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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDY E. CASTRO,
Plaintiff,
v.
CITY OF CLOVIS; et al.,
Defendants.

No. 1:19-cv-00821-DAD-SKO

ORDER GRANTING IN PART
DEFENDANTS' MOTIONS TO DISMISS
AND GRANTING PLAINTIFF LEAVE TO
AMEND

(Doc. Nos. 8, 9)

This matter is before the court on the motions to dismiss filed on behalf of defendant City of Clovis (the “City”) and defendants Clovis Unified School District (“CUSD”), Andrew Bolls, and Stephanie Hanks (collectively, the “CSUD defendants”). (Doc. Nos. 8, 9.) A hearing on the motions was held on October 1, 2019. Plaintiff Andy E. Castro appeared *pro se*, attorney Gregory Myers appeared telephonically on behalf of the City of Clovis, and attorney Ryan Porte appeared on behalf of defendants CUSD, Bolls, and Hanks. The court has considered the parties’ briefing and heard from the parties, and for the reasons set forth below, will grant the City’s motion in its entirety and grant the CUSD defendants’ motion in part.

BACKGROUND

On June 13, 2019, plaintiff filed this action, alleging violations of his rights to free speech and due process. (Doc. No. 1 (“Compl.”).) According to the complaint, plaintiff is a former

1 Clovis High School student who recently turned 18 and finished high school. (*Id.* at ¶ 8.)
2 Plaintiff was scheduled to attend his graduation ceremony on May 30, 2019, when his school
3 “revok[ed] his VIP sitting privilege in the graduation ceremony, remov[ed] him off the school
4 premises, and enjoin[ed] him from participating in his long-awaited graduation ceremony that
5 was by then only 3 hours away,” allegedly as punishment for a tweet that he had posted on
6 Twitter. (*Id.*) In that tweet, sent to a Nigerian friend on an unidentified date before his
7 graduation, plaintiff used the words “nigga” and “nigger,” apparently with his friend’s consent
8 and as a form of “intercultural communication.” (*Id.*) Another Twitter user saw the tweet and
9 reported it to the school, which, in addition to barring plaintiff from attending his graduation,
10 “order[ed] him to delete the alleged offensive message from his [T]witter account[.]” (*Id.*)

11 Based on these allegations, plaintiff asserts four causes of action seeking general and
12 punitive damages: (1) violation of his First Amendment right to free speech; (2) violation of his
13 Fifth Amendment right to due process; (3) violation of his right to free speech under Article I, § 2
14 of the California Constitution; and (4) violation of his right to free speech under California
15 Education Code § 48950(a). (Doc. No. 1.) Construing the complaint “liberally because it was
16 drafted by a pro se plaintiff,” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004), the court
17 observes that plaintiff appears to have brought his federal constitutional claims pursuant to 42
18 U.S.C. § 1983. (*Id.* at 1.)

19 On July 15, 2019, the City filed a Rule 12(b)(6) motion to dismiss on the basis that
20 plaintiff did not plead a single substantive allegation against it. (Doc. No. 8-1 at 2.) Plaintiff
21 filed his opposition to the motion on August 6, 2019, and requested leave to amend to add the
22 State of California as a defendant. (Doc. No. 15.) The City filed its reply on August 8, 2019.
23 (Doc. No. 16.)

24 Separately, defendants CUSD, Bolls, and Hanks moved to dismiss on July 16, 2019, for
25 failure to state a claim and for failure to comply with California’s Government Claims Act
26 (“CGCA”). (Doc. No. 9.) Plaintiff filed his opposition to that motion September 3, 2019, and
27 CUSD, Hanks, and Bolls replied on September 9, 2019. (Doc. Nos. 17, 19.)

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1 **LEGAL STANDARDS**

2 **A. Motion to Dismiss**

3 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
4 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Dismissal
5 can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
6 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
7 1990). A plaintiff is required to allege “enough facts to state a claim to relief that is plausible on
8 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility
9 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
10 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
11 (2009).

12 In determining whether a complaint states a claim on which relief may be granted, the
13 court accepts as true the allegations in the complaint and construes the allegations in the light
14 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
15 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth
16 of legal conclusions cast in the form of factual allegations. *U.S. ex rel. Chunie v. Ringrose*, 788
17 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations,
18 “it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*,
19 556 U.S. at 678. A pleading is insufficient if it offers mere “labels and conclusions” or “a
20 formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see*
21 *also Iqbal*, 556 U.S. at 676 (“Threadbare recitals of the elements of a cause of action, supported
22 by mere conclusory statements, do not suffice.”). Moreover, it is inappropriate to assume that the
23 plaintiff “can prove facts which it has not alleged or that the defendants have violated the . . . laws
24 in ways that have not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State*
25 *Council of Carpenters*, 459 U.S. 519, 526 (1983).

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1 **LEGAL ANALYSIS**

2 **A. The City’s Motion to Dismiss**

3 The City argues that it should be dismissed from this case because “[t]here is not a single
4 substantive allegation or reference to the City throughout the complaint.”¹ It notes:

5 [a]ll allegations in the Complaint are asserted against the Clovis
6 Unified School District (“CUSD”) or Clovis High School, where the
7 Plaintiff was allegedly a student. The City and CUSD are separate
8 entities and “City” has no authority, control or involvement in the
9 operations of CUSD or Clovis High School and CUSD are
10 completely separate, and there are no allegations to the contrary
11 within the Complaint.

12 (Doc. No. 8-1 at 2.)

13 Other than asserting that Clovis is a city located in Fresno County, the complaint does not
14 allege that the City itself engaged in any conduct that violated plaintiff’s rights and does not
15 explain how or why the City is responsible for plaintiff not being allowed to attend his high
16 school graduation. (Compl. at ¶ 4.) Although plaintiff argued in his opposition to the pending
17 motion to dismiss that the City is liable because defendants Bolls and Hanks are “[e]mployees of
18 City of Clovis and/or Clovis Unified School District” and “CUSD is . . . partially funded by City
19 of Clovis tax money,” the City flatly denies that Hanks and Bolls are its employees and that it
20 funds CUSD with its tax dollars. (Doc. Nos. 15 at 2; 16 at 2.) After the court questioned plaintiff
21 at the hearing on the pending motion, plaintiff conceded that he could not allege any facts to
22 support his claim that the City employs Bolls and Hanks and funds CUSD with tax revenue or
23 any other facts that would support his suit against the City. Hr’g Tr. at 4:16–22, *Castro v. City of*
24 *Clovis, et al.*, No. 1:19-cv-00821-DAD-SKO (E.D. Cal. Oct. 1, 2019). Accordingly, the City will
25 be dismissed from this action with prejudice.

26 **B. The CUSD Defendants’ Motion to Dismiss**

27 The CUSD defendants contend that plaintiff’s action should be dismissed because: (1)
28 plaintiff failed to allege compliance with California’s Government Claims Act (“CGCA”); and
29 (2) the right to free speech does not protect obscene speech. (Doc. No. 10.) Defendants also

¹ Aside from the allegation that the City “is an incorporated city in the County of Fresno.”
(Compl. at ¶ 4.)

1 argue that plaintiff failed to state a claim for a violation of due process because he did not allege
2 “sufficient facts to allege a cognizable legal theory.” (*Id.* at 6.)

3 1. The CGCA Bars Plaintiff’s State Law Claims But Does Not Apply to § 1983
4 Claims

5 Under the CGCA, “no suit for money or damages may be brought against a public
6 entity . . . until a written claim therefor has been presented to the public entity[.]” Cal. Gov. Code
7 § 945.4; *see also State of California v. Superior Court*, 32 Cal. 4th 1234, 1239 (2004) (“[F]ailure
8 to timely present a claim for money or damages” or “to allege facts demonstrating or excusing
9 compliance with the claim presentation requirement subjects a claim against a public entity to a
10 demurrer for failure to state a cause of action.”). “A suit for ‘money or damages’ includes all
11 actions where the plaintiff is seeking monetary relief, regardless whether the action is founded in
12 ‘tort, contract or some other theory.’” *Hart v. Alameda Cty.*, 76 Cal. App. 4th 766, 778 (1999)
13 (citation omitted); *see also City of Stockton v. Superior Court*, 42 Cal. 4th 730, 738 (2007). This
14 is true “whenever the primary purpose of a lawsuit is damages, even where that claim also
15 requests some non-pecuniary relief.” *Synergy Project Mgmt., Inc. v. City & Cty. of San*
16 *Francisco*, No. 17-cv-06763-JST, 2018 WL 2234596, at *6 (N.D. Cal. May 16, 2018) (citing
17 *Hart*, 76 Cal. App. 4th at 782).

18 Here, plaintiff has requested mainly money damages—\$5,000,000 in general damages and
19 \$5,000,000 in punitive damages, as well as attorney’s fees and costs. (Compl. at 6.)
20 Accordingly, plaintiff’s state law claims are subject to the CGCA. But plaintiff has alleged no
21 facts indicating compliance with or excusal of the CGCA’s claim presentation requirement.
22 (Doc. No. 8–1 at 3–4.) Plaintiff’s third and fourth causes of action, which are brought under state
23 law for money damages, are thus barred by the CGCA and will be dismissed. Plaintiff will,
24 however, be granted leave to amend in order to comply with the CGCA.

25 The claims presentation requirement, however, does not apply to all of plaintiff’s causes
26 of action. *See, e.g.*, Cal. Gov. Code § 905 (listing exceptions to the claim presentation
27 requirement). Civil rights claims brought under 42 U.S.C. § 1983 are also exempt from CGCA
28 requirements. *See Silva v. Crain*, 169 F.3d 608, 610 (9th Cir. 1999) (holding that “state notice of

1 claim statutes have no applicability to § 1983 actions”) (citation omitted). Thus, plaintiff’s First
2 and Fifth Amendment claims, which appear to be brought pursuant to § 1983, are exempt from
3 the CGCA’s requirements.

4 2. Plaintiff’s Tweets Are Not “Obscene” Speech

5 Defendants argue that plaintiff’s free speech claims must fail because the terms “nigga”
6 and “nigger” are obscene and therefore not protected speech. (Doc. No. 10 at 5–8.) It is true that
7 courts “have long held that obscene speech—sexually explicit material that violates fundamental
8 notions of decency—is not protected by the First Amendment.” *United States v. Williams*, 553
9 U.S. 285, 288 (2008). However, as plaintiff points out, the terms “nigga” and “nigger,” while
10 offensive to many, are facially not sexually explicit and, thus, cannot be considered obscene
11 under the framework set forth by the U.S. Supreme Court. *See id.* Thus, defendants’ motion to
12 dismiss on the basis that plaintiff’s tweets are obscene speech not protected by the First
13 Amendment will be denied.

14 3. The Fifth Amendment’s Due Process Clause Does Not Apply to Local
15 Governments

16 Plaintiff alleges that defendants deprived him of his Fifth Amendment right to due process
17 “without any right to be heard administratively or judicially[.]” (Compl. at ¶ 15.) However, the
18 Fifth Amendment’s due process clause only applies to the federal government.² *See Bingue v.*
19 *Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008) (holding that Fifth Amendment claims against
20 local governments are “plainly foreclosed by the Constitution” because “the Fifth Amendment’s
21 due process clause only applies to the federal government”). Because defendants CUSD, Bolls,
22 and Hanks are local government entities, or employees thereof, the Fifth Amendment cannot be
23 invoked against them. Accordingly, plaintiff’s second cause of action brought under the Fifth
24 Amendment will be dismissed with prejudice.

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26 ² The Fourteenth Amendment’s Due Process Clause, however, does apply to the States.
27 U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the
28 privileges or immunities of citizens of the United States; nor shall any State deprive any person of
life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction
the equal protection of the laws.”).

1 4. Plaintiff Cannot Recover Punitive Damages

2 The CUSD defendants contend that, under California law, plaintiff cannot recover
3 punitive damages against public entities such as CUSD. *See* Cal. Gov. Code § 818
4 (“Notwithstanding any other provision of law, a public entity is not liable for damages awarded
5 under Section 3294 of the Civil Code or other damages imposed primarily for the sake of
6 example and by way of punishing the defendant.”). Defendants also argue that punitive damages
7 are not available against defendants Bolls and Hanks because the complaint is “completely devoid
8 of any facts” showing that they “acted with fraud, oppression, or malice.” (Doc. No. 10 at 9).

9 The Supreme Court has held that “the immunity of a municipal corporation from punitive
10 damages at common law [is] not open to serious question” and that “a municipality is immune
11 from punitive damages under 42 U.S.C. § 1983.” *City of Newport v. Fact Concerts, Inc.*, 453
12 U.S. 247, 259, 271 (1981). Moreover, punitive damages are appropriate against defendants in
13 their individual capacities only when a plaintiff has established that they are guilty “of fraud,
14 oppression, or malice.” *See* Cal. Civ. Code § 3294(a); *Cruz v. HomeBase*, 83 Cal. App. 4th 160,
15 167 (2000) (“Punitive damages are awarded only where there is malice, oppression, or fraud,
16 defined . . . to mean intent to injure or willful and conscious disregard of others’ rights.”);
17 *Cisneros v. Instant Capital Funding Grp., Inc.*, 263 F.R.D. 595, 611 (E.D. Cal. 2009)
18 (“Allegations that the acts . . . were ‘arbitrary, capricious, fraudulent, wrongful and unlawful,’
19 like other adjectival descriptions of such proceedings, constitute mere conclusions of law” and are
20 insufficient to support a claim for punitive damages because “such allegations do not charge
21 malice” (citations omitted)) (collecting cases).

22 Here, plaintiff has cited no authority to support his request for the award of punitive
23 damages against CUSD. He has also not alleged maliciousness, oppression, or outrageousness—
24 or any facts that would support such claims—against defendants Bolls and Hanks. Moreover,
25 plaintiff has not responded to any of defendants’ arguments about his claim for punitive damages,
26 effectively conceding them. *See Contreras v. Esper*, No. 2:14-cv-01282-KJM-KJN, 2018 WL
27 1503678, at *3 (E.D. Cal. Mar. 27, 2018) (citing *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d
28 876, 888 (9th Cir. 2010) (“A plaintiff who makes a claim . . . in his complaint, but fails to raise

1 the issue in response to a defendant’s motion to dismiss . . . has effectively abandoned his claim .
2 . . .”) and *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014) (collecting cases and
3 finding that abandonment of a claim warrants dismissal without leave to amend or with
4 prejudice)). Therefore, plaintiff’s claims for punitive damages will be dismissed with prejudice.

5 **C. Leave to Amend**

6 In his opposition to the City’s motion to dismiss, plaintiff requested that the court grant
7 him leave to amend and to add the State of California as a defendant.³ In reviewing his request, a
8 more liberal standard applies:

9 In civil rights cases where the plaintiff appears pro se, the court must
10 construe the pleadings liberally and must afford plaintiff the benefit
11 of any doubt. A pro se litigant must be given leave to amend his or
12 her complaint unless it is ‘absolutely clear that the deficiencies of the
13 complaint could not be cured by amendment. Moreover, before
14 dismissing a pro se civil rights complaint for failure to state a claim,
15 the district court must give the plaintiff a statement of the complaint’s
16 deficiencies. Without the benefit of a statement of deficiencies, the
17 pro se litigant will likely repeat previous errors.

18 *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623–24 (9th Cir. 1988) (internal
19 quotations and citations omitted). “However, ‘a liberal interpretation of a [pro se] civil rights
20 complaint may not supply essential elements of the claim that were not initially pled.’” *Pena v.*
21 *Gardner*, 976 F.2d 469, 471 (9th Cir. 1992), *as amended* (Oct. 9, 1992) (quoting *Ivey v. Board of*
22 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

23 After considering defendants’ motions to dismiss, the only cognizable claim left in the
24 complaint is the First Amendment free speech claim against defendants CUSD, Bolls, and Hanks.
25 However, it appears that plaintiff may be able to allege sufficient facts to resuscitate at least some
26 of his other claims. Accordingly, plaintiff will be granted leave to amend so that he can attempt
27 to cure the deficiencies identified by the court above. However, plaintiff is not required to amend
28 his complaint; he may choose to proceed solely on his First Amendment claim against CUSD,
Bolls, and Hanks.

³ The State of California was referenced once in plaintiff’s complaint in its introductory sentence,
but the State was not included as a defendant on the Civil Docket Sheet and thus was not
summoned as part of this action. (*See Compl.*; Doc. No. 1-1.)

1 If, however, plaintiff chooses to amend his complaint, he must carefully follow the court's
2 instructions. To adequately plead state law claims that contain a request for money damages
3 against a government entity in California, plaintiff must comply with the CGCA's claim
4 presentation requirements, which are set forth in California Government Code § 910 *et seq.* To
5 state a due process claim against a state or local government, plaintiff must allege a violation of
6 the Fourteenth Amendment. If such a claim is brought pursuant to § 1983, a plaintiff must allege
7 in clear and specific terms how each defendant is involved in the conduct that deprived plaintiff
8 of his constitutional rights because:

9 There can be no liability under 42 U.S.C. § 1983 unless there is some
10 affirmative link or connection between a defendant's actions and the
11 claimed deprivation. *Rizzo v. Goode*, 423 U.S. 362 (1976); *May v.*
12 *Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v. Duffy*, 588
13 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory
allegations of official participation in civil rights violations are not
sufficient. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.
1982).

14 *Michoff v. El Dorado Cty.*, No. 2:17-cv-02584 CKD P, 2018 WL 2441583, at *3 (E.D. Cal. May
15 31, 2018). Moreover:

16 Plaintiff is informed that the court cannot refer to a prior pleading in
17 order to make plaintiff's amended complaint complete. Local Rule
18 220 requires that an amended complaint be complete in itself without
19 reference to any prior pleading. This is because, as a general rule, an
20 amended complaint supersedes the original complaint. *See Loux v.*
21 *Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an
amended complaint, the original pleading no longer serves any
function in the case. Therefore, in an amended complaint, as in an
original complaint, each claim and the involvement of each
defendant must be sufficiently alleged.

22 *Michoff*, 2018 WL 2441583, at *3. The court also reiterates its suggestion that plaintiff attempt to
23 retain counsel if he wishes to pursue this action.

24 Finally, the court turns to plaintiff's request to add the State of California as a defendant.
25 Although the State was mistakenly left off the docket, plaintiff admitted at the hearing on the
26 pending motion that he could provide no justification as to why the State should be added as a
27 party to this case. Hr'g Tr. at 4:7-9, *Castro v. City of Clovis, et al.*, No. 1:19-cv-00821-DAD-
28 SKO (E.D. Cal. Oct. 1, 2019). Even if the State had been named in this action, the complaint

1 does not contain any factual allegations indicating that it is liable for the alleged conduct that is
2 the basis of plaintiff's suit. Adding the State as a defendant would result in its dismissal for the
3 same reasons that the court is granting dismissal as to the City of Clovis and would be an exercise
4 in futility. Accordingly, plaintiff's request for leave to amend to add the State of California as a
5 defendant is denied.

6 CONCLUSION

7 For the reasons discussed above:

- 8 1. Defendant City of Clovis's motion to dismiss (Doc. No. 8) is granted with
9 prejudice;
- 10 2. Defendants CUSD, Bolls, and Hank's motion to dismiss (Doc. No. 9) is granted in
11 part:
 - 12 a. Plaintiff's state law claims are dismissed for failure to comply with
13 California's Government Claims Act;
 - 14 b. Plaintiff's Fifth Amendment claim is dismissed for failure to state a claim;
 - 15 c. Plaintiff's request for punitive damages is dismissed with prejudice;
- 16 3. Plaintiff's request to add the State of California as a defendant is denied;
- 17 4. Plaintiff is granted leave to amend for the purpose of curing the deficiencies in his
18 complaint; and
- 19 5. Any amended complaint shall be filed within 30 days from the date of service of
20 this order.

21 IT IS SO ORDERED.

22 Dated: November 15, 2019

23 
UNITED STATES DISTRICT JUDGE