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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TYRONE T. TAYLOR,

Plaintiff,

v.

GOLDEN GATE FIELDS, et al.,

Defendants.

No. C 14-0411 PJH

**ORDER VACATING ORDER FOR  
SERVICE, DISMISSING CASE WITH  
LEAVE TO AMEND, DENYING  
APPLICATION FOR TRO, AND DENYING  
MOTION TO COMPEL DISCOVERY**

Plaintiff Tyrone T. Taylor filed this action on January 28, 2014, against defendants Golden Gate Fields, The Stronach Group (which owns and operates the Golden Gate Fields racetrack), Mike Rogers (an employee of The Stronach Group), and the California Horse Racing Board ("CHRB"), asserting three claims of constitutional violations under 42 U.S.C. § 1983<sup>1</sup> against the California Horse Racing Board, and possibly against the other three defendants, and asserting a state-law cause of action for intentional infliction of emotional distress against all defendants. Plaintiff seeks compensatory and punitive damages "in excess of \$20 million U.S. dollars," and declaratory and injunctive relief.

Also on January 28, 2014, plaintiff filed an application to proceed in forma pauperis ("IFP"), which was granted on January 29, 2014, apparently without the review required under 28 U.S.C. § 1915(e)(2). The case was subsequently reassigned to the undersigned district judge. Because a proper § 1915(e)(2) review was not completed, the court hereby VACATES only the portion of the January 29, 2014 IFP order that directed that the United

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<sup>1</sup> Plaintiff alleges in the complaint that the constitutional claims are brought pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (although he also describes the case as "a civil action under 42 U.S.C. § 1983"). Bivens actions can be brought only against federal employees sued in their individual capacities. See, e.g., Correct. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001). No federal employees are named as defendants in plaintiff's complaint. Constitutional claims against state actors must be brought under 42 U.S.C. § 1983. See, e.g., Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991).

1 States Marshal serve the summons and complaint on defendants.

2 Further, the court DISMISSES the complaint, pursuant to 28 U.S.C. § 1915(e) for  
3 failure to state a claim. The dismissal is with leave to amend, as set forth below. Before  
4 the summons and complaint can be served, plaintiff must file a viable complaint.

5 Finally, on February 13, 2014, plaintiff filed an application for a temporary restraining  
6 order ("TRO"), and also filed a motion to compel production of documents. Both the TRO  
7 application and the motion to compel are DENIED.

## 8 DISCUSSION

### 9 A. Legal Standard

10 The court may authorize a plaintiff to file an action in federal court without  
11 prepayment of fees or security if the plaintiff submits an affidavit showing that he or she is  
12 unable to pay such fees or give security therefor. 28 U.S.C. § 1915(a)(1). When a  
13 complaint is filed IFP, it must be dismissed prior to service of process if it is frivolous or  
14 malicious, fails to state a claim on which relief may be granted, or seeks monetary  
15 damages against defendants who are immune from suit. 28 U.S.C. § 1915(e)(2); see also  
16 Franklin v. Murphy, 745 F.2d 1221, 1226-27 (9th Cir. 1984).

17 A complaint is frivolous for purposes of § 1915(e)(2) if it lacks any arguable basis in  
18 fact or in law. Neitzke v. Williams, 490 U.S. 319, 328-30 (1989). A complaint lacks an  
19 arguable basis in law only if controlling authority requires a finding that the facts alleged fail  
20 to establish an arguable legal claim. Guti v. INS, 908 F.2d 495, 496 (9th Cir. 1990).  
21 Thus, a court may dismiss as frivolous complaints that recite bare legal conclusions without  
22 any supporting facts. Franklin, 745 F.2d at 1228; see also Tripati v. First Nat'l Bank &  
23 Trust, 821 F.2d 1368, 1370 ( 9th Cir.1987). The term "frivolous" embraces "not only the  
24 inarguable legal conclusion, but also the fanciful factual allegation." Neitzke, 490 U.S. at  
25 325; McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

26 In reviewing a complaint for frivolity, a trial court may "pierce the veil" of the  
27 allegations and dismiss those claims whose factual contentions are clearly baseless."  
28 Neitzke, 490 U.S. at 327. In so doing, the assessment of the factual allegations must be

1 weighted in plaintiff's favor. Denton v. Hernandez, 504 U.S. 25, 32 (1992).

2 Where a litigant is acting pro se and the court finds the litigant's complaint frivolous  
3 within the meaning of § 1915(e)(2), the court must give the litigant notice of the deficiencies  
4 of the complaint and an opportunity to amend before final dismissal, unless it is absolutely  
5 clear that the deficiencies of the complaint could not be cured by amendment. Cato v.  
6 United States, 70 F.3d 1103, 1106 (9th Cir. 1995); Eldridge v. Block, 832 F.2d 1132,  
7 1135-37 (9th Cir. 1987).

8 B. The Complaint

9 Plaintiff is a long-time patron of Golden Gate Fields, a horse racing facility located in  
10 Albany, California. He alleges that on December 28, 2013, he was waiting in line to enter  
11 the racetrack, along with 30-40 other patrons. He claims that the person standing in front  
12 of him offered to "take care of his admission" by allowing plaintiff to use A "Trainer's Card."  
13 After plaintiff entered using the "Trainer's Card," he reached for a race program, but claims  
14 he was told by the "Gate Person" that he was not entitled to a program because he had  
15 used one of the "Trainer's Guest Credentials." Cplt ¶¶ 16-18

16 Plaintiff informed the Gate Person that he believed he was entitled to a program,  
17 whereupon he and the Gate Person became involved in a heated discussion, the gist of  
18 which appears to have been that plaintiff demanded that he be treated with courtesy and  
19 respect; and the Gate Person insisted that "You don't pay nothing, you don't get nothing."  
20 Cplt ¶¶ 19-20. In response, plaintiff asserted that he didn't "deserve to be treated as if I'm  
21 some ignorant Nigga" and that he was "tired just [as] . . . many other patrons, [of] being  
22 talked down to, disrespected and looked at in a contemptible low class manner, as if we are  
23 some 'ignorant Nigga' and I'm tired of you and others consistently talking down to us as if  
24 we 'are Ignorant Nigga's.'" See Cplt ¶ 21. Eventually, security personnel appeared on the  
25 scene, and further heated discussion ensued. Cplt ¶ 23. According to plaintiff, the security  
26 personnel ordered him to leave, based on the volume of his voice and his use of offensive  
27 language, and refused his request for a refund of his \$10 parking fee. Cplt ¶ 23.

28 Plaintiff alleges that on December 31, 2013, he mailed written requests to each of

1 the defendants herein, seeking "a meeting to resolve the alleged issues without the need of  
2 filing a complaint in regards to the issues on the face of the complaint." He asserts that he  
3 gave defendants until January 14, 2014 to respond, but that he had received no response  
4 as of the date of filing of the complaint. Cplt ¶¶ 24-26.

5 Plaintiff filed the complaint as a proposed class action, on behalf of a class defined  
6 as "all persons who have been unfairly ejected, expelled, psychologically harassed and  
7 intimidated by the Golden Gate Fields Security Department without at least a due process  
8 informal explaining of the negative circumstances." Cplt ¶ 27.

9 Plaintiff asserts that the California Horse Racing Board (and possibly the other  
10 defendants) violated his rights to due process under the Fifth Amendment,<sup>2</sup> his First  
11 Amendment right to freedom of speech, and his Fourth Amendment right to be free from  
12 unlawful search and seizure. He also asserts a claim of intentional infliction of emotional  
13 distress against all defendants.

14 C. Analysis

15 1. Violation of Federal Rule of Civil Procedure 8(a)

16 The court finds that plaintiff's complaint does not comply with Federal Rule of Civil  
17 Procedure 8(a), which requires that "[a] pleading that states a claim for relief" contain,  
18 among other things, "a short and plain statement of the claim showing that the pleader is  
19 entitled to relief." Fed. R. Civ. P. 8(a).

20 Detailed factual allegations are not required, but "[t]hreadbare recitals of the  
21 elements of a cause of action, supported by mere conclusory statements, do not suffice,"  
22 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S.  
23 544, 555 (2007)), and courts "are not required to indulge unwarranted inferences," Doe I v.  
24 Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (quotation and citation omitted).  
25 While factual allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at  
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27 <sup>2</sup> The Fifth Amendment's Due Process Clause applies only to the federal government.  
28 Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008). Accordingly, the court interprets  
plaintiff's claim as one alleging violations of the Fourteenth Amendment's Due Process Clause.

1 678.

2 Here, the complaint is deficient in that it fails to clearly allege which cause of action  
3 is being asserted against which defendant. While the first, second, and third causes of  
4 action all state in the heading that they are brought against the CHRB, the first and second  
5 causes of action also refer to "the wrongful conduct of the [d]efendants, each and every  
6 one of them," and the third cause of action refers to "retaliatory actions" of The Stronach  
7 Group. Nowhere does the complaint plead any facts against Mike Rogers.

8 2. Dismissal of California Horse Racing Board

9 Further, because the CHRB is a Department of the Business, Consumer Services,  
10 and Housing Agency of the State of California, the Eleventh Amendment to the United  
11 States Constitution precludes plaintiff from pursuing claims against CHRB in federal court.

12 The Eleventh Amendment bars from the federal courts suits against a state by its  
13 own citizens, citizens of another state or citizens or subjects of any foreign state.  
14 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237-38 (1985). This includes state law  
15 claims brought against a state in federal court under the supplemental jurisdiction statute,  
16 28 U.S.C. § 1367. Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 541-42  
17 (2002). This Eleventh Amendment immunity extends to suits against a state agency. See,  
18 e.g., Brown v. Cal. Dep't of Corrs., 554 F.3d 747, 752 (9th Cir. 2009).

19 Relying in part on the Eleventh Amendment immunity discussed above, the  
20 Supreme Court also has held that states are not "persons" under § 1983. See Will v.  
21 Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Accordingly, the claims against the  
22 CHRB must be DISMISSED from the case, and all references to the CHRB must be  
23 deleted in any amended complaint.

24 3. Constitutional claims

25 The court finds further that the complaint fails to state a claim of constitutional  
26 violations against Golden Gate Fields, the Stronach Group, or Mike Rogers. Title 42  
27 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or  
28 immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia

1 Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not  
2 itself a source of substantive rights, but merely provides a method for vindicating federal  
3 rights elsewhere conferred. See Graham v. Connor, 490 U.S. 386, 393-94 (1989). Here,  
4 plaintiff alleges violations of his Fifth Amendment due process rights, his First Amendment  
5 rights to freedom of speech and freedom of association, and his Fourth Amendment rights  
6 to be free of unlawful search and seizure.

7 To state a claim under § 1983, a plaintiff must allege two essential elements – that a  
8 right secured by the Constitution or laws of the United States was violated; and that the  
9 alleged violation was committed by a person acting under the color of state law. West v.  
10 Atkins, 487 U.S. 42, 48 (1988); see also Marsh v. County of San Diego, 680 F.3d 1148,  
11 1152 (9th Cir. 2012). Taking the second element first, the court notes that a person acts  
12 under color of state law if he "exercise[s] power possessed by virtue of state law and made  
13 possible only because the wrongdoer is clothed with the authority of state law." West, 487  
14 U.S. at 49 (citation and quotation omitted).

15 A private individual generally does not act under color of state law. See Gomez v.  
16 Toledo, 446 U.S. 635, 640 (1980). Purely private conduct, no matter how wrongful, is not  
17 covered under § 1983. Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974).  
18 Simply put – there is no right to be free from the infliction of constitutional deprivations by  
19 private individuals. See Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).

20 Action taken by private individuals or organizations may be under color of state law  
21 if "there is such a close nexus between the State and the challenged action that seemingly  
22 private behavior may be fairly treated as that of the State itself." Brentwood Academy v.  
23 Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001). Here, however,  
24 plaintiff has alleged no facts sufficient to show that Golden Gate Fields, Mike Rogers, or  
25 The Stronach Group is a state actor.

26 Golden Gate Fields is a racing facility owned and operated by The Stronach Group,  
27 which, according to its website, is a private company based in Canada, and owns and  
28 operates a number of horse racing, breeding, and training facilities in the United States and

1 Canada. Mike Rogers is the President of The Stronach Group's Racing Division.

2 The sole connection alleged in the complaint between Golden Gate Fields and any  
3 governmental entity is the fact that the CHRB "authorizes and licenses" Golden Gate Fields  
4 to operate as a racing facility under California law. Cplt ¶ 7. However, the mere fact that a  
5 facility or individual must be licensed by the State of California is not sufficient to establish  
6 that such facility or individual is a state actor. See Moose Lodge No. 107 v. Irvis, 407 U.S.  
7 163, 175-78 (1972) (a state's alcohol licensing and regulatory scheme did not transform a  
8 private club with a liquor license into a state actor); Simmons v. Sacramento County Sup.  
9 Ct., 318 F.3d 1156, 1161 (9th Cir. 2003) (attorney does not become state actor simply by  
10 virtue of fact he/she is licensed to practice law in the state).

11 The complaint also alleges that the CHRB "approves of" the "unconstitutional  
12 actions" taken by the Security Department at Golden Gate Fields "in the [e]xpelling and  
13 permanent barring of nonviolent and complying disgruntled racing patrons who exercise  
14 their [c]onstitutional Free Speech [r]ights," Cplt ¶ 7, but this conclusory allegation is  
15 insufficient to state a plausible claim in the absence of any supporting facts. Plaintiff  
16 alleges no facts showing, for example, that the alleged constitutional violations resulted  
17 from the exercise of coercive power by the government, or that Golden Gate Fields or The  
18 Stronach Group operated as a willful participant in joint activity with the government, which  
19 resulted in the alleged constitutional violations. See Brentwood, 531 U.S. at 296. Nor has  
20 plaintiff alleged facts showing that Golden Gate Fields or The Stormach Group is controlled  
21 by some governmental entity, or that the government is entwined in the management or  
22 control of Golden Gate Fields. See id.

23 With regard to the first element of the § 1983 claim – that a right secured under the  
24 Constitution and laws of the United States was violated – the court finds that the facts  
25 alleged are insufficient to support the elements of the claims. However, given the failure of  
26 the complaint to allege state action, or to plead facts showing that specific actions by a  
27 specific defendant caused any constitutional violation, the court finds it unnecessary to  
28 address the specific elements of each of the three constitutional claims.

1           4.       Claim of intentional infliction of emotional distress

2           Plaintiff asserts a claim of intentional infliction of emotional distress as to all  
3 defendants. The elements of a claim of intentional infliction of emotional distress are  
4 (1) extreme and outrageous conduct by the defendant with the intention of causing, or  
5 reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's  
6 suffering severe or extreme emotional distress; and (3) actual and proximate causation of  
7 the emotional distress by the defendant's outrageous conduct. Christensen v. Superior  
8 Court, 54 Cal. 3d 868, 903 (1991); see also Yun Hee So v. Sook Ja Shin, 212 Cal. App. 4th  
9 652, 671 (2013).

10           Conduct to be outrageous must be so extreme as to exceed all bounds of that  
11 usually tolerated in a civilized community. Christensen, 54 Cal. at 903. The tort does not  
12 extend to mere insults, indignities, threats, annoyances, petty oppressions, or other  
13 trivialities. Hughes v. Pair, 46 Cal. 4th 1035, 1051 (2009). “[P]laintiffs must necessarily be  
14 expected and required to be hardened to a certain amount of rough language, and to  
15 occasional acts that are definitely inconsiderate and unkind. There is no occasion for the  
16 law to intervene in every case where some one's feelings are hurt.” Cochran v. Cochran,  
17 65 Cal. App. 4th 488, 496 (1998). Moreover, the defendant's conduct must be intended to  
18 inflict injury or engaged in with the realization that injury will result. Potter v. Firestone Tire  
19 & Rubber Co., 6 Cal. 4th 965, 1001 (1993).

20           In this case, the complaint alleges that Golden Gate Fields Security Department  
21 violated plaintiff's constitutional rights, and "exposed [him] to beyond an 'Orwellian regime  
22 of totalitarianism[,]" and that his rights "are being surrendered in secret to the demands of  
23 unaccountable intelligence and other government agencies, as well as all of the  
24 [d]efendants." Cplt ¶ 67. The complaint alleges further that "[t]he only purpose of this  
25 outrageous and illegal conduct is to intimidate horse racing patrons and keep them from  
26 challenging a intimidative [sic] tyrannical racing [f]acility presently controlled by [d]efendants  
27 'The Stronach Group' and the California Horse Racing Board a state of California  
28 governmental agency which seeks to control virtually every aspect of [p]laintiff [sic]



1 behavior . . . ." Cplt ¶¶ 67-68.

2 The court finds that the complaint fails to allege specific facts showing that  
3 defendants engaged in conduct that was "so extreme as to exceed all bounds of that  
4 usually tolerated in a civilized community." See Christensen, 54 Cal. at 903; see also Tekle  
5 v. United States, 511 F.3d 839, 855 (9th Cir. 2007). Nor does the complaint allege facts  
6 describing the emotional distress that plaintiff allegedly experienced as a result of his  
7 expulsion from Golden Gate Fields.

8 The complaint asserts only that defendants "intended" to cause plaintiff "distress and  
9 physical harm" and did in fact cause plaintiff emotional distress, and that defendants'  
10 conduct was "outrageous" and "tyrannical." Conclusory allegations that a plaintiff suffered  
11 severe emotional distress are insufficient to state a cognizable claim. See Steel v. City of  
12 San Diego, 726 F.Supp.2d 1172, 1191-92 (S.D. Cal. 2010). To state a cognizable claim,  
13 the complaint must include factual allegations describing the nature of the severe emotional  
14 distress that the plaintiff is alleged to have experienced. See Harvey G. Ottovich  
15 Revocable Living Trust Dated May 12, 2006 v. Washington Mutual, Inc., 2010 WL 3769459  
16 at \*6 (N.D. Cal. September 22, 2010).

17 5. Class allegations

18 Finally, because plaintiff is proceeding in pro per, and is not an attorney, he cannot  
19 represent any other plaintiffs, including unnamed members of a proposed class. See  
20 Simon v. Hartford Life, Inc., 546 F.3d 661, 664 (9th Cir. 2008) (privilege to represent  
21 oneself pro se provided by 28 U.S.C. § 1654 is personal to litigant and does not extend to  
22 other parties/entities); Johns v. Cnty of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) (non-  
23 attorney may appear pro se on own behalf, but has no authority to appear as an attorney  
24 for others than himself); McShane v. United States, 366 F.2d 286, 288 (9th Cir. 1966) (non-  
25 lawyer does not have authority to appear as attorney for other persons in purported class  
26 action). Accordingly, the class allegations are STRICKEN from the complaint.

27 D. Motion to Compel Discovery

28 As noted above, plaintiff filed a motion to compel production of documents on

1 February 13, 2014, approximately two weeks after filing the complaint in this action. The  
2 motion is DENIED. Absent authorization from the court, discovery in federal court is not  
3 permitted until at least after the parties have conferred under Federal Rule of Civil  
4 Procedure 26(f). See Fed. R. Civ. P. 26(d).

5 E. Application for TRO

6 Plaintiff also seeks a temporary restraining order and preliminary injunction. He  
7 seeks an order restraining Golden Gate Fields from barring him from entering the racetrack  
8 facility.

9 Requests for temporary restraining orders are governed by the same general  
10 standards that govern the issuance of a preliminary injunction. See New Motor Vehicle Bd.  
11 v. Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977); Stuhlbarg Int'l Sales Co., Inc. v. John  
12 D. Brush & Co., Inc., 240 F.3d 832, 839 n. 7 (9th Cir. 2001). An injunction is a matter of  
13 equitable discretion and is “an extraordinary remedy that may only be awarded upon a  
14 clear showing that the plaintiff is entitled to such relief.” Winter v. Natural Resources  
15 Defense Council, Inc., 555 U.S. 7, 22 (2008); see also Munaf v. Geren, 553 U.S. 674, 689-  
16 90 (2008).

17 A preliminary injunction “should not be granted unless the movant, by a clear  
18 showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972  
19 (1997) (per curiam) (citation omitted). A plaintiff seeking a preliminary injunction must  
20 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable  
21 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and  
22 that an injunction is in the public interest. Winter, 555 U.S. at 20. Alternatively, the plaintiff  
23 may demonstrate that the likelihood of success is such that “serious questions going to the  
24 merits were raised and that the balance of hardships tips sharply in the plaintiff's favor,” so  
25 long as the other two elements of the Winter test are met. Alliance for Wild Rockies v.  
26 Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

27 Showing “serious questions going to the merits” requires more than establishing that  
28 “success is more likely than not,” and it requires a plaintiff to demonstrate a “substantial

1 case for relief on the merits.” Leiva-Perez v. Holder, 640 F.3d 962, 967 (9th Cir. 2011).  
2 And even where success on the merits is likely or “serious questions” are raised an  
3 injunction “is not a remedy which issues as of course.” Weinberger v. Romero-Barcelo,  
4 456 U.S. 305, 311 (1982).

5 Here, plaintiff has not argued that he is entitled to a TRO under the applicable  
6 standard, and in particular, has not established a likelihood of success on the merits of his  
7 claims. Accordingly, the application for the TRO and preliminary injunction is DENIED.

8 **CONCLUSION**

9 In accordance with the foregoing, defendant California Horse Racing Board is  
10 DISMISSED from the case, with prejudice. The first, second, and third causes of action are  
11 DISMISSED as to the remaining defendants, with leave to amend to allege facts showing  
12 that the defendants are state actors, and to allege facts showing each defendant's  
13 involvement in the alleged constitutional violations. The fourth cause of action is  
14 DISMISSED, with leave to amend to allege facts showing that each defendant engaged in  
15 conduct that was so extreme as to exceed all bounds of that usually tolerated in a civilized  
16 community, and to allege facts describing the nature of the severe emotional distress that  
17 plaintiff allegedly experience as a result of the expulsion from Golden Gate Fields. Finally,  
18 the class allegations are STRICKEN from the complaint.

19 Any amended complaint must be filed no later than March 21, 2014. Plaintiff may  
20 add no new parties and no new claims without leave of court.

21 The TRO application and the motion to compel production of documents are  
22 DENIED.

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24 **IT IS SO ORDERED.**

25 Dated: February 19, 2014

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PHYLLIS J. HAMILTON  
United States District Judge