

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO BONILLA, SANDRA ) 2:16-CV-01742L LEK  
AMAYA BONILLA, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CALIFORNIA HIGHWAY PATROL AN )  
AGENCY OF THE STATE OF )  
CALIFORNIA; OFFICER MCKENZIE )  
AND SGT. PETERSON and DOES 1 )  
TO 50, )  
 )  
Defendants. )  
 )

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**AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT  
CALIFORNIA HIGHWAY PATROL'S MOTION TO DISMISS COMPLAINT**

Before the Court is Defendant California Highway  
Patrol's ("Highway Patrol") Motion to Dismiss Complaint  
("Motion"), filed on August 1, 2016. [Dkt. no. 7.] Plaintiffs  
Guillermo Bonilla and Sandra Amaya Bonilla ("Plaintiffs") filed  
their memorandum in opposition on September 7, 2016, and the  
Highway Patrol filed its reply on September 14, 2016. [Dkt.  
nos. 12, 17.] The Court finds this matter suitable for  
disposition without a hearing pursuant to L.R. 230(g) of the  
Local Rules of the United States District Court for the Eastern  
District of California ("Local Rules"). After careful  
consideration of the Motion, supporting and opposing memoranda,  
and the relevant legal authority, the Highway Patrol's Motion is  
HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set  
forth below.

1 **BACKGROUND**

2 Plaintiffs, who were proceeding pro se at the time,  
3 filed their Complaint in the Superior Court of California, County  
4 of Sacramento, on November 24, 2015. The Highway Patrol removed  
5 the case pursuant to 28 U.S.C. §§ 1331 and 1441(a), based on  
6 federal question jurisdiction. [Notice of Removal of Action,  
7 filed 7/25/16 (dkt. no. 1), at ¶ 4.] The Complaint also names as  
8 Defendants "Officer McKenzie and Sgt. Peterson." [Notice of  
9 Removal of Action, Exh. A (Complaint) at 1.] Defendants McKenzie  
10 and Peterson have not yet been served.

11 The Complaint alleges that, on August 27, 2014, on the  
12 I-80 in Sacramento County, Highway Patrol agents seized  
13 Plaintiffs' 2000 utility flatbed and 2005 Freightliner Truck  
14 (collectively "the property"). After the seizure, the Highway  
15 Patrol and its agents, Defendants McKenzie and Peterson (all  
16 collectively "Defendants"), "were presented with evidence that  
17 the property seized was, not for hire, and in the process of  
18 being shipped for purposes of sale." [Notice of Removal of  
19 Action, Exh. A (Complaint) at 1 Cause of Action - General  
20 Negligence.<sup>1</sup>] Plaintiffs allege that, because Defendants were  
21 presented with evidence that Plaintiffs "had taken all lawful  
22 steps required for the release of the property," Defendants "were

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23 <sup>1</sup> The Complaint consists of several documents that are not  
24 consecutively paginated.

1 under a mandatory, non-discretionary duty to release the property  
2 to Plaintiffs but failed and refused to do so." [Id.]  
3 Plaintiffs argue that the conditions of release that Defendants  
4 imposed were "not necessary under law," and Defendants "knew or  
5 should have known that the property was not for hire and was  
6 being moved only for purposes of sale and not for reasons that  
7 required repairs, registration or permits." [Id.] The first  
8 cause of action alleges that Defendants recklessly and  
9 negligently refused to release Plaintiffs' property without a  
10 legal basis ("Count I"). As a result of Defendants' breach of  
11 duty, Plaintiffs allegedly suffered financial loss, "including  
12 loss of the sale of the property, loss of use of the property and  
13 unnecessary costs and expenses including but not limited to  
14 storage fees in an amount of \$250,000.00." [Id.]

15 Plaintiffs also allege: an intentional tort claim  
16 because Defendants refused to release Plaintiffs' property even  
17 though they knew that the property was pending sale to a third  
18 party ("Count II"); [Complaint, 2 Cause of Action - Intentional  
19 Tort;] violation of the mandatory duties under California Vehicle  
20 Code §§ 22651 and 34660 ("Count III"); [id., 3rd Cause -  
21 Mandatory Duty;] and a 42 U.S.C. § 1983 claim alleging  
22 deprivation of property without due process, in violation of the  
23 Fourteenth Amendment ("Count IV") [id., 4th Cause - 42 U.S.C.  
24 Section 1983].

1 In the instant Motion, the Highway Patrol alleges:  
2 Counts I and II fail based on California Government Code § 815  
3 because there is no statutory basis for liability; Count III  
4 fails because neither § 22651 nor § 34660 imposes a mandatory  
5 duty; Counts I, II, and III also fail because the Highway Patrol  
6 is immune from liability under California Government Code  
7 § 820.2; and Count IV fails because the Highway Patrol is not a  
8 "person" for purposes of a § 1983 claim.

## 9 **DISCUSSION**

### 10 **I. Counts I and II**

11 Counts I, II, and III allege state law claims that this  
12 Court has supplemental jurisdiction over pursuant to 28 U.S.C.  
13 § 1367. See, e.g., Cozad v. Astrazeneca LP, Case No.  
14 1:14-cv-02049-SKO, 2016 WL 4539944, at \*3 (E.D. Cal. Aug. 30,  
15 2016) ("When a district court . . . hears state law claims based  
16 on supplemental jurisdiction, the court applies state substantive  
17 law to the state law claims." (some citations omitted) (citing  
18 Bass v. First Pac. Networks, Inc., 219 F.3d 1052, 1055 n.2 (9th  
19 Cir. 2000))). California Government Code § 815 states:

20 Except as otherwise provided by statute:

21 (a) A public entity is not liable for an injury,  
22 whether such injury arises out of an act or  
23 omission of the public entity or a public employee  
24 or any other person.

25 (b) The liability of a public entity established  
26 by this part (commencing with Section 814) is  
27 subject to any immunity of the public entity

provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

The California Supreme Court has stated that, under § 815, direct tort liability of public entities must be based on a **specific statute** declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles. (See, e.g., Zelig [v. Cty. of Los Angeles], 27 Cal. 4th [1112,] 1131-1132, 119 Cal. Rptr. 2d 709, 45 P.3d 1171 [(2002)]; Hoff v. Vacaville Unified School Dist. (1998) 19 Cal. 4th 925, 932, 80 Cal. Rptr. 2d 811, 968 P.2d 522, and cases cited.) As Zelig observed, quoting from an earlier case, ""the intent of the [Tort Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances . . . ."" (Zelig, *supra*, at p. 1127, 119 Cal. Rptr. 2d 709, 45 P.3d 1171.)

Eastburn v. Reg'l Fire Prot. Auth., 80 P.3d 656, 660 (Cal. 2003)

(some alterations in Eastburn) (emphasis added). Further, [t]o state a cause of action, every fact essential to the existence of statutory liability must be pleaded with particularity, including the existence of a statutory duty. Susman v. Los Angeles, 269 Cal. App. 2d 803, 808, 75 Cal. Rptr. 240 (Cal. App. 2d Dist. 1969); Lopez [v. S. Cal. Rapid Transit Dist.], 40 Cal. 3d 780, 795, 221 Cal. Rptr. 840, 710 P.2d 907 [(1985)]. "The facts showing the existence of the claimed duty must be alleged." Since the duty of a governmental agency can only be created by statute, the statute claimed to establish the duty must be identified. Searcy v. Hemet Unified Sch. Dist., 177 Cal. App. 3d 792, 802, 223 Cal. Rptr. 206 (Cal. App. 4th Dist. 1986).

1 D.K. ex rel. G.M. v. Solano Cty. Office of Educ., 667 F. Supp. 2d  
2 1184, 1198 (E.D. Cal. 2009).

3 Plaintiffs argue that liability as to Counts I and II  
4 is based on California Government Code § 815.2, which states:

5 (a) A public entity is liable for injury  
6 proximately caused by an act or omission of an  
7 employee of the public entity within the scope of  
8 his employment if the act or omission would, apart  
9 from this section, have given rise to a cause of  
10 action against that employee or his personal  
11 representative.

12 (b) Except as otherwise provided by statute, a  
13 public entity is not liable for an injury  
14 resulting from an act or omission of an employee  
15 of the public entity where the employee is immune  
16 from liability.

17 Plaintiffs acknowledge that the Complaint does not cite § 815.2,  
18 but they argue that this is not fatal to their claims. However,  
19 as stated *supra*, the statutory basis for liability must be  
20 identified to state a cause of action. Counts I and II therefore  
21 fail to state plausible claims for relief. See Ashcroft v.  
22 Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss,  
23 a complaint must contain sufficient factual matter, accepted as  
24 true, to 'state a claim to relief that is plausible on its  
25 face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570,  
26 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). The Highway  
27 Patrol's Motion is therefore GRANTED insofar as Plaintiffs'  
28 claims against the Highway Patrol in Counts I and II are HEREBY  
29 DISMISSED.

1           “Whether dismissal is with or without prejudice will  
2   depend upon whether it is possible for Plaintiff to cure any  
3   defects.” Rodriguez v. Brown, 1:15-cv-01754-LJO-EPG-PC, 2016 WL  
4   6494705, at \*3 (E.D. Cal. Nov. 1, 2016) (citing Vess v. Ciba-  
5   Geigy Corp. USA, 317 F.3d 1097, 1107-08 (9th Cir. 2003)  
6   (collecting cases)), *report and recommendation adopted*, 2016 WL  
7   7104173 (E.D. Cal. Dec. 6, 2016). The Highway Patrol also argues  
8   that Counts I and II fail because they do not allege the  
9   requirements of California Government Code § 815.6, which states:

10           Where a public entity is under a mandatory duty  
11           imposed by an enactment that is designed to  
12           protect against the risk of a particular kind of  
13           injury, the public entity is liable for an injury  
14           of that kind proximately caused by its failure to  
15           discharge the duty unless the public entity  
16           establishes that it exercised reasonable diligence  
17           to discharge the duty.

18   See Motion at 5 (“In California, a private cause of action lies  
19   against a public entity only if the underlying enactment sets  
20   forth the elements of liability identified in California  
21   Government Code § 815.6.” (citing Haggis v. City of Los Angeles,  
22   22 Cal. 4th 490, 499-500 (2000))). However, Haggis does not  
23   stand for the proposition that all claims against a governmental  
24   entity must meet the requirements of § 815.6. See Haggis, 22  
25   Cal. 4th at 495 (stating that the four causes of action brought  
26   by the plaintiff were for breach of mandatory duties pursuant to  
27   § 815.6). Plaintiffs do not bring either Count I or Count II  
28   pursuant to § 815.6. This Court therefore CONCLUDES that § 815.6

1 does not apply. Because it is possible for Plaintiffs to cure  
2 the defects in their claims against the Highway Patrol in  
3 Counts I and II, the dismissal is WITHOUT PREJUDICE.

4 **II. Count III**

5 In contrast to Counts I and II, Count III expressly  
6 alleges that Defendants violated California Vehicle Code §§ 22651  
7 and 34660. The instant Motion contends that Count III still  
8 fails to state a claim upon which relief can be granted because  
9 it does not plead a violation of a mandatory duty, as required by  
10 § 815.6.

11 Section 22651 sets forth various circumstances when a  
12 peace officer is permitted to remove a vehicle. The Highway  
13 Patrol argues that language regarding removal is permissive, not  
14 mandatory, [Mem. in Supp. of Motion at 6,] but its argument  
15 misconstrues Count III. Plaintiffs do not allege that there was  
16 a mandatory duty to **remove** their property; they allege that  
17 Defendants had a mandatory duty to **release** their property after  
18 they were presented with evidence that Plaintiffs "had taken all  
19 lawful steps required for the release of the property," but

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21 //

22 //

23 //

24 //



1 Defendants failed to do so.<sup>2</sup> [Complaint, 3rd Cause - Mandatory  
2 Duty.] Section 22651 does includes certain circumstances when  
3 the return of a removed vehicle is mandatory. See, e.g.,  
4 § 22651(i)(4) ("A vehicle shall be released to the legal owner,  
5 as defined in Section 370, if the legal owner does all of the  
6 following"), (o)(3) ("For the purposes of this subdivision, the  
7 vehicle shall be released under either of the following  
8 circumstances").

9 Similarly, § 34660(a) states that it is a misdemeanor  
10 for "[a] motor carrier of property, after its motor carrier  
11 permit has been suspended by the department, [to] continue[] to  
12 operate as a motor carrier," and § 34660(d) allows the Highway  
13 Patrol to impound a vehicle operated in violation of subsection  
14 (a). Subsection (d) also states that the vehicle "shall be  
15 released to the registered owner or authorized agent" upon the  
16 provision of the required driver's license and proof of  
17 compliance with Division 14.8.5 of the Vehicle Code. Thus, while

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18 <sup>2</sup> The Highway Patrol's Motion includes additional  
19 information about the circumstances surrounding the removal of  
20 Plaintiffs' property. However, this Court will not consider the  
21 information because, as a general rule, this Court's scope of  
22 review in considering a motion to dismiss is limited to the  
23 allegations in the complaint. See Daniels-Hall v. Nat'l Educ.  
24 Ass'n, 629 F.3d 992, 998 (9th Cir. 2010). Further, counsel's  
25 statements in a motion are not evidence. Cf. Barcamerica Int'l  
26 USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 593 n.4 (9th  
27 Cir. 2002) ("[A]rguments and statements of counsel are not  
28 evidence and do not create issues of material fact capable of  
29 defeating an otherwise valid motion for summary judgment."  
30 (citation and internal quotation omitted)).

1 the impounding of a vehicle under § 34660(d) is discretionary,  
2 once impounded, the release of the impounded vehicle is mandatory  
3 if the registered owner or authorized agent provides the required  
4 documentation.

5           This Court therefore CONCLUDES that Count III alleges  
6 violations of mandatory duties under § 22651 and § 34660. In  
7 light of this conclusion, this Court also rejects the Highway  
8 Patrol's argument that it is immune from liability under  
9 California Government Code § 820.2. Section 820.2 states:  
10 "Except as otherwise provided by statute, a public employee is  
11 not liable for an injury resulting from his act or omission where  
12 the act or omission was the result of the **exercise of the**  
13 **discretion** vested in him, whether or not such discretion be  
14 abused." (Emphasis added.)

15           This Court therefore CONCLUDES that Count III states a  
16 plausible claim for relief against the Highway Patrol and DENIES  
17 the Highway Patrol's Motion as to Count III.

18 **III. Section 1983**

19           Plaintiffs bring Count IV pursuant to 42 U.S.C. § 1983,  
20 which states, in pertinent part:

21           Every person who, under color of any statute,  
22 ordinance, regulation, custom, or usage, of any  
23 State or Territory or the District of Columbia,  
24 subjects, or causes to be subjected, any citizen  
25 of the United States or other person within the  
26 jurisdiction thereof to the deprivation of any  
27 rights, privileges, or immunities secured by the  
28 Constitution and laws, shall be liable to the

1 party injured in an action at law, suit in equity,  
2 or other proper proceeding for redress . . . .

3 A state agency is not a "person" for purposes of a § 1983 claim  
4 for damages. See Will v. Mich. Dep't of State Police, 491 U.S.  
5 58, 71 (1989); Regents of the Univ. of Cal. v. Doe, 519 U.S. 425,  
6 429 (1997). The Highway Patrol is a state agency. See Cal.  
7 Gov't Code § 11000(a). Plaintiffs agree that a § 1983 claim for  
8 damages is not available against a public entity, but they  
9 emphasize that a § 1983 claim is available against the individual  
10 defendants. [Mem. in Opp. at 7-8.]

11 In light of the foregoing, this Court CONCLUDES that  
12 Count IV fails to state a plausible claim against the Highway  
13 Patrol and that it is not possible to cure the defects in the  
14 claim by amendment. This Court therefore GRANTS the Motion  
15 insofar as this Court DISMISSES Count IV WITH PREJUDICE.

#### 16 **CONCLUSION**

17 On the basis of the foregoing, the Highway Patrol's  
18 Motion to Dismiss Complaint, filed August 1, 2016, is HEREBY  
19 GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED  
20 insofar as Plaintiffs' claims against the Highway Patrol in  
21 Counts I and II are HEREBY DISMISSED, and their claim against the  
22 Highway Patrol in Count IV is HEREBY DISMISSED WITH PREJUDICE.  
23 The Motion is DENIED insofar as the dismissal of Plaintiffs'  
24 claims against the Highway Patrol in Counts I and II are WITHOUT

1 PREJUDICE, and the Motion is DENIED as to Plaintiffs' claim  
2 against the Highway Patrol in Count III.<sup>3</sup>

3 This Court GRANTS Plaintiffs leave to file an amended  
4 complaint to address the defects in their claims against the  
5 Highway Patrol in Counts I and II. Plaintiffs do not have leave  
6 to make any other amendments to the Complaint. Plaintiffs shall  
7 file their amended complaint by **February 17, 2017**. If Plaintiffs  
8 fail to do so, or if the amended complaint fails to cure the  
9 defects in Counts I and II that this Court has identified in this  
10 Order, the claims that this Court has dismissed without prejudice  
11 will be dismissed with prejudice.

12 IT IS SO ORDERED.

13 DATED AT HONOLULU, HAWAII, January 17, 2017.  
14



/s/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge

15 **GUILLERMO BONILLA, ET AL. VS. CALIFORNIA HIGHWAY PATROL AN AGENCY**  
16 **OF THE STATE OF CALIFORNIA, ET AL; 2:16-CV-01742 LEK; AMENDED**  
17 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CALIFORNIA**  
18 **HIGHWAY PATROL'S MOTION TO DISMISS COMPLAINT**

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19 <sup>3</sup> This Court makes no findings or conclusions regarding  
20 Plaintiffs' claims against the other defendants.