th Cir. 2000), *overruled in part on other grounds by Wallace v. Kato*, 549 U.S. 384, 393-94 (2007);
4 *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996). Here, a money judgment in Plaintiff's favor on his
5 claim that his no-contest plea to the DUI was not voluntary and intelligent would obviously call the DUI
6 conviction into question. Likewise, a judgment in Plaintiff's favor on his due process claim regarding
7 Judge Kapetan's purported failure to provide Plaintiff with the criminal complaint and to identify the
8 person who signed it, if true, would also implicate the validity of his conviction. *See, e.g., Vonne Ray v.*
9 *Warner*, No. SA CV 15-01242-JLS (DFM), 2015 WL 5444491, *2-3 (C.D. Cal. Sept. 14, 2015) (finding
10 due process claim of failure to give notice barred by *Heck* because it would call into question the
11 lawfulness of plaintiff's conviction). Finally, Plaintiff's claim that he was falsely imprisoned by Judge
12 Kapetan during his arraignment, if found true, would implicate the validity of his conviction, as the DUI
13 charge was the basis for the handcuffing. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380
14 (9th Cir. 1998).

15 To the extent any of Plaintiff's claims are not precluded by *Heck*, the Court also agrees that,
16 alternatively, the doctrine of judicial immunity requires dismissal of any claims against Judge Kapetan
17 for money damages. *See Mireles v. Waco*, 502 U.S. 9, 10-12 (1991) (*per curiam*) (the only exceptions to
18 judicial immunity from damages actions are if the actions were not taken in the judge's judicial capacity
19 or if there is a complete absence of jurisdiction). The claims in this case all involve actions taken by
20 Judge Kapetan in his judicial capacity and there is no non-frivolous allegation that Judge Kapetan acted
21 in the absence of jurisdiction. Plaintiff points out that his Complaint alleges Judge Kapetan only
22 "acquires jurisdiction upon and only upon a BONA FIED [sic] ACCUSATORY INSTRUMENT." ECF
23 No. 9 at 2. Plaintiff misapprehends the "absence of all jurisdiction" exception. In *Stump v. Sparkman*,
24 435 U.S. 349, 357 (1978), the Supreme Court provided an example of when a judge might be found to
25 have acted in the absence of all jurisdiction:

1 [If a probate judge, with jurisdiction over only wills and estates, should
2 try a criminal case, he would be acting in the clear absence of jurisdiction
3 and would not be immune from liability for his action; on the other hand,
4 if a judge of a criminal court should convict a defendant of a nonexistent
5 crime, he would merely be acting in excess of his jurisdiction and would
6 be immune.

7 Accordingly, Plaintiff's complaint that he was not presented with an appropriate charging instrument,
8 even if true, does not demonstrate a clear lack of all jurisdiction. *See Gutierrez v. Atkins*, No. 2:13-CV-
9 00245-RCJ, 2013 WL 1789594, at *2 (D. Nev. Apr. 25, 2013) (applying *Stump* to reject argument that
10 judge's failure to provide charging instrument amounted to action in absence of all jurisdiction).

11 In conclusion, any claims for monetary damages against Judge Kapetan are DISMISSED
12 WITHOUT LEAVE TO AMEND because amendment would be futile.

13 **D. Section 1983 Claims for Injunctive Relief Against Judge Kapetan**

14 The Court departs from the F&Rs with respect to its application of judicial immunity to
15 Plaintiff's claims for injunctive relief. As to injunctive relief, in 1996, Congress amended Section 1983
16 to prohibit the grant of injunctive relief against judges for acts or omissions taken in their judicial
17 capacities unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C.
18 § 1983 (2012); *see* Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317, 110 Stat.
19 3847, 3853 (Oct. 19, 1996) ("[I]n any action brought against a judicial officer for an act or omission
20 taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree
21 was violated or declaratory relief was unavailable.").

22 The phrase "declaratory relief" in the current version of § 1983 refers to the ability of a litigant to
23 "appeal[] the judge's order." *Owens v. Cowan*, No. CV1703674FMOJDE, 2018 WL 1002313, at *11
24 (C.D. Cal. Jan. 17, 2018), report and recommendation approved, No. CV1703674FMOJDE, 2018 WL
25 1009268 (C.D. Cal. Feb. 16, 2018) (citing numerous cases). The state appellate system afforded Plaintiff
an opportunity to appeal the voluntariness of his no contest plea on such grounds. *See* Cal. Penal Code §
1237.5. Therefore, declaratory relief, as that term is used in § 1983, was available, whether or not

1 Plaintiff took advantage of the opportunity provided by state appellate procedure. *See Sutton v. Nevada*,
2 No. 3:17-CV-00357 MMD VPC, 2018 WL 1081709, at *4 (D. Nev. Jan. 24, 2018), report and
3 recommendation adopted, No. 3:17-CV-00357-MMD-VPC, 2018 WL 1077281 (D. Nev. Feb. 27, 2018)
4 (citing *Kampfer v. Scullin*, 989 F. Supp. 194, 201 (N.D.N.Y. 1997) (denying plaintiffs’ claim against
5 judge for injunctive relief because they “could have sought declaratory relief but failed to do so”)).
6 Because declaratory relief (*i.e.*, the ability to appeal) was available to Plaintiff, injunctive relief under
7 § 1983 against Judge Kapetan for actions taken in his judicial capacity is not available, since the
8 exceptions to the statutory bar against injunctive relief do not apply. The Court cannot envision any fact
9 pattern in which Plaintiff could overcome Section 1983’s statutory bar against injunctive relief against
10 Judge Kapetan, and Plaintiff offers no argument to the contrary. Therefore, any such claim is
11 DISMISSED WITHOUT LEAVE TO AMEND because amendment would be futile.

12 **E. Section 1983 Claims for Declaratory Relief Against Judge Kapetan**

13 To the extent Plaintiff seeks declaratory relief at all in his Complaint, any claim for retrospective
14 declaratory relief (*i.e.*, a declaration that Plaintiff’s no-contest plea to DUI was not voluntary and
15 intelligent, that Judge Kapetan violated Plaintiffs’ due process rights by failing to provide Plaintiff with
16 the criminal complaint and failing to identify the person who signed it, and/or that Plaintiff was falsely
17 imprisoned by Judge Kapetan during his arraignment) is barred by *Heck* for the same reason(s) a money
18 judgment on those subjects would be barred by *Heck*: such a judgment would call into question the
19 validity of his conviction, as discussed above.

20 A Section § 1983 Claim for prospective (*i.e.*, forward-looking) declaratory relief is theoretically
21 possible. *Heck* does not bar claims for prospective declaratory relief. *See Rose v. California*, 356 F.
22 App’x 975 (9th Cir. 2009) (internal citations omitted). Likewise, neither the doctrine of judicial
23 immunity nor Section 1983’s immunity language specifically precludes claims for prospective
24 declaratory relief. *See Yellen v. Hara*, No. CIV. 15-00300 JMS, 2015 WL 4877805, at *5 (D. Haw. Aug.
25 13, 2015); *Ray v. Judicial Corrs. Servs., Inc.*, 2014 WL 5090723, at *4 (N.D. Ala. Oct. 9, 2014)

