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

TERRYLYN McCAIN,

Plaintiff,

No. CIV S-10-3170 JAM CKD PS

vs.

STOCKTON POLICE
DEPARTMENT, et al.

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

Defendants Adair, Gonzalez, Hughes, Reynosa, Teague, and Stockton Police Department’s (“City Defendants”) motion for judgment on the pleadings came on regularly for hearing on September 28, 2011. Plaintiff Terrylyn McCain, who is proceeding pro se, appeared on her own behalf. Marciana Arredondo appeared on behalf of the City Defendants. No appearance was made for the remaining defendant, Evangelina Duran dba Brownies Towing. Also pending before the court is plaintiff’s motion for a default judgment against defendant Duran. Upon review of the documents in support and opposition to the motions, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

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1 BACKGROUND

2 This civil rights action arises from a traffic stop resulting in impoundment of
3 plaintiff's vehicle, as well as her subsequent arrest. On November 3, 2010, at approximately
4 3:45 p.m., plaintiff was driving eastward on "Quail Lakes" in her 2006 White Ford Diesel 4x4
5 (the "Vehicle"). (See First Amended Complaint For Damages, Dkt. No. 33 ["FAC"] ¶¶ 18-19.)
6 It appears from plaintiff's somewhat confusing allegations that defendant Reynosa pulled
7 plaintiff over by activating his patrol car's emergency lights. (FAC ¶¶ 26-30.) Plaintiff's vehicle
8 had no license plates, and plaintiff admits in her complaint that the Vehicle was not registered.
9 (FAC ¶ 75.) Subsequently, other police officers, defendants Adair, Gonzalez, and Teague,
10 arrived at the scene. (FAC ¶¶ 39-50.) Plaintiff failed to produce a driver's license, which she
11 admits she does not have. (FAC ¶ 74.) Plaintiff's photo and fingerprints were taken, and a tow
12 truck was called. (FAC ¶ 47, 59-62.) When the tow truck from Brownies Towing arrived, the
13 Vehicle was searched, towed away, and impounded. (FAC ¶¶ 63-70.) Plaintiff was apparently
14 not arrested at that time.

15 On November 16, 2010, at approximately 11:00 a.m., plaintiff went to the
16 Stockton Police Department and presented the bill of sale for the Vehicle in an attempt to get it
17 back. (FAC ¶¶ 76-77.) At that time, defendant Hughes arrested plaintiff pursuant to a bench
18 warrant that had been issued by the San Joaquin County Superior Court. (FAC ¶¶ 78-85;
19 Defendants' Request for Judicial Notice ["RJN"] Ex. B.) Plaintiff was searched, locked in a
20 holding cell for more than an hour, and then handcuffed and transported to the San Joaquin
21 County Jail. (FAC ¶¶ 86-92.) There, plaintiff alleges, she was "tortured" and "suffered
22 excruciating pain" at the hands of three unknown deputies. (FAC ¶ 93.) She was locked in a
23 "freezing cold solitary confinement cell" without her coat, boots, socks, or hat, and was refused a
24 phone call. (FAC ¶¶ 94-96.) After four hours, plaintiff was released without bail. (FAC ¶¶ 97-
25 103.)

26 \\\

1 On November 23, 2010, plaintiff filed her initial complaint in this action, to which
2 City Defendants filed an answer on December 20, 2010. (Dkt. Nos. 1, 11.) On January 11, 2011,
3 plaintiff filed a motion to amend her complaint along with a first amended complaint, but failed
4 to properly notice the hearing or serve any of the defendants. (Dkt. Nos. 20, 21.) Accordingly,
5 the motion was denied without prejudice. (Dkt. No. 30.)¹ Subsequently, on March 2, 2011,
6 plaintiff again filed a motion to amend her complaint (without noticing it for hearing) along with
7 a proposed first amended complaint. (Dkt. Nos. 32, 33.) After a scheduling conference, during
8 which it was stipulated that the City of Stockton could be added as a defendant, plaintiff's
9 motion was granted and the action proceeded on the operative FAC. (Dkt. No. 38.)² The court
10 made clear that no further joinder of parties or amendment to pleadings would be permitted
11 except with leave of court and upon a showing of good cause. (Dkt. No. 38.)

12 The FAC contains five causes of action for violation of plaintiff's rights under the
13 (1) First and Fourteenth Amendments³; (2) Fourth and Fourteenth Amendments; (3) Fifth and
14 Fourteenth Amendments; (4) Sixth and Fourteenth Amendments; and (5) Eighth and Fourteenth
15 Amendments. (FAC ¶¶ 116-120.) In each of these causes of action, plaintiff also alleges that she
16 has been deprived of her "right to travel on the public right of ways." (FAC ¶¶ 116-120.) The
17 court construes these causes of action as being brought pursuant to 42 U.S.C. § 1983.
18 Additionally, plaintiff generally alleges liability under multiple other statutes, including 42

20 ¹ At that time, the court noted that plaintiff had filed numerous pleadings since the
21 commencement of the action, including deposition notices and motions that were not properly
22 noticed for hearing or served on defendants. As such, the court imposed limits on plaintiff's
future filings. (See Dkt. No. 30.)

23 ² The answer previously filed by the Stockton Police Department and the individual
officers were deemed an answer on behalf of the City of Stockton.

24 ³ The Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of
25 Rights (including most provisions of the First, Fourth, Fifth, Sixth, and Eighth Amendments) and
26 makes it applicable to the states and local governments. See Daniels v. Williams, 474 U.S. 327,
337 (1986); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992); Oliver
v. U.S., 466 U.S. 170, 187 (1984).

1 U.S.C. §§ 1985, 1986, 1988; 18 U.S.C. §§ 4, 241, 242; and 42 U.S.C. § 2000d-7. (FAC ¶ 3.)

2 The parties' filings indicate that a significant amount of written discovery and depositions has
3 already been completed.

4 DISCUSSION

5 CITY DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

6 "After the pleadings are closed – but early enough not to delay trial – a party may
7 move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Because the motions are
8 functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to
9 its Rule 12(c) analog." Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir.1989).
10 Dismissal may be granted where there is no cognizable legal theory or lack of sufficient facts
11 alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
12 (9th Cir.1990). In considering a motion for judgment on the pleadings, the Court accepts all
13 factual allegations in the complaint as true and must construe them in the light most favorable to
14 the non-moving party. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). "[A] judgment on
15 the pleadings is appropriate when, even if all allegations in the complaint are true, the moving
16 party is entitled to judgment as a matter of law." Westlands Water Dist. v. Firebaugh Canal, 10
17 F.3d 667, 670 (9th Cir.1993).

18 Request for Judicial Notice

19 City Defendants filed a request for judicial notice along with their motion. (Dkt.
20 No. 54-3.) Although a court generally is confined to the pleadings on a Rule 12(c) motion, it can
21 also consider facts which may be judicially noticed. Mullis v. United States Bankruptcy Ct., 828
22 F.2d 1385, 1388 (9th Cir. 1987). "A judicially noticed fact must be one not subject to reasonable
23 dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court
24 or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
25 reasonably be questioned." Fed. R. Evid. 201(b). Consideration of these documents outside the
26 complaint will not convert the motion into a motion for summary judgment. United States v.

1 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

2 Here, the court takes judicial notice of Exhibit B (a bench warrant), Exhibit D (a
3 printout from the records of the Department of Motor Vehicles) and Exhibits E, F, and G (minute
4 orders from San Joaquin Superior Court), because these are public records whose accuracy
5 cannot reasonably be questioned. See Mack v. South Bay Beer Distributors, 798 F.2d 1279,
6 1282 (9th Cir. 1986), abrogated on other grounds, Astoria Fed. Sav. Etc. v. Solimino, 501 U.S.
7 104 (1991). The court will not take judicial notice of Exhibit A, which consists of alleged photos
8 of the Vehicle taken by the Stockton Police Department and is not the proper subject of judicial
9 notice. Furthermore, the court declines to take judicial notice of Exhibit C (a police report).
10 Although administrative reports are usually the proper subject of judicial notice, the Ninth
11 Circuit has suggested that courts should not take judicial notice of police reports. Ritchie, 342
12 F.3d at 909. Based on the FAC and plaintiff's opposition, it is clear that plaintiff disputes some
13 of the statements in the police report, and judicial notice would be improper.

14 Finally, the court declines to consider the Declaration of Marci A. Arredondo.
15 (Dkt.No. 54-2.) This declaration attempts to establish facts related to counsel's observations at
16 depositions conducted in this matter. Because these proffered facts are wholly extraneous to the
17 FAC and not the proper subject of judicial notice, the court will not consider them for purposes
18 of this motion.

19 Section 1983 Claims

20 To state a claim under section 1983, a plaintiff must allege that: (1) defendant
21 was acting under color of state law at the time the complained of act was committed; and (2)
22 defendant's conduct deprived plaintiff of rights, privileges or immunities secured by the
23 Constitution or laws of the United States. 42 U.S.C. § 1983; see West v. Atkins, 487 U.S. 42, 48
24 (1988). Here, there is no dispute that the individual officers were acting under color of state law.
25 West, 487 U.S. at 50 ("generally, a public employee acts under color of state law while acting in
26 his official capacity or while exercising his responsibilities pursuant to state law.") Instead, City

1 Defendants contend that the FAC fails to allege facts that suggest that the individual officers
2 violated plaintiff's constitutional rights.

3 In regards to plaintiff's claims against the Stockton Police Department and the
4 City of Stockton, these claims must satisfy the requirements of Monell v. New York City Dep't
5 of Social Services, 436 U.S. 658, 691 (1978). Since there is no respondeat superior liability
6 under § 1983, counties and municipalities may be sued under § 1983 only upon a showing that an
7 official policy or custom caused the constitutional tort. Id. Plaintiff has alleged in conclusory
8 fashion that the Stockton Police Department and/or City of Stockton "as a policy and custom,
9 neglected to train, supervise, control, correct the abuse of authority, or curtail the outrageous
10 conduct, or discourage the unlawful abuse of authority" by the individual officers. (FAC ¶ 111.)
11 However, because any Monell claim here necessarily rests on underlying constitutional violations
12 by the individual officers, the court first evaluates whether plaintiff has stated a claim for any
13 such constitutional violations.

14 First Cause of Action for Violation of First Amendment Rights

15 The First Amendment to the United States Constitution provides that:

16 Congress shall make no law respecting an establishment of
17 religion, or prohibiting the free exercise thereof; or abridging the
18 freedom of speech, or of the press; or the right of the people
peaceably to assemble, and to petition the Government for a
redress of grievances.

19 U.S. CONST. amend. I.

20 Although plaintiff contends that she was deprived of her First Amendment "right
21 to freedom of expression and redress of grievance," all her allegations related to this cause of
22 action concern the stop and search of plaintiff and her Vehicle. None of the facts alleged by
23 plaintiff even remotely implicates her First Amendment rights, and this cause of action is clearly
24 frivolous. Because it is unlikely that plaintiff will be able to allege a First Amendment violation
25 in this action challenging the search and seizure of her Vehicle, and her subsequent arrest, this
26 cause of action should be dismissed without leave to amend.

1 Second Cause of Action for Violation of Fourth Amendment Rights

2 Although the allegations related to this cause of action are somewhat confusing,
3 plaintiff essentially claims that her Fourth Amendment rights were violated when she was
4 stopped and her Vehicle searched and impounded without a warrant on November 3, 2010.

5 The Fourth Amendment provides that:

6 The right of the people to be secure in their persons, houses,
7 papers, and effects, against unreasonable searches and seizures,
8 shall not be violated, and no Warrants shall issue, but upon
9 probable cause, supported by Oath or affirmation, and particularly
describing the place to be searched, and the persons or things to be
seized.

10 U.S. CONST. amend. IV. The United States Supreme Court has held that, in the Fourth
11 Amendment context, the expectation of privacy as to automobiles is reduced. “Automobiles,
12 unlike homes, are subjected to pervasive and continuing governmental regulation and controls,
13 including periodic inspection and licensing requirements. As an everyday occurrence, police
14 stop and examine vehicles when license plates or inspection stickers have expired, or if other
15 violations ... are noted” South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

16 A warrantless traffic stop is permissible under the Fourth Amendment “where the
17 police have probable cause to believe a traffic violation has occurred.” Whren v. U.S., 517 U.S.
18 806, 810 (1996). Indeed, a traffic stop may be supported by “reasonable suspicion” rather than
19 probable cause. U.S. v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000); U.S. v. Lopez-Soto, 205
20 F.3d 1101, 1104 (9th Cir. 2000). Furthermore, “[t]he authority of police to seize and remove
21 from the streets vehicles impeding traffic or threatening public safety and convenience is beyond
22 challenge.” Opperman, 428 U.S. at 369. Impoundment is proper when “the driver’s violation of
23 a vehicle regulation prevents the driver from lawfully operating the vehicle....” Miranda v. City
24 of Cornelius, 429 F.3d 858, 865 (9th Cir. 2005). Additionally, “[a]n inventory search of the
25 stopped vehicle is permissible and acceptable police operating procedure if it is made in good
26 faith compliance with reasonable police regulations. U.S. v. Bass, 325 F.3d 847, 850 (2003); see

1 also Colorado v. Bertine, 479 U.S. 367, 374 (1987) (holding that officer’s search of closed
2 backpack in car, initiated after arrest but before the tow truck arrived, was a proper inventory
3 search).

4 Here, plaintiff was pulled over for driving without proper license plates and did
5 not produce a valid driver’s license upon request. Plaintiff admits in the FAC that the Vehicle
6 was not registered and that she does not have a current driver’s license. (FAC ¶¶ 74, 75.)

7 Therefore, not only was the traffic stop reasonable under the Fourth Amendment, but the officers
8 were also justified in impounding plaintiff’s vehicle under the facts alleged. California Vehicle
9 Code section 14602.6(a)(1) states:

10 Whenever a peace officer determines that a person was driving a
11 vehicle while his or her driving privilege was suspended or
12 revoked ... the peace officer may either immediately arrest that
13 person and cause the removal and seizure of that vehicle....

13 Cal. Veh. Code § 14602.6(a)(1). The California statute is entirely consistent with the Fourth
14 Amendment, which allows impoundment of the vehicle when “the driver’s violation of a vehicle
15 regulation prevents the driver from lawfully operating the vehicle....” Miranda, 429 F.3d at 865.
16 Consequently, the officers were entitled to have plaintiff’s Vehicle towed and to conduct an
17 inventory search of the Vehicle associated with the impoundment.

18 Additionally, if plaintiff bases her claim for violation of the Fourth Amendment
19 on the search of her person and belongings conducted at the time of her arrest on November 16,
20 2010, that claim is also without merit. See U.S. v. Edwards, 415 U.S. 800, 802 (1974) (holding
21 that the Fourth Amendment permits warrantless searches incident to custodial arrests).

22 Thus, the FAC fails to allege a cognizable claim for violation of plaintiff’s Fourth
23 Amendment rights. Given plaintiff’s admissions in the FAC, it is implausible that plaintiff will
24 be able to allege a Fourth Amendment violation as a result of the traffic stop, the impoundment
25 and inventory search of her Vehicle, or the search incident to her arrest. Accordingly, the second
26 cause of action should be dismissed without leave to amend.

1 In addition to plaintiff's Fourth Amendment allegations, but somewhat related to
2 them, plaintiff also claims in each cause of action that she has been deprived of her "right to
3 travel on the public right of ways." (FAC ¶¶ 116-120.) Throughout her 65-page opposition,
4 plaintiff challenges the authority of the State of California to require her to have a driver's license
5 and register the Vehicle, arguing that she does not have a "contract" with the State of California.
6 (See e.g. Pl.'s Opp., Dkt. No. 57, at 4.) To the extent plaintiff contends that her fundamental
7 right to interstate travel is violated by impoundment of her Vehicle or state requirements that she
8 register the Vehicle and possess a valid driver's license, that claim fails as a matter of law. See
9 Miller v. Reed, 176 F.3d 1202, 1205-06 (9th Cir. 1999) (holding that while there is a
10 fundamental right to interstate travel, no fundamental right to drive a motor vehicle exists that
11 can be abridged by denial of a driver's license).

12 Third Cause of Action for Violation of Fifth and Fourteenth Amendment Rights

13 The Fifth Amendment to the United States Constitution provides:

14 No person shall be held to answer for a capital, or otherwise
15 infamous crime, unless on a presentment or indictment of a Grand
16 Jury ...; nor shall any person be subject for the same offence to be
17 twice put in jeopardy of life or limb; nor shall be compelled in any
18 criminal case to be a witness against himself, nor be deprived of
19 life, liberty, or property, without due process of law; nor shall
20 private property be taken for public use, without just
21 compensation.

19 U.S. CONST. amend. V.

20 The FAC essentially restates most of the language from the Fifth Amendment
21 without specifically alleging how plaintiff's Fifth Amendment rights were violated. However, to
22 the extent plaintiff claims that her Vehicle was impounded "without due process" (here,
23 presumably under the Due Process Clause of the Fourteenth Amendment) that claim is without
24 merit for the reasons discussed above. Also, any claim that plaintiff's Vehicle was taken
25 "without just compensation" fails as a matter of law, because "property seized and retained
26 pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause"

1 of the Fifth Amendment. AmeriSource Corp. v. United States, 525 F.3d 1149, 1153 (Fed. Cir.
2 2008).

3 Finally, in the event plaintiff contends that she was compelled to give evidence
4 against herself when she was asked to present a current driver's license (which she admits she
5 did not have), this fails to state a claim for a Fifth Amendment violation. "It is well established
6 that the privilege [against self-incrimination] only attaches to testimonial or communicative
7 evidence." Paine v. McCarthy, 527 F.2d 173, 177 (9th Cir. 1975); see also Sherman v. Babbitt,
8 772 F.2d 1476, 1478 (9th Cir. 1985) (enforcement of driver's financial responsibility statute does
9 not implicate Fifth Amendment's privilege against self-incrimination, in part because act of
10 handing over insurance certificate is not testimonial). Here, the act of handing over a driver's
11 license would not be testimonial or communicative, and accordingly there could be no Fifth
12 Amendment violation on this basis. Additionally, a police officer is specifically authorized by
13 California law to make such a request. See Cal. Veh. Code § 12951(b) ("The driver of a motor
14 vehicle shall present his or her license for examination upon demand of a peace officer enforcing
15 the provisions of this code.")

16 Because plaintiff has failed to state a valid claim for violation of her Fifth and
17 Fourteenth Amendment rights, and there is no plausible reason to believe that the complaint
18 could be further amended to state such a claim, the third cause of action should be dismissed
19 without leave to amend.

20 Fourth Cause of Action for Violation of Sixth Amendment Rights

21 The Sixth Amendment to the United States Constitution provides:

22 In all criminal prosecutions, the accused shall enjoy the right to a
23 speedy and public trial, by an impartial jury of the State and district
24 wherein the crime shall have been committed ... , and to be
25 informed of the nature and cause of the accusation; to be
26 confronted with the witnesses against him; to have compulsory
process for obtaining witnesses in his favor, and to have Assistance
of Counsel for his defence.

U.S. CONST. amend. VI.

1 The FAC fails to allege any facts in support of a Sixth Amendment violation.
2 Instead, plaintiff primarily contends that she did not commit a crime when she was stopped on
3 November 3, 2010 or on November 16, 2010 when she was arrested. Although she makes a
4 conclusory assertion that she was not “informed of the nature and cause of the charges against
5 her,” she clearly admits in the FAC that her Vehicle was not registered and that she does not have
6 a valid driver’s license. (FAC ¶¶ 74-75.) She also admits that she was informed of the existence
7 of a bench warrant at the time of her arrest on November 16, 2010. (See FAC ¶¶ 76-84; RJN Ex.
8 B.) Furthermore, the March 16, 2011 minute order from San Joaquin County Superior Court
9 indicates that plaintiff appeared at an arraignment hearing where plaintiff was again informed of
10 the charges against her related to the November 3, 2010 traffic stop and advised of her rights.
11 (RJN Ex. E.) For these reasons, and because it is unlikely that plaintiff would be able to state a
12 claim under the Sixth Amendment, plaintiff’s fourth cause of action should be dismissed without
13 leave to amend.

14 Fifth Cause of Action for Violation of Eighth Amendment Rights

15 Pursuant to the Eighth Amendment to the United States Constitution, “[e]xcessive
16 bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments
17 inflicted.”

18 In support of this cause of action, plaintiff alleges that she suffered “physical and
19 emotional, cruel and unusual punishment” by City Defendants. This formulaic and conclusory
20 recitation is entirely unsupported by factual allegations and again seem to merely attack the
21 validity and reasonableness of the traffic stop and impoundment of plaintiff’s vehicle. However,
22 plaintiff further alleges that she was “tortured” and “suffered excruciating pain” at the hands of
23 three unknown deputies at the San Joaquin County Jail. (FAC ¶ 93.) She was locked in a
24 “freezing cold solitary confinement cell” without her coat, boots, socks, or hat, and was refused a
25 phone call. (FAC ¶¶ 94-96.) There are two problems with plaintiff’s claim. First, “[t]he Eighth
26 Amendment’s prohibition of cruel and unusual punishments applies only after conviction and

1 sentence.” Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). “Therefore, pretrial
2 detainees are accorded no rights under the Eighth Amendment...Instead their rights arise under
3 the Due Process Clause of the Fourteenth Amendment.” Id. Second, to the extent plaintiff
4 attempts to state a claim under the Due Process Clause of the Fourteenth Amendment, that claim
5 also fails, because her allegations do not involve any of the named defendants, but instead
6 unnamed deputies employed by the San Joaquin County Jail. Similarly, plaintiff’s allegation that
7 she will be charged “extortion fees” by “a third party” for recovery of her Vehicle does not
8 implicate any of the named defendants. Because plaintiff has failed to state a claim for violation
9 of the Eighth Amendment, and is unable to do so, the fifth cause of action should be dismissed
10 without leave to amend.

11 Therefore, because plaintiff has failed to state a claim for constitutional violations
12 against the individual officers, plaintiff’s section 1983 claims against the Stockton Police
13 Department and City of Stockton should also be dismissed without leave to amend. In light of
14 these conclusions, it is unnecessary to consider City Defendants’ argument that dismissal is
15 warranted based on the doctrine of qualified immunity.

16 Other Federal Claims

17 As mentioned above, in the jurisdiction section of the FAC, plaintiff also alleges
18 liability under multiple other statutes, including 42 U.S.C. §§ 1985, 1986, 1988; 18 U.S.C. §§ 4,
19 241, 242; and 42 U.S.C. § 2000d-7. (FAC ¶ 3.) Plaintiff sets forth no factual allegations that can
20 support a claim under any of these statutes. For example, with respect to 42 U.S.C. §§ 1985 and
21 1986, plaintiff fails to identify an underlying constitutional right of which she has been deprived.
22 42 U.S.C. § 1988 provides for the discretionary award of attorneys’ fees and expert fees in civil
23 rights cases, but does not create a substantive cause of action. Furthermore, plaintiff’s citation to
24 18 U.S.C. §§ 4, 241, and 242 is unavailing in that these statutes provide for criminal penalties,
25 not civil liability. Finally, 42 U.S.C. § 2000d-7 abrogates the immunity of states from suit for
26 violations of certain federal statutes prohibiting discrimination by recipients of federal financial

1 assistance. It plainly has no application to this case. Consequently, these claims should also be
2 dismissed without leave to amend.

3 For the reasons outlined above, City Defendants' motion for judgment on the
4 pleadings should be granted with prejudice.

5 PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

6 On August 18, 2011, plaintiff filed a motion for default judgment against
7 defendant Evangelina Duran dba Brownies Towing ("Duran"), the only remaining named
8 defendant. Brownies Towing was the company which allegedly towed plaintiff's vehicle on
9 November 3, 2010. (FAC ¶¶ 63-72.)

10 Duran has not appeared in this action. On December 27, 2010, plaintiff initially
11 filed a motion for default judgment against Ms. Duran. (Dkt. No. 12.) A review of the return of
12 summons indicated that the summons and complaint were left with an individual named
13 "Stephanie Ortiz" on November 24, 2010. (Dkt. No. 4.) The court denied the motion without
14 prejudice, because there was no evidence that "Stephanie Ortiz" was authorized to accept service
15 on behalf of Duran.

16 Subsequently, in the March 17, 2011 pre-trial scheduling order, the court again
17 made clear that service of process on Duran was deficient. (Dkt. No. 38) The court noted that
18 Rule 4(e)(1) of the Federal Rules of Civil Procedure provides that, where service is not waived, a
19 person may be served in a judicial district of the United States by: "(1) following state law for
20 serving a summons in an action brought in courts of general jurisdiction in the state where the
21 district court is located or where service is made." Under Cal. Civ. Proc. Code § 415.20(b), if a
22 copy of the summons and complaint cannot with reasonable diligence be personally delivered to
23 the person to be served, substituted service may be made on a person apparently in charge of the
24 business *and* mailing thereafter to the person to be served at the place where copies of the
25 summons and complaint were left. Plaintiff submitted a declaration by the process server
26 indicating that although Duran was not present, he was told by the receptionist that she could

1 accept the summons and complaint on behalf of Duran. (See Affidavit of Jeffrey Scott Roark,
2 Dkt. No. 35, at p. 8.) The court explained that there was no evidence of due diligence to make
3 other attempts at personal service and no indication that a copy of the papers were subsequently
4 mailed to Duran. Accordingly, plaintiff was ordered to complete service of summons on Duran
5 within 30 days.

6 On April 21, 2011, plaintiff filed a “Notice to Amend Proof of Service” signed by
7 her process server, Jeffrey Scott Roark. (Dkt. No. 49.) The notice claims that the summons was
8 properly served, but that the original proof of service form was “improperly filled out.” The
9 notice attached an amended proof of service claiming that the process server personally served
10 summons “on the individual at Evangelina Duran aka dba Brownies Towing” on November 24,
11 2010. Presumably based on this amended proof of service, the clerk entered default as to Duran
12 on May 19, 2011. (Dkt. No. 53.) Consequently, plaintiff filed the instant motion for default
13 judgment.

14 The “amended” proof of service does not definitively indicate that Duran herself
15 was personally served on November 24, 2010; it merely states that “the individual” at Brownies
16 Towing was served. Moreover, the process server’s prior affidavit specifically represented that
17 Duran was not present, but that the papers were accepted by Stephanie Ortiz. Thus, the court is
18 not convinced that the statements in the “amended” proof of service are accurate. For these
19 reasons, the clerk’s entry of default as to Duran should be set aside and plaintiff’s motion for
20 default judgment should be denied without prejudice as premature.

21 Nevertheless, the claims against Duran should also be dismissed. “A District
22 Court may properly on its own motion dismiss an action as to defendants who have not moved to
23 dismiss where such defendants are in a position similar to that of moving defendants or where
24 claims against such defendants are integrally related.” Silverton v. Dep’t of Treasury, 644 F.2d
25 1341, 1345 (9th Cir. 1981). “Such a dismissal may be made without notice where the [plaintiffs]
26 cannot possibly win relief.” Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987).

1 The court's authority in this regard includes sua sponte dismissal as to defendants who have not
2 been served and defendants who have not yet answered or appeared. Columbia Steel Fabricators,
3 Inc. v. Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995) ("We have upheld dismissal with
4 prejudice in favor of a party which had not yet appeared, on the basis of facts presented by other
5 defendants which had appeared."); see also Bach v. Mason, 190 F.R.D. 567, 571 (D. Idaho
6 1999); Ricotta v. California, 4 F. Supp. 2d 961, 978-79 (S.D. Cal. 1998). Here, the non-
7 appearing defendant, Duran, is in a position similar to that of the defendants who have moved for
8 dismissal and the claims are integrally related. Duran's only involvement in this case is that her
9 towing company, Brownie's Towing, was allegedly called out to tow plaintiff's Vehicle pursuant
10 to the instructions of the individual officers from the Stockton Police Department. Accordingly,
11 all claims against Duran should be dismissed with prejudice.

12 A review of the court's records reveals that plaintiff has filed an action against
13 the California Highway Patrol involving very similar allegations (see 2:11-CV-1265-KJM-KJN)
14 and had unsuccessfully attempted to remove to this court various state court actions against her in
15 San Joaquin County Superior Court involving charges of driving with a suspended license,
16 display of false evidence of registration, forging and altering vehicle registration, resistance and
17 obstruction of a peace officer, speeding, failure to register her vehicle, failure to provide evidence
18 of financial responsibility, and failure to appear on a misdemeanor charge. (See 2:11-CV-0784-
19 GEB-EFB, Dkt. No. 1.) As such, plaintiff essentially appears to be using the federal courts to
20 challenge the authority of the State of California to require her to abide by its traffic laws and
21 regulations.

22 Accordingly, IT IS HEREBY ORDERED that:

- 23 1. The clerk's entry of default as to Evangelina Duran (Dkt. No. 53) is set aside.
- 24 2. Plaintiff's motion for default judgment (Dkt. No. 61) is denied without
25 prejudice as premature.

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1 IT IS HEREBY RECOMMENDED that:

2 1. City Defendants' motion for judgment on the pleadings (Dkt. No. 54) be
3 granted with prejudice.

4 2. Defendants Adair, Gonzalez, Hughes, Reynosa, Teague, City of Stockton,
5 Stockton Police Department, and Evangelina Duran dba Brownies Towing be dismissed from the
6 case with prejudice.

7 3. The case be closed.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
10 fourteen days after being served with these findings and recommendations, any party may file
11 written objections with the court and serve a copy on all parties. Such a document should be
12 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the
13 objections shall be served and filed within seven days after service of the objections. The parties
14 are advised that failure to file objections within the specified time may waive the right to appeal
15 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: October 3, 2011

17 
18 CAROLYN K. DELANEY
19 UNITED STATES MAGISTRATE JUDGE

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