

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4 WO OF IDEAFARM,
5 Plaintiff,

6 v.

7 COUNTY OF SANTA CLARA, et al.,
8 Defendants.
9

Case No. [5:16-cv-06270-EJD](#)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

Re: Dkt. Nos. 94, 95

10 Plaintiff Wo of Ideafarm is a “street essayist” who alleges in this action that Defendants
11 City of Mountain View (the “City”) and the County of Santa Clara (the “County”) violated his
12 constitutional rights by exposing him to “police harassment” and “overwhelming frivolous
13 criminal prosecution.” They City and the County now move to dismiss Plaintiff’s Second
14 Amended Complaint (“SAC”). Dkt. Nos. 94, 95. Plaintiff opposes.

15 Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. These matters are suitable for
16 decision without oral argument. Civ. L.R. 7-1(b). Because the SAC does not state plausible
17 claims against either defendant, the motions to dismiss will be granted for the reasons explained
18 below.

19 **I. FACTUAL AND PROCEDURAL BACKGROUND**

20 According to Plaintiff, he began a “speech operation” in 2006 by mounting large signs on a
21 minivan displaying messages, such as “DON’T BE SELFISH - MAKE LIFE BETTER” and
22 “COME, EAT WITH US.” SAC, Dkt. No. 90, at p. 22. Plaintiff initially planned to travel
23 throughout the United States, but “police harassment” forced him to eventually limit the operation
24 to Mountain View. *Id.* Once there, Plaintiff began to use the “‘street essay’ general method of
25 spontaneous direct speech,” in which he would display once sentence per day of an entire essay or
26 speech. *Id.* at p. 23. To “engage” his audience, Plaintiff would “use humor and indecency, and
27 would alternate mild, pleasant themes with provocative and at times incendiary themes.” *Id.*

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1 Plaintiff alleges that police harassment was “manageable” until August, 2010, when “a
2 federal judge struck down California’s constitutional provision limiting marriage to a ‘man and a
3 woman.’” Id. In response, Plaintiff began to “speak against queer marriage.” Id. Plaintiff states
4 that both “private violence and police harassment quickly became overwhelming” once he did so,
5 and that the County, the City and the “Bench” attempted to end his operation. Id. He alleges the
6 “attacks” continued through 2016, and he recounts many in the SAC. Id. at pp. 30-41.

7 Plaintiff further alleges that:

8 In Santa Clara County, a decisive majority faction exists that is both
9 substantially and procedurally “political left”. This faction captured
10 and perverted institutions of government to establish a renegade
11 plutocratic local government that maintains a mere charade of
12 constitutionality. (Whenever the Constitution conflicts with Money,
13 Money prevails.)

14 SAC, at p. 7.

15 Plaintiff contends the “political left” majority has engaged in “speech rights discrimination
16 motivated by invidious animus against the political right,” and that the City, the County and the
17 “Bench” conspired “to use force and violence and threats of force or violence, including deadly
18 force,” to silence him. Id. at pp. 7, 19. For example, Plaintiff alleges the City deprived him of
19 various rights using police harassment and “frivolous criminal prosecution,” and that the County
20 violated his rights by providing “ineffective and treacherous defense counsel” and “causing
21 cancer” to appear and grow more aggressively. Id. at pp. 12-13.

22 Plaintiff filed the original complaint directly in this court on October 31, 2016, and a First
23 Amended Complaint (“FAC”) on January 10, 2017. Dkt. No. 27. The court granted motions to
24 dismiss the FAC brought by the City and the County on September 25, 2017. Dkt. No. 85.
25 Plaintiff then filed the SAC, which asserts causes of action under 42 U.S.C. §§ 1983 and 1985(3).
26 The instant motions followed.

27 **II. LEGAL STANDARD**

28 **A. Federal Rule of Civil Procedure 12(b)(6)**

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient

1 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
2 it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted).
3 The factual allegations in the complaint “must be enough to raise a right to relief above the
4 speculative level” such that the claim “is plausible on its face.” Id. at 556-57. A complaint that
5 falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief
6 can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only
7 where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
8 legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

9 When deciding whether to grant a motion to dismiss, the court must generally accept as
10 true all “well-pleaded factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). The court
11 must also construe the alleged facts in the light most favorable to the plaintiff (Retail Prop. Trust
12 v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)), even those
13 facts that strike a “savvy judge” as improbably or unlikely to result in recovery. Twombly, 550
14 U.S. at 556. However, “courts are not bound to accept as true a legal conclusion couched as a
15 factual allegation.” Iqbal, 556 U.S. at 678.

16 Also, the court usually does not consider any material beyond the pleadings for a Rule
17 12(b)(6) analysis. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19
18 (9th Cir. 1990). Exceptions to this rule include material submitted as part of the complaint or
19 relied upon in the complaint, and material subject to judicial notice. See Lee v. City of Los
20 Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001).

21 **B. Pro Se Pleadings**

22 Where, as here, the pleading at issue is filed by a plaintiff proceeding pro se, it must be
23 construed liberally. Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). This is particularly true
24 when a pro se plaintiff asserts civil rights violations. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir.
25 2010).

26 However, the court “need not give a plaintiff the benefit of every conceivable doubt” but
27 “is required only to draw every reasonable or warranted factual inference in the plaintiff’s favor.”

1 McKinney v. De Bord, 507 F.2d 501, 504 (9th Cir. 1974). Rather, the court “should use common
2 sense in interpreting the frequently diffuse pleadings of pro se complainants.” Id. But pro se
3 parties must still abide by the rules of the court in which they litigate. Carter v. Comm’r of
4 Internal Revenue, 784 F.2d 1006, 1008 (9th Cir. 1986). Moreover, the court may not “supply
5 essential elements of claims that were not initially pled.” Ivey v. Bd. of Regents of the Univ. of
6 Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

7 A pro se complaint should not be dismissed unless the court finds it “beyond doubt that the
8 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”
9 Haines v. Kerner, 404 U.S. 519, 521 (1972).

10 **III. DISCUSSION**

11 As they did in response to the FAC, the City and the County argue the SAC does not
12 contain sufficient factual allegations to state plausible causes of action under §§ 1983 and 1985(3).
13 Re-engaging well-established pleading principles and applying them to the SAC, the court must
14 agree.

15 **A. General Authority Governing Plausibility**

16 The last dismissal order defined Rule 8’s pleading requirement. It is worth repeating and
17 refining here. “[T]he pleading standard Rule 8 announces does not require ‘detailed factual
18 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me
19 accusation.” Iqbal, 556 U.S. at 678. Plausibility is achieved “when the plaintiff pleads factual
20 content that allows the court to draw the reasonable inference that the defendant is liable for the
21 misconduct alleged.” Iqbal, 556 U.S. at 678. The plaintiff must rely on “well-pleaded factual
22 allegations,” which the court can assume are true, and not on legal or factual conclusions, which
23 are not entitled to an assumption of truth. Id. at 679; accord Sprewell v. Golden State Warriors,
24 266 F.3d 979, 988 (9th Cir. 2001) (holding the court need not “accept as true allegations that are
25 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”).

26 Recognizing this principal, the Ninth Circuit has established a procedure for determining
27 the plausibility of a complaint’s allegations:

1 First, to be entitled to the presumption of truth, allegations in a
2 complaint or counterclaim may not simply recite the elements of a
3 cause of action, but must contain sufficient allegations of underlying
4 facts to give fair notice and to enable the opposing party to defend
5 itself effectively. Second, the factual allegations that are taken as
6 true must plausibly suggest an entitlement to relief, such that it is not
7 unfair to require the opposing party to be subjected to the expense of
8 discovery and continued litigation.

9 Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014).

10 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
11 possibility of misconduct, the complaint has alleged - but it has not ‘show[n]’ - ‘that the pleader is
12 entitled to relief.’” Id. (quoting Fed. R. Civ. P. 8(a)(2)).

13 It is also important to note that when “determining the propriety of a Rule 12(b)(6)
14 dismissal, a court may not look beyond the complaint to a plaintiff’s moving papers, such as a
15 memorandum in opposition to a defendant’s motion to dismiss.” Schneider v. Cal. Dep’t of Corr.,
16 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998)

17 **B. Application to the SAC**

18 The court now applies the plausibility standard defined above to the two types of claims
19 asserted in the SAC.

20 **i. Cause of Action under § 1983**

21 The court understands based on the amended allegations that Plaintiff alleges a conspiracy
22 under § 1983. SAC, at p. 19 (quoting Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238,
23 254 (3d Cir. 1999)). To establish a § 1983 conspiracy claim, Plaintiff must allege facts
24 demonstrating: ““(1) the existence of an express or implied agreement among the defendant[s] []
25 to deprive him of his constitutional rights, and (2) an actual deprivation of those rights resulting
26 from that agreement.”” Avalos v. Baca, 596 F.3d 583, 592 (9th Cir. 2010) (citing Ting v. United
27 States, 927 F.2d 1504, 1512 (9th Cir. 1991)).

28 Since Plaintiff names only municipalities as defendants, he must allege a policy, practice,
or custom that causes the constitutional violation within the conspiracy elements. See Monell v.
New York City Dep’t of Soc. Serv., 436 U.S. 658, 694 (1978); see also Trevino v. Gates, 99 F.3d

1 911, 918 (9th Cir. 1996). Indeed, “[a] municipality may not be sued under § 1983 solely because
2 an injury was inflicted by its employees or agents.” Long v. Cty. of Los Angeles, 442 F.3d 1178,
3 1185 (9th Cir. 2006).

4 Plaintiff has not stated a plausible § 1983 claim against either the City or the County under
5 this framework. As to both defendants, Plaintiff concludes that a “pattern or practice or policy”
6 exists to deprive him of constitutional rights. See, e.g., SAC, at p. 4 (“Over the about nine year
7 period 2009-2017, the City of Mountain View (“City”) willfully, knowingly, and maliciously, as
8 pattern or practice or policy, attacked me with overwhelming police harassment and frivolous
9 criminal prosecution.”). But “it is not enough to state that there is a policy and the policy
10 amounted to deliberate indifference to various constitutional rights . . . ; there must be facts
11 showing the plausibility of those statements.” Herrera v. City of Sacramento, No. 2:13-cv-00456
12 JAM-AC, 2013 WL 3992497, at *8 (E.D. Cal. Aug. 2, 2013). Conspicuously missing from the
13 SAC are any supporting allegations describing either a formally adopted policy of the City or the
14 County, or an allegation of a widespread pattern of other similar behavior on the part of the City
15 and the County. See Boyd v. Benton Cty., 374 F.3d 773, 784 (9th Cir. 2004) (“[A] municipality
16 may only be sued under section 1983 if the action that is alleged to be unconstitutional implement
17 [ed] or execute[d] a policy statement, ordinance, regulation, or decision officially adopted and
18 promulgated by that body’s officers, or the city made a deliberate or conscious choice to fail to
19 train its employees adequately.”); see also Pembaur v. City of Cincinnati, 475 U.S. 469, 483
20 (1986) (defining a formal municipal policy as “a deliberate choice to follow a course of action . . .
21 made from among various alternatives by the official or officials responsible for establishing final
22 policy with respect to the subject matter in question”); see also City of St. Louis v. Praprotnik, 485
23 U.S. 112, 127 (1988) (defining an informal municipal policy as “the existence of a widespread
24 practice that, although not authorized by written law or express municipal policy, is ‘so permanent
25 and well settled as to constitute a custom or usage with the force of law’”).

26 Instead, the alleged factual predicate for the § 1983 conspiracy claim is specific conduct
27 toward Plaintiff alone, along with an assumption that the conduct must arise from an official

1 policy, practice or custom to deny him constitutional protections. To be sure, Plaintiff recounts a
2 long history of personal interactions with law enforcement and the state legal system. Even if
3 these factual allegations describing Plaintiff’s experiences are liberally construed and credited as
4 true, they raise only the possibility of misconduct prohibited by § 1983; they do not support a
5 plausible inference that the defendants violated Plaintiff’s rights based on an official policy,
6 formal or otherwise. See Eclectic Props., 751 F.3d at 996.

7 Plaintiff’s theory concerning the appointment of “ineffective and treacherous defense
8 counsel” illustrates the point. Plaintiff merely concludes that counsel appointed to represent him
9 in various criminal actions was inadequate, but does not identify, with supporting facts, any
10 County policy or practice underlying the allegedly deficient appointments, or explain how the
11 actions of decision-makers were in accordance with that policy or constituted a policy. In that
12 way, the allegations of the SAC are distinguishable from those found sufficient in cases like
13 Miranda v. Clark County, Nevada, since they do not describe something akin to “a deliberate
14 pattern or policy of refusing to train lawyers for capital cases known to the county administrators
15 to exert unusual demands on attorneys.” 319 F.3d 465, 471 (9th Cir. 2003) (en banc). Plaintiff’s
16 opposing arguments on this topic, which rely on inference and opinion regarding the expense,
17 riskiness and dangerousness of the “joint attacks” as well as speculation about the role of “Big
18 Money,” does not alter the analysis.

19 Similarly, allegedly wrongful actions by employees of the City or the County do not satisfy
20 Monell when not accompanied by plausible allegations of official policy or custom. Monell itself
21 makes clear that “a municipality cannot be held liable under § 1983 on a respondeat superior
22 theory.” 436 U.S. at 691; accord Flores v. Cty. of Los Angeles, 758 F.3d 1154, 1158 (9th Cir.
23 2014) (“Neither state officials nor municipalities are vicariously liable for the deprivation of
24 constitutional rights by employees.”). “Instead, it is only when execution of a government’s
25 policy or custom inflicts the injury that the municipality as an entity is responsible.” Long, 442
26 F.3d at 1185. Thus, though the SAC apparently implicates the decisions of several individuals,
27 their conduct as alleged does not translate into policy or custom for the purpose of municipal

1 liability.

2 Furthermore, the court cannot find that the SAC is premised on the decisions of a “final
3 policymaker” of the County, even when liberally construed. See Webb v. Sloan, 330 F.3d 1158,
4 1164 (9th Cir. 2003) (“A municipality can be liable even for an isolated constitutional violation,
5 however, when the person causing the violation has final policymaking authority.”). There are no
6 plausible allegations supporting such a theory in the SAC; that is, the pleading is missing
7 allegations explaining that any named official is “responsible for establishing final government
8 policy respecting such activity.” Pembaur, 475 U.S. at 482. “The fact that a particular official -
9 even a policymaking official - has discretion in the exercise of particular functions does not,
10 without more, give rise to municipal liability based on an exercise of that discretion.” Id. at 481-
11 82. The purported “imputed participation” of certain officials, which Plaintiff argues implicates
12 the County in the alleged conspiracy, sounds much like a derivative of vicarious liability and is not
13 enough under Monell.

14 In any event, the County cannot be held liable as a matter of law for District Attorney Jeff
15 Rosen’s decision to prosecute Plaintiff “in all cases” since the Ninth Circuit has found it “clear
16 that the district attorney acts on behalf of the state when conducting prosecutions” in California.
17 Goldstein v. City of Long Beach, 715 F.3d 750, 759 (9th Cir. 2013). Plaintiff may disagree with
18 the Ninth Circuit, but this court is bound to follow its holding. See In re Zermeno-Gomez, 868
19 F.3d 1048, (9th Cir. 2017). Nor can the court consider the additional statements about other
20 County officials made in Plaintiff’s written opposition since they are not reflected by plausible
21 allegations in the SAC. See Schneider, 151 F.3d at 1197 n. 1.

22 For these reasons, the § 1983 claim against the City and the County will be dismissed.

23 **ii. Cause of Action under § 1985(3)**

24 The court now turns to allegations under § 1985(3), a statute prohibiting conspiracies to
25 deprive “any person or class of persons of the equal protection of the laws, or of equal privileges
26 and immunities under the laws.” The SAC’s version of the claim remains defective.

27 As before, any cause of action under § 1985(3) must be dismissed to the extent it shares

1 allegations with the one under § 1983 since the latter claim will again be dismissed. See Caldeira
2 v. Cty. of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) (“[T]he absence of a section 1983
3 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same
4 allegations.”).

5 Additionally, the SAC still does not establish Plaintiff’s ability to assert a claim under §
6 1985(3). In the order dismissing the FAC, the court advised Plaintiff he must include allegations
7 establishing his membership in a qualifying class in order to proceed. The court explained that
8 though the Supreme Court has held that § 1985(3) may apply to conspiracies motivated by a
9 “class-based, invidiously discriminatory animus” other than racial discrimination (Griffin v.
10 Breckenridge, 403 U.S. 88, 102 (1971)), the Ninth Circuit has extended it “beyond race only when
11 the class in question can show that there has been a governmental determination that its members
12 ‘require and warrant special federal assistance in protecting their civil rights.’” Schulz v.
13 Sundberg, 759 F.2d 714, 718 (9th Cir. 1985) (quoting DeSantis v. Pac. Telephone & Telegraph
14 Co., 608 F.2d 327, 333 (9th Cir. 1979)). More specifically, the Ninth Circuit requires “either that
15 the courts have designated the class in question a suspect or quasi-suspect classification requiring
16 more exacting scrutiny or that Congress has indicated through legislation that the class required
17 special protection.” Id.

18 Much like he did in the FAC, Plaintiff defines the § 1985(3) conspiracy as against “the
19 political-right minority faction” or the “procedural political-right faction,” a group he argues
20 warrants special protection. But Plaintiff has not cited a “governmental determination that such a
21 class merits special protection,” despite the court’s instruction that he do so. Id. Furthermore, it is
22 questionable whether § 1985(3) applies at all to “wholly political, non-racial conspiracies,” which
23 description seems to capture the conspiracy alleged in the SAC. Id. (citing United Bhd. of
24 Carpenters & Joiners v. Scott, 463 U.S. 825, 836-37 (1983)).

25 The § 1985(3) cause of action will also be dismissed.

26 **C. Leave to Amend**

27 The court must now decide whether Plaintiff should be permitted leave to amend, which is

1 generally granted with liberality. Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave
2 when justice so requires.”); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
3 Cir. 1990). Leave need not be granted, however, where the amendment of the complaint would
4 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility,
5 or creates undue delay. Foman v. Davis, 371 U.S. 178, 182 (1962); Janicki Logging Co. v.
6 Mateer, 42 F.3d 561, 566 (9th Cir. 1994). Leave to amend may also be denied for “failure to cure
7 deficiencies by amendments previously allowed.” Leadsinger, Inc. v. BMG Music Publ’g, 512
8 F.3d 522, 532 (9th Cir. 2008).

9 Here, Plaintiff was previously advised why his § 1983 cause of action failed under Monell.
10 He was also specifically instructed to include in any amended complaint allegations identifying a
11 class capable of seeking relief under § 1985(3). Plaintiff has failed to remedy these deficiencies
12 and the court is unaware of additional facts that could result in sufficiently-pled claims. As such,
13 the court finds that permitting further amendment would be futile at this point, and will dismiss all
14 causes of action without further leave to amend.

15 **IV. ORDER**

16 Based on the foregoing, the Motions to Dismiss (Dkt. Nos. 94, 95) are GRANTED. All
17 causes of action in the SAC are DISMISSED WITHOUT LEAVE TO AMEND. The hearing
18 scheduled for January 25, 2018, is VACATED.

19 Any additional matters are TERMINATED and VACATED. Judgment will be entered in
20 favor of defendants, and the Clerk shall close this file.

21
22 **IT IS SO ORDERED.**

23 Dated: January 12, 2018



EDWARD J. DAVILA
United States District Judge