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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MICHAEL E BOYD,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
TREASURY, et al.,
Defendants.

Case No. [15-cv-03494-BLF](#)

**ORDER GRANTING DEFENDANTS’
MOTIONS TO DISMISS WITH LEAVE
TO AMEND**

[Re: ECF 35, 40, 42, 45]

This action arises out of foreclosure proceedings initiated after Plaintiff Michael Boyd (“Boyd”) defaulted on two loans secured by two properties, one in Soquel, California and one in Sunnyvale, California. Pending before the Court are motions to dismiss by Defendants Jerry Brown (“Brown”), Michael Cohen (“Cohen”), Kamala Harris (“Harris”), Betty Yee (“Yee”), United States Department of Treasury (“DOT”) and Jack Lew (“Lew”). For the reasons stated herein, the Court GRANTS each motion to dismiss with leave to amend.

I. BACKGROUND

On December 22, 2006, Boyd obtained a loan secured by a mortgage on a property located on Lakebird Drive in Sunnyvale, California (“Lakebird Loan”). Compl. ¶ 9. Nearly one month

1 later, Boyd obtained a second loan secured by a property located on Soquel Drive in Soquel,
2 California (“Soquel Loan”). *Id.*

3 At some point thereafter, Boyd defaulted on the Lakebird and Soquel Loans. Compl. ¶ 10.
4 The Lakebird Loan was referred to foreclosure on August 9, 2011 and a notice of default was
5 recorded on September 14, 2011. *Id.* The Soquel Loan was referred to foreclosure on February 9,
6 2011 and on a notice of default was recorded on March 1, 2011. *Id.*

7 In December 2011, Boyd filed for chapter 13 bankruptcy. Compl. ¶ 11. The Bankruptcy
8 Court confirmed his chapter 13 plan on May 14, 2014. Compl. ¶ 12.

9 After his bankruptcy, Boyd filed an administrative tort “class claim,” which was received
10 by the U.S. Department of Treasury on January 28, 2015. Compl. ¶ 13. His tort claim asserts a
11 claim for relief against the Department of Treasury “because [his] house in Soquel CA and Duplex
12 in Sunnyvale CA are being taken by GMAC, AKA ResCap. AKA 74% Owned by Treasury
13 Department through TARP and [he is] making payments for property the government defrauded
14 of.” Comp. ¶ 14.

15 During this time period, the United States and forty-nine states sued several mortgage loan
16 servicers in the U.S. District Court for the District of Columbia in March 2012. Exh. to Compl. at
17 93, ECF 1-1. That complaint alleged that the mortgage loan servicers had engaged in unlawful
18 practices. *Id.* That lawsuit was resolved through a settlement agreement known as the “National
19 Mortgage Settlement.” *Id.* Pursuant to this settlement, the mortgage loan servicers agreed to pay
20 approximately \$5 billion and institute various reforms. *Id.* at 94. The State of California received
21 approximately \$410 million from the settlement and placed its share of the settlement funds into
22 the National Mortgage Special Deposit Fund. *Id.* at 94, 97.

23 In 2014, some community groups filed a petition for writ of mandate in the Sacramento
24 County Superior Court alleging that California’s portion of the settlement had been improperly
25 diverted from the Special Deposit Fund and used for purposes not allowed by the terms of the
26 consent judgment. *Id.* at 99. The Sacramento Court agreed and found that approximately \$331
27 million had been unlawfully diverted from the Special Deposit Fund to the State of California’s
28 General Fund. *Id.* at 116.

1 On July 29, 2015, Boyd filed the instant action against United States Department of the
2 Treasury, Treasury Secretary Jack Lew, Governor Edmund G. Brown, Jr., Attorney General
3 Kamala D. Harris, Michael Cohen, Director, Department of Finance, Betty Yee, Controller,
4 GMAC Mortgage LLC, and Mortgage Electronic Registration Systems. On August 3, 2015, Boyd
5 voluntarily dismissed GMAC Mortgage LLC and Mortgage Electronic Registration Systems.
6 ECF 3.

7 **II. LEGAL STANDARD**

8 **A. Rule 12(b)(1)**

9 A motion to dismiss under Rule 12(b)(1) challenges whether a court has subject matter
10 jurisdiction to hear the action. In deciding a Rule 12(b)(1) motion, the court is not restricted to the
11 pleadings, but can also “review any evidence, such as affidavits and testimony, to resolve factual
12 disputes regarding the evidence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560
13 (9th Cir. 1988). Once subject matter jurisdiction is challenged, the party opposing the motion
14 bears the burden of establishing jurisdiction. *See, e.g., Chandler v. State Farm Mut. Auto Ins. Co.*,
15 598 F.2d 1115, 1122 (9th Cir. 2010).

16 **B. Rule 12(b)(6)**

17 A motion to dismiss under Rule 12(b)(6) concerns what facts a plaintiff must plead on the
18 face of his claim. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must
19 include “a short and plain statement of the claim showing that the pleader is entitled to relief.”
20 Any complaint that does not meet this requirement can be dismissed pursuant to Rule 12(b)(6). In
21 interpreting Rule 8(a)’s “short and plain statement” requirement, the Supreme Court has held that
22 a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face,” *Bell Atl.*
23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007), which requires that “the plaintiff plead factual
24 content that allows the court to draw the reasonable inference that the defendant is liable for the
25 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard does not ask a
26 plaintiff to plead facts that suggest he will probably prevail, but rather “it asks for more than a
27 sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted).
28 The Court must “accept factual allegations in the complaint as true and construe the pleadings in

1 the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
2 519, F.3d 1025, 1031 (9th Cir. 2008).

3 **III. DISCUSSION¹**

4 **A. Yee’s Motion to Dismiss**

5 Plaintiff Boyd alleges two claims against Controller Betty Yee. The second cause of
6 action claims “Gross Negligence” and “Willful Misconduct.” Compl. ¶¶ 39-41, ECF 1. The
7 fourth cause of action claims a violation of 42 U.S.C. § 1983. Compl. ¶¶ 48-49. Yee seeks to
8 dismiss Boyd’s complaint because he lacks Article III standing, the claims are barred by the
9 Eleventh Amendment, the Controller is not a person for purposes of § 1983, and the Controller is
10 entitled to qualified immunity. Mot. 3, ECF 42. Boyd mentions Yee only once in his factual
11 allegations and alleges that:

12 On July 7, 2015 the Superior Court of the State of California for the
13 County of Sacramento issued its Judgment in which “The Court declares
14 that \$331,044,084 in offsets were unlawfully diverted from the National
15 Mortgage Special Deposit Fund to the General Fund...The Court enjoins
16 the State of California to restore/return \$331,044,084 to the National
17 Mortgage Special Deposit Fund as soon as there is a sufficient
18 appropriation reasonably and generally available for such purpose... The
19 Court reserves jurisdiction to issue a peremptory writ of 21 mandate
20 compelling Respondents Governor Edmund Gerald “Jerry” Brown Jr.,
21 Director of Finance Michael Cohen, and Controller Betty Yee to restore
22 refund the unlawfully diverted funds from any appropriation that is
23 determined to be reasonably and generally available for payment of the
24 obligation.”

25 Compl. ¶ 23.

26 The Court agrees with Yee and finds Boyd has not sufficiently alleged Article III standing.
27 *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (An injury
28 for Article III standing purposes must be “actual or imminent, not conjectural or hypothetical.”).
Based on Boyd’s complaint and his argument at the hearing, he appears to be claiming an injury
based on the \$331 million that was wrongly deposited into the general fund instead of the National

¹ Boyd submitted multiple requests for judicial notice. ECF 33, 49, 61. The Court did not rely on any of these documents in deciding this motion and accordingly, the Court DENIES AS MOOT Boyd’s requests for judicial notice.

1 Mortgage Special Deposit Fund. What Boyd overlooks is that any injury to him would require
2 significant speculation as to how those funds would be used had they not been transferred. For
3 example, California may have used that money to educate homeowners on foreclosure as opposed
4 to specifically aiding borrowers in foreclosure who had undergone chapter 13 bankruptcy. As a
5 result, Boyd has not sufficiently alleged that he an interest in those funds.

6 Second, Boyd sued Yee in her official capacity and the Eleventh Amendment prohibits
7 lawsuits against state officials sued in their official capacity. *See, e.g., Flint v. Dennison*, 488 F.3d
8 816, 824-25 (9th Cir. 2007) (quotations omitted). Boyd has not alleged that any exception to
9 Eleventh Amendment immunity applies in this case.

10 Third, Boyd has not sufficiently alleged Yee is a “person” under § 1983. A § 1983 claim
11 for damages is not cognizable against the state, arms of the state, or state officials sued in their
12 official capacities. Such parties are not “persons” under § 1983 and cannot be held liable for
13 money damages under § 1983. *See Thornton v. Brown*, 757 F.3d 834, 839 (9th Cir.2013).
14 “Obviously, state officials literally are persons. But a suit against a state official in his or her
15 official capacity is not a suit against the official but rather is a suit against the official's office...As
16 such, it is no different from a suit against the State itself ...We hold that neither a State nor its
17 officials acting in their official capacities are ‘persons’ under § 1983.” *Will v. Michigan Dept. of*
18 *State Police*, 491 U.S. 58, 71 (1989) (internal citations and footnotes omitted). As a result, Yee
19 may not be sued for money damages. However, injunctive relief may be sought against state
20 actors. *See Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 871 (9th Cir. 2001). As a result, any
21 claims against Yee for money damages are dismissed.

22 Fourth, to the extent Boyd is seeking to bring state law claims against a California public
23 entity, he has not alleged compliance with the California Tort Claims Act. *See, e.g., Creighton v.*
24 *City of Livingston*, 628 F. Supp. 2d 1199, 1225 (E.D. Cal. 2009).

25 Accordingly, the Court GRANTS Yee’s motion to dismiss.

26 **B. Harris’s Motion to Dismiss**

27 Attorney General Kamala Harris is named in the second claim for “Gross Negligence” and
28 “Willful Misconduct” and fourth claim for a violation of § 1983. Compl. ¶¶ 39-41, 48-49, ECF 1.

1 She moves to dismiss Boyd’s complaint for several different reasons. Notice of Motion, ECF 40.
2 The Court addresses Harris’s first and second reasons together. Harris seeks to dismiss Boyd’s
3 second claim for relief for “Gross Negligence” and “Willful Misconduct” and fourth claim for
4 relief brought under 42 U.S.C. § 1983 because Boyd has not alleged any facts indicating a case or
5 controversy exists between himself and her. Mot. 4-5, ECF 41. After reviewing the complaint,
6 Boyd has not alleged any specific facts with respect to Harris. Therefore, Boyd has not alleged a
7 case or controversy exists as to Harris.

8 Second, Harris argues that the Eleventh Amendment precludes Boyd’s § 1983 claim. Mot.
9 5, ECF 41. “For sovereign immunity purposes, we treat [suits] against state officials in their
10 official capacities as a suit against the state of California. The Eleventh Amendment bars such a
11 suit unless Congress has abrogated state sovereign immunity under its power to enforce the
12 Fourteenth Amendment or a state has waived it.” *Holley v. California Department of Corrections*,
13 599 F.3d 1108, 1111 (9th Cir. 2010). Congress has not abrogated Eleventh Amendment immunity
14 for § 1983 claims. *See, e.g. Will*, 491 U.S. at 66. By asserting an Eleventh Amendment immunity
15 argument, Harris has also not waived immunity with respect to the § 1983 claim. Finally, Boyd
16 has not argued that any exception to Eleventh Amendment immunity applies in this case. *See*
17 *Edelman v. Jordan*, 416 U.S. 651, 663 (1974).

18 Next, to the extent Boyd is seeking to bring state law claims against Harris, he has not
19 alleged compliance with the California Tort Claims Act. *See, e.g., State v. Superior Court*
20 *(Bodde)*, 32 Cal.4th 1234, 1239 (2004).

21 Accordingly, the Court GRANTS Harris’s motion to dismiss all of the claims asserted
22 against her.

23 **C. Brown’s and Cohen’s Motion to Dismiss**

24 Governor Jerry Brown and Director of Finance Michael Cohen are also named in the
25 second and fourth claims. Compl. ¶¶ 39-41, 48-49, ECF 1. They seek to dismiss this action
26 against them on the basis of Eleventh Amendment immunity. Mot., ECF 36. “For sovereign
27 immunity purposes, we treat [suits] against state officials in their official capacities as a suit
28 against the state of California. The Eleventh Amendment bars such a suit unless Congress has

1 abrogated state sovereign immunity under its power to enforce the Fourteenth Amendment or a
2 state has waived it.” *Holley*, 599 F.3d at 1111.

3 As it pertains to this action, Congress has not abrogated Eleventh Amendment immunity
4 for § 1983 claims. *See, e.g. Will*, 491 U.S. at 66. By asserting an Eleventh Amendment immunity
5 argument, Mot. 3-5, ECF 36, the State of California has also not waived immunity with respect to
6 the § 1983 claim. Finally, Boyd has not argued that any exception to Eleventh Amendment
7 immunity applies in this case and based on the complaint, it appears Boyd is seeking monetary
8 relief which would not fall within any exception. *See Edelman*, 416 U.S. at 663.

9 As to Boyd’s state law claims for willful misconduct and gross negligence, Boyd has not
10 alleged compliance with the California Tort Claims Act. *Shirk v. Vista Unified Sch. Dist.*, 42
11 Cal.4th 201, 208 (2007). Moreover, although Boyd’s factual allegations with respect to Brown
12 and Cohen are vague and difficult to under, it does not appear there are any allegations that Brown
13 and Cohen owed a duty to Boyd or that they acted willfully. Accordingly, the Court GRANTS
14 Brown and Cohen’s motion to dismiss.

15 **D. Department of Treasury and Lew’s Motion to Dismiss**

16 The Department of Treasury and Secretary of Treasury Jack Lew (“Federal Defendants”)
17 are named in the second and fourth causes of action. Compl. ¶¶ 39-41, 48-49, ECF 1. They move
18 to dismiss this action because the United States has not waived sovereign immunity. Mot. 4-7,
19 ECF 45. First, in a tort action relating to acts by federal employees, the proper defendant is the
20 United States and not a government agency or official. *See, e.g. Colony First Fed. Sav. & Loan*
21 *Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 643 F. Supp. 410, 416 (C.D. Cal. 1986). Since Boyd has not
22 named the proper federal defendant, his complaint must be dismissed as to the Federal Defendants.

23 Moreover, Boyd appears to be seeking redress for torts committed by GMAC. Contrary to
24 Boyd’s belief, the Department of Treasury’s stock did not make the federal government liable for
25 alleged torts committed by GMAC. *See, e.g., 12 U.S.C. §§ 5201, 5211* (explaining that the
26 purpose of TARP was to help restore liquidity and stability to the financial system, not to take
27 control of financial institutions). Boyd, other than alleging that the government was involved with
28 GMAC through TARP, fails to allege any facts regarding how the government is responsible for

1 the foreclosure on his house.

2 As to Boyd’s § 1983 claims, parties may not rely on § 1983 to bring claims against the
3 federal government or its officers or employees. *Russell v. U.S. Dep’t of the Army*, 191 F.3d 1016,
4 1019 (9th Cir. 1999).

5 Finally, Boyd’s claims appear to be time barred. Tort claims against the United States
6 must be presented to the appropriate federal agency within two years of the claim accruing. The
7 two year period begins when the plaintiff knows, or should have known with reasonable diligence
8 that facts necessary to establish the injury. *Hensley v. U.S.* 531 F.3d 1052, 1056 (9th Cir. 2008).
9 Here, Boyd alleges that he did not learn of the Treasury Department’s involvement in GMAC until
10 a 2013 Special Inspector General’s report. Compl. ¶ 14. However, that report, which describes
11 the Treasury Department’s bailout of GMAC with TARP funds, cites several public sources dated
12 from 2009 to 2012. *See, e.g.* Report at 9, 10, 18-21, available at [http://www.sig tarp.gov/Audit%20](http://www.sig tarp.gov/Audit%20Reports/Taxpayers_GMAC.pdf)
13 [Reports/Taxpayers_GMAC.pdf](http://www.sig tarp.gov/Audit%20Reports/Taxpayers_GMAC.pdf). Boyd’s property was also foreclosed upon in 2011 and he filed a
14 lawsuit against GMAC in October 2011 as a result of that foreclosure. Boyd has not sufficiently
15 alleged why he, with reasonable diligence, could not have discovered the Treasury Department’s
16 involvement with GMAC back in 2009, 2010 or 2011 when he filed a lawsuit against GMAC. As
17 alleged, Boyd’s claims appear to have accrued when his properties were forelclosed upon in 2011.
18 Since he did not make his claims against the government until 2015, his claims are to be time-
19 barred. Since Boyd may not assert a § 1983 claim against the Federal Defendants, his § 1983
20 claim is dismissed without leave to amend. His remaining claim against the Federal Defendants
21 for gross negligence and willful misconduct is dismissed with leave to amend.

22 **E. Leave to Amend**

23 Boyd is proceeding *pro se* and the Court is mindful that *pro se* complaints are held to “less
24 stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519,
25 520 (1972). However, this liberal standard does not absolve Boyd’s responsibility to plead with
26 specificity allegations against each of the named Defendants. In the absence of any specific
27 allegations the Court is unable to determine whether Boyd may state a viable claim. It is not the
28 Court’s obligation to “shoulder the full burden of fashioning a viable complaint for a *pro se*

1 plaintiff.” *Simon v. Shawnee Corr. Ctr.*, Case No. 13–521–GPM, 2013 WL 3463595, at *1
2 (S.D.Ill. July 9, 2013). Because the complaint contains many conclusory assertions and lacks
3 factual detail, the Court cannot determine whether Boyd can sufficiently allege any claim.
4 Accordingly, the Court will give Boyd one attempt to plead specific allegations as to each of the
5 Defendants consistent with the Court’s comments above. *See Lucas v. Dep’t of Corr.*, 66 F.3d
6 245, 248 (9th Cir. 1995) (per curiam) (“Unless it is absolutely clear that no amendment can cure
7 the defect, however, a pro se litigant is entitled to notice of the complaint’s deficiencies and an
8 opportunity to amend prior to dismissal of the action.”). Although the Court is giving Boyd leave
9 to amend, Boyd may not add new causes of actions or parties without leave of Court.

10 Finally, at the hearing, Boyd appeared to clarify that he is seeking to enforce a consent
11 decree entered into between the United States and forty-nine states and several mortgage loan
12 servicers in the U.S. District Court for the District of Columbia. The Court notes that several
13 courts have held that an individual plaintiff does not have standing to enforce the National
14 Mortgage Settlement consent judgment. *See, e.g., Lawrence v. Wells Fargo Bank, N.A.*, Case No.
15 14-cv-1272-PJH, 2014 WL 2705425, at *6 (N.D. Cal. June 13, 2014) (“Numerous courts have
16 held that individual borrowers are merely incidental beneficiaries of the National Mortgage
17 Settlement, and so have no right to bring third-party suits to enforce the consent judgment.”)
18 (collecting cases).

19 **IV. ORDER**

20 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 21 1. Yee’s motion to dismiss is GRANTED with leave to amend.
- 22 2. Harris’ motion to dismiss is GRANTED with leave to amend.
- 23 3. Brown and Cohen’s motion to dismiss is GRANTED with leave to amend.
- 24 4. The Department of Treasury and Lew’s motion to dismiss is GRANTED with partial
25 leave to amend. Specifically, the Court dismisses Boyd’s § 1983 claim without leave
26 to amend and dismisses Boyd’s gross negligence and willful misconduct claim with
27 leave to amend.

28 Any amended complaint is due **on or before September 16, 2016**. No new causes of

1 action or parties may be added without leave of Court except that Boyd may substitute the United
2 States as a defendant in place of the Department of Treasury and Lew if he can properly allege
3 sufficient facts to support a valid claim against the United States including timeliness under the
4 Federal Tort Claims Act. Failure to meet the September 16, 2016 deadline to file an amended
5 complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with
6 prejudice of all of Boyd's claims in this action.

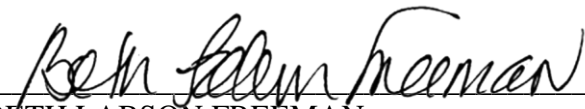
7 Boyd may wish to contact the Federal Pro Se Program, a free program that offers limited
8 legal services and advice to parties who are representing themselves. The Federal Pro Se Program
9 has offices in two locations, listed below. Help is provided by appointment and on a drop-in basis.
10 Parties may make appointments by calling the program's staff attorney, Mr. Kevin Knestrick, at
11 408-297-1480. Additional information regarding the Federal Pro Se Program is available at
12 <http://cand.uscourts.gov/helpcentersj>.

13 Federal Pro Se Program
14 United States Courthouse
15 280 South 1st Street
16 2nd Floor, Room 2070
17 San Jose, CA 95113
18 Monday to Thursday 1:00 pm – 4:00 pm
19 Fridays by appointment only

Federal Pro Se Program
The Law Foundation of Silicon Valley
152 North 3rd Street
3rd Floor
San Jose, CA 95112
Monday to Thursday 9:00 am – 12:00 pm
Fridays by appointment only

18 **IT IS SO ORDERED.**

19 Dated: August 15, 2016

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21 BETH LABSON FREEMAN
22 United States District Judge
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