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

JEFFERSON A. MCGEE and
PERSONS SIMILARLY SITUATED,

Plaintiffs,

No. CIV S-09-0740 GEB EFB PS

vs.

THE STATE OF CALIFORNIA,
et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21), pursuant to 28 U.S.C. § 636(b)(1). On October 19, 2009, the undersigned granted plaintiff's request to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 and dismiss plaintiff's complaint with leave to amend. Dckt. No. 3. That order explained that the determination that a plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

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1 The October 19, 2009 order further stated:

2 The court notes initially that plaintiff is a frequent pro se litigant in this court. A
3 cursory review of the court's dockets indicates that plaintiff has filed over ten
4 complaints. The instant complaint generally challenges "the State of California's
5 Policy of Discriminating Against African Americans in Law Enforcement
6 Programs and Activities." Limiting the challenged programs to those receiving
7 federal and state financial assistance, plaintiff asserts that this court has
8 jurisdiction pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§
9 2000d *et seq.*, and the California Unruh Civil Rights Act, California Civil Code §§
10 51 and 52. Plaintiff broadly alleges conduct in violation of these provisions by
11 "the State of California Department of Fair Employment and Housing, the State
12 of California Department of Justice, the State of California Department of
13 Alcoholic Beverage Control, the County of Sacramento, the City of Sacramento,
14 the City of Elk Grove, and City of Citrus Heights, the Elk Grove Unified School
15 District and their law enforcement officers. . . ." Dckt. No. 1, at 2; *see also*, ¶ 8
16 (naming the "Elk Grove School District Police Department").

17 Although plaintiff names only the State of California as defendant on the title
18 page of his complaint, he names several other entities (noted above) and
19 individuals throughout his complaint. For example, plaintiff states that the
20 following individuals "worked in concert to unlawfully seize plaintiff's property
21 and to unlawfully keep plaintiff and his family away from their business and
22 residence by use of intimidation by threats of violence and threats of arrest" –
23 "James Stinson, Mel Di Salvo, Willie Richardson, John Lawrence Tiner, John
24 Benjamin Tiner, John McGuinness, Lou Blanas, Thomas Hogan, Edward Brenner,
25 and John T. White." Compl., at 18. Elsewhere plaintiff appears to name as
26 defendants, *inter alia*, Arnold Schwarzenegger, Gray Davis, Peter Wilson,
Edmund G. Brown Jr., William Lockyer, Daniel Lungren, Jan Scully and
Thomas Hogan. *Id.* at 6-7.

17 Plaintiff indicates that this action is brought on behalf of himself, "doing business
18 as McGee and Associates, and Valley Hi Sports Bar & Grill." Compl., at ¶ 4. He
19 indicates that it is his intent to pursue a class action, noting that "Albert Glen
20 Thiel, Anthony Lee, Javon Drake, Donald Venerable, Milton Baker, plaintiff, and
21 their families consist of adult and minor citizens of the United States who are
22 predominately African Americans who have been denied their rights secured by
23 Title 42 §§ 1981, 1982 and 2000 and Cal. Civ. Code § 51 and 52 by the racial
24 discriminatory polices of the State of California as set forth in this complaint."
25 Compl., at ¶ 5; *see also* ¶ 11, adding Tibita Whittin.

22 In addition, throughout his complaint, plaintiff expands the legal bases upon
23 which he brings this action, including 42 U.S.C. §§ 1981, 1982, 1983, 1985,
24 1986, and 2000a, Cal. Gov't Code §§ 11135 *et seq.*, and the Fourteenth
25 Amendment. Plaintiff alleges generally that he and others have been denied
26 adequate law enforcement protections, unequal to that provided white citizens,
Compl., at ¶ 11; that government officials and some private citizens have
participated in a "vast racially motivated conspiracy to violate plaintiff's and
others rights," including conspiring, or aiding or inciting others, to commit
against plaintiff and others "attempted murder; attempted kidnap; torture; assault
with a deadly weapon; assault; battery; intimidation by threats of violence;

1 extortion; false imprisonment; malicious prosecution; robbery; burglary; breaking
2 and entering into plaintiff's property; perjury; forgery; unlawful sexual conduct;
3 and unlawful search and seizure of plaintiff's property causing plaintiff to lose
4 income." Compl., at ¶ 12.

5 In short, the court is unable to ascertain the precise conduct plaintiff challenges,
6 against which defendant(s), and on what legal bases. The court will therefore
7 dismiss the complaint for failure to state a claim, as well as failure to comply with
8 the requirements of Fed. R. Civ. P. 8(a) (i.e., that the complaint set forth a short
9 and plain statement of the claim(s), showing entitlement to relief and giving the
10 defendant(s) fair notice of the claim(s) against them).

11 Dckt. No. 3 at 4-5 (internal footnote omitted).

12 Despite these admonishments, plaintiff thereafter filed a one hundred forty-three (143)
13 page amended complaint and a one hundred fifty-five (155) page second amended complaint,
14 both of which suffer from many of the same defects as plaintiff's previously lodged complaint.
15 Upon review of both the amended complaint and the second amended complaint, it appears that
16 plaintiff has disregarded the court's admonishments regarding Rule 8 and regarding other aspects
17 of his pleading and claims.

18 Although *pro se* pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519,
19 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if
20 it fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*
21 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
22 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). "[A] plaintiff's obligation to provide the 'grounds' of
23 his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of
24 a cause of action's elements will not do. Factual allegations must be enough to raise a right to
25 relief above the speculative level on the assumption that all of the complaint's allegations are
26 true." *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

In reviewing a complaint under this standard, the court must accept as true the allegations
of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740

1 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in
2 the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A *pro se* plaintiff must
3 satisfy the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule
4 8(a)(2) requires a complaint to plead "factual content that allows the court to draw reasonable
5 that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
6 (2009). This plausibility requirement is "not akin to a 'probability requirement,' but it asks for
7 more than a sheer possibility that a defendant has acted unlawfully." *Id.*

8 DISMISSAL OF COMPLAINT

9 The court finds that plaintiff's amended complaint and second amended complaint fail to
10 comply with Fed. R. Civ. P. 8(a)(2), in that they do not contain a short and plain statement of
11 plaintiff's claims showing entitlement to relief. Although the Federal Rules of Civil Procedure
12 adopt a flexible pleading policy, a complaint must state the elements of the claim sufficient to
13 put defendants fairly on notice of the claims against them. *Jones v. Cmty. Redev. Agency*, 733
14 F.2d 646, 649 (9th Cir. 1984). Plaintiff's amended complaint and second amended complaint
15 fail to concretely put any of the numerous named defendants on notice of how their specific
16 action(s) resulted in a violation of plaintiff's civil rights.

17 Additionally, because of the lack of brevity, the court cannot determine whether the
18 amended complaint and second amended complaint are frivolous or whether they can be
19 amended to state a claim. Plaintiff appears to allege that he was treated disparately based on his
20 race. To state a claim for a violation of the equal protection clause, a plaintiff must show that the
21 defendants acted with an intent or purpose to discriminate against the plaintiff based upon
22 membership in a protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998);
23 *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Based on the conclusory allegations, plaintiff alleges
24 that the State of California, its attorneys, officers, municipalities, agencies, employees, and all
25 persons acting in concert with it, are all engaged in a conspiracy, the goal of which is to
26 discriminate against African Americans, Latin Americans, and Asian Americans in California in

1 violation of Title IX of the Civil Rights Act of 1964. Plaintiff, however, merely addresses a
2 litany of what he believes to be actions taken by the State of California in furtherance of a
3 racially discriminatory conspiracy. At no point does plaintiff sufficiently demonstrate that any
4 of the named defendants acted with specific racial animus or discriminatory intent. Plaintiff
5 merely concludes that each of the actions taken by defendants were fueled by racial animus.
6 Therefore, plaintiff has not stated a claim for violation of the equal protection clause.

7 Additionally, in order to state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1)
8 the violation of a federal constitutional or statutory right; and (2) that the violation was
9 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48
10 (1988). Plaintiff’s claims against private persons are thus improper under § 1983. Further, since
11 there is no respondeat superior liability under § 1983, municipalities (and their departments) may
12 be sued under § 1983 only upon a showing that an official policy or custom caused the
13 constitutional tort. *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280
14 (1977); *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Haugen v.*
15 *Brosseau*, 351 F.3d 372, 393 (9th Cir. 2003) (granting summary judgment to city and city police
16 department under *Monell*). “A local government entity cannot be held liable under § 1983 unless
17 the plaintiff alleges that the action inflicting injury flowed from either an explicitly adopted or a
18 tacitly authorized [governmental] policy.” *Ortez v. Wash. County*, 88 F.3d 804, 811 (9th Cir.
19 1996) (citation and quotations omitted) (alteration in original). “[L]ocal governments, like any
20 other § 1983 ‘person,’ . . . may be sued for constitutional deprivations visited pursuant to
21 governmental ‘custom’ even though such a custom has not received formal approval through the
22 body’s official decisionmaking channels.”¹ *Monell*, 436 U.S. at 690-91.

24 ¹ “The custom must be so “persistent and widespread” that it constitutes a “permanent
25 and well settled city policy.” *Monell*, 436 U.S. at 691. Liability for improper custom may not be
26 predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient
duration, frequency and consistency that the conduct has become a traditional method of
carrying out policy. *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984); *see also*

1 To the extent plaintiff seeks to pursue claims under 42 U.S.C. § 1983 against
2 prosecutorial defendants, plaintiff is reminded that “[p]rosecutors are absolutely immune from
3 liability under § 1983 for their conduct insofar as it is ‘intimately associated’ with the judicial
4 phase of the criminal process.” *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir. 2005) (quoting
5 *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Prosecutors are fully protected by absolute
6 immunity when performing traditional activities related to the initiation and presentation of
7 criminal prosecutions. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Botello*, 413 F.3d at
8 976 (it is “well established that a prosecutor has absolute immunity for the decision to prosecute
9 a particular case.”). Thus, even charges of malicious prosecution, falsification of evidence,
10 coercion of perjured testimony and concealment of exculpatory evidence will be dismissed on
11 grounds of prosecutorial immunity. *See Stevens v. Rifkin*, 608 F. Supp. 710, 728 (N.D. Cal.
12 1984).

13 Additionally, plaintiff’s claims for damages against the state, its agencies or its officers
14 for actions performed in their official capacities are barred under the Eleventh Amendment,
15 unless the state waives its immunity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also*
16 *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989) (neither a state nor its officials
17 acting in their official capacities are persons under § 1983). Section 1983 does not abrogate the
18 states’ Eleventh Amendment immunity from suit. *See Quern v. Jordan*, 440 U.S. 332, 344-45
19 (1979). Thus, plaintiff’s claims for damages against these state defendants cannot proceed.

20 Similarly, plaintiff fails to state a claim under § 1985. Section 1985 proscribes
21 conspiracies to interfere with civil rights. *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039
22 (9th Cir. 1990). To state a claim for conspiracy under § 1985(3), a plaintiff must allege (1) a
23 conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or
24

25 *Meehan v. Los Angeles County*, 856 F.2d 102 (9th Cir. 1988) (two incidents not sufficient to
26 establish custom); *Davis v. Ellensburg*, 869 F.2d 1230 (9th Cir. 1989) (manner of one arrest
insufficient to establish policy).

1 of equal privileges and immunities under the laws, (3) an act by one of the conspirators in
2 furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any
3 right or privilege of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03
4 (1971). Further, a plaintiff must allege that some racial, or class-based, invidiously
5 discriminatory animus lay behind the conspirators' action. *Butler v. Elle*, 281 F.3d 1014, 1028
6 (9th Cir. 2002) (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68, (1993)
7 (internal citations and quotations omitted)).

8 Here, plaintiff fails to allege a conspiracy between the defendants, let alone one that was
9 aimed at interfering with his constitutional rights. *Butler*, 281 F.3d at 1028. Again, plaintiff has
10 failed to state any basis for his claims of racial animus and has provided this court only with a
11 list of instances that he believes show that he has suffered discrimination at the hands of the
12 state. Plaintiff, however, has not stated anything to indicate that the actions of defendants were
13 propelled by racial animus. He relies solely on his own conclusory allegations in formulating his
14 assertions. Thus, plaintiff fails to state a claim under § 1985.

15 Because it appears plaintiff alleges no basis for this court's jurisdiction and fails to
16 articulate a cognizable claim for relief, and because plaintiff continues to fail to comply with the
17 requirements of Rule 8, as discussed above, the court must dismiss the complaint. However,
18 plaintiff is granted leave to file a third amended complaint that complies with Rule 8 and corrects
19 the deficiencies addressed herein. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en
20 banc) (district courts must afford pro se litigants an opportunity to amend to correct any
21 deficiency in their complaints). Should plaintiff choose to file a third amended complaint, he
22 shall identify each defendant in both the caption and the body of the amended complaint, and
23 clearly set forth the allegations against each such defendant. He shall also specify a basis for this
24 court's subject matter jurisdiction.

25 Plaintiff is informed that plaintiffs are not lawyers, and may not represent individuals or a
26 class. It is well established that a layperson cannot ordinarily represent the interests of a class.

1 *See McShane v. United States*, 366 F.2d 286 (9th Cir. 1966). In direct terms, plaintiff cannot
2 “fairly and adequately protect the interests of the class,” as required by Rule 23(a)(4) of the
3 Federal Rules of Civil Procedure. *See Martin v. Middendorf*, 420 F. Supp. 779 (D.D.C. 1976).
4 This action, therefore, will not be construed as a class action and instead will be construed as an
5 individual civil suit brought by plaintiff.

6 Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to
7 make an amended complaint complete. Local Rule 220 requires that an amended complaint be
8 complete in itself. This is because, as a general rule, an amended complaint supersedes the
9 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once
10 plaintiff files an amended complaint, the original no longer serves any function in the case.
11 Therefore, “a plaintiff waives all causes of action alleged in the original complaint which are not
12 alleged in the amended complaint,” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.
13 1981), and defendants not named in an amended complaint are no longer defendants. *Ferdik v.*
14 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

15 Finally, the court cautions plaintiff that failure to comply with the Federal Rules of Civil
16 Procedure, this court’s Local Rules, or any court order may result in a recommendation that this
17 action be dismissed. *See Local Rule 110*.

18 REQUEST TO PERMIT THE ATTORNEY GENERAL TO INTERVENE

19 Plaintiff requests that the Court “permit the Attorney General to intervene, and certify
20 that this case is of general public importance pursuant to Title 42 U.S.C. § 2000a-3.” Dckt. No.
21 6. Because the amended complaint and second amended complaint are dismissed, plaintiff’s
22 request is denied without prejudice.

23 TEMPORARY RESTRAINING ORDER

24 Plaintiff also seeks a temporary restraining order preventing the State of California and
25 her attorneys, officers, municipalities, agencies, employees, and all persons in active concert
26 with them:

1 (1) from continuing to use intimidation by threats of violence and
2 threats of arrest to prevent plaintiff and his family from returning
3 to his residence located at 5617 Bonniemae Way Sacramento,
4 California 95824 and his personal property; and (2) from further
5 prosecuting the unlawful detainer action in the matter of *McGee v.*
6 *McGee et al.*, No. 09UD12194.

7 Dckt. No. 8 at 1; *see also* Dckt. No. 7. Plaintiff contends that “the State of California, Thomas
8 M. Hogan, and other persons are using law enforcement programs and activities receiving
9 federal financial assistance to unlawfully prevent plaintiff and his family from the same rights, in
10 the State of California as is enjoyed by European American citizens,” and that plaintiff and his
11 family “will suffer irreparable injury” if defendants are not restrained or enjoined. Dckt. No. 8 at
12 1-2.

13 Plaintiff fails to meet the requirements for a temporary restraining order. “The standards
14 for granting a temporary restraining order and a preliminary injunction are identical.” *Haw.*
15 *County Green Party v. Clinton*, 980 F. Supp. 1160, 1164 (D. Haw. 1997); *cf. Stuhlberg Int’l*
16 *Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (observing that an
17 analysis of a preliminary injunction is “substantially identical” to an analysis of a temporary
18 restraining order). The Ninth Circuit recently modified its standard for preliminary injunctive
19 relief to conform to the Supreme Court’s admonition in *Winter v. Natural Resources Defense*
20 *Council, Inc.*, that the moving party must demonstrate that, absent an injunction, irreparable
21 injury is not only possible, but likely. *Winter v. Natural Resources Defense Council, Inc.*, ___
22 U.S. ___, 129 S. Ct. 365, 375-76 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.
23 2009). Under the new standard, “preliminary injunctive relief requires a party to demonstrate
24 ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
25 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction
26 is in the public interest.’” *Id.* (quoting *Winter*, 129 S.Ct. at 375-76).

27 Here, plaintiff’s amended complaint and second amended complaints are dismissed;
28 therefore, necessarily plaintiff has not shown any likelihood of success on the merits. Moreover,

1 Federal Rule of Civil Procedure 65(b) specifically provides that “[t]he court may issue a
2 temporary restraining order without written or oral notice to the adverse party or its attorney only
3 if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and
4 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
5 in opposition; and (B) the movant’s attorney certifies in writing any efforts made to give notice
6 and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1). Local Rule 231(a) also
7 provides that “Except in the most extraordinary of circumstances, no temporary restraining order
8 shall be granted in the absence of actual notice to the affected party and/or counsel, by telephone
9 or other means, or a sufficient showing of efforts made to provide notice Appropriate
10 notice would inform the affected party and/or counsel of the intention to seek a temporary
11 restraining order, the date and time for hearing to be requested of the Court, and the nature of the
12 relief to be requested.” Plaintiff’s temporary restraining order motions did not include either (1)
13 an affidavit or a verified complaint showing that immediate and irreparable injury, loss, or
14 damage would result to plaintiff before defendants could be heard in opposition, or (2) a
15 certification in writing that efforts were made to give notice or reasons why notice should not be
16 required. Based on the record before the court, it appears that none of the defendants have been
17 provided with actual notice of plaintiff’s temporary restraining order motions. Therefore, the
18 undersigned will recommend that the temporary restraining order motions be denied.

19 Accordingly, IT IS ORDERED that:


- 20 1. Plaintiff’s amended complaint and second amended complaints, Dckt. Nos. 4 and 5,
21 are dismissed with leave to amend;
- 22 2. Plaintiff’s motion to permit the Attorney General to intervene, Dckt. No. 6, is denied;
23 and,
- 24 3. Plaintiff is granted thirty days from the date of service of this order to file an amended
25 complaint. The amended complaint must bear the docket number assigned to this case and must
26 be labeled “Third Amended Complaint.” Failure to timely file an amended complaint in

1 accordance with this order will result in a recommendation this action be dismissed.

2 IT IS FURTHER RECOMMENDED that plaintiff's motions for a temporary restraining
3 order, Dckt. Nos. 7 and 8, be denied.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
6 after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
9 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
10 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: May 20, 2010.

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13 EDMUND F. BRENNAN
14 UNITED STATES MAGISTRATE JUDGE
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