

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 RICHARD MALOTT,

12 Plaintiff,

13 v.

14 PLACER COUNTY, et al.,¹

15 Defendants.
16

No. 2:14-cv-01040-KJM-EFB

ORDER

17 This matter is before the court on the motions by defendants Sacramento County,
18 Scott Jones, Javier Bustamante, Michelle Hendricks, and Darin Epperson (Sacramento County
19 defendants) and defendants Nevada County and David DeVogelaere (Nevada County defendants)
20 to dismiss plaintiff's second amended complaint under Federal Rule of Civil Procedure 12(b)(6).

21 ¹ Plaintiff has identified certain Doe defendants. The Ninth Circuit has held that if a
22 defendant's identity is not known before the complaint is filed, a "plaintiff should be given an
23 opportunity through discovery to identify the unknown defendants." *Wakefield v. Thompson*, 177
24 F.3d 1160, 1163 (9th Cir. 1999) (quotation marks omitted) (quoting *Gillespie v. Civiletti*, 629
25 F.2d 637, 642 (9th Cir. 1980)). Plaintiffs are warned, however, that Doe defendants will be
26 dismissed if "it is clear that discovery would not uncover the[ir] identities, or that the complaint
27 would be dismissed on other grounds." *Id.* (quotation marks omitted) (quoting *Gillespie*, 629
28 F.2d at 642). Plaintiffs are also warned that Federal Rule of Civil Procedure 4(m) is applicable to
Doe defendants. That rule provides the court must dismiss defendants who have not been served
within 120 days after the filing of the complaint unless good cause is shown. *See Glass v. Fields*,
No. 09-00098, 2011 U.S. Dist. LEXIS 97604 (E.D. Cal. Aug. 31, 2011); *Hard Drive Prods. v.*
Does, No. 11-01567, 2011 U.S. Dist. LEXIS 109837, at *2-4 (N.D. Cal. Sep. 27, 2011).

(ECF Nos. 47, 50.) Plaintiff opposes the motions (ECF Nos. 52, 53), and the Sacramento and Nevada County defendants have replied (ECF Nos. 54, 55). The court held a hearing on the matters on March 27, 2015. Stewart Katz appeared for plaintiff, Scott McLeran appeared for Nevada County defendants, and Robert Chalfant appeared for Sacramento County defendants. As explained below, the court GRANTS in part and DENIES in part defendants' motions.

I. PLAINTIFF'S ALLEGATIONS AND PROCEDURAL BACKGROUND

On or about April 25, 2013, Sacramento County Sheriff Deputies Bustamante and Epperson stopped plaintiff for rolling through a stop sign, found a gun on his person, arrested him for carrying a concealed weapon without a permit, searched his Jeep, and seized his diary, among other things. (Compl., ECF No. 46 ¶¶ 25–38.) During the search of the Jeep, plaintiff, handcuffed in the back of Bustamante's and Epperson's patrol car, began to experience "extreme physical distress." (*Id.* ¶ 39.) He told the officers he believed he was suffering from a heat stroke. (*Id.* ¶¶ 40–41.) The officers refused to call for medical assistance, believing plaintiff was faking his symptoms. (*Id.* ¶ 42.) As plaintiff was leaning against the patrol car door, Bustamante opened the door, causing plaintiff's head to fall out; Bustamante then closed the door on plaintiff's head and then shoved it back into the car. (*Id.* ¶ 43.)

Bustamante told Epperson plaintiff was "playing them" and so, as plaintiff's head was leaning against the back of the passenger seat, Bustamante twice used a small, hard object to push on his sternum, looking for a reaction. (*Id.* ¶¶ 44–47.) These "sternum rubs" were painful and caused bruising. (*Id.* ¶ 47.) During both sternum rubs, defendant Epperson was sitting in the front passenger seat of the same patrol car. (*Id.* ¶¶ 48–49.)

Plaintiff alleges defendant Sheriff Jones was aware of Bustamante's propensity to use unreasonable force, as the County had just settled a lawsuit stemming from Bustamante's killing of an unarmed man. (*Id.* ¶ 55.) At the same time, Sacramento County allegedly declines to track the number of reported instances of force by officer and fails to undertake the proper training and discipline of officers whose conduct suggests they are at high risk of using force. (*Id.* ¶ 56.)

On April 29, 2013, plaintiff initiated a citizen's complaint in Sacramento County

1 concerning Bustamante's and Epperson's actions. (*Id.* ¶ 95.) Although Sheriff's personnel asked
2 for plaintiff's medical records, plaintiff was unable to contact the officer who had requested the
3 information. (*Id.* ¶¶ 97–99.) In a letter dated October 10, 2013, defendant Jones rejected
4 plaintiff's citizen complaint. (*Id.* ¶ 100.)

5 Later Bustamante and Epperson gave plaintiff's diary to defendant Hendricks, a
6 detective with the Sheriff's Department, who was part of a task force designed to target plaintiff.
7 (*Id.* ¶¶ 59–60.) Despite the diary's benign contents, Hendricks copied portions of it and showed
8 these to plaintiff's former girlfriend and his close friend. (*Id.* ¶¶ 62–63.) As a result of
9 Hendricks' encouragement, plaintiff's former girlfriend filed a request for a restraining order in
10 Placer County Superior Court. (*Id.* ¶ 73.) The request was granted. (*Id.*)

11 Sometime later, Placer County Sheriff's Deputies entered plaintiff's property
12 located in Nevada County without a warrant. (*Id.* ¶ 80.) On at least one occasion, the Nevada
13 County Sheriff's Department assisted in the warrantless search of plaintiff's property by
14 providing Placer County Sheriff's Deputies with the code to open the locked security gate
15 surrounding plaintiff's property. (*Id.* ¶ 82.)

16 Even though plaintiff reported these actions to defendant DeVogelaere, a Nevada
17 County Sheriff's Deputy, DeVogelaere developed a pretextual reason for the Placer County
18 authorities' entry onto plaintiff's property. (*Id.* ¶¶ 85–87.) DeVogelaere was aware of Placer
19 County's numerous illegal entries onto plaintiff's property and assisted in a cover-up of these
20 actions. (*Id.* ¶ 84.)

21 Plaintiff's second amended complaint contains thirteen claims. In their motions,
22 the Sacramento County and Nevada County defendants do not seek to dismiss all the claims. The
23 Sacramento County defendants seek dismissal of: claim number one, unreasonable force under
24 the Fourth Amendment against Epperson; and claim number ten, conspiracy to violate plaintiff's
25 Fourth Amendment rights in the search of his diary against Bustamante, Epperson, Hendricks.²

26
27 ² The complaint also alleges a Placer County defendant Matt Hardcastle participated in
28 this conspiracy, but the Sacramento County defendants do not address his involvement.

1 The Nevada County defendants seek dismissal of claim eleven, conspiracy to violate plaintiff's
2 Fourth Amendment rights in the search of his property against DeVogelaere and Nevada County.
3 The Placer County defendants have not filed a motion to dismiss, so the claims against them are
4 not discussed here.

5 II. LEGAL STANDARD ON MOTION TO DISMISS

6 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a
7 complaint for "failure to state a claim upon which relief can be granted." A court may dismiss
8 "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a
9 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

10 Although a complaint need contain only "a short and plain statement of the claim
11 showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), to survive a motion to
12 dismiss this short and plain statement "must contain sufficient factual matter . . . to 'state a claim
13 to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something
15 more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" or "'labels and
16 conclusions' or 'a formulaic recitation of the elements of a cause of action . . .'" *Id.* (quoting
17 *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss
18 for failure to state a claim is a "context-specific task that requires the reviewing court to draw on
19 its judicial experience and common sense." *Id.* at 679. Ultimately, the inquiry focuses on the
20 interplay between the factual allegations of the complaint and the dispositive issues of law in the
21 action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

22 In making this context-specific evaluation, this court "must presume all factual
23 allegations of the complaint to be true and draw all reasonable inferences in favor of the
24 nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). This rule
25 does not apply to "a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478
26 U.S. 265, 286 (1986), *quoted in Twombly*, 550 U.S. at 555, to "allegations that contradict matters
27 properly subject to judicial notice," or to material attached to or incorporated by reference into the
28 complaint, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

1 III. DISCUSSION

2 A. Sacramento County's Motion to Dismiss

3 1. First Claim: Excessive Force Against Epperson

4 Defendants assert plaintiff's second amended complaint does not state a claim
5 showing Epperson's involvement in Bustamante's alleged use of force. (ECF No. 50-1 at 4.)
6 Even though Epperson was allegedly sitting in the front seat of the patrol vehicle at the time,
7 defendants argue there are no factual allegations suggesting Epperson personally participated in
8 Bustamante's alleged applications of force. (*Id.* at 5.) Furthermore, they argue there is no
9 indication in the second amended complaint that Epperson even had an opportunity to intervene
10 because Epperson was sitting in the front seat of the patrol car and plaintiff was seating in the
11 back. (*Id.* at 5–6.)

12 Plaintiff responds that Bustamante's statement that plaintiff was "playing them"
13 alerted Epperson to the use of force. (ECF No. 52 at 4.) Additionally, plaintiff argues Epperson
14 had enough time to intercede between being alerted to the use of force and the actual use of force,
15 including the two sternum rubs, which lasted 10 to 25 seconds each. (*Id.*) Moreover, plaintiff
16 asserts that he could see Epperson, who was sitting in the front seat "the entire time . . .
17 Bustamante was performing each sternum rub" (*id.* at 5), which, he argues, implies Epperson
18 could likewise see him (*id.*).

19 In reply defendants claim the complaint only shows that Epperson was present,
20 and any contrary argument must rely on conclusory statements. (ECF No. 54 at 2–4.) They also
21 point out the complaint does not allege Epperson witnessed the two sternum rubs. (*Id.* at 3–4.)

22 A claim under 42 U.S.C. § 1983 has two elements: (1) a violation of a federal
23 constitutional or statutory right (2) committed by a person acting under the color of state law.
24 *Long v. Cnty. Of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). In addition, the person acting
25 under color of state law must have personally participated in the acts giving rise to the claim or
26 "set in motion a series of acts by others which the actor knows or reasonably should know would
27 cause others to inflict the constitutional injury." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
28 1989); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). A defendant is a personal participant

1 in an alleged deprivation of rights “‘if he does an affirmative act, participates in another’s
2 affirmative acts, or omits to perform an act which he is legally required to do that *causes* the
3 deprivation’” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (quoting *Johnson*, 588
4 F.2d at 743) (emphasis in original); *see also Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002)
5 (foreclosing group liability for constitutional violations).

6 Even when a defendant does not inflict the constitutional injury himself, he may be
7 liable if he failed to intervene to prevent others’ actions: “‘police officers have a duty to intercede
8 when their fellow officers violate the constitutional rights of a suspect or other citizen.’”
9 *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (quoting *Koon v. United States*, 34
10 F.3d 1416, 1447 n.25 (9th Cir. 1994), *rev’d on other grounds*, 518 U.S. 81 (1996). However,
11 officers may be liable under a failure-to-intercede theory only when they have the opportunity to
12 do so. *Id.* As one district court has said, to proceed on a failure to intervene claim, “plaintiff
13 must show that the defendant-bystanders had enough time to observe what was happening and to
14 intervene to stop it.” *Harrison v. Hedgpeth*, No. 12-0963, 2014 WL 46701, at *8 (N.D. Cal. Jan.
15 6, 2014).

16 The court’s original order dismissed this claim because, among other reasons,
17 plaintiff had not alleged Epperson was close to or in the vehicle. Now plaintiff alleges Epperson
18 was not only in the vehicle at the time, but could see plaintiff and Bustamante, and could have
19 intervened but did not. Construed in the light most favorable to plaintiff, these allegations are
20 sufficient at this stage to identify Epperson as an integral participant in the alleged violation.
21 Although plaintiff relies on an assumption that Epperson could see him because he saw Epperson,
22 that assumption is not wholly implausible; all plaintiff must do is to allege sufficient factual
23 matter to state a claim plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
24 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff has done that here. Accordingly,
25 the Sacramento County defendants’ motion to dismiss this claim is DENIED.

26 2. Tenth Claim: Conspiracy Against Bustamante, Epperson, and Hendricks

27 Defendants argue plaintiff’s complaint does not state a claim because he has not
28 alleged sufficient facts to meet the Ninth Circuit’s heightened pleading standard for conspiracy

1 claims. (ECF No. 50-1 at 4–5.) Specifically, defendants argue the complaint is insufficient
2 because the factual allegations do not plausibly establish a meeting of defendants’ minds. (*Id.* at
3 5.) Plaintiff has not alleged Bustamante reproduced or disseminated the diary; rather, he says he
4 simply booked it into evidence. (ECF No. 54 at 4–5.) Defendants point out the absence of any
5 allegations they ever discussed the diary’s contents. (*Id.* at 5–6.)

6 Plaintiff counters the Ninth Circuit no longer imposes a heightened pleading
7 standard on conspiracy claims. (ECF No. 52 at 5 n.1.) He also argues a meeting of the minds
8 may be inferred from circumstantial evidence, for example, from the defendants’ actions. (*Id.* at
9 6.) As such, reproducing and disseminating the alleged illegally seized diary establishes
10 sufficient evidence to infer a meeting of the minds. Additionally, plaintiff correctly notes that his
11 initial complaint raised this same claim, and that the defendants did not contest its adequacy in
12 their initial motion to dismiss. He argues, therefore, that should the complaint’s factual
13 allegations fall short, he should be afforded an opportunity to correct the deficiency. He suggests
14 an amended complaint could include allegations of the relevant, publicly available reports. (*Id.* at
15 7.)

16 The elements of a conspiracy claim under section 1983 are (1) the existence of an
17 agreement, either express or implied, to deprive plaintiff of his constitutional rights and (2) a
18 deprivation of rights resulting from the agreement. *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir.
19 2010). Although the conspiratorial agreement need not be overt, a complaint must include some
20 factual basis to support the inference defendants’ acts were propelled by the agreement.
21 *Mendocino Env’tl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999); *Harris v.*
22 *Clearlake Police Dep’t*, No. 12-0864, 2012 WL 3042942, at *9 (N.D. Cal. July 25, 2012). The
23 plaintiff “must state specific facts to support the existence of the claimed conspiracy.” *Buckey v.*
24 *Cnty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992); *Burns v. Cnty. of Kings*, 883 F.2d 819,
25 821 (9th Cir. 1989). Allegations in a complaint “may not simply recite the elements of a cause of
26 action, but must contain sufficient allegations of underlying facts” *AE ex rel. Hernandez v.*
27 *Cnty. Of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012). Vague claims that defendants were involved
28 in a conspiracy to deprive plaintiff of his rights will not suffice. *See Hansen v. Black*, 885 F.2d

1 642, 646 (9th Cir. 1989); *see also* *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 937 (9th Cir. 2012)
2 (noting conclusory conspiracy allegations are insufficient to provide notice to defendants);
3 *Cabrera v. Maddock*, No. 10-00611, 2015 WL 3466398, at *7 (E.D. Cal. June 1, 2015) (noting “a
4 bare allegation that defendants conspired to violate plaintiff’s constitutional rights will not suffice
5 to give rise to a conspiracy claim under section 1983”).

6 Here, plaintiff alleges that Bustamante and Epperson, after seizing the diary and
7 forwarding it to Hendricks, entered into a conspiracy to reproduce and disseminate the diary for
8 unlawful purposes. (ECF No. 52 at 6.) These allegations are vague and conclusory recitations of
9 the bare-bone elements of conspiracy stripped of any meaningful detail. A meeting of the minds
10 does not plausibly follow from the lone fact of the defendants’ reproduction and distribution of
11 the diary. These allegations do not establish “some factual basis to support the inference that
12 defendants’ acts were propelled by the agreement.” *Mendocino*, 192 F.3d at 1301. However, this
13 is the defendants’ first challenge of this claim. Plaintiff has suggested additional factual
14 allegations he would include in an amended complaint. Accordingly, the Sacramento County
15 defendants’ motion to dismiss plaintiff’s claim for conspiracy is GRANTED with leave to amend
16 if plaintiff can do so consonant with Rule 11.

17 B. Nevada County’s Motion to Dismiss

18 1. Eleventh Claim: Conspiracy Against DeVogelaere and Nevada County

19 Plaintiff claims defendant DeVogelaere conspired to violate plaintiff’s Fourth
20 Amendment rights, alleging some of the Placer County defendants entered his property on more
21 than one occasion in August 2013. (ECF No. 46 at 24.) Plaintiff also claims DeVogelaere
22 supplied the Placer County defendants with the code to his security gate, concealed their illegal
23 conduct, conspired to fabricate a pre-textual reason for the entries, and failed to document the
24 actions of Placer County law enforcement. (*Id.* at 24–25.)

25 Defendants argue plaintiff’s second amended complaint has failed to allege any
26 facts or claims against Nevada County. (ECF No. 48 at 4–6.) Defendants also argue an
27 agreement to violate plaintiff’s rights cannot be implied simply because DeVogelaere gave Placer
28 County law enforcement a code to his property, saying there is nothing demonstrating the code

1 was confidential and could not be disclosed to law enforcement. (*Id.* at 7.) Defendants further
2 argue that “[p]laintiff has failed to allege any facts to demonstrate he had a legally cognizable
3 privacy interest in the . . . property.” (*Id.*) Moreover, they claim DeVogelaere is entitled to
4 qualified immunity. (*Id.* at 10–13.)

5 Plaintiff counters his privacy interest lies in his residence in a home located on the
6 Malott Ranch. (ECF No. 53 at 4.) He cites *Minnesota v. Olsen*, 495 U.S. 91 (1990), suggesting
7 “[e]ven an ordinary overnight guest has sufficient privacy interest in a residence to establish
8 Fourth Amendment standing.” (*Id.* at 4.) Plaintiff also dismisses defendants’ assertion that
9 DeVogelaere is entitled to qualified immunity. (*Id.* at 6-8.)

10 In reply, defendants say that plaintiff’s complaint fails to demonstrate any
11 evidence aside from conclusory arguments tending to prove DeVogelaere conspired with others
12 to violate plaintiff’s rights. (ECF No. 55 at 5–6.)

13 Here, plaintiff agrees Nevada County’s inclusion was inadvertent, and the
14 complaint does not adequately allege Nevada County’s policy or custom was the moving force
15 behind the alleged constitutional violations. Accordingly, the motion to dismiss is GRANTED
16 with prejudice as to Nevada County.

17 Moreover, the complaint does not adequately describe DeVogelaere’s involvement
18 in a conspiracy. Plaintiff contends his pleading is sufficient because it shows DeVogelaere
19 acquiesced in Placer County law enforcement’s illegal activities. (ECF No. 55 at 5–6.) However,
20 plaintiff has not adequately pled how DeVogelaere’s supplying the Placer County defendants
21 with the code to his security gate constitutes a conspiracy. In fact, a more plausible
22 understanding of DeVogelaere’s conduct is his knowledge of the outstanding felony firearm
23 charges against plaintiff, the restraining order against plaintiff, and the belief that the Placer
24 County defendants intended to complete a legitimate welfare check of the Malott property. While
25 it gives the court pause that Placer County law enforcement performed a welfare check on a
26 Nevada County resident, the facts as currently pled do not adequately implicate DeVogelaere in a
27 conspiracy.

1 Nevada County defendants also reassert that DeVogelaere, as a law enforcement
2 officer, is entitled to qualified immunity. (ECF No. 55 at 7–8.) Here, because the facts alleged
3 do not support a claim that DeVogelaere violated plaintiff’s constitutional rights, the court need
4 not reach the question of qualified immunity. Defendants’ motion to dismiss is GRANTED as to
5 the claim against defendant DeVogelaere. Plaintiff is given leave to amend if he can do so
6 consonant with Rule 11.

7 IV. CONCLUSION

8 For the foregoing reasons, the court orders as follows:

- 9 1. The Sacramento County defendants’ motion to dismiss plaintiff’s claim against
10 defendant Epperson arising out of the use of excessive force is DENIED.
- 11 2. The Sacramento County defendants’ motion to dismiss plaintiff’s conspiracy
12 claim against defendants Bustamante, Epperson, Hendricks is GRANTED with
13 leave to amend.
- 14 3. The Nevada County defendants’ motion to dismiss plaintiff’s claim of
15 conspiracy against defendant Nevada County is GRANTED with prejudice.
- 16 4. The Nevada County defendants’ motion to dismiss plaintiff’s claim of
17 conspiracy against defendant DeVogelaere is GRANTED with leave to amend.
- 18 5. Plaintiff’s third amended complaint is due within twenty-one (21) days of the
19 date of this order.
- 20 6. This order resolves ECF Nos. 47, 50.

21 IT IS SO ORDERED.

22 DATED: June 17, 2015.

23
24 
25 UNITED STATES DISTRICT JUDGE
26
27
28