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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY LARIOS,

Plaintiff,

v.

SCOTT LUNARDI, et al.,

Defendants.

No. 2:15-cv-02451-MCE-CMK

MEMORANDUM AND ORDER

Plaintiff Timothy Larios originally initiated this lawsuit against six defendants—
Scott Lunardi, Mel Hutsell, T.A. Garr, Lieutenant Foster, R.J. Jones, and Joseph A.
Farrow—claiming they violated his rights by searching his personal cellular phone.
Defendants, however, filed a Motion to Dismiss, ECF No. 15, which was granted in part
and denied in part, ECF No. 22. All of Plaintiff’s claims except those premised on the
Fourth Amendment were dismissed for failure to state a claim. The motion also
eliminated Plaintiff’s claims in their entirety against Defendants Hutsell, Garr, and
Farrow. Plaintiff was given leave to amend his claims against Hutsell and Garr, but the
claims against Farrow were dismissed with prejudice. He then filed a Second Amended
Complaint (“SAC”), ECF No. 23, which re-alleges claims against Hutsell, but not against

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1 Garr. Currently before the Court is Defendants' Motion to Dismiss those remaining
2 claims. ECF No. 24. For the reasons that follow, that Motion is GRANTED.¹

3
4 **BACKGROUND²**

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6 Plaintiff was an officer with the California Highway Patrol ("CHP") and was
7 assigned to the Shasta Interagency Narcotics Task Force. While working for the CHP,
8 Plaintiff had both a cell phone issued to him by the CHP and a personal cell phone.

9 In September 2013, Plaintiff was removed from his position and was told that he
10 was the subject of an internal investigation. The investigation was led by Defendants
11 Lundardi and Hutsell. During the course of those proceedings, Plaintiff was originally
12 ordered to relinquish only his state-issued phone for searching. However, on
13 November 6, 2014, Plaintiff was also ordered to hand over his personal phone.

14 On that day, Plaintiff met with Lieutenant Foster, Officer Lunardi, and an
15 unidentified officer in Lieutenant Foster's office. Despite Lieutenant Foster having
16 advised Plaintiff that he would not need a union representative to accompany him,
17 Plaintiff's union representative was also present. Plaintiff initially refused to give up his
18 phone on grounds that it contained purely personal information. In response, Lunardi
19 provided Plaintiff with a memorandum that was written by Jones and directed Plaintiff to
20 relinquish his phone so that the CHP could "conduct a data extraction to retrieve all work
21 product." ECF No. 23, ¶ 18. The memorandum warned that Plaintiff would be subject to
22 "charges/disciplinary action" if he failed to cooperate. Id.

23 Plaintiff continued to object and offered to voluntarily show Officer Lunardi any
24 and all work product stored on Plaintiff's personal phone. Officer Lundardi rejected

25
26 ¹ Because oral argument would not have been of material assistance, the Court ordered this
matter submitted on the briefs. See E.D. Cal. Local R. 230(g).

27 ² The following recitation of facts is taken, sometimes verbatim, from the allegations contained in
28 Plaintiff's SAC.

1 Plaintiff's offer and assured Plaintiff that his personal phone would only be confiscated
2 for three to four hours. Because Plaintiff was concerned he might be subject to criminal
3 prosecution if he failed to obey his superior's directives, he eventually relinquished his
4 personal phone to Officer Lunardi.

5 Plaintiff's phone was returned to him approximately eight hours later. Upon its
6 return, Plaintiff noticed that phone calls had been made from his device after he had
7 turned it over and that all of the information stored on the phone had been searched and
8 downloaded.

9 Plaintiff was subsequently informed that he was suspected of violating a number
10 of sections of the California Penal Code. On two separate occasions, Plaintiff was
11 issued Miranda warnings and interrogated by Defendants. Officers Lunardi and Hutsell
12 questioned Plaintiff about personal information discovered on his phone, and Officer
13 Hutsell admitted that the reason Plaintiff's phone had been searched was to gather that
14 personal information. As a result of the investigation, Plaintiff was terminated. This
15 action followed.

17 STANDARD

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19 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
20 Procedure 12(b)(6), all allegations of material fact must be accepted as true and
21 construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins.
22 Co., 80 F.3d 336, 337–38 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and plain
23 statement of the claim showing that the pleader is entitled to relief’ in order to ‘give the
24 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell
25 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41,
26 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require
27 detailed factual allegations. However, “a plaintiff's obligation to provide the grounds of
28 his entitlement to relief requires more than labels and conclusions, and a formulaic

1 recitation of the elements of a cause of action will not do.” Id. (citation omitted). A court
2 is not required to accept as true a “legal conclusion couched as a factual allegation.”
3 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555).
4 “Factual allegations must be enough to raise a right to relief above the speculative level.”
5 Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal
6 Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain
7 something more than “a statement of facts that merely creates a suspicion [of] a legally
8 cognizable right of action”)).

9 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
10 assertion, of entitlement to relief.” Id. at 555 n.3 (citation omitted). Thus, “[w]ithout some
11 factual allegation in the complaint, it is hard to see how a claimant could satisfy the
12 requirements of providing not only ‘fair notice’ of the nature of the claim, but also
13 ‘grounds’ on which the claim rests.” Id. (citing Wright & Miller, supra, at 94–95). A
14 pleading must contain “only enough facts to state a claim to relief that is plausible on its
15 face.” Id. at 570. If the “plaintiffs . . . have not nudged their claims across the line from
16 conceivable to plausible, their complaint must be dismissed.” Id. However, “[a] well-
17 pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those
18 facts is improbable, and ‘that a recovery is very remote and unlikely.’” Id. at 556 (quoting
19 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

20 A court granting a motion to dismiss a complaint must then decide whether to
21 grant leave to amend. Leave to amend should be “freely given” where there is no
22 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
23 to the opposing party by virtue of allowance of the amendment, [or] futility of the
24 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
25 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
26 be considered when deciding whether to grant leave to amend). Not all of these factors
27 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
28 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,

1 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
2 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Grp.,
3 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
4 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
5 1989) (“Leave need not be granted where the amendment of the complaint . . .
6 constitutes an exercise in futility”)).

8 ANALYSIS

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10 In its prior Order, the Court found the following allegations against Hutsell
11 insufficient to state a claim that Hutsell had violated Plaintiff’s Fourth Amendment rights:
12 “Hutsell led the investigation into Plaintiff’s conduct, questioned Plaintiff after he was
13 mirandized, and advised Plaintiff at some point after Plaintiff’s phone had been searched
14 that the purpose of examining the cell phone was to gather personal information.” Mem.
15 & Order, ECF No. 22, at 10. These allegations were insufficient because “Plaintiff d[id]
16 not allege that Officer Hutsell was involved in the search or knew that it occurred until
17 after the fact.” Id.

18 Seemingly to remedy this error, Plaintiff amended his complaint to include the
19 following allegation:

20 On information and belief, OFFICERS, including but not
21 limited to HUTSELL and LUNARDI, searched the entirety of
22 the telephone and downloaded and kept personal and private
information of plaintiff.

23 SAC, ¶ 23. This purely conclusory statement, however, is insufficient to state a claim
24 against Hutsell. Plaintiff’s bald assertion that Hutsell searched his personal phone fails
25 to contain enough factual allegations to “nudge[] [his] claims across the line from
26 conceivable to plausible.” Twombly, 550 U.S. at 570. In contrast, to support his claims
27 against other Defendants, Plaintiff either alleges that they were present when Plaintiff
28 was told to hand over his cell phone (Lunardi and Foster) or that they wrote the

1 memorandum directing Plaintiff to relinquish it (Jones). Plaintiff fails to provide any
2 similar factual allegations to make his claim that Hutsell searched his personal cell
3 phone sufficiently plausible under the Twombly/Iqbal standard.

4
5 **CONCLUSION**

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7 For the reasons above, Defendants' Motion to Dismiss, ECF No. 24, is GRANTED
8 with leave to amend. Plaintiff may (but is not required to) file an amended complaint not
9 later than twenty (20) days following the date this Memorandum and Order is
10 electronically filed. If no amended pleading is timely filed, the causes of action
11 dismissed by virtue of this order will be deemed dismissed with prejudice upon no further
12 notice to the parties.

13 IT IS SO ORDERED.

14 Dated: April 18, 2017

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17 MORRISON C. ENGLAND, JR.
18 UNITED STATES DISTRICT JUDGE
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