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DAVID FOSTER,

Plaintiff,

v.

CITY OF SOUTH LAKE TAHOE and

NANCY KERRY,

Defendants.

No. 2:16-cv-02840-JAM-EFB

**ORDER**

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This case involves a dispute between Plaintiff David Foster and the City of South Lake Tahoe ("City") and Nancy Kerry, City Manager for the City of South Lake Tahoe (collectively, "Defendants"). Defendants filed a Rule 12(b)(1) motion to dismiss. ECF No. 4. While evaluating that motion, the Court discerned a Rule 12(b)(6) issue regarding Foster's § 1983 claim. Concluding that this Court had jurisdiction, the Court denied Defendants' motion, but ordered supplemental briefing on the Rule 12(b)(6) issue. See Min. Order, ECF No. 9. For the reasons stated below, the Court concludes Foster failed to state a § 1983 claim.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 In April 2015 the City commissioned a sculpture to be built  
3 at Champions Plaza to celebrate local athletes and their  
4 accomplishments in the 2014 Winter Olympics. See Compl., ECF No.  
5 1, ¶ 9. The City opened a bidding process and eventually  
6 selected Foster's "Olympic Flame" design. See id. ¶ 11. The  
7 parties executed a written contract, see id. ¶ 12, and then  
8 Foster began making maquettes (i.e., three-dimensional versions  
9 of his design), see id. ¶¶ 12-15. After Foster submitted his  
10 third maquette, the City terminated the contract and refused to  
11 reimburse him for his expenses. See id. ¶¶ 15-16. Foster sued  
12 Defendants, bringing a Fifth Amendment § 1983 claim, a breach of  
13 contract claim, and a misappropriation of intellectual property  
14 claim. See Compl. at 5-8.

15 II. OPINION

16 A. Sua Sponte Rule 12(b)(6) Challenge

17 A court may dismiss a claim sua sponte for failure to state  
18 a claim. See Vahora v. Masood, No. 16-1624, 2017 WL 1213423, at  
19 \*15 (E.D. Cal. Apr. 3, 2017) (internal citation omitted).

20 1. Defendant Kerry

21 The Court dismisses Foster's § 1983 claim against defendant  
22 Kerry because Foster improperly sued her in her official  
23 capacity. See Harmon v. Cty. of Sacramento, No. 12-2758, 2016  
24 WL 319232, at \*18 (E.D. Cal. Jan. 27, 2016) (federal district  
25 courts routinely dismiss official-capacity claims as duplicative  
26 or redundant when a plaintiff also brings the same § 1983 claim

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28 scheduled for March 7, 2017. In deciding this motion, the Court  
takes as true all well-pleaded facts in the complaint.

1 against a municipality) (internal citations omitted).

2 2. The City

3 Foster argues this Court may dismiss a claim sua sponte for  
4 failure to state a claim only if the plaintiff cannot possibly  
5 win relief. See Pl.'s Suppl. Br. at 1. Vahora, 2017 WL  
6 1213423 at \*15 (internal citation omitted). But where, as here,  
7 a court notifies a plaintiff, that plaintiff must meet Rule  
8 8(a)'s plausibility standard to survive the court's sua sponte  
9 challenge. Vahora, 2017 WL 1213423 at \*15 (internal citation  
10 omitted).

11 Foster has not done so. He alleges "Defendants violated  
12 the Takings Clause when [they] took [his] designs, maquettes,  
13 and labor, for public use and without just compensation."  
14 Compl. ¶ 25. That does not suffice to state a Monell claim.  
15 See Monell v. Dep't of Soc. Servs. of the City of New York, 436  
16 U.S. 658, 694–95 (1978) (holding that a plaintiff must show the  
17 municipality had a policy or custom that violated plaintiff's  
18 federally protected rights). Because Foster's complaint does  
19 not allege a policy or custom as the moving force behind his  
20 alleged constitutional violation, the Court dismisses Foster's  
21 § 1983 claim for failure to state a Monell claim. This Court  
22 finds, however, that further amendment would not be futile and  
23 will give Plaintiff one more opportunity to try to properly  
24 plead his § 1983 claim against the City. See DeSoto v. Yellow  
25 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

26 B. State Law Claims

27 That two remaining claims brought by Foster are state law  
28 claims for breach of contract and misappropriation of

1 intellectual property. The Court intends to decline to exercise  
2 supplemental jurisdiction over these claims if Foster elects not  
3 to amend his complaint to include a § 1983 claim-the only claim  
4 over which this Court has original jurisdiction. See 28 U.S.C.  
5 § 1367(c)(3).

6 C. Sanctions

7 This Court enforces page limits for briefs, see ECF No. 3-2  
8 ("Filing Requirements Order"), and a violation results in  
9 monetary sanctions, see id. Defendants' reply brief for their  
10 Rule 12(b)(1) motion to dismiss exceeded those limits. See  
11 Reply, ECF No. 7 (8 pages); see Filing Requirements Order at 1  
12 (imposing 5-page limit for reply briefs and charging \$50.00 for  
13 each additional page). The Court sanctions Defendants \$150 for  
14 violating the Order.

15 III. ORDER

16 For the reasons set forth above, the Court dismisses all  
17 claims against defendant Nancy Kerry with prejudice and dismisses  
18 Foster's § 1983 claim against the City with leave to amend.  
19 Foster shall file his amended complaint within twenty days of the  
20 date of this Order and the City shall file its responsive  
21 pleading within twenty days thereafter. If Foster elects not to  
22 file an amended complaint this case will be dismissed without  
23 prejudice. Finally, Defendants shall pay the Court \$150 no later  
24 than April 26, 2017.

25 IT IS SO ORDERED.

26 Dated: April 21, 2017

27   
28 JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE