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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY A. KERSTEN, D.D.S.,

Plaintiff,

v.

STATE OF CALIFORNIA FRANCHISE
TAX BOARD, et al,

Defendants.

No. 2:16-cv-00309-JAM-CMK

**ORDER GRANTING INDIVIDUAL
DEFENDANTS' AND LUIS R.
DOMINICIS'S MOTIONS TO DISMISS**

At first glance, this case involves a dentist's constitutional challenge to California's tax system. But a closer look reveals salient procedural issues about federalism, proper service, and Eleventh Amendment immunity. Plaintiff Timothy A. Kersten, D.D.S. challenges California's statutory tax scheme. First Am. Compl. ("FAC"), ECF No. 12. Now before the Court are two motions to dismiss. ECF No. 15 ("Individual Defendants' MTD"); ECF No. 17 ("Dominicis's MTD"). Kersten offers no opposition to the substantive legal arguments raised in these motions. ECF No. 20. For the reasons set forth below
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1 both motions are granted and the FAC is dismissed in its
2 entirety.¹

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4 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

5 California has a statutory scheme for handling delinquent
6 taxpayers. Section 19195 requires the California Franchise Tax
7 Board ("FTB") to biannually compile and publish a list of the 500
8 largest state income tax delinquencies. Cal. Rev. & Tax. Code
9 § 19195 (West 2012).² And Section 494.5 requires the FTB to
10 create a "certified list" of those taxpayers and mandates the
11 Board of Dentistry ("Board") (which is part of the Department of
12 Consumer Affairs ("DCA")) and the Department of Motor Vehicles
13 ("DMV") to revoke the licenses of taxpayers on the delinquency
14 list unless they obtain a release. Cal. Bus. & Prof. Code
15 § 494.5 (West 2013).

16 Plaintiff Timothy A. Kersten's name appeared on the FTB list
17 in October 2013. FAC ¶ 118. The Board and DCA suspended
18 Kersten's dental license, and he could not renew it. Id. ¶¶ 70-
19 72. He also could not renew his revoked driver's license. Id.
20 ¶¶ 80-83. So Kersten challenged California's tax scheme in a
21 § 1983 suit. He alleged that several California agencies and
22 officials violated his procedural due process, substantive due
23 process, and equal protection rights. See generally FAC. He

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25 ¹ This motion was determined to be suitable for decision without
26 oral argument. E.D. Cal. L.R. 230(g). The hearing was
27 scheduled for February 21, 2017. In deciding this motion, the
28 Court takes as true all well-pleaded facts in the complaint.

² Defendants incorrectly cite section 10195. No such provision
exists in California's Revenue and Taxation Code, and Kersten
references Section 19195 in his FAC.

1 also claimed California's statutory scheme violated the supremacy
2 clause. Id. Kersten seeks monetary, declarative, and injunctive
3 relief. Id. at 47-50.

4 Kersten named all of the following defendants in the FAC:
5 the FTB, the DCA, the Board, and the DMV ("State Agencies");
6 Betty T. Yee, Jerome Horton, Michael Cohen, Selvi Stanislaus,
7 John Chiang, Awet Kidane, Alexis Podesta, Spencer L. Walker,
8 Steven G. Morrow, Judith Forsythe, Steven Afriat, Fran Burton,
9 Stephen Casagrande, Yvette Chappel-Ingram, Katie Dawson, Luis R.
10 Dominicis, Kathleen King, Ross Lai, Huong Le, Meredith McKenzie,
11 Thomas Stewart, Bruce L. Witcher, Debra Woo, Karen Fischer, Dawn
12 Dill, Jean Shiimoto, David P. Harris, and Fiona Ma ("Individual
13 Defendants") (collectively "Defendants").

14 Soon after filing his FAC, Kersten moved to voluntarily
15 dismiss the FTB, the Board, and the DMV, leaving the DCA as the
16 only remaining state agency. ECF No. 19. The Court granted his
17 motion without prejudice. ECF No. 21.

18 That leaves Defendants' motions to dismiss. All individual
19 defendants—except Luis R. Dominicis and Dawn Dill—bring the first
20 motion. See generally Individual Defendants' MTD. Dominicis
21 brings the second motion. See generally Dominicis's MTD.
22 Neither Dawn Dill nor the DCA is a party to either motion to
23 dismiss. Kersten opposes only the Individual Defendants' motion.
24 See Opp'n at 1. The Individual Defendants and Dominicis filed a
25 joint reply. See Reply at 2 n.1.

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1 II. OPINION

2 A. Judicial Notice

3 The Individual Defendants and Dominicis separately request
4 judicial notice for the same documents: (1) Kersten's Petition
5 for Writ of Mandamus (attached to Request for Judicial Notice
6 ["RJN"] as Exh. A); (2) Kersten's First Amended Petition for
7 Writ of Mandamus (attached to RJN as Exh. B); and (3) the Shasta
8 County Superior Court's Final Ruling on Motion for Judgment on
9 the Pleadings (attached to RJN as Exh. C). See Individual
10 Defendants' RJN, ECF No. 15-3, at 2. See also Dominicis's RJN,
11 ECF No. 17-1, at 2. All documents arise from the state court
12 case.

13 A court may take judicial notice of a fact that is not
14 reasonably disputed if it "can be accurately and readily
15 determined from sources whose accuracy cannot reasonably be
16 questioned." Fed. R. Evid. 201(b)(2). On a motion to dismiss,
17 courts may consider "matters of public record." Northstar Fin.
18 Advisors Inc. v. Schwab Inv., 779 F.3d 1036, 1042 (9th Cir.
19 2015) (internal citation omitted). "Matters of public record"
20 include court filings. See Reyn's Pasta Bella, LLC v. Visa USA,
21 Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (courts may take
22 judicial notice of court filings and other matters of public
23 record).

24 The Court takes judicial notice of Kersten's Petition, his
25 First Amended Petition, and the Superior Court's Final Ruling
26 because they constitute matters of public record not subject to
27 reasonable dispute.

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1 B. Discussion

2 1. Comity

3 The comity principle's teeth are sharpest in federal cases
4 involving challenges to state taxation. For nearly a century,
5 Congress has recognized that "the autonomy and fiscal stability
6 of the States survive best when state tax systems are not
7 subject to scrutiny in federal courts." Fair Assessment in Real
8 Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102-03 (1981).
9 Congress codified this recognition in its Tax Injunction Act,
10 which provides that "district courts shall not enjoin, suspend
11 or restrain the assessment, levy or collection of any tax under
12 State law where a plain, speedy and efficient remedy may be had
13 in the courts of such State." 28 U.S.C. § 1341. Rooted in
14 federalism principles, § 1341 "was first and foremost a vehicle
15 to limit drastically federal district court jurisdiction to
16 interfere with so important a local concern as [tax
17 collection]." Franchise Tax Bd. of California v. Alcan Aluminum
18 Ltd., 493 U.S. 331, 338 (1990) (internal citation and quotation
19 marks omitted).

20 In other words, the comity principle precludes taxpayers
21 from bringing § 1983 actions challenging the validity of state
22 tax systems in federal court. See McNary, 454 U.S. at 116
23 (emphasis added). Instead, these taxpayers must use state
24 remedies to protect their federal rights, provided "those
25 remedies are plain, adequate, and complete" Id. "A
26 state remedy is adequate only where it is certain that the
27 taxpayer can raise constitutional claims in the state court."
28 Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1116

1 (internal citation omitted).

2 Defendants argue that comity bars Kersten's suit, reasoning
3 that his case attacks California's tax system and, so,
4 implicates federalism. See Individual Defendants' MTD at 7-8;
5 Dominicis's MTD at 7-8. Kersten offers no response. See Opp'n
6 at 1(discussing only mootness). Instead, he argues that,
7 properly construed, the Individual Defendants' motion is
8 actually FTB's motion because defense counsel appeared solely on
9 FTB's behalf, and so the Court should dismiss Individual
10 Defendants' motion as moot because FTB lacks standing to sue on
11 the Individual Defendants' behalf. Id. at 2. This makes no
12 sense. As the Individual Defendants and Dominicis correctly
13 state in reply, the notice of motion clearly shows the
14 Individual Defendants brought the motion. See Reply at 2
15 (emphasis added). See also Notice of Mot., ECF No. 15-1, at 2.
16 And defense counsel has been counsel of record since the case's
17 inception. The docket reflects this. To argue that the Court
18 made a clerical error, see Opp'n at 2, is wholly without merit.
19 There is no error because the Individual Defendants properly
20 noticed and filed their motion.

21 In short, the Court agrees with Defendants. Federal law
22 makes clear Kersten cannot bring his § 1983 suit in federal
23 court if California provides an adequate remedy. See McNary,
24 454 U.S. at 116. See also 28 U.S.C. § 1341. California
25 provides an adequate remedy because taxpayers may bring § 1983
26 actions in state court. See Logan v. S. California Rapid
27 Transit Dist., 136 Cal. App. 3d 116, 124 (1982) (finding state
28 courts have concurrent jurisdiction to adjudicate federally

1 created causes of action like § 1983 claims). Kersten elected
2 not to and that is a mistake with serious consequences for him.
3 See First Am. Pet. at 1, attached to RJN as Exh. B (seeking only
4 writ of mandamus under CCP Section 1085). Given "the important
5 and sensitive nature of state tax systems and the need for
6 federal-court restraint when deciding cases that affect [those]
7 systems," and because Kersten has not shown his remedy in
8 California state court is inadequate, the Court dismisses with
9 prejudice Kersten's FAC. See McNary, 454 U.S. at 102, 105
10 (dismissing "a § 1983 challenge to the administration of state
11 tax laws" on comity grounds). See also Navarro v. Block, 250
12 F.3d 729, 732 (9th Cir. 2001) (explaining dismissal with
13 prejudice appropriate "only if it appears beyond doubt that the
14 plaintiff can prove no set of facts in support of his claim
15 which would entitle him to relief."). Having dismissed
16 Kersten's FAC, the Court need not address Defendants' arguments
17 regarding res judicata and failure to state a claim.

18 2. Additional Jurisdictional Issues

19 Notwithstanding this dismissal, the Court must still
20 resolve, sua sponte, two jurisdictional issues affecting two
21 defendants: Dawn Dill and the DCA. Neither defendant was a
22 party to either motion to dismiss.

23 a. Improper Service on Defendant Dawn Dill

24 A federal court lacks personal jurisdiction over a
25 defendant if service of process is insufficient. See Omni
26 Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).
27 Rule 4 permits service of process by following state law in the
28 state where the district court is located. See Fed. R. Civ. P.

1 4(e)(1). Under California law, process can be served by
2 delivering the summons and complaint to the defendant personally
3 or to an agent authorized to receive service of process. Cal.
4 Code Civ. Proc. Section 416.90 (West 2017). Where service is
5 improper, a court may dismiss the case under Rule 12(b)(5). See
6 Bravo v. CDCR Director, No. C-12-06414 JSC, 2013 WL 3786630, at
7 *1 (N.D. Cal. July 17, 2013).

8 In their motions, Defendants note that Dawn Dill is not a
9 party to their briefs, reasoning that Kersten improperly served
10 her when he served the DCA because, at the time, she no longer
11 worked there. See Individual Defendants' MTD at 2 n.1;
12 Dominicis's MTD at 2 n.1. Kersten does not contest this issue.
13 See Opp'n at 1 (discussing only mootness). Because Kersten has
14 not met his burden to establish valid service under Rule 4, the
15 Court finds it lacks personal jurisdiction over Defendant Dill.
16 See Omni Capital Int'l, 484 U.S. at 104. And given the
17 federalism concerns underlying Kersten's suit, see supra Part
18 B.1, the Court dismisses with prejudice Kersten's FAC against
19 Dill.

20 b. Defendant DCA's Eleventh Amendment Immunity

21 Congress did not intend for § 1983 to abrogate a state's
22 Eleventh Amendment immunity. See Dittman v. California, 191
23 F.3d 1020, 1025-26 (9th Cir. 1999) (internal citations and
24 quotation marks omitted). And California has not waived its
25 immunity with respect to § 1983 claims brought in federal court.
26 See id. Because a suit against a California agency effectively
27 constitutes a suit against California, and because Kersten does
28 not contest that the DCA is a California agency, the Eleventh

1 Amendment bars Kersten's § 1983 suit against the DCA. See Kent
2 v. California Dep't of Consumer Affairs, No. 2:09-cv-02905, 2010
3 WL 2838628, at *3 (E.D. Cal. June 11, 2010) (dismissing
4 plaintiff's § 1983 claim against the DCA on Eleventh Amendment
5 immunity grounds). The Court dismisses with prejudice Kersten's
6 FAC against the DCA.

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8 III. ORDER

9 For the reasons set forth above, Kersten's FAC is DISMISSED
10 WITH PREJUDICE in its entirety.

11 IT IS SO ORDERED.

12 Dated: March 22, 2017

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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