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

CD ALSTON,

Plaintiff,

No. CIV S-11-0678 KJM CKD PS

vs.

CITY OF ELK GROVE, et al.,

Defendants.

ORDER

_____ /

Plaintiff is proceeding in this action pro se and in forma pauperis. This proceeding was referred to this court by E.D. Cal. L.R. 302(c)(21). On August 5, 2011, plaintiff filed a second amended complaint (“SAC”) against the City of Elk Grove and various City of Elk Grove police officers. (Dkt. No. 20.)

The federal in forma pauperis statute authorizes federal courts to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,

1 490 U.S. at 327.

2 To avoid dismissal for failure to state a claim, a complaint must contain more than
3 “naked assertions,” “labels and conclusions,” or “a formulaic recitation of the elements of a
4 cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words,
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
6 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a
7 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.
8 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
9 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129
10 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be
11 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200
12 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
13 Rhodes, 416 U.S. 232, 236 (1974).

14 The court twice previously cautioned plaintiff that the allegations in her complaint
15 were so vague and conclusory that it was unable to determine whether the current action is
16 frivolous or fails to state a claim for relief. The court also noted that the complaint does not
17 contain a short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal
18 Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of
19 the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th
20 Cir. 1984). Plaintiff must allege with at least some degree of particularity overt acts which
21 defendants engaged in that support plaintiff's claim. Id. Instead of making a good faith attempt
22 to cure the deficiencies outlined in the court's previous orders, plaintiff essentially re-filed, with
23 minimal changes, the previously dismissed first amended complaint as her second amended
24 complaint.¹ Plaintiff is cautioned that any further failure to follow this court's orders will result

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26 ¹ Both the first amended complaint (dkt. no. 12) and the second amended complaint (dkt.
no. 20) contain exactly 33 pages and 283 paragraphs.

1 in a recommendation that this action be dismissed. See E.D. Cal. L.R. 110.

2 Reviewing the SAC in the most favorable light, plaintiff alleges that defendant
3 McDaniel, a City of Elk Grove police officer, stopped plaintiff’s vehicle without probable cause
4 and approached plaintiff in a hostile and aggressive manner. During the course of the traffic
5 stop, McDaniel allegedly pulled out the window of plaintiff’s vehicle with his hands, interrupted
6 plaintiff’s 911 call, pulled plaintiff out of her vehicle, and later forcefully yanked plaintiff to the
7 ground by her hair causing plaintiff to hit the ground face first. Plaintiff’s car was searched and
8 towed, and plaintiff was arrested. Although McDaniel is alleged to be the primary actor, plaintiff
9 contends that two other officers, defendants Morrow and Benitez, later arrived at the scene and
10 were also involved in her detention and arrest. Jeff Murray, the “Sergeant of Beat 2” and
11 supervisor of officers McDaniel, Morrow, and Benitez, was also allegedly on the scene and had
12 some interaction with plaintiff in the course of her arrest. According to plaintiff, McDaniel filed
13 false charges against her and made various false statements in his report related to the incident,
14 which were corroborated by Morrow, Benitez, and Murray. The charges were later dismissed.

15 For the limited purposes of screening, the SAC states colorable claims for relief
16 against defendants McDaniel, Morrow, Benitez, Murray, the Elk Grove Police Department, and
17 the City of Elk Grove for violation of plaintiff’s Fourth Amendment rights (on false arrest and
18 excessive force grounds) in violation of 42 U.S.C. § 1983 and Cal. Civ. Code § 52.1(b). The
19 complaint also states colorable claims for battery,² intentional infliction of emotional distress,³

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21 ² Although it appears that plaintiff has alleged sufficient facts to state a claim for battery
22 against McDaniel, a battery claim cannot be stated under the California Penal Code, which does
23 not impose civil liability. Instead, a civil battery claim arises under California common law. The
24 elements of a civil battery are as follows: “(1) defendant intentionally did an act that resulted in a
harmful or offensive contact with the plaintiff’s person, (2) plaintiff did not consent to the
contact, and (3) the contact caused injury, damage, loss or harm to the plaintiff.” Garcia, 637 F.
Supp. 2d at 748. When a defendant is a police officer, plaintiff must show that the officer used
unreasonable force. Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1272 (1998).

25 ³ As discussed below, however, plaintiff’s intentional infliction of emotional distress
26 claim is barred in part by Cal. Gov’t Code § 821.6 to the extent it is based on emotional distress
caused by the allegedly false statements and charges. However, the SAC states a colorable claim

1 and negligence.

2 For the reasons stated below, the court finds that plaintiff's remaining causes of
3 action fail to state a claim upon which relief can be granted, and that the SAC does not state a
4 cognizable claim against defendants Robert Lehner, Elk Grove Police Department Bureau of
5 Professional Standards, Craig Potter, and Scott French.

6 The Civil Rights Act provides as follows:

7 Every person who, under color of [state law] . . . subjects, or causes
8 to be subjected, any citizen of the United States . . . to the
9 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

10 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
11 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
12 *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362
13 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
14 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
15 omits to perform an act which he is legally required to do that causes the deprivation of which
16 complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

17 As plaintiff was previously advised, supervisory personnel are generally not liable
18 under § 1983 for the actions of their employees under a theory of respondeat superior and,
19 therefore, when a named defendant holds a supervisory position, the causal link between him
20 and the claimed constitutional violation must be specifically alleged. See *Fayle v. Stapley*, 607
21 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert.
22 denied, 442 U.S. 941 (1979). Vague and conclusory allegations concerning the involvement of
23 official personnel in civil rights violations are not sufficient. See *Ivey v. Board of Regents*, 673
24 F.2d 266, 268 (9th Cir. 1982). Here, plaintiff's claims against Robert Lehner, Chief of Police,

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26 for intentional infliction of emotional distress based on the police conduct in the course of
plaintiff's arrest.

1 are frivolous because she has not shown that Lehner had any involvement with her detention and
2 arrest.

3 Plaintiff’s claims against the Elk Grove Police Department Bureau of
4 Professional Standards and two of its investigators, Craig Potter and Scott French, should also be
5 dismissed. Plaintiff reported the incident of her arrest to the Elk Grove Police Department
6 Bureau of Professional Standards and is greatly dissatisfied with how the investigation into
7 alleged police misconduct was handled. That dissatisfaction, however, does not a constitutional
8 claim make.

9 Additionally, the SAC fails to state claims for violation of the Eighth Amendment
10 and the Due Process Clause of the Fourteenth Amendment under 42 U.S.C. § 1983. “The Eighth
11 Amendment’s prohibition of cruel and unusual punishments applies only after conviction and
12 sentence.” Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). Here, plaintiff was
13 never convicted or sentenced. To the extent plaintiff attempts to state a violation of the Due
14 Process Clause of the Fourteenth Amendment related to the detention and arrest, that claim is
15 improper. All constitutional claims, including excessive force claims, resulting from an arrest,
16 investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth
17 Amendment rather than under a substantive due process approach. Graham v. O’Connor, 490
18 U.S. 386, 395 (1989).

19 As to the conspiracy claim, plaintiff is further advised that [t]o state a claim for
20 conspiracy to violate constitutional rights, the plaintiff must state specific facts to support the
21 existence of the claimed conspiracy.” Olsen v. Idaho State Board of Medicine, 363 F.3d 916,
22 929 (9th Cir. 2004); Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989). Currently, the
23 SAC is devoid of facts supporting an agreement among the named defendants to violate
24 plaintiff’s Fourth Amendment rights. Plaintiff should identify the persons with whom officer
25 McDaniel allegedly conspired, as well as facts supporting the existence of an agreement to
26 violate plaintiff’s Fourth Amendment rights.

1 Plaintiff's claims under 18 U.S.C. § 1510 and the California Penal Code are also
2 improper, because these statutes do not impose civil liability.

3 With respect to plaintiff's state law tort claims, the defamation and abuse of
4 process claims are barred by Cal. Gov't Code § 821.6. Section 821.6 provides that "[a] public
5 employee is not liable for injury caused by his instituting or prosecuting any judicial or
6 administrative proceeding within the scope of his employment, even if he acts maliciously and
7 without probable cause." Section 821.6 immunity applies to both prosecutors and police officers.
8 Randle v. City & County of San Francisco, 186 Cal. App. 3d 449, 457-58 (1986). Thus, because
9 these claims are based on the police officers' allegedly false charges and statements, they are
10 barred by Cal. Gov't Code § 821.6. See Gillan v. City of Marino, 147 Cal. App. 4th 1033, 1048
11 (2007) (holding that immunity under Cal. Gov't Code § 821.6 is not limited to claims for
12 malicious prosecution, but also extends to other causes of action arising from conduct protected
13 under the statute, including defamation and intentional infliction of emotional distress); see also
14 Garcia v. City of Merced, 637 F. Supp. 2d 731, 751-52 (E.D. Cal. 2008) (involving application of
15 Cal. Gov't Code § 821.6 immunity to abuse of process claim). To the extent plaintiff's
16 intentional infliction of emotional distress claim is based on emotional distress caused by the
17 allegedly false statements and charges, it is also barred. However, to the extent her intentional
18 infliction of emotional distress claim is based on events during the arrest, that claim is not
19 precluded by Cal. Gov't Code § 821.6. See Blankenhorn v. City of Orange, 485 F.3d 463, 488
20 (9th Cir. 2007).

21 Plaintiff's claim for fraud and intentional deceit also fails. "The elements of
22 fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation,
23 concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud,
24 i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Small v. Fritz
25 Companies, Inc., 30 Cal. 4th 167, 173 (2003). The problem with plaintiff's fraud claim is that
26 she cannot show that the alleged false statements were made to induce reliance by *plaintiff* or that

1 *plaintiff* justifiably relied on such statements to her detriment. The allegedly false statements
2 were instead made to induce reliance by senior police officers and/or prosecutors.

3 In light of the above, the court concludes that defendants Lehner, Elk Grove
4 Police Department Bureau of Professional Standards, Craig Potter, and Scott French should be
5 dismissed from the action. The court also finds that the third cause of action (violation of the
6 Eighth and Fourteenth Amendments); sixth cause of action (duty to investigate/reckless or
7 intentional failure to investigate); eighth cause of action (violation of Fourteenth Amendment);
8 tenth cause of action (defamation); eleventh cause of action (violation of 18 U.S.C. § 1510);
9 seventeenth cause of action (abuse of process); eighteenth cause of action (conspiracy); and
10 nineteenth cause of action (fraud and intentional deceit) should be dismissed.

11 However, plaintiff will be given 28 days from the date of service of this order to
12 amend her complaint to cure any deficiencies outlined above. Plaintiff is not required to file a
13 third amended complaint, but failure to do so will be construed as plaintiff's consent to dismiss
14 the above-mentioned defendants and causes of action with prejudice. Upon filing an amended
15 complaint or expiration of the time allowed therefor, the court will make further orders for
16 service of process upon some or all of the defendants.

17 If plaintiff chooses to amend, plaintiff must set forth the jurisdictional grounds
18 upon which the court's jurisdiction depends. Fed. R. Civ. P. 8(a). Further, plaintiff must
19 demonstrate how the conduct complained of has resulted in a deprivation of plaintiff's federal
20 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). In addition, plaintiff is informed that
21 the court cannot refer to a prior pleading in order to make plaintiff's amended complaint
22 complete. E.D. Cal. L.R. 220 requires that an amended complaint be complete in itself without
23 reference to any prior pleading. This is because, as a general rule, an amended complaint
24 supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once
25 plaintiff files an amended complaint, the original pleading no longer serves any function in the
26 case. Therefore, in an amended complaint, as in an original complaint, each claim and the

1 involvement of each defendant must be sufficiently alleged.

2 Furthermore, any third amended complaint shall not include allegations regarding
3 the acts of Paul Tassone and Bruce Smith, Sacramento County deputy sheriffs, which are
4 unrelated to the claims against the Elk Grove police officers involved in this action.

5 Finally, plaintiff alleges that she has exhausted government tort claim procedures
6 with respect to the state law tort claims prior to bringing this action. Plaintiff is advised to attach
7 copies of any such written claims as an exhibit to any third amended complaint.

8 In accordance with the above, IT IS HEREBY ORDERED that:

9 1. Plaintiff's claims against defendants Lehner, Elk Grove Police Department
10 Bureau of Professional Standards, Craig Potter, and Scott French are dismissed with leave to
11 amend. Additionally, the third cause of action (violation of the Eighth and Fourteenth
12 Amendments); sixth cause of action (duty to investigate/reckless or intentional failure to
13 investigate); eighth cause of action (violation of Fourteenth Amendment); tenth cause of action
14 (defamation); eleventh cause of action (violation of 18 U.S.C. § 1510); seventeenth cause of
15 action (abuse of process); eighteenth cause of action (conspiracy); and nineteenth cause of action
16 (fraud and intentional deceit) are dismissed with leave to amend.

17 2. Plaintiff is granted 28 days from the date of service of this order to amend her
18 complaint to cure the deficiencies outlined in this order. Plaintiff is not required to file a third
19 amended complaint, but failure to do so will be construed as plaintiff's consent to the dismissal
20 of the above-mentioned defendants and causes of action.

21 3. If plaintiff elects to amend, any third amended complaint shall bear the docket
22 number assigned to this case, shall be labeled "Third Amended Complaint," and shall not exceed
23 twenty (20) pages. Plaintiff must file an original and two copies of the third amended complaint.

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