

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

DANIEL THOMAS HARVEY,
Plaintiff,

No. 2:10-cv-1653-KJM-EFB PS

vs.

CITY OF SOUTH LAKE TAHOE;
EL DORADO COUNTY; ANDREW
EISSINGER; CHARLES DUKE,
Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

DANIEL THOMAS HARVEY,
Plaintiff,

No. 2:12-cv-526-KJM EFB PS

vs.

CITY OF SOUTH LAKE TAHOE;
DOUGLAS COUNTY; EL DORADO
COUNTY; ROBERT K. PRISCARO;
JAKE HERMINGHAUS; SHANNON
LANEY; ANDREW EISSINGER,
Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

These two actions, in which plaintiff is proceeding pro se, are before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21). See 28 U.S.C. § 636(b)(1).

1 The actions were determined to be related within the meaning of Local Rule 123(a) on May 4,
2 2012 and they were reassigned to the same judges, *Harvey v. City of South Lake Tahoe, et al.*,
3 2:10-cv-1653-KJM-EFB (the “first action”), Dckt. No. 52; *Harvey v. City of South Lake Tahoe,*
4 *et al.*, 2:12-cv-526-KJM-EFB (the “second action”), Dckt. No. 17. The complaints describe
5 plaintiff’s ongoing disputes with law enforcement for the City of South Lake Tahoe and the
6 County of El Dorado arising out of his contacts with law enforcement on March 18, 2010 and
7 August 28, 2011. Although the actions have not been consolidated pursuant to Federal Rule of
8 Civil Procedure 42(a), the pending motions to dismiss in each action raise similar and related
9 issues and are jointly addressed in this order and recommendation, which will be filed in each
10 action.

11 In the first action, defendants City of South Lake Tahoe (the “City”), South Lake Tahoe
12 Police Officer Andrew Eissinger, and South Lake Tahoe Police Officer Charles Duke move to
13 dismiss plaintiff’s third amended complaint pursuant to Federal Rule of Civil Procedure (“Rule”)
14 12(b)(6) for failure to comply with Rules 8(a) and 10(b). Dckt. No. 63. Plaintiff opposes the
15 motion.¹ Dckt. No. 66; *see also* Dckt. Nos. 70, 71.

16 In the second action, there are three motions to dismiss pending: (1) a Rule 12(b)(6)
17 motion to dismiss filed by the City of South Lake Tahoe (the “City”), South Lake Tahoe Police
18 Officer Andrew Eissinger, South Lake Tahoe Police Officer Jake Herminghaus, and South Lake
19 Tahoe Police Officer Shannon Laney, Dckt. Nos. 4, 5; (2) a Rule 12(b)(2) motion to dismiss for
20 lack of personal jurisdiction filed by Douglas County, Nevada, Dckt. No. 8; and (3) a Rule
21 12(b)(6) motion to dismiss filed by El Dorado County and an El Dorado County prosecutor
22 Robert Priscaro, Dckt. No. 19. Plaintiff opposes all three motions. Dckt. Nos. 9, 10, 25.

23 ///

25 ¹ The court has determined that oral argument would not be of material assistance and
26 hearing on the motion was vacated. *See* E.D. Cal. L.R. 230(g). Therefore, plaintiff’s request for
a hearing, Dckt. No. 72, will be denied.

1 For the reasons stated herein, it is recommended that the motion to dismiss in the first
2 action be granted, that the motions to dismiss in plaintiff's second action be granted, and that
3 plaintiff be provided leave to amend in the first action but not in the second action.

4 I. PROCEDURAL HISTORY

5 A. First Action, 2:10-cv-1653

6 Plaintiff initially filed this action in June 2010 against the City of South Lake Tahoe,
7 Officers Eissinger and Duke, and the County of El Dorado, alleging a claim under 42 U.S.C.
8 § 1983 and various state law claims. Dckt. No. 1. After the County moved to dismiss the
9 complaint, plaintiff filed a first amended complaint. Dckt. No. 13. The court construed that first
10 amended complaint as a motion to amend and granted it. Dckt. No. 15. Thereafter, the County
11 once again moved to dismiss the amended complaint, Dckt. No. 16, and the City, Eissinger, and
12 Duke moved to dismiss, to strike, and for a more definite statement. Dckt. No. 17. The court
13 granted the motions to dismiss and granted plaintiff leave to amend some of his claims. Dckt.
14 Nos. 33, 35.

15 Then, on October 19, 2011, plaintiff filed a second amended complaint. Dckt. No. 38.
16 The County moved to dismiss, Dckt. No. 40, as did the City, Eissinger, and Duke, Dckt. No. 39.
17 Again, the court granted the County's motion to dismiss and dismissed the claims against the
18 County without leave to amend. Dckt. Nos. 50, 56. The court also granted the City defendants'
19 motion to dismiss, dismissed plaintiff's state law claims against those defendants without leave
20 to amend, and dismissed plaintiff's *Monell* claims against the City and plaintiff's federal claims
21 against Eissinger and Duke with leave to amend. *Id.*

22 Plaintiff has now filed a third amended complaint against the City, Eissinger, and Duke,
23 Dckt. No. 57, which those defendants move to dismiss, Dckt. No. 63.

24 B. Second Action, 2:12-cv-526

25 Plaintiff filed the second action in February 2012 against the City of South Lake Tahoe;
26 Douglas County, Nevada; El Dorado County, California; Robert K. Priscaro; and City of South

1 Lake Tahoe Officers Jake Herminghaus, Shannon Lacey, and Andrew Eissinger, alleging a claim
2 under 42 U.S.C. § 1983 against all of the defendants and a defamation claim against Douglas
3 County. Compl., Dckt. No. 1. Each of the defendants moves to dismiss that complaint. Dckt.
4 Nos. 4, 8, 19.

5 II. FACTUAL ALLEGATIONS

6 A. First Action, 2:10-cv-1653

7 Plaintiff's third amended complaint in the first action asserts claims under 42 U.S.C.
8 § 1983 against the City of South Lake Tahoe, South Lake Tahoe Police Officer Andrew
9 Eissinger, and South Lake Tahoe Police Officer Charles Duke, alleging that they violated his
10 Eighth Amendment right to be free from excessive bail and his Fifth and Fourteenth Amendment
11 rights to due process. Third Am. Compl. ("TAC"), Dckt. No. 57.

12 The underlying basis for the first action is what plaintiff calls the "Dog Bite Incident."
13 *Id.* at 3, 4. Plaintiff alleges that on March 18, 2010, he was bitten by a dog belonging to James
14 Handley, and when he informed Mr. Handley of the bite, Mr. Handley "then fled taking his dog
15 away with him." *Id.* at 6. Plaintiff contends that because he feared that if he did not obtain the
16 dog's vaccination information "he would have to undergo rabies treatment," he followed Mr.
17 Handley on his bicycle. *Id.* Because Mr. Handley "refused to stop while he used his skateboard
18 to flee," plaintiff then "used his bicycle and pushed [Mr. Handley] off of the skateboard." *Id.*
19 Plaintiff then grabbed the skateboard and waited for the police, along with Mr. Handley. *Id.*

20 Plaintiff alleges that Officers Eissinger and Duke arrived at the scene and interviewed
21 various witnesses to discern what happened. *Id.* Plaintiff claims that the officers "were well
22 aware that [plaintiff] had a right to detain the dog owner and that [plaintiff] had not committed
23 any crime." *Id.* at 7. According to plaintiff, the officers listened to a female witness' "lies"
24 about the incident (the woman joined in Mr. Handley's alleged lie that plaintiff had punched Mr.
25 Handley) and "decided to use the woman's lies to frame [plaintiff]." *Id.* Plaintiff contends that
26 the decision by Officers Duke and Eissinger "constituted a conspiracy." *Id.* Plaintiff alleges that

1 the day after the Dog Bite Incident, Eissinger “submitted lies to the court” via a declaration
2 which described the incident at the grocery store, omitted information about Mr. Handley’s
3 flight, stated that plaintiff punched Mr. Handley, and stated that plaintiff walked away with the
4 skateboard, resulting in false charges being filed against plaintiff. *Id.* at 7-9.

5 According to plaintiff, the officers “decided to use lies to frame” plaintiff and submitted
6 those lies to the court in order “to maintain false charges and cause excessive bail.” *Id.* at 2, 3.
7 Plaintiff contends that all of this violated his right to be free from excessive bail since his bail
8 was increased from \$50,000 to \$80,000, and his right to due process since Eissinger used the lies
9 “to deceive the court and cause an unjust decision by the court” and plaintiff “was not allowed
10 access to court” and was not “provided an opportunity to dispute the statements.” *Id.* at 2, 9.
11 Plaintiff contends that two false felony charges and one misdemeanor charge were brought
12 against plaintiff even though the officers knew that plaintiff had not committed any crime. He
13 further asserts that the officers’ motive “was to cause financial injury to the plaintiff by using the
14 false charges to cause excessive bail and cause the plaintiff to spend thousands of dollars in
15 attorney fees defending against the charges.” *Id.* at 3, 7, 9.

16 Plaintiff further contends that while the first case has been pending, plaintiff “was framed
17 a second time.” *Id.* at 3. Specifically, he claims that on August 28, 2011, a man named Gary
18 Corniel entered plaintiff’s garage and threatened plaintiff with two bricks. He adds that when
19 officers from the City of South Lake Tahoe arrived at the scene they used “the same methods” to
20 frame plaintiff. *Id.* Plaintiff calls this the “Brick Incident.” *Id.* at 3, 11-12. According to
21 plaintiff, when Officer Jake Herminghaus arrived at the scene, he accepted Mr. Corniel’s claim
22 of self defense and ignored plaintiff’s claim of self defense, as well as the statement from a
23 witness. *Id.* at 12. Plaintiff contends that “the police officers of South Lake Tahoe are not
24 properly trained to investigate citizen disputes” and “did not share information with each other
25 when two police officers [Shannon Lacey and Andrew Eissinger] saw evidence that proved
26 [plaintiff] had been telling the truth and that [plaintiff] had acted in self defense.” *Id.*

1 According to plaintiff, both the Dog Bite Incident and the Brick Incident² demonstrate
2 that the City of South Lake Tahoe has an unconstitutional policy of extracting excessive bail by
3 having officers lie so that bail is higher; an unconstitutional policy of violating due process by
4 lying about what occurs and not providing the accused an opportunity to oppose those lies; and
5 an unconstitutional policy of discriminating against men by relying upon female witnesses'
6 statements over male witnesses' statements. *Id.* at 15-19, 23-24. Plaintiff contends that each
7 time plaintiff has been framed, the same methods have been used: the officers use lies against
8 plaintiff, ignore exculpatory evidence, and use false felony allegations to create excessive bail.
9 *Id.* at 15. The officers also "act as a team so that they are positioned to support each other should
10 any trouble materialize." *Id.* Plaintiff contends that there is widespread participation in this
11 conduct, since no officer has opposed the conduct even though they know or should know that
12 plaintiff has not committed a crime. *Id.* at 15, 19. Plaintiff also lists six officers who have been
13 involved in framing plaintiff: Eissinger, Duke, Herminghaus, Laney, as well as Josh Adler and
14 Brian Williams. *Id.* at 15. Plaintiff alleges that the City of South Lake Tahoe has been negligent
15 by failing to properly train its officers and has failed to properly discipline its officers. *Id.* at 25-
16 26.

17 B. Second Action, 2:12-cv-526

18 Plaintiff's complaint in the second action alleges a defamation claim against Douglas
19 County and a claim under 42 U.S.C. § 1983 against the City of South Lake Tahoe, Douglas
20 County, El Dorado County, Priscaro, and City of South Lake Tahoe Officers Jake Herminghaus,
21 Shannon Lacey, and Andrew Eissinger, for violation of his Eighth Amendment right to be free
22 from excessive bail and his Fifth and Fourteenth Amendment rights to due process. Compl.,
23

24 ² Plaintiff also references a third incident, occurring in 2004 in which plaintiff was
25 arrested in Douglas County, Nevada and was held in custody until 2009 (the "Bargas Incident").
26 However, plaintiff has not alleged that conduct demonstrated a policy or custom by the City of
South Lake Tahoe; he only alleges that there is a pattern in that general geographic region. TAC
at 17-18, 19-22.

1 Dckt. No. 1.

2 Although plaintiff contends that the focus of plaintiff's second action is the Brick
3 Incident described above, the complaint in the second action reiterates the allegations in the first
4 action that plaintiff "has been framed" three times by police officers in the South Lake Tahoe
5 region (the Dog Bite Incident in the City of South Lake Tahoe, the Brick Incident in the City of
6 South Lake Tahoe, and the Bargas Incident in Douglas County, Nevada) and that the City of
7 South Lake Tahoe has unconstitutional policies of allowing officers to frame innocent men using
8 lies and allowing those lies to lead to excessive bail. *Id.* at 2-7, 11. Plaintiff further alleges that
9 his right to equal protection was violated after the Brick Incident when Mr. Corniel was offered a
10 form to fill out in order to make a citizen's arrest but plaintiff was not offered such a form. *Id.* at
11 7.

12 Plaintiff also alleges that El Dorado County prosecutor Priscaro maliciously prosecuted
13 plaintiff and filed charges against him in connection with the Brick Incident, that the \$75,000
14 bail imposed after he was arrested in connection with the Brick Incident was excessive, and that
15 when he was taken to El Dorado County jail after the Brick Incident, he was denied water,
16 fainted twice, and suffered an injury to his shoulder as a result. *Id.* at 10-12.

17 Plaintiff also alleges that Douglas County violated his right to due process on August 29,
18 2011 when it provided a police report regarding the Bargas Incident to a California prosecutor,
19 while knowing that the report contained lies that would be used to injure plaintiff, and violated
20 his Eighth Amendment right when the lies contained in that police report caused excessive bail
21 in the California court. *Id.* at 3, 8-9. Plaintiff contends that Priscaro used that 2004 police report
22 in deciding to maliciously prosecute plaintiff in August 2011. *Id.* at 9, 10-11. Plaintiff includes
23 general allegations regarding the Bargas Incident, but it is unclear what precisely he is alleging
24 against Douglas County with regard to that incident. *Id.* at 3-5, 12.

25 ///

26 ///

1 III. MOTIONS TO DISMISS

2 A. Rule 12(b)(6) Standards

3 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint
4 must contain more than a “formulaic recitation of the elements of a cause of action”; it must
5 contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*
6 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more
7 . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of
8 action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp.
9 235-236 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true,
10 to ‘state a claim to relief that is plausible on its face.’” *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1949
11 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when plaintiff
12 pleads factual content that allows the court to draw the reasonable inference that the defendant is
13 liable for the misconduct alleged.” *Id.* Dismissal is appropriate based either on the lack of
14 cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal
15 theories. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

16 In considering a motion to dismiss, the court must accept as true the allegations of the
17 complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe
18 the pleading in the light most favorable to the party opposing the motion, and resolve all doubts
19 in the pleader’s favor. *Jenkins v. McKeithem*, 395 U.S. 411, 421, *reh’g denied*, 396 U.S. 869
20 (1969). The court will “presume that general allegations embrace those specific facts that are
21 necessary to support the claim.” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256
22 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

23 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
24 *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.
25 1985). The Ninth Circuit has held that the less stringent standard for pro se parties is now higher
26 in light of *Iqbal* and *Twombly*, but the court still continues to construe pro se filings liberally.

1 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). However, the court’s liberal interpretation of
2 a pro se litigant’s pleading may not supply essential elements of a claim that are not plead. *Pena*
3 *v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673
4 F.2d 266, 268 (9th Cir. 1982). Furthermore, “[t]he court is not required to accept legal
5 conclusions cast in the form of factual allegations if those conclusions cannot reasonably be
6 drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.
7 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact.
8 *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

9 In deciding a Rule 12(b)(6) motion to dismiss, the court may consider facts established
10 by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th
11 Cir. 1987). The court may also consider facts which may be judicially noticed, *Mullis v. U.S.*
12 *Bankr. Ct.*, 828 F.2d at 1338, and matters of public record, including pleadings, orders, and other
13 papers filed with the court. *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir.
14 1986).

15 B. Plaintiff’s Claims in First Action, 2:10-cv-1653

16 The City of South Lake Tahoe, Eissinger, and Duke move to dismiss plaintiff’s third
17 amended complaint in the first action, arguing that (1) plaintiff fails to properly plead a *Monell*
18 claim against the City, making only threadbare allegations that simply track the *Monell* claim
19 requirements; (2) plaintiff fails to set forth a short and plain statement of his claims, as required
20 by Rule 8(a); and (3) plaintiff fails to set forth his claims in separate paragraphs using clear
21 headings to delineate the claims alleged and against which defendant each claim is alleged, and
22 further fails to plead clear facts in support of such claims, as required by Rule 10(b). Dckt. No.
23 63 at 2. Defendants request that the third amended complaint be dismissed without further leave
24 to amend. *Id.*

25 ///

26 ///

1 1. Claims Against El Dorado County and/or State Law Claims

2 As a threshold matter, plaintiff appears to include in his third amended complaint claims
3 that were previously dismissed without leave to amend. Where plaintiff attempts to include in
4 the third amended complaint claims against El Dorado County or any state law claims against
5 any of the defendants, those claims were already dismissed without leave to amend. Dckt. Nos.
6 50, 56. Therefore, any such claims were not properly included in the third amended complaint
7 and should once again be dismissed.

8 2. Monell Claims Against the City

9 The City argues that plaintiff fails to properly plead a *Monell* claim. The City contends
10 that the third amended complaint asserts threadbare allegations that simply track the *Monell*
11 claim requirements. Dckt. No. 63-1 at 6-13. The City argues that plaintiff does not allege
12 sufficient facts showing that: (a) the City has a policy of framing people; (b) the City has a
13 policy of excessive bail; (c) the City has a policy of discriminating against men or treating
14 women preferentially; (d) the City fails to discipline its officers for misconduct; or (e) the City
15 fails to properly train its officers. *Id.*

16 As previously explained to plaintiff, because there is no respondeat superior liability
17 under 42 U.S.C. § 1983, municipalities may be sued under § 1983 only upon a showing that an
18 official policy or custom caused the constitutional tort. *Monell v. Dep't of Soc. Servs.*, 436 U.S.
19 658, 691 (1978). The first requirement of *Monell* is that “plaintiff must identify a ‘policy’ or
20 ‘custom’ that caused the plaintiff injury.” *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403
21 (1997) (citing *Monell*, 436 U.S. at 694; *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986);
22 *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). In justifying the imposition of liability for
23 a municipal custom, the Supreme Court has noted that “an act performed pursuant to a ‘custom’
24 that has not been formally approved by an appropriate decisionmaker may fairly subject a
25 municipality to liability on the theory that the relevant practice is so wide-spread as to have the
26 force of law.” *Id.* at 404 (citing *Monell*, 436 U.S. at 690-91). Additionally, a custom or practice

1 can be “inferred from widespread practices or ‘evidence of repeated constitutional violations for
2 which the errant municipal officers were not discharged or reprimanded.’” *Nadell v. Las Vegas*
3 *Metro. Police Dep’t*, 268 F.3d 924, 929 (9th Cir. 2001) (quoting *Gillette v. Delmore*, 979 F.2d
4 1342, 1349 (9th Cir. 1992)); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir.
5 2005); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986). “A policy is a deliberate choice
6 to follow a course of action . . . made from among various alternatives by the official or officials
7 responsible for establishing final policy with respect to the subject matter in question.” *Long v.*
8 *Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Alternatively, a single act of a
9 policymaker in some instances can be sufficient for a Monell claim when “the decisionmaker
10 possesses final authority to establish municipal policy with respect to the action ordered.”
11 *Pembaur*, 475 U.S. at 481-82.

12 When dismissing plaintiff’s second amended complaint, the court informed plaintiff that
13 with regard to his *Monell* claims against the City, in any third amended complaint plaintiff must
14 (1) identify the challenged policy or custom; (2) explain how the policy or custom is deficient;
15 (3) explain how the policy or custom caused the plaintiff harm; and (4) reflect how the policy or
16 custom amounted to deliberate indifference, i.e. show how the deficiency involved was obvious
17 and the constitutional injury was likely to occur. Dckt. No. 50 at 16 (citing *Young*, 687 F. Supp.
18 2d at 1149). The court also reminded plaintiff that he must articulate more than threadbare
19 allegations that simply track the *Monell* claim requirements. *Id.* (citing *Iqbal*, 129 S. Ct. at
20 1949). The plaintiff continues to struggle to do so.

21 As with plaintiff’s second amended complaint, his third amended complaint does not
22 allege a formal policy or official custom. Nor does the complaint allege that a policymaker acted
23 against the plaintiff. Rather, plaintiff appears to be alleging that the conduct he complains of
24 regarding his law enforcement contacts during the two incidents necessarily amounts to a
25 custom/policy because there was widespread participation in the conduct, and police training
26 was inadequate.

1 As for the “widespread participation,” the facts alleged are that six different South Lake
2 Tahoe police officers were involved in framing plaintiff and no officer opposed the conduct,
3 even though they knew or should have known that plaintiff had not committed a crime. The
4 third amended complaint does not identify what conduct of each of the six officers supposedly
5 demonstrates that their actions over the two separate contacts with plaintiff constitutes a policy
6 to frame defendants, or otherwise arises to “widespread practices or ‘evidence of repeated
7 constitutional violations. . . .’” *Nadell v. Las Vegas Metro. Police Dep’t*, 268 F.3d at 929. Post-
8 *Iqbal*, plaintiff cannot rely on conclusory factual allegations. Rather, he must allege facts which,
9 if true, show that the County actually had a constitutionally impermissible policy, practice, or
10 custom. *Waggy v. Spokane County Washington*, 594 F.3d 707, 713 (2010). Asserting the
11 ultimate conclusion that it did is no longer adequate.

12 Reduced to its core allegations, the complaint describes two different law enforcement
13 contacts in which plaintiff was involved and complains that the officers in each instance
14 interviewed and believed other witnesses but not plaintiff.³ The first contact was when officers
15 responded to the Dog Bite Incident in which plaintiff chased down the fleeing dog owner and
16 pushed him off the skate board. Plaintiff alleges that Officers Duke and Eissinger arrived and
17 listened to a female witness’ version of what happened (which plaintiff dismisses as lies), and
18 chose to rely on her statements rather than plaintiff’s description of the incident. Plaintiff labels
19 this in a conclusory fashion as “decid[ing] to use the woman’s lies to frame [plaintiff].” Dckt
20 No. 57 at 7. Plaintiff claims he was aggrieved by the submission of these “lies” to the court
21 which resulted in false charges. The second contact occurred when officers responded to an
22 altercation that plaintiff refers to as the Brick Incident. Plaintiff claims that during this incident
23

24 ³ As noted above, although plaintiff also alleges that the Bargas Incident provides a third
25 example of the policy of framing individuals in the Lake Tahoe region generally, that incident
26 occurred in Douglas County, Nevada, not in the City of South Lake Tahoe. There are no
allegations in the third amended complaint indicating that any City officers were at all connected
to the Bargas Incident.

1 he was threatened by Corniel with two bricks. Plaintiff claims that when Officer Herminghaus
2 arrived, the officer listened to and accepted Corniel's version of what happened and did not
3 believe plaintiff's version. Dckt No. 57 at 11-12. Plaintiff, in conclusory fashion, characterizes
4 this as again using lies to frame him. *Id.* Plaintiff relies on each of these events as showing an
5 unconstitutional policy of using lies to frame him, to extract excessive bail and to discriminate
6 against men by relying on female witnesses over the statement of male witnesses.⁴ Dckt No. 57
7 at 15-19, 23-24. Setting aside plaintiff's conclusory characterizations, the specific facts that he
8 describes hardly demonstrate a widespread practice of the City's police department of using lies
9 to frame accused defendants. Rather, he articulates facts showing two encounters with law
10 enforcement, both of which occurred when officers responded to altercations in which plaintiff
11 was involved. By plaintiff's own description, the officers listened to the witnesses and relied on
12 the statements of the other witnesses rather than accepting plaintiff's account of what happened.
13 An officer relying on and reporting the statements of witnesses to the event does not demonstrate
14 a policy, custom or widespread practice of framing defendants or using lies to extract excessive
15 bail. Plaintiff's conclusory characterizations of the events in that manner simply do not meet the
16 pleading requirement of *Iqbal*.

17 The third amended complaint, like the second amended complaint, once again vaguely
18 alleges several overlapping municipal "customs." First, plaintiff alleges that the City has a
19 policy of violating due process by framing people through the use of lies by police officers and
20 failure to consider exculpatory evidence. But, as discussed above, apart from the those ultimate
21 conclusions, which under *Iqbal* cannot form the basis for the claim, the complaint is devoid of
22 specific acts which, if taken as true, demonstrate such a policy or established pattern or practice.
23 Second, he alleges that the City has a policy of violating due process by not providing the
24 accused an opportunity to respond to the lies told by police officers. Third, he alleges that the

25
26 ⁴ Curiously, the witness officers relied on in the brick incident, Gary Corniel, is male.

1 City has an unconstitutional policy of extracting excessive bail in violation of the Eighth
2 Amendment based on those lies. Fourth, he alleges that the City has a policy of discriminating
3 against men by relying upon female witnesses' statements over male witnesses' statements.
4 Fifth, he contends that the City fails to properly train its officers. Sixth, plaintiff contends the
5 City fails to properly discipline its officers. Again, plaintiff has alleged ultimate conclusions but
6 not specific acts that show such policies actually existed. Those conclusory allegations cannot
7 satisfy *Iqbal*. 129 S.Ct. 1937, 1951 ("It is the conclusory nature of respondent's allegations,
8 rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.")

9 As for the claim of inadequacy of police training, such a failure may serve as the basis for
10 § 1983 liability against a municipality where the failure to train amounts to deliberate
11 indifference to the rights of persons with whom the police come into contact. *City of Canton*,
12 489 U.S. at 388. "Deliberate indifference" is established where "the need for more or different
13 training is so obvious, and the inadequacy so likely to result in the violation of constitutional
14 rights, that the policymakers of the city can reasonably be said to have been deliberately
15 indifferent to the need." *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir.
16 2010) (quoting *City of Canton*, 489 U.S. at 390). However, to survive a motion to dismiss, a
17 plaintiff alleging *Monell* liability based on lack of training must allege that: (1) he was deprived
18 of a constitutional right; (2) the local government entity had a training policy that amounts to
19 deliberate indifference to constitutional rights of persons with whom its peace officers are likely
20 to come into contact; and (3) his constitutional injury would have been avoided had the local
21 government unit properly trained those officers. See *Lanier v. City of Fresno*, 2010 WL
22 5113799 at *11-12 (E.D. Cal. Dec. 9, 2010). Other than stating the ultimate conclusions that the
23 officers were inadequately trained and the failure to provide training violated plaintiff's
24 constitutional rights, plaintiff has not identified what acts directed at him satisfy each of the
25 elements above and show that these ultimate conclusions are warranted. Accordingly, the City's
26 motion to dismiss plaintiff's *Monell* claim(s) should be granted with leave to amend.

1 3. Claims Against Eissinger and Duke

2 Defendants also argue that plaintiff’s third amended complaint fails to comply with Rules
3 8(a) and 10(b), and thus fails to state a claim against Eissinger or Duke. Dckt. No. 63-1 at 13-15.
4 Specifically, defendants contend that the third amended complaint does not contain a short and
5 plain statement of the claims against Eissinger and Duke and does not give those defendants fair
6 notice of the claims against them, as required by Rule 8(a), nor does it set forth the different
7 claims in separate paragraphs under clear headings that delineate each claim or designate which
8 defendant each claim is asserted against, with clear facts in support of each such claim, as
9 required by Rule 10(b). *Id.* The arguments are well taken.

10 The third amended complaint alleges a variety of conduct against defendants Eissinger
11 and Duke. Once again, however, plaintiff fails to comply with Rules 8(a) and 10(b). *See* Fed. R.
12 Civ. P. 8(a) (requiring the complaint to set forth a short and plain statement of the claim(s),
13 showing entitlement to relief and giving the defendant(s) fair notice of the claim(s) against
14 them); Fed. R. Civ. P. 10(b) (providing that if plaintiff has more than one claim based upon
15 separate transactions or occurrences, the claims must be set forth in separate counts). As
16 defendants note, the third amended complaint “recites factual allegations regarding three
17 separate incidents and then makes broad, vague, disjointed, and unelaborated statements
18 following his factual allegations.” Dckt. No. 63-1 at 15. Nowhere does the complaint, as most
19 recently amended, list the specific cause(s) of action being asserted against Eissinger and/or
20 Duke, let alone provide separate headings for each such claim together with the factual
21 allegations that are necessary to establish the particular cause of action being asserted. Given the
22 large number of allegations in the third amended complaint, this failure to specifically identify
23 the claims against Eissinger and Duke and the additional failure to specify which factual
24 allegations relate to which claims and which defendant(s), not only presents a factual morass that
25 is difficult to sort through, but it results in a lack of fair notice to defendants of the claim(s)
26 against them. Accordingly, plaintiff’s federal claims against defendants Eissinger and Duke

1 must be dismissed for failure to comply with Rules 8(a) and 10(b). *See* Fed. R. Civ. P. 12(b)(6)
2 and 41(b)

3 4. Leave to Amend

4 Ninth Circuit precedent cautions that pro se plaintiffs must be afforded an opportunity to
5 cure pleading deficiencies by amendment. Plaintiff is admonished, however, that his entitlement
6 to further leave to amend is not limitless. He has now filed three amended complaints and has
7 still failed to state a cognizable claim. The court will give plaintiff one further chance to amend
8 his complaint to state federal claims against Eissinger and Duke and/or a *Monell* claim against
9 the City. If plaintiff elects to do so, plaintiff *must* comply with the requirements of Rules 8(a)
10 and 10(b); the complaint must use clear headings to delineate each claim alleged and against
11 which defendant or defendants the claim is alleged; and must plead clear facts that support each
12 claim under each header. Except as addressed below, the complaint shall not add new claims or
13 new defendants. Plaintiff is also reminded that if he elects to file a fourth amended complaint,
14 the court cannot refer to a prior pleading in order to make his fourth amended complaint
15 complete. Local Rule 220 requires that an amended complaint be complete in itself without
16 reference to any prior pleading. This is because, as a general rule, an amended complaint
17 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). If plaintiff
18 does not file a fourth amended complaint within the time prescribed below, this action may be
19 dismissed for failure to prosecute.

20 C. Plaintiff's Claims in Second Action, 2:12-cv-526

21 1. Claims Against Douglas County

22 Defendant Douglas County, Nevada moves to dismiss plaintiff's complaint in the second
23 action for lack of personal jurisdiction pursuant to Rule 12(b)(2), arguing that the allegations
24 against it are insufficient to establish minimum contacts with the State of California sufficient to
25 vest this court with personal jurisdiction over Douglas County, Nevada. Dckt. No. 8-1 at 2-3.

26 ///

1 When a defendant challenges the sufficiency of personal jurisdiction under Rule 12(b)(2),
2 the plaintiff bears the burden of establishing that the exercise of jurisdiction is proper. *Sinatra v.*
3 *Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988). When, as here, the court acts on the
4 motion without conducting an evidentiary hearing, plaintiff's burden is light: "the plaintiff need
5 only make 'a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011). The
6 uncontroverted allegations in the complaint are taken as true, and factual disputes are resolved in
7 the plaintiff's favor. *Id.*

9 Plaintiff has not identified any statute that provides either for nationwide service of
10 process or for any other basis of personal jurisdiction over Douglas County in this case.
11 Accordingly, the court must rely upon Rule 4(k)(1) (personal jurisdiction over defendant "who is
12 subject to the jurisdiction of a court of general jurisdiction in the state where the district court is
13 located"), and applies California law. *See id.* (where "no federal statute authorizes personal
14 jurisdiction, the district court applies the law of the state in which the court sits"). California's
15 long-arm statute, California Civil Procedure Code section 410.10, therefore governs this inquiry,
16 and it authorizes the court to exercise personal jurisdiction to the extent permitted by federal due
17 process. *Id.* at 1074.

18 For a court to exercise personal jurisdiction over a nonresident defendant consistent with
19 due process, that defendant must have "certain minimum contacts . . . such that the maintenance
20 of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Calder v.*
21 *Jones*, 465 U.S. 783, 788 (1984); *CollegeSource*, 653 F.3d at 1074. If the nonresident
22 defendant's contacts with the state are not sufficiently continuous or systematic to give rise to
23 "general personal jurisdiction," the defendant may still be subject to "specific personal
24 jurisdiction" on claims arising out of defendant's contacts with the forum state. *Burger King*
25 *Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985); *Haisten v. Grass Valley Med. Reimbursement*
26 *Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986). Specifically, a "nonresident defendant's

1 discrete, isolated contacts with the forum” will support “specific jurisdiction” over that
2 defendant “on a cause of action arising directly out of its forum contacts.” *CollegeSource*, 653
3 F.3d at 1076. Whether specific jurisdiction exists is determined by a three-pronged test:

- 4 (1) The non-resident defendant must purposefully direct his activities or
5 consummate some transaction with the forum or resident thereof; or perform
6 some act by which he purposefully avails himself of the privilege of conducting
7 activities in the forum, thereby invoking the benefits and protections of its laws;
8 (2) the claim must be one which arises out of or relates to the defendant's
9 forum-related activities; and (3) the exercise of jurisdiction must comport with
10 fair play and substantial justice, i.e., it must be reasonable.

11 *Id.* Plaintiff bears the burden of satisfying the first two prongs. *Id.* If plaintiff does so, the
12 burden then shifts to defendant “to set forth a ‘compelling case’ that the exercise of jurisdiction
13 would not be reasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 476-78).

14 Plaintiff has not shown that within the context of the claims he purports to assert here
15 Douglas County’s contacts with the state of California are sufficiently continuous or systematic
16 to give rise to general personal jurisdiction. Nor has he shown that the County’s specific
17 forum-related activities directed at plaintiff give rise to specific jurisdiction over Douglas
18 County on plaintiff’s claims. He alleges that Douglas County defamed him. He claims that the
19 County violated his right to due process and his right to be free from excessive bail when it
20 provided a police report regarding the Bargas Incident to a California prosecutor, knowing that
21 the report contained lies that would be used to injure plaintiff. Compl. at 3, 8-9. Plaintiff also
22 includes general allegations regarding the 2004 Bargas Incident, but it is unclear what precisely
23 he is alleging against Douglas County with regard to that incident. *Id.* at 3-5, 12. Distilled to
24 their essence, plaintiff’s specific allegations are that Douglas County complied with a request by
25 a California prosecutor for a copy of a police report. Plaintiff has not shown that the incident or
26 his arrest, conviction, or incarceration was connected to California in any way.⁵ Nor do his

⁵ In his opposition, plaintiff focuses primarily on his argument that the 2004 Bargas Incident in Douglas County, Nevada violated his rights. Dckt. No. 9. However, he does not connect that incident to the State of California or any residents thereof (other than the letter that

1 allegations show that the provision of a police report regarding the Bargas Incident to the
2 California prosecutor, amount to the purposeful availment of the privilege of conducting
3 activities in California, thereby invoking the benefits and protections of its laws, or the
4 purposeful direction of County activities or the consummation of a transaction with the state of
5 California or a resident thereof, that could support personal jurisdiction. *See Sher v. Johnson*,
6 911 F.2d 1357, 1362 (9th Cir. 1990) (finding that contacts such as accepting payment from a
7 California bank and making phone calls and sending letters to California do not, by themselves,
8 establish purposeful availment if they are not the deliberate creation of a “substantial
9 connection” with California and are not done for the purpose of promoting business within
10 California); *see also Bright Development v. Touton*, 2010 WL 2842919, at *4-5 (E.D. Cal. July
11 19, 2010). And, even if plaintiff could establish the first two prongs of the specific jurisdiction
12 test, Douglas County has demonstrated that the exercise of jurisdiction here, where the only
13 conduct Douglas County had with California was mailing a police report to a California
14 prosecutor upon that prosecutor’s request, would not be reasonable and would not comport with
15 the traditional notions of fair play and substantial justice.

16 In short, plaintiff has failed to establish the court’s personal jurisdiction over Douglas
17 County, Nevada, and his claims against that defendant must be dismissed without leave to
18 amend.

19 2. Claims Against El Dorado County and Priscaro

20 Defendants El Dorado County and El Dorado County prosecutor Robert Priscaro move to
21 dismiss, arguing that (1) plaintiff fails to properly state a *Monell* claim against El Dorado County
22 despite specific instruction by the court in the first Harvey action; (2) plaintiff has not and cannot
23 demonstrate excessive bail as a matter of law; (3) Priscaro is absolutely immune from liability
24 under California and federal law; (4) El Dorado County cannot be held vicariously liable for any

25 _____
26 was sent to the California prosecutor, which is discussed separately), nor does he respond to
Douglas County’s arguments regarding lack of personal jurisdiction.

1 alleged conduct by Priscaro; and (5) plaintiff is impermissibly attempting to maintain duplicative
2 actions against El Dorado County. Dckt. No. 19 at 2.

3 Plaintiff's complaint in the second action alleges a claim under 42 U.S.C. § 1983 against
4 Priscaro and El Dorado County, contending that Priscaro brought false charges against him
5 based on the Brick Incident, that excessive bail was imposed, and that when he was taken to the
6 El Dorado County jail after the Brick Incident, he was denied water, fainted twice, and suffered
7 an injury to his shoulder as a result. Compl., Dckt. No. 1, at 2, 10-11, 12.

8 a. False Charges/Malicious Prosecution

9 Plaintiff's § 1983 claim against defendant Priscaro alleges that Priscaro violated
10 plaintiff's rights by filing charges against him and maliciously prosecuting him in connection
11 with the Brick Incident. The claim is barred by absolute immunity.

12 "Prosecutors are absolutely immune from liability under § 1983 for their conduct insofar
13 as it is 'intimately associated' with the judicial phase of the criminal process." *Botello v.*
14 *Gammick*, 413 F.3d 971, 975 (9th Cir. 2005) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430
15 (1976)). Prosecutors are fully protected by absolute immunity when performing traditional
16 activities related to the initiation and presentation of criminal prosecutions. *Imbler*, 424 U.S. at
17 430-31; *Botello*, 413 F.3d at 976 (it is "well established that a prosecutor has absolute immunity
18 for the decision to prosecute a particular case."). Thus, even allegations of malicious
19 prosecution, *Imbler*, 424 U.S. at 424-427, coercion of perjured testimony, *Blevins v. Ford*, 572
20 F.2d 1336, 1339 (9th Cir.1978), falsification of evidence and concealment of exculpatory
21 evidence, *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir.), cert. denied 449 U.S. 861 (1980),
22 concealing exculpatory evidence, *Brawer v. Horowitz*, 535 F.2d 830, 834 (3d Cir.1976), and
23 even conspiracy between judge and prosecutor to predetermine the outcome, *Ashelman v. Pope*,
24 793 F.2d at 1072, at 1079 (1986) (*en banc*), must be dismissed on grounds of prosecutorial
25 immunity where the alleged acts occurred while performing prosecutorial activities of initiating
26 and presenting criminal cases. In this case, the complaint itself demonstrates that all allegations

1 against Priscaro involve conduct that was solely associated with the judicial phase of the
2 criminal process. Therefore, plaintiff's § 1983 claims against Priscaro, and any § 1983 claims
3 against the County premised on the allegations in the complaint of Priscaro's prosecutorial
4 conduct, must be dismissed.

5 Moreover, the purported state law claims against Priscaro or El Dorado County for
6 malicious prosecution are also barred. California Government Code section 821.6 states that
7 "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial
8 or administrative proceeding within the scope of his employment, even if he acts maliciously and
9 without probable cause." California Government Code section 815.2(b) further provides that "a
10 public entity is not liable for an injury resulting from an act or omission of an employee of the
11 public entity where the employee is immune from liability." As Priscaro was clearly acting
12 within the scope of his employment in prosecuting the Brick Incident, both he and the County
13 are immune from liability on any state law malicious prosecution claim.

14 Therefore, plaintiff's state law claims against defendant Priscaro and any such claims
15 against El Dorado County based on Priscaro's alleged conduct must be dismissed without leave
16 to amend.

17 b. Excessive Bail in Connection with the Brick Incident

18 Plaintiff's complaint is unclear as to whether he purports to state a claim against El
19 Dorado County based on the allegation that plaintiff was charged excessive bail after he was
20 arrested for the Brick Incident.⁶ He suggests in his opposition that his excessive bail claims were
21 only brought against El Dorado County in connection with the Dog Bite Incident. Dckt. No. 25
22 at 5. Whatever his intent, a claim for excessive bail in connection with the Brick Incident would
23

24 ⁶ Plaintiff does not appear to allege a claim of excessive bail in connection with the Dog
25 Bite Incident. However, such a claim would be duplicative of the claims plaintiff brought in his
26 first action against El Dorado County, which were dismissed without leave to amend. Plaintiff
may not now attempt to reassert those claims in his second action. *See Adams v. State of Cal.*
Dep't of Health Servs., 487 F.3d 684, 688 (9th Cir. 2007).

1 have to be dismissed because plaintiff has not alleged facts demonstrating any County policy or
2 custom to seek (or cause to be set) excessive bail. Therefore, no basis for *Monell* liability on that
3 claim has been alleged.⁷

4 Moreover, even assuming a custom or policy, plaintiff fails to state a claim of excessive
5 bail. To prevail on a § 1983 claim that bail set for plaintiff violated the Excessive Bail Clause of
6 the Eight Amendment, plaintiff must demonstrate that his bail was enhanced for purposes
7 unauthorized by California law or that the amount of bail was excessive in light of the valid
8 purposes for which it was set. *Galen v. County of Los Angeles*, 477 F.3d 652, 661 (9th Cir.
9 2007); *see also Williams v. City of Sacramento Police Dep’t*, 2012 WL 762016, at *5 (E.D. Cal.
10 Mar. 6, 2012). California Penal Code section 1269b(c) provides that “[i]t is the duty of the
11 superior court judges in each county to prepare, adopt, and annually revise a uniform countywide
12 schedule of bail for all bailable felony offenses” Cal. Pen. Code § 1269b(c). Certain jail
13 custodians are authorized to immediately release those who are arrested and booked, prior to an
14 initial court appearance, upon the posting of bail in the amount specified in the countywide
15 schedule of bail. *Id.* § 1269b(b). However, “California vests judicial officers with the exclusive
16 authority to enhance or reduce bail.” *Galen*, 477 F.3d at 663 (citing Cal. Pen. Code § 1269c).
17 “Pursuant to traditional tort law principles of causation, which we apply to § 1983 claims, . . . a
18 judicial officer’s exercise of independent judgment in the course of his official duties is a
19 superseding cause that breaks the chain of causation linking law enforcement personnel to the
20 officer’s decision” *Id.* (internal citations omitted).

21 Here, plaintiff has not alleged that any County employee “prevented the [judicial officer]
22 from exercising his independent judgment.” *Id.* To the contrary, the documents attached to

23 ⁷ Plaintiff’s most recent allegations fail even though he was provided specific instructions
24 in his first action regarding how to state a *Monell* claim. The failure to follow that guidance, and
25 the failure to include any allegations in his complaint regarding a policy or custom by the County
26 regarding excessive bail, suggest that plaintiff simply is unable to allege the required facts and
that further leave to amend would be futile. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th
Cir. 1992).

1 plaintiff's complaint reveal that the El Dorado County Probation Department Bail Investigation
2 Report recommended that bail be set at \$105,000, Compl. at 21, which is consistent with the El
3 Dorado County bail schedule. Def. El Dorado County's Req. for Jud. Not., Dckt. No. 19-3, Ex.
4 3.⁸ Those documents are properly considered on this motion. When a complaint is accompanied
5 by attached documents, the court is not limited by the allegations contained in the body of the
6 complaint. Rather, the attachments become part of the complaint for purposes of a Rule 12(b)(6)
7 motion and may be considered in ruling on the motion. *See Durning v. First Boston Corp.*, 815
8 F.2d 1265, 1267 (9th Cir. 1987). Plaintiff's complaint together with its attachments demonstrate
9 that he cannot show that the \$75,000 bail amount that was set after the Brick Incident is
10 excessive. Therefore, any claims against El Dorado County based on an excessive bail amount
11 must be dismissed without leave to amend.⁹

12 c. Shoulder Injury/Denial of Water While in El Dorado County Jail

13 Plaintiff also attempts to assert a claim against El Dorado County based on the County's
14 alleged failure to provide him water while in the jail after the Brick Incident. He claims that this
15 caused him to faint twice and suffer an injury to his shoulder. However, he again fails to provide
16 any factual basis for *Monell* liability on that claim. He has not alleged any County policy or
17 custom relating to withholding water from jail inmates. He also was provided specific
18 instructions in the first action regarding how to state a *Monell* claim against El Dorado County
19 generally. His failure to address the *Monell* requirements with allegations demonstrating an

20
21 ⁸ The court grants El Dorado County's request for judicial notice of the 2011 Uniform
22 Bail Schedule for the Superior Court of California County of El Dorado pursuant to Federal Rule
of Evidence 201(b).

23 ⁹ Moreover, to the extent plaintiff was seeking to hold the El Dorado County Superior
24 Court liable for an allegedly excessive bail schedule, that claim would be barred by the Eleventh
25 Amendment and it must be dismissed without leave to amend. *See Simmons v. Sacramento*
26 *County Super. Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) (plaintiff cannot state a claim against
Sacramento County Superior Court because it is an arm of the state and thus barred by the
Eleventh Amendment); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (claim against
South Orange County Municipal Court barred by Eleventh Amendment because it is "arm of the
state").

1 established custom or policy in his new complaint as to this claim suggests that he simply cannot
2 do so. However, given that he was not previously allowed an opportunity to amend his *Monell*
3 claim based on lack of water while in the County jail following the Brick Incident he will be
4 allowed an opportunity to do so now. Therefore, to the extent plaintiff can actually state a
5 proper *Monell* claim against El Dorado County based on a denial of water or other injury he
6 sustained as a result of that denial while housed at the El Dorado County jail after the Brick
7 Incident, he may include such allegations in any fourth amended complaint he files in the first
8 action.¹⁰

9 3. Claims Against the City, Eissinger, Herminghaus, and Laney

10 Finally, the City of South Lake Tahoe and Officers Eissinger, Herminghaus, and Laney
11 move to dismiss plaintiff's complaint in the second action. They argue that (1) plaintiff fails to
12 state a claim upon which relief may be granted, and (2) the second action should be dismissed as
13 impermissibly duplicative of plaintiff's first action.¹¹ Dckt. No. 5.

14 Indeed, plaintiff's claims against the City defendants in his second action are very similar
15 to those asserted in his first action. Although plaintiff contends that the focus of his second
16 action is the Brick Incident, while the focus of the first action is the Dog Bite Incident, the
17 complaint in the second action reiterates many of the allegations that plaintiff has made in the
18 first action – that plaintiff “has been framed” three times by police officers in the South Lake
19 Tahoe region (the Dog Bite Incident in the City of South Lake Tahoe, the Brick Incident in the
20 City of South Lake Tahoe, and the Bargas Incident in Douglas County, Nevada) and that the City
21 of South Lake Tahoe has unconstitutional policies of allowing officers to frame innocent men
22 using lies and allowing those lies to lead to excessive bail. Compl. at 2-7, 11. The only new

23 ¹⁰ Other than its general arguments that plaintiff has failed to allege a *Monell* claim and
24 that the second action is duplicative of plaintiff's first action, El Dorado County has not provided
25 a basis for its argument that this claim should be dismissed without leave to amend.

26 ¹¹ In the alternative, the City defendants request that the court stay plaintiff's second
action pending resolution of plaintiff's first action.

1 allegation in his second complaint against the City defendants appears to be his claim that his
2 right to equal protection was violated after the Brick Incident when Mr. Corniel was offered a
3 form to fill out in order to make a citizen's arrest but plaintiff was not offered such a form. *Id.* at
4 7.

5 Plaintiff has "no right to maintain two separate actions involving the same subject matter
6 at the same time in the same court and against the same defendant." *Adams v. Cal. Dep't of*
7 *Health Services*, 487 F.3d 684, 688 (9th Cir. 2007). To determine whether a second action is
8 duplicative of an earlier-filed action, the court must "examine whether the causes of action and
9 relief sought, as well as the parties or privies to the action, are the same." *Id.* at 688-89 (citing
10 *United States v. The Haytian Republic*, 154 U.S. 118, 124 (1894) ("There must be the same
11 parties, or, at least, such as represent the same interests; there must be the same rights asserted
12 and the same relief prayed for; the relief must be founded upon the same facts, and the . . .
13 essential basis, of the relief sought must be the same."); *Curtis v. Citibank, N.A.*, 226 F.3d 133,
14 140 (2d Cir. 2000) (holding that the trial court did not abuse its discretion in dismissing "*Curtis*
15 *II* claims arising out of the same events as those alleged in *Curtis I*," which claims "would have
16 been heard if plaintiffs had timely raised them"); *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221,
17 223 (7th Cir. 1993) ("[A] suit is duplicative if the claims, parties, and available relief do not
18 significantly differ between the two actions.")).

19 Here, plaintiff's claims against the City defendants in the second action are duplicative of
20 the claims against the City defendants in the first action. First, the causes of action are the same
21 since the rights or interests established in the first action would be destroyed or impaired by
22 prosecution of the second action; substantially the same evidence will be presented in the two
23 actions; the two suits involve alleged infringement of the same rights; and the two suits arise out
24 of the same transactional nucleus of facts. *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th
25 Cir. 1992) ("Whether two events are part of the same transaction or series depends on whether
26 they are related to the same set of facts and whether they could conveniently be tried together.");

1 *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (providing that in
2 applying the transaction test, the court examines four criteria: (1) whether rights or interests
3 established in the prior judgment would be destroyed or impaired by prosecution of the second
4 action; (2) whether substantially the same evidence is presented in the two actions; (3) whether
5 the two suits involve infringement of the same right; and (4) whether the two suits arise out of
6 the same transactional nucleus of facts). Second, two of the City defendants in the first action
7 and the second action are the same (the City of South Lake Tahoe and Officer Eissinger) and the
8 other two South Lake Tahoe police officers named in the section action (Herminghaus and
9 Laney) are in privity with those named in the first action. *See Kourtis v. Cameron*, 419 F.3d
10 989, 996 (9th Cir. 2005).

11 Therefore, the claims in the second action will be dismissed. However, since plaintiff
12 was given leave to amend his complaint in the first action with regard to his claims against the
13 individual police officers named therein (Eissinger and Duke), plaintiff will also be permitted
14 leave to add to any fourth amended complaint his § 1983 claims against the other individual city
15 police officers (Herminghaus and Laney).¹²

16 IV. CONCLUSION AS TO FIRST ACTION, 2:10-cv-1653

17 Accordingly, with regard to plaintiff's first action, 2:10-cv-1653-KJM-EFB, IT IS
18 HEREBY ORDERED that plaintiff's request for a hearing, Dckt. No. 72, is denied.

19 IT IS FURTHER RECOMMENDED that:

20 1. Defendants' motion to dismiss, Dckt. No. 63, be granted, with leave to amend as
21 provided herein. Specifically, plaintiff should be permitted to amend his § 1983 *Monell* claim
22 against the City and his § 1983 claim against defendants Eissinger and Duke. He should also be
23 permitted to include in any fourth amended complaint his § 1983 claims against defendants

24
25 ¹² Since plaintiff's complaint in the section action does not allege any state law claims
26 against the City defendants and the state law claims in the first action were dismissed without
leave to amend, the only claims plaintiff may assert against any of the City defendants in his
fourth amended complaint will be his § 1983 claims.

1 Herminghaus and Laney and/or a § 1983 *Monell* claim El Dorado County based *only* on the
2 County's alleged failure to provide him water and the alleged resulting shoulder injury while in
3 the jail after the Brick Incident.

4 2. Plaintiff be provided forty-five days from the date any order adopting these findings
5 and recommendations is filed to file a fourth amended complaint as provided herein. If plaintiff
6 does not file a fourth amended complaint within the time prescribed, this action may be
7 dismissed for failure to prosecute.

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

15 V. CONCLUSION AS TO SECOND ACTION, 2:12-cv-526

16 With regard to the second action, 2:12-cv-526-KJM-EFB, IT IS HEREBY ORDERED
17 that the status (pretrial scheduling) conference currently set for May 15, 2013 is vacated.¹²

18 IT IS FURTHER RECOMMENDED that:

19 1. Each of the three motions to dismiss, Dckt. Nos. 4, 8, and 19, be granted without leave
20 to amend;¹³ and

21 ///

22 ///

23 ¹² Accordingly, the parties need not file status reports as provided in the January 22, 2013
24 minute order. If the recommendation of dismissal herein is not adopted by the assigned district
25 judge, the scheduling conference will be re-set.

26 ¹³ As noted above, some of the claims in plaintiff's second action may be asserted in any
fourth amended complaint filed in the first action.

