

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RHAWN JOSEPH, Ph.D.,
Plaintiff,
v.
LUCY KOH, et al.,
Defendants.

Case No. 20-cv-03782-VKD

**ORDER FOR REASSIGNMENT TO A
DISTRICT JUDGE; REPORT AND
RECOMMENDATION RE MOTION
TO DISMISS AND MOTION TO STAY
DISCOVERY**

Re: Dkt. No. 5, 16

Plaintiff Rhawn Joseph, Ph.D., proceeding pro se, sues for alleged civil rights and other violations arising from municipal code enforcement proceedings. Presently before the Court is a motion to dismiss filed by defendants the City of San Jose (“City”), Dave Sykes, Richard Doyle,¹ Kendra McGee-Davies, Rosalynn Hughey, Jason Gibileco and Brian Munoz (“City defendants”). Dr. Joseph opposes the motion. The Court deemed the matter suitable for determination without oral argument and vacated the September 1, 2020 hearing. Civ. L.R. 7-1(b); General Order No. 72-5; Dkt. No. 22. Because not all parties have appeared,² this Court orders that this case be reassigned to a district judge, with the following report and recommendation that the City defendants’ motion to dismiss be granted with leave to amend as to some claims for relief and

¹ Based on media reports, the Court is informed that Mr. Doyle recently passed away.

² Dr. Joseph and the City defendants have expressly consented that all proceedings in this matter may be heard and finally adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 2, 8. Judge Koh, however, has not appeared in this action. Although Dr. Joseph filed a notice indicating that he voluntarily dismissed her from these proceedings (Dkt. No. 10), he subsequently withdrew that document (Dkt. Nos. 11, 12). Additionally, while Dr. Joseph filed a certificate of service (Dkt. No. 4), there is no indication on the docket that Judge Koh properly has been served with process as prescribed by Rule 4(i), and the deadline for service of process was August 27, 2020. Fed. R. Civ. P. 4(m).

1 without leave to amend as to others. 28 U.S.C. § 636; Fed. R. Civ. P. 72. Additionally, this Court
 2 recommends that the City defendants' motion to stay discovery (Dkt. No. 16) be granted and that
 3 discovery be stayed at least through the resolution of the present motion to dismiss.

4 **I. BACKGROUND**

5 **A. Dr. Joseph's 2019 Action**

6 Dr. Joseph previously sued several of the same City defendants for alleged civil rights and
 7 other violations arising out of municipal code enforcement proceedings concerning Dr. Joseph's
 8 wrought iron fence and cypress trees, as well as three sheets of 24-inch polyurethane he had
 9 erected on a portion of his property. See Case No. 5:19-cv-01294-LHK Joseph v. City of San
 10 Jose, et al. ("2019 Action").³ Defendants' motion to dismiss the original complaint in that action
 11 was mooted when Judge Koh, who presides over the 2019 Action, granted Dr. Joseph's unopposed
 12 motion for leave to file an amended complaint. 2019 Action, Dkt. No. 29. Judge Koh
 13 subsequently granted defendants' motion to dismiss the First Amended Complaint, with leave to
 14 amend, on the ground that Dr. Joseph's allegations did not comply with Rule 8's mandate to
 15 provide a "short and plain" statement of his claims. 2019 Action, Dkt. No. 43.

16 In his Second Amended Complaint ("SAC"), the operative pleading in the 2019 Action,
 17 Dr. Joseph named as defendants the City, Dave Sykes (City Manager), Richard Doyle (City
 18 Attorney), Rosalyn Hughey (Director of San Jose Code Enforcement), Mollie McLeod (City Code
 19 Enforcement Division Manager and Administrative Hearing Officer), Sean Flanagan (Code
 20 Enforcement Inspector), and Jason Gibileco (Code Enforcement Inspector and Supervisor). 2019
 21 Action, Dkt. No. 45; Dkt. No. 5-1, Ex. C. Dr. Joseph claimed that the defendants filed false code
 22 violations against him, requiring that he remove three sheets of 24-inch polyurethane, which Dr.
 23 Joseph claimed were necessary to protect his home and property against harassing and wrongful
 24 conduct by one of his neighbors. Additionally, Dr. Joseph contended that although his cypress
 25 trees did not violate any code, defendants wrongfully required that he destroy them and that he

26 _____
 27 ³ Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of facts not
 28 subject to reasonable dispute because it "can be accurately and readily determined from sources
 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The Court may take
 judicial notice of its own records.

1 also cut his wrought iron fence to a height of no more than three feet—or face substantial fines.
2 Further, Dr. Joseph claimed that the City, Mr. Gibilescio and Ms. Hughey altered and backdated
3 records to support the false code violations. 2019 Action, Dkt. No. 45; Dkt. No. 5-1, Ex. C.

4 Dr. Joseph asserted twelve claims for relief: (1) “Violation of the First Amendment, Civil
5 Rights Claim (42 U.S.C. § 1981)”; (2) “Conspiracy, Hate Crimes (CPS Part 1, Title 2 Section 31,
6 CPS §§ 182 422.6; 42 U.S.C. § 1981)”; (3) “Violation of the Fourth Amendment”; (4) “Violation
7 of the Fifth Amendment”; (5) “Violation of the Sixth Amendment”; (6) “Violation of the Eighth
8 Amendment: Excessive Fines”; (7) “Violation of the Fourteenth Amendment (42 U.S.C. § 1981.5
9 § 1983)”; (8) “Monell Liability, Constitutional Torts, Violation of Fourteenth Amendment (42
10 U.S.C. § 1983)”; (9) “Violations of Bane Act (Cal. Civ. Code § 52.1), and Ralph Act (Cal. Civ.
11 Code § 51.7)”; (10) “Negligence (42 U.S.C. § 1983) ‘Willful Indifference’ Constitutional Torts,
12 Liability, Damages: No Immunity”; (11) “Intentional Infliction of Emotional Distress, Malice,
13 Harassment”; and (12) “Demand for Declarative and Injunctive Relief.” *Id.* ¶¶ 182-325.

14 On March 3, 2020, Judge Koh granted in part and denied in part defendants’ motion to
15 dismiss the SAC as follows:

16 Judge Koh granted the motion to dismiss without leave to amend with respect to Dr.
17 Joseph’s First Amendment claim to the extent that it asserted violation of 42 U.S.C. § 1981; his
18 second claim for relief for “Conspiracy, Hate Crimes (CPS Part 1, Title 2 Section 31, CPS §§ 182
19 422.6; 42 U.S.C. § 1981)”; his Fourth Amendment claim to the extent that it asserts an unlawful
20 search as to the City and Hughey; and the claim for violation of the Ralph Act, Cal. Civ. Code
21 § 51.7. 2019 Action, Dkt. No. 73; Dkt. No. 5-1, Ex. B. Additionally, Judge Koh granted without
22 prejudice defendants’ motion to dismiss the SAC with respect to Dr. Joseph’s claim for
23 declaratory and injunctive relief.

24 Judge Koh concluded that Younger⁴ abstention applied to a number of Dr. Joseph’s claims,
25 and she stayed the suit with respect to the claims for alleged violation of the First, Fourth, Fifth,
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⁴ Younger v. Harris, 401 U.S. 37 (1971).

1 Sixth, Eighth and Fourteenth Amendments, as well as the claims for Monell⁵ liability, alleged
2 violation of the Bane Act (Cal. Civ. Code § 52.1), “Negligence (42 U.S.C. § 1983) Willful
3 Indifference,” and intentional infliction of emotional distress. Pursuant to Judge Koh’s March 3,
4 2020 order, the stay of these claims remains in effect “until the Court orders otherwise.” Judge
5 Koh further directed the parties to notify the Court “when the underlying state proceedings are no
6 longer ongoing and [to] explain why Younger abstention is no longer warranted[.]” 2019 Action,
7 Dkt. No. 73 at 35; Dkt. No. 5-1, Ex. B.

8 Judge Koh denied defendants’ motion to dismiss with respect to Dr. Joseph’s unlawful
9 search claim under the Fourth Amendment against Messrs. Flanagan and Gibileco. 2019 Action,
10 Dkt. No. 73 at 35; Dkt. No. 5-1, Ex. B. However, on March 10, 2020 she granted the parties’
11 stipulated request to stay the litigation as to that claim, with the stay to “remain in effect until the
12 parallel administrative and state court proceedings and their appeals are fully resolved.” 2019
13 Action, Dkt. No. 78 at 2. Judge Koh then administratively closed the 2019 Action. Id. at 3.

14 **B. Dr. Joseph’s Present Lawsuit**

15 On May 29, 2020, Dr. Joseph filed the present lawsuit, naming as defendants Judge Koh,
16 the City, Messrs. Sykes, Doyle and Gibileco, Ms. Hughey, City attorney Kendra McGee-Davies
17 and Brian Munoz, identified as a senior maintenance worker for the Department of Streets and
18 Traffic. Dr. Joseph again claims civil rights and other violations based on the same allegedly false
19 code enforcement proceedings concerning his cypress trees and wrought iron fence. According to
20 his complaint, “[a]ll these false charges were officially dismissed in February 2020 by the City of
21 San Jose when Plaintiff was prosecuted and proved the charges were false.” Dkt. No. 1 ¶ 3.
22 Nevertheless, Dr. Joseph claims that with Judge Koh’s “encouragement,” the City defendants
23 “again fashioned false charges to illegally destroy Plaintiff’s Cypress trees, in early March 2020,
24 during the corona pandemic, so as [to] force him to violate shelter in place mandates and
25 recklessly endanger and knowingly expose him to the corona virus[.]” Id. ¶ 7.

26 The complaint alleges that around March 16, 2020, Mr. Munoz called Dr. Joseph and
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⁵ Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978).

1 demanded that he “butcher his trees,” but “was unable to cite any codes Plaintiff had allegedly
2 violated.” Id. ¶ 9. Mr. Munoz allegedly further told Dr. Joseph that he had no rights of appeal or
3 to an administrative hearing, and that he “was to do as ordered or suffer fines, costs and property
4 damage.” Id. ¶¶ 9, 55. According to the complaint, although Dr. Joseph “complained he was
5 being ordered to expose himself to the [corona] virus by violating shelter in place mandates, Mr.
6 Munoz ‘stated he was just ‘following orders’ and if Plaintiff did not cut his trees the City would
7 cut down all his trees and Plaintiff would be charged costs and administrative fees and fines.” Id.
8 ¶ 54.

9 Dr. Joseph alleges that on March 17, 2020, he emailed the City, Messrs. Doyle and Sykes,
10 and Ms. McGee-Davies, pointing out that the City had “declared his trees were not in violation,”
11 and additionally demanding to know what codes he allegedly was violating, as well as an
12 administrative hearing. Id. ¶ 10; see also ¶ 56. The complaint alleges that Dr. Joseph’s emails
13 were ignored and that defendants “retaliated by sending a second letter via [Mr.] Munoz, dated
14 4/29/20, threatening to damage and deprive Plaintiff of his property within 14 days and cited
15 codes that had nothing to do with Plaintiff’s trees[.]” Id. ¶¶ 11, 56. The City and Mr. Munoz
16 reportedly “also levied and threaten[ed] to levy more fines and charges if Plaintiff refused to
17 violate the shelter in place mandates and mutilate his trees[.]” Id. ¶ 11. As a result, Dr. Joseph
18 claims that he “was coerced and forced to mutilate his trees, and on 5/1/20 suffered a deprivation
19 of and destruction of his property without due process.” Id. ¶ 13; see also ¶ 57. The complaint
20 further alleges that on or about May 1, 2 and 3, 2020, Dr. Joseph emailed to all defendants (except
21 Judge Koh) “a notice of intention to file suit,” accusing defendants of “purposefully and recklessly
22 endangering and exposing him to the corona virus[.]” Id. ¶ 58. Dr. Joseph claims that defendants
23 retaliated and that around May 13, 2020 he received a third notice from defendants ordering him
24 to “butcher more of his trees.” Id. ¶ 13; see also ¶ 59. Additionally, Dr. Joseph alleges that
25 between March and May 2020, he “observed the same and different vehicles stopping in front of
26 his home, and observed drivers who took pictures of Plaintiff, his trees, and his property.” Id.
27 ¶ 14. He believes that defendants “are harassing and seeking to intimidate [him], and planning
28 additional fake charges to destroy his property and his home, and cause his death.” Id.

1 Dr. Joseph alleges that based on his “religion, race, and sexual orientation,” all defendants
2 “engaged in a criminal conspiracy resulting in reckless endangerment and attempted murder
3 (exposure to the Corona virus), elder abuse, property damage, deprivation of property, cruel and
4 unusual punishment, extortion, perjury, fraud, false charges, the backdating of fake evidence,
5 demands for payment of protection to avoid the subsequent filing of false charges targeting
6 Plaintiff’s property for destruction, filing fake charges when he refused, and violating his 1st, 4th,
7 5th, 8th, and 14th Amendment rights.” Id. ¶ 2. With respect to the 2019 Action, the complaint
8 alleges that defendants “conspired to and obstructed justice, committed fraud, and violated
9 Plaintiff’s constitutional rights.” Id. ¶ 20.

10 Dr. Joseph’s complaint asserts 15 claims for relief: (1) “Demand for Declarative and
11 Injunctive Relief”; (2) “Violation of the First Amendment, Civil Rights Claim (42 U.S.C. § 1981);
12 (3) “Conspiracy, Hate Crimes (CPS Part 1, Title 2 Section 31, CPS §§ 182 422.6; 42 U.S.C.
13 § 1981)”; (4) “Violation of the Fourth Amendment”; (5) “Violation of the Fifth Amendment”;
14 (6) “Fraud: City of San Jose, Hughey, Gibilesco, Munoz”; (7) “False Charges, Malicious
15 Prosecution, Pain and Suffering”; (8) “False Charges, Property Damage, Pain and Suffering”;
16 (9) Violation of the Eighth Amendment: Excessive Fines, Cruel and Unusual Punishment”;
17 (10) “Violation of the Fourteenth Amendment (42 U.S.C. § 1981.5 § 1983)”; (11) “Monell
18 Liability, Constitutional Torts, Violation of Fourteenth Amendment (42 U.S.C. § 1983)”;
19 (12) “Violations of Bane Act (Cal. Civ. Code § 52.1), Ralph Act (Cal. Civ. Code § 51.7), 42
20 U.S.C. § 1983”; (13) “Negligence (42 U.S.C. § 1983) ‘Willful Indifference’ — Constitutional
21 Torts”; (14) “Intentional Infliction of Emotional Distress, Malice, Harassment”; and (15) “Fraud:
22 Lucy Koh, City of San Jose.” Dkt. No. 1 ¶¶ 126-227.

23 C. The City Defendants’ Pending Motion to Dismiss

24 On July 8, 2020, the City defendants filed the present motion to dismiss the complaint,
25 arguing that under the first-to-file rule, the present lawsuit should be dismissed in favor of the
26 earlier-filed 2019 Action. Dkt. No. 5 at 13-16. That same day, however, Judge Koh denied their
27 motion to relate the present case and the 2019 Action, and the City defendants now acknowledge
28 that their first-to-file argument is moot. Dkt. No. 13 at 1. Additionally, in his opposition to the

1 present motion to dismiss, Dr. Joseph clarifies that the claims asserted in the present lawsuit are
 2 based on events occurring in March 2020 after Judge Koh closed the 2019 Action on March 10,
 3 2020. See Dkt. No. 9 at 1 (“The Causes of Action detailed in Joseph v. Koh have their onset in
 4 March of 2020, and details how Defendants filed false charges, levied fraudulent fines, and
 5 inflicted damages and injuries in 2020—after [Judge] Koh issued her ruling and closed the [2019
 6 Action].”). The City defendants nonetheless maintain that dismissal is warranted on the grounds
 7 that the complaint violates Rules 8 and 11 and because, pursuant to Rule 12(b)(6), the complaint
 8 also fails to state a claim for relief. For the reasons discussed below, this Court recommends that
 9 the City defendants’ motion to dismiss be granted with leave to amend as to some claims for relief
 10 and without leave to amend as to others.

11 **II. DISCUSSION**

12 **A. Rule 11**

13 The City defendants move to dismiss the complaint with prejudice for failure to comply
 14 with Rule 11. Dkt. No. 5 at 16-18; Dkt. No. 13 at 9.

15 Rule 11(b) states:

16 By presenting to the court a pleading, written motion, or other
 17 paper—whether by signing, filing, submitting, or later advocating
 18 it—an attorney or unrepresented party certifies that to the best of the
 person’s knowledge, information, and belief, formed after an inquiry
 reasonable under the circumstances:

19 (1) it is not being presented for any improper purpose, such
 20 as to harass, cause unnecessary delay, or needlessly increase the cost
 of litigation;

21 (2) the claims, defenses, and other legal contentions are
 22 warranted by existing law or by a nonfrivolous argument for
 extending, modifying, or reversing existing law or for establishing
 23 new law.

24 (3) the factual contentions have evidentiary support or, if
 specifically so identified, will likely have evidentiary support after a
 reasonable opportunity for further investigation or discovery; and

25 (4) the denials of factual contentions are warranted on the
 26 evidence or, if specifically so identified, are reasonably based on
 27 belief or a lack of information.

28 Fed. R. Civ. P. 11(b)(1)-(4). The City defendants contend that the complaint’s allegations are not

1 factual, but rather are conclusory, speculative, based on opinion and legally frivolous. Dkt. No. 5
2 at 16; Dkt. No. 13 at 9. In their view, the present lawsuit is an attempt by Dr. Joseph to
3 collaterally attack Judge Koh’s stay and/or dismissal of various claims in the 2019 Action, as well
4 as to circumvent her denial of Dr. Joseph’s motions requesting her disqualification and recusal as
5 the presiding judge in that case. Dkt. No. 5 at 17. Insofar as the complaint alleges that all
6 defendants conspired against Dr. Joseph in connection with the 2019 Action, the City defendants
7 argue that the doctrine of judicial immunity precludes a lawsuit against Judge Koh for actions
8 taken in her judicial capacity, asserting that “[n]owhere does the complaint allege that Judge Koh
9 acted in the clear absence of all jurisdiction.” Id. at 16.

10 As the City defendants correctly note, it is well settled that even in civil rights actions
11 brought pursuant to 42 U.S.C. § 1983, judges acting within their judicial jurisdiction are
12 absolutely immune from liability for damages. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).
13 Nevertheless, as to the claims asserted against them, the City defendants’ arguments appear to be
14 based largely on an alleged failure by Dr. Joseph to state facts sufficient to support a plausible
15 claim for relief under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). See Dkt. No. 5 at 16.
16 Those arguments are addressed below in connection with the City defendants’ arguments for
17 dismissal pursuant to Rule 12(b)(6). Moreover, to the extent the City defendants appear to seek
18 dismissal as a sanction for violation of Rule 11(b), it is unclear on the record presented that their
19 motion complies with the procedural requirements for a motion for Rule 11 sanctions. Rule 11(c)
20 and Civil Local Rule 7-8 identify specific requirements for bringing such motions, including a 21-
21 day safe harbor period for correcting or withdrawing the challenged paper. Accordingly, on the
22 record presented, this Court declines to recommend dismissal under Rule 11.

23 **B. Rule 8**

24 The City defendants argue that the complaint should be dismissed for failure to comply
25 with the general rules for pleading set out in Rule 8(a) of the Federal Rules of Civil Procedure.
26 Rule 8 requires a complaint to include a short and plain statement indicating the grounds for
27 jurisdiction, a short and plain statement of the claim, and a demand for the relief sought. Fed. R.
28 Civ. P. 8(a)(1)-(3). “The propriety of dismissal for failure to comply with Rule 8 does not depend

1 on whether the complaint is wholly without merit.” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th
2 Cir. 1996). Accordingly, even claims that are not on their face subject to dismissal under Rule
3 12(b)(6) may still be dismissed for violating Rule 8(a). *Id.* Although “verbosity or length is not
4 by itself a basis for dismissing a complaint based on Rule 8(a),” *Hearns v. San Bernardino Police*
5 *Dep’t*, 530 F.3d 1124, 1131 (9th Cir. 2008), where the allegations in a complaint are
6 “argumentative, prolix, replete with redundancy and largely irrelevant,” the complaint is properly
7 dismissed for failure to comply with Rule 8(a), *McHenry*, 84 F.3d at 1178-79.

8 This Court agrees that the complaint fails to comply with Rule 8’s mandate to provide a
9 short and plain statement of each claim showing that Dr. Joseph is entitled to relief. The
10 complaint contains numerous theories of legal wrongs that the defendants have committed, and
11 often refers to multiple state, federal, civil and criminal statutes and cases together, but fails to set
12 forth clear facts in an organized fashion showing that Dr. Joseph is entitled to relief under various
13 asserted theories. Illustrative of the allegations of the complaint is the Fourth Claim for Relief for
14 “Violation of the Fourth Amendment,” which purports to assert a claim against all defendants for
15 “conspiracy to create fake code violations, to fake evidence, to alter photographs, and to alter and
16 backdate official records and they did so to deprive Plaintiff of his property, and this conduct is a
17 violation of 18 U.S.C. § 1001, CPC § 422.6:18 and the 4th Amendment rights.” Dkt. No. 1 ¶ 142.
18 These allegations cite federal and state criminal statutes without any clear relationship to the
19 constitutional claim apparently being asserted. The Eleventh Claim for Relief for “Monell
20 Liability, Constitutional Torts, Violation of Fourteenth Amendment (42 U.S.C. § 1983),” similarly
21 cites to multiple federal and state statutes, including 42 U.S.C. § 1983, California Government
22 Code § 815.2(a), California Health and Safety Code 26205, Division 20, the Federal Tort Claims
23 Act, 28 U.S.C. §§ 1346(b), 2671-2680, while asserting violations of Dr. Joseph’s “1st, 4th, 5th,
24 8th [and] 14th Amendment rights.” Dkt. No. 1 ¶¶ 182-195. Elsewhere in a section of his
25 complaint entitled “Argument,” Dr. Joseph makes sweeping allegations of conspiracy, as well as
26 “Attempted Murder,” “Elder Abuse,” and alleged constitutional violations. See *id.* ¶¶ 63-88.

27 In sum, the complaint is so prolix and argumentative that it fails to provide fair notice of
28 the claims being asserted or the grounds on which they rest. Fed. R. Civ. P. 8(a)(2). Although the

1 City defendants argue that dismissal with prejudice is appropriate, the Court first looks to less
2 drastic alternatives to dismissal. *McHenry*, 84 F.3d at 1178. As discussed below, even liberally
3 construing the complaint, the allegations are insufficient to support a plausible claim for relief.

4 **C. Rule 12(b)(6)**

5 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal
6 sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
7 Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts
8 alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep't*, 901
9 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be
10 taken as true and construed in the light most favorable to the claimant. *Id.* However,
11 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
12 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, “the court is
13 not required to accept legal conclusions cast in the form of factual allegations if those conclusions
14 cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d
15 752, 754-55 (9th Cir. 1994). Additionally, “[f]actual allegations must be enough to raise a right to
16 relief above the speculative level,” *Twombly*, 550 U.S. at 555, and only plausible claims for relief
17 will survive a motion to dismiss, *Iqbal*, 556 U.S. at 679. A claim is plausible if its factual content
18 permits the court to draw a reasonable inference that the defendant is liable for the alleged
19 misconduct. *Iqbal*, 556 U.S. at 679. A plaintiff does not have to provide detailed facts, but the
20 pleading must include “more than an unadorned, the-defendant-unlawfully-harmed-me
21 accusation.” *Id.* at 678. Documents appended to or incorporated into the complaint or which
22 properly are the subject of judicial notice may be considered along with the complaint when
23 deciding a Rule 12(b)(6) motion. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir.
24 2010).

25 If the Court determines that a complaint should be dismissed, it must then decide whether
26 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to
27 amend “shall be freely given when justice so requires,” because “the underlying purpose of Rule
28 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v.*

1 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks
2 omitted). When dismissing a complaint for failure to state a claim, “a district court should grant
3 leave to amend even if no request to amend the pleading was made, unless it determines that the
4 pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal
5 quotation marks omitted). “The decision of whether to grant leave to amend nevertheless remains
6 within the discretion of the district court,” which may deny leave to amend if allowing amendment
7 would unduly prejudice the opposing party, cause undue delay, or be futile, or if the party seeking
8 amendment has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th
9 Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

10 Preliminarily, this Court notes that to the extent Dr. Joseph’s complaint seeks to hold the
11 City liable under various claims based on the conduct of its employees, those claims do not state a
12 plausible claim for relief as to the City because a municipality may not be held vicariously liable
13 for the unconstitutional acts of its employees under the theory of respondeat superior. See
14 *Monell*, 436 U.S. at 691. Additionally, the City defendants note that dismissal is warranted to the
15 extent the complaint appears to reassert a number of claims that Judge Koh dismissed without
16 leave to amend in the 2019 Action. See 2019 Action, Dkt. No. 73, Ex. B. Indeed, any such claims
17 would not provide a plausible basis for relief. As noted above, however, Dr. Joseph clarifies that
18 the claims in his complaint are based only on events that occurred in 2020 after Judge Koh closed
19 the 2019 Action on March 10, 2020. Dkt. No. 9 ¶¶ 9, 80. With that clarification, this Court now
20 addresses the City defendants’ motion to dismiss each of the asserted claims for relief.

21 **1. First Claim for Relief: “Demand for Declarative and Injunctive Relief”**

22 This claim, which is asserted against only the City, appears to be based on alleged
23 violations of Dr. Joseph’s constitutional rights. Dkt. No. 1 ¶¶ 126-129. As discussed below, this
24 Court recommends that the City defendants’ motion to dismiss be granted, with leave to amend
25 only as to some claims. Accordingly, Dr. Joseph’s claim for declarative and injunctive relief
26 should also be dismissed with leave to amend.

1 **2. Second Claim for Relief: “Violation of the First Amendment, Civil**
 2 **Rights Claim (42 U.S.C. § 1981)”**

3 This claim is based on 42 U.S.C. § 1981 and alleges that the defendants violated Dr.
 4 Joseph’s right to freedom of religion under the First Amendment. The City defendants argue that
 5 the complaint fails to allege an actionable impairment of Dr. Joseph’s right to freedom of religion.
 6 Indeed, it is not apparent that a claim for violation of the First Amendment right to freedom of
 7 religion is actionable under 42 U.S.C. § 1981. That statute provides:

8 All persons within the jurisdiction of the United States shall have the
 9 same right in every State and Territory to make and enforce
 10 contracts, to sue, be parties, give evidence, and to the full and equal
 11 benefit of all laws and proceedings for the security of persons and
 12 property as is enjoyed by white citizens, and shall be subject to like
 13 punishment, pains, penalties, taxes, licenses, and exactions of every
 14 kind, and to no other.

15 42 U.S.C. § 1981(a). Courts have held that “[o]nly race is actionable under 42 U.S.C. section
 16 1981.” *Lelaind v. City & Cty. of San Francisco*, 576 F.Supp.2d 1079, 1089 (N.D. Cal. 2008). In
 17 his opposition, Dr. Joseph asserts that he “loves and views his trees with religious re[v]erence.”
 18 Dkt. No. 9 at 4. However, “[t]he Free Exercise Clause simply cannot be understood to require the
 19 Government to conduct its own internal affairs in ways that comport with the religious beliefs of
 20 particular citizens.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448 (1988),
 21 (quoting *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986)). The facts as alleged in the complaint are
 22 not sufficient to give rise to a plausible claim for relief, and it is not apparent from the record
 23 presented that the pleading could be cured by the allegations of additional facts on amendment.
 24 Accordingly, this Court recommends that the City defendants’ motion to dismiss this claim be
 25 granted, without leave to amend.

26 **3. Third Claim for Relief: “Conspiracy, Hate Crimes (CPC Part 1, Title 2**
 27 **Section 31, CPC §§ 182 422.6; 42 U.S.C. § 1981)**

28 With respect to the City defendants, the complaint alleges: “As detailed in [the 2019
 Action] Plaintiff and his trees were targeted and false charges were filed and Plaintiff was
 prosecuted in 2018 to 2019, because of perceptions about Plaintiff’s religion, race, and sexual
 orientation.” Dkt. No. 1 ¶ 136. The complaint further alleges that Dr. Joseph’s “trees were also
 targeted and demands were repeatedly made to castrate and mutilate these trees, as attacks on

1 Plaintiff's manhood and sexuality and religious beliefs." Id. ¶ 137. The City defendants contend
2 that in the 2019 Action, Judge Koh dismissed this same claim without leave to amend, and that
3 dismissal is warranted here because Dr. Joseph has simply realleged the claim in the present
4 action. Dkt. Nos. 5, 13. Although this claim appears to be expressly based on events in 2018 and
5 2019, Dr. Joseph now argues that his complaint concerns only events arising in 2020 after Judge
6 Koh closed the 2019 Action, and also pertains to different trees than those that are at issue in that
7 earlier-filed case. Dkt. No. 9 ¶¶ 6, 31-33, 80. Even so, those arguments do not save this claim
8 from dismissal, as the complaint cannot state a claim for relief under 42 U.S.C. § 1981, California
9 Penal Code §§ 182, 422.6 or 422.55.

10 To the extent this claim is based on California Penal Code § 182, "which makes it a crime
11 to conspire to falsely and maliciously cause someone to be arrested, charged, or indicted for any
12 crime," this Court concludes that it should be dismissed without leave to amend "because this
13 section of the Penal Code does not create any private right of action." *Evans v. United States*, No.
14 CV 18-06546 AB (ASx), 2019 WL 2970830, at *3 n.3 (C.D. Cal. Apr. 17, 2019), report and
15 recommendation adopted, 2011 WL 4543195 (E.D. Cal. Sept. 27, 2011)). Similarly, courts have
16 found no private right of action under California Penal Code § 422.6, which makes it a crime to
17 interfere with the exercise of civil rights or to damage property based on the perceived
18 characteristics of the victim. See, e.g., *Hoffman v. Lassen Adult Detention Facility*, No. 2:15-cv-
19 1558 JAM KJN P, 2017 WL 2535461, at *3 n.1 (E.D. Cal. June 12, 2017) (noting "that California
20 Penal Code section 422.6 provides no private right of action."), report and recommendation
21 adopted, 2017 WL 4310507 (E.D. Cal. Sept. 28, 2017); *Nible v. Fink*, No. 16cv2849-BAS (PCL),
22 2017 WL 1885740, at *3 (S.D. Cal. May 9, 2017) (finding no authority to support the plaintiff's
23 claims under a private right of action with respect to California's Penal Code § 422.6), report and
24 recommendation adopted as stated in 2017 WL 4581520, at *3 (S.D. Cal. Oct. 12, 2017). Nor
25 does this Court find any basis for a private right of action under California Penal Code § 422.55,
26 which simply provides the statutory definition of "hate crime." See *Thomas v. Thomas*, No. 18-
27 cv-00825-LB, 2018 WL 5099668, at *2 n.6 (N.D. Cal. Mar. 12, 2018) (noting that statute
28 providing definitions does not give rise to a private right of action).

1 To the extent this claim is based on 42 U.S.C. § 1981, as discussed above, only
2 discrimination based on race is actionable under that statute. *Lelaind*, 576 F.Supp.2d at 1089.
3 Courts have held that in order to state a claim under § 1981, a plaintiff must allege facts
4 demonstrating (1) that he is a member of a racial minority; (2) the defendant’s intent to
5 discriminate on the basis of race; and (3) that the discrimination concerned one or more of the
6 activities enumerated in the statute. *Lenk v. Sacks, Ricketts, and Case LLP*, No. 19-cv-03791-
7 BLF, 2020 WL 2793480, at *4 (N.D. Cal. May 29, 2020). Here, the complaint alleges that Dr.
8 Joseph “is a ‘minority’” as compared to Judge Koh because in terms of global population, “Asians
9 account for 60% of the world population (4.5 billion as of 2015), whereas Whites account for
10 11.5%.” Dkt. No. 1 ¶ 30. Although the complaint further alleges that Dr. Joseph’s “racial
11 background is a mixture of ‘Saxon,’ ‘Egyptian,’ ‘Jewish,’ ‘Arabic,’” the complaint does not allege
12 any facts from which it may reasonably be inferred that any of the City defendants acted based on
13 an intent to discriminate based on Dr. Joseph’s race. Moreover, the complaint expressly states that
14 this claim is based on events that occurred in 2018 and 2019, contrary to Dr. Joseph’s assertion in
15 his opposition brief that the complaint only concerns more recent events after March 10, 2020. In
16 any event, the complaint does not allege sufficient facts to state a plausible claim for relief based
17 on 42 U.S.C. § 1981.

18 As the record includes no indication that Dr. Joseph could address these deficiencies in an
19 amended complaint, this claim should be dismissed without leave to amend.

20 **4. Fourth Claim for Relief: “Violation of the Fourth Amendment”**

21 This claim alleges that the “[d]efendants entered into a conspiracy to create fake code
22 violations, to fake evidence, to alter photographs, and to alter and backdate official records and
23 they did so to deprive Plaintiff of his property, and this conduct is a violation of 18 U.S.C. § 1001,
24 CPC § 422.6; and the 4th Amendment rights.” Dkt. No. 1 ¶ 142. The complaint further states that
25 the City violated Dr. Joseph’s “expectation of privacy,” and that he “was forced, compelled by
26 threats to mutilate three of his trees on May 1, 2020 and Defendants have repeatedly threatened to
27 seize his property and mutilate his trees.” *Id.* ¶¶ 141, 143. Although not expressly alleged within
28 the text of this claim, the complaint elsewhere says that between March and May 2020, Dr. Joseph

1 “observed the same and different vehicles stopping in front of his home, and observed drivers who
2 took pictures of [him], his trees, and his property.” Dkt. No. 1 ¶ 14.

3 To the extent this claim is based on alleged violation of 18 U.S.C. § 1001 or California
4 Penal Code § 422.6, the claim fails and should be dismissed without leave to amend. For the
5 reasons discussed above, there is no private right of action under California Penal Code § 422.6.
6 Nor is there a private right of action under 18 U.S.C. § 1001. See *Murphy v. Bank of New York*
7 *Mellon*, No. 14-cv-02030-JST, 2014 WL 4222188, at *5 (N.D. Cal. Aug. 25, 2014) (“Section 1001
8 is a criminal statute pertaining to the falsification of documents and the making of false statements
9 in matters within the jurisdiction of the federal government. . . . The statute contains no private
10 right of action.”).

11 As for the alleged Fourth Amendment violations, the Fourth Amendment protects against
12 unreasonable searches and seizures. *Soldal v. Cook Cty.*, 506 U.S. 56, 63 (1992) (quoting *United*
13 *States v. Jacobsen*, 466 U.S. 109, 113 (1984)); see also U.S. Const. amend. IV (“The right of the
14 people to be secure in their persons, houses, papers, and effects, against unreasonable searches and
15 seizures, shall not be violated.”). “A ‘search’ occurs when the government intrudes upon an
16 expectation of privacy that society is prepared to consider reasonable. A ‘seizure’ of property
17 occurs when there is some meaningful interference with an individual’s possessory interests in that
18 property.” *Soldal*, 506 U.S. at 63 (quoting *Jacobsen*, 466 U.S. at 113).

19 To the extent Dr. Joseph bases this claim on an alleged unlawful seizure of his property, in
20 response to the City defendants’ motion to dismiss, he cites no authority indicating that the City
21 defendants’ alleged “threatened seizure” of his trees or the fact that he was “compelled by threats
22 to mutilate three of his trees” gives rise to a claim for violation of the Fourth Amendment.

23 Insofar as this claim is based on an alleged unlawful search, the complaint fails to state
24 sufficient facts supporting a plausible claim for relief. “The touchstone of Fourth Amendment
25 analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’”
26 *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360
27 (1967)). “What a person knowingly exposes to the public, even in his own home or office, is not a
28 subject of Fourth Amendment protection.” *Katz*, 389 U.S. at 351. The complaint alleges that

1 between March and May 2020, Dr. Joseph “observed the same and different vehicles stopping in
2 front of his home, and observed drivers who took pictures of [him], his trees, and his property.”
3 Dkt. No. 9 ¶ 35; see also Dkt. No. 1 ¶ 14. That allegation is vague as to what conduct, if any, is
4 attributable to any particular defendant. Moreover, the allegation is not sufficient to state a
5 plausible claim for unlawful search under the Fourth Amendment inasmuch as it indicates that the
6 observations occurred in areas of public access. See *Ciraolo*, 476 U.S. at 213 (“The Fourth
7 Amendment protection of the home has never been extended to require law enforcement officers
8 to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that
9 an individual has taken measures to restrict some views of his activities preclude an officer’s
10 observations from a public vantage point where he has a right to be and which renders the
11 activities clearly visible.”).

12 Accordingly, this Court recommends that the City defendants’ motion to dismiss this claim
13 for alleged Fourth Amendment violations be granted. Because it is not clear whether the
14 deficiencies described above may be cured, this Court recommends that Dr. Joseph be given leave
15 to amend, except that no amended claim may be based 18 U.S.C. § 1001 or California Penal Code
16 § 422.6 for the reasons discussed above.

17 **5. Fifth Claim for Relief: “Violation of the Fifth Amendment”**

18 The complaint alleges that the City, Messrs. Doyle, Sykes and Munoz, and Ms. McGee-
19 Davies “ignored all demands for an administration hearing to appeal these most recent false and
20 fraudulent code violations filed repeatedly beginning March of 2020, and denied Plaintiff his 5th
21 Amendment right to due process.” Dkt. No. 1 ¶ 148. This claim apparently is based on
22 allegations that Dr. Joseph’s emailed requests for a hearing sent to these defendants were ignored.
23 *Id.* ¶ 10; see also Dkt. No. 9 ¶ 40. The City defendants argue that allegations concerning ignored
24 emails are not sufficient to state a claim for a due process violation, pointing out that the City’s
25 municipal code⁶ provides procedures for filing requests for a hearing, which they contend Dr.

26 _____
27 ⁶ The City defendants’ request for judicial notice of the proffered municipal code sections is
28 granted, as municipal codes and ordinances properly are subjects for judicial notice. *Fed. R. Evid.*
201; *Smith v. City of Oakland*, — F. Supp. 3d —, No. 19-cv-05398-JST, 2020 WL 2517857, at *1,
n.1 (N.D. Cal. Apr. 2, 2020) (citing *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1153

1 Joseph has followed before, although he did not do so here.⁷ Dr. Joseph does not squarely address
 2 these arguments, and merely reiterates that several of the City defendants “ignored all email
 3 demands” for a hearing. Dkt. No. 9 ¶ 40. This Court agrees that the complaint does not state
 4 sufficient facts to support a plausible claim for violation of due process under the Fifth
 5 Amendment. In any event, the Fifth Amendment’s due process clause applies only to the federal
 6 government, and not to the actions of a state or city. *Bingue v. Prunchak*, 512 F.3d 1169, 1174
 7 (9th Cir. 2008). This Court therefore finds no basis to conclude that this claim could be saved by
 8 amendment and recommends that the City defendants’ motion to dismiss this claim be granted
 9 without leave to amend.

10 **6. Sixth Claim for Relief: “Fraud: City of San Jose, Hughey, Gibilescio,
 11 Munoz”**

12 This claim alleges that “[f]rom October of 2018 until February of 2020, Defendants City of
 13 San Jose, Sykes, Hughey, and Gibilescio, engaged in fraud as [sic] attempted to extort and
 14 threatened fines of \$5000.00 a day, if Plaintiff did not kill his trees and destroy his wrought iron
 15 fence.” Dkt. No. 1 ¶ 153. The complaint further alleges that “the alleged code violations filed in
 16 2020, also have no basis in law or any City Code, and were and are fraudulent.” *Id.* ¶ 156. The
 17 City defendants contend that dismissal is warranted because the complaint does not comply with
 18 heightened pleading standards under Rule 9 and fails to sufficiently state facts supporting any
 19 misrepresentation, much less justifiable reliance on any alleged misrepresentation.

20 To state a claim for fraud under California law, a plaintiff must allege: (1) a
 21 misrepresentation (false representation, concealment, or non-disclosure); (2) knowledge of falsity
 22 (or scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and
 23 (5) resulting damage. *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996). Additionally, while

24 _____
 25 n.3 (9th Cir. 2017)).

26 ⁷ The Court takes judicial notice of the existence of a document titled “Demand for Hearing: San
 27 Jose Planning, Building, Code Enforcement,” by Dr. Joseph, dated February 21, 2019. Dkt. No.
 28 5-1 at ECF 336-347. See *California Sportfishing Protection Alliance v. Shiloh Group, LLC*, 268
 F. Supp. 3d 1029, 1038 (N.D. Cal. 2017) (stating that judicial notice may be taken of the existence
 of documents in administrative records).

1 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally,” a
 2 claim for fraud “must state with particularity the circumstances constituting fraud or mistake.”
 3 Fed. R. Civ. P. 9(b). “To comply with Rule 9(b), allegations of fraud must be specific enough to
 4 give defendants notice of the particular misconduct which is alleged to constitute the fraud
 5 charged so that they can defend against the charge and not just deny that they have done anything
 6 wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal quotations and
 7 citation omitted). Mere conclusory allegations of fraud are insufficient. *Moore v. Kayport*
 8 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

9 The complaint fails to allege sufficient facts demonstrating any misrepresentation or Dr.
 10 Joseph’s justifiable reliance on any such misrepresentation. Under California law, the key
 11 question in assessing justifiable reliance is “whether the person who claims reliance was justified
 12 in believing the representation in the light of his own knowledge and experience.” *Gray v. Don*
 13 *Miller & Assocs., Inc.*, 35 Cal. 3d 498, 503 (1984). The gravamen of the alleged fraud is that
 14 defendants pursued “fake code violations.” Dkt. No. 1 ¶ 156. The complaint does not allege that
 15 Dr. Joseph was misled into believing that the alleged charges were valid; rather, the allegations
 16 indicate that he knew or believed that the charges were false, that his “property is not in violation
 17 of any codes,” that he “refused to mutilate his trees,” and that he did so only because he “was
 18 coerced.” *Id.* ¶¶ 154, 155. Similarly, although the complaint alleges that the City and Mr. Munoz
 19 “attempted through fraud, to coerce Plaintiff into entering expensive contracts with private
 20 contractors associated with the City” (*id.* ¶ 155), there are no specific facts alleged suggesting that
 21 Dr. Joseph was misled into doing so based on any misrepresentation. Accordingly, this Court
 22 concludes that the City defendants’ motion to dismiss this claim should be dismissed. There being
 23 no indication on the record presented that deficiencies in this claim plausibly could be corrected
 24 by amendment, the claim should be dismissed without leave to amend.

25 **7. Seventh Claim for Relief: “False Charges, Malicious Prosecution, Pain**
 26 **and Suffering”**

27 In this claim, the complaint alleges that Messrs. Gibileso and Sykes and Ms. Hughey
 28 “falsely charged and maliciously prosecut[ed]” Dr. Joseph by “conspir[ing] together to falsely

1 search and charge Plaintiff with violations of codes after October 24, 2018, and again in January
2 and February of 2019 only to have the charges dismissed as Plaintiff's property was not in
3 violation of any codes[.]” Dkt. No. 1 ¶ 161. Elsewhere the complaint asserts that although “[a]ll
4 these false charges were officially dismissed in February 2020 by the City,” defendants
5 nonetheless proceeded to “file fake charges” again in March 2020. Id. ¶ 3. Construing this claim
6 as one for malicious prosecution, the City defendants contend that the complaint fails to state a
7 plausible claim for relief.

8 To establish a claim for malicious prosecution of a criminal or civil proceeding, a plaintiff
9 must plead facts demonstrating that the prior action was (1) “commenced by or at the direction of
10 the defendant and was pursued to a legal termination in his, plaintiff's, favor;” (2) “brought
11 without probable cause”; and (3) “initiated with malice.” *Casa Herrera, Inc. v. Beydoun*, 32 Cal.
12 4th 336, 341 (2004). The City defendants contend that the prior issuance of a compliance order
13 and the administrative hearing held in 2019, are not the type of proceeding that provides an
14 appropriate basis for a malicious prosecution claim. As confirmed by Dr. Joseph in his opposition
15 papers, however, his claims are based on events that began in March 2020 after Judge Koh closed
16 the 2019 Action. Dkt. No. 9 ¶ 6. As alleged in the complaint, beginning in March 2020 Dr.
17 Joseph received more than one order or letter demanding that he “butcher” and “mutilate” his
18 trees. See, e.g., Dkt. No. 1 ¶¶ 9, 11, 13. Even assuming that such orders or letters qualify as a
19 proceeding that provides an appropriate basis for a malicious prosecution claim, there are no
20 allegations demonstrating that those orders or letters were resolved in Dr. Joseph's favor. Nor is
21 there any indication on the record presented that Dr. Joseph could support his claim with such
22 allegations were he given leave to amend. Accordingly, this Court concludes that the City
23 defendants' motion to dismiss this claim should be granted without leave to amend.

24 **8. Eighth Claim for Relief: “False Charges, Property Damage, Pain and**
25 **Suffering”**

26 This claim alleges that Messrs. Munoz, Sykes and Doyle, Ms. McGee-Davies and the City
27 “conspired to falsely charge Plaintiff with violations of codes in February, March, April and May
28 of 2020,” and cites to a collection of various state and federal statutes, which appear to duplicate

1 other asserted claims based on malicious prosecution, as well as the Fourth, Fifth, Eighth and
2 Fourteenth Amendments. Dkt. No. 1 ¶¶ 164, 165. The mix of varied legal citations make it
3 difficult to decipher precisely what claim is being asserted or the factual and legal bases on which
4 any such claim is based, and this claim is subject to dismissal on that ground alone. Nonetheless,
5 positing that Dr. Joseph may be attempting to state a claim for abuse of process, the City
6 defendants argue that the complaint fails to state a claim for relief. This Court agrees.

7 “The common law tort of abuse of process arises when one uses the court’s process for a
8 purpose other than that for which the process was designed.” *Rusheen v. Cohen*, 37 Cal. 4th 1048,
9 1056 (2006). “It has been “interpreted broadly to encompass the entire range of ‘procedures’
10 incident to litigation,” *id.* at 1057, including the taking of depositions and appeals, *Barquis v.*
11 *Merchants Collection Ass’n.*, 7 Cal. 3d 94, 104 n.4 (1972). “To succeed in an action for abuse of
12 process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using
13 the court process, and (2) committed a willful act in the use of the process not proper in the regular
14 conduct of the proceedings.” *Rusheen*, 37 Cal. 4th at 1057. Dr. Joseph’s complaint alleges no
15 facts demonstrating that defendants used any court process incident to litigation for improper
16 purposes, and the sweeping allegations that the City defendants conspired in connection with the
17 2019 Action are insufficient to state a plausible claim for relief. Accordingly, this Court
18 concludes that the City defendants’ motion to dismiss this claim should be dismissed. There being
19 no indication on the record presented that this claim may be successfully pled on amendment, the
20 claim should be dismissed without leave to amend.

21 **9. Ninth Claim for Relief: “Violation of the Eighth Amendment:
22 Excessive Fines, Cruel and Unusual Punishment”**

23 This claim alleges that Dr. Joseph “has been and is being subject to profound personal and
24 emotional injury and cruel and unusual punishment (damage to his valuable religious property)
25 during the Corona virus pandemic, and illegal fines and illegal administrative costs, as well as
26 stress, anxiety, sleepless nights, all of which affect the immune system.” Dkt. No. 1 ¶ 168. The
27 complaint further alleges that “[a]ny fine or charging of costs would be excessive as Plaintiff has
28 not violated any codes or laws.” *Id.* ¶ 169.

1 The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive
2 fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. The City
3 defendants contend that the complaint’s allegations fail to establish any “punishment” within the
4 meaning of the Eighth Amendment. See Dkt. No. 1 ¶ 57. Indeed, “[t]o qualify as a punishment
5 subject to the Eighth Amendment, there must be a criminal penalty or punishment that attaches
6 after a formal adjudication of guilt.” *Bradford v. Minh Voong*, No. 17-cv-04964-HSG, 2018 WL
7 2047718, at *2 (N.D. Cal. May 2, 2018) (citing *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979)).
8 There are no facts alleged suggesting that the conduct at issue relates to punishment for a crime or
9 adjudication of guilt for a crime. Nor is there any indication that any such facts plausibly could be
10 alleged on amendment.

11 Insofar as this claim is based on alleged excessive fines, the City defendants contend that
12 Dr. Joseph has not yet paid any fines and therefore has no standing to pursue this claim. Some
13 authority suggests that such a claim may be ripe once a fine is imposed. See generally *San*
14 *Francisco Technology, Inc. v. Dial Corp.*, No. 5:10-cv-04986-JF/PSG, 2011 WL 941152, at *4
15 (N.D. Cal. Mar. 17, 2011) (concluding that an Eighth Amendment excessive fines issue was not
16 yet ripe where the fine in question had not yet been imposed). Even so, this Court finds that the
17 complaint’s allegations are ambiguous as to whether any fines have been imposed, or merely
18 threatened. See, e.g., Dkt. No. 1 ¶¶ 8, 11, 45, 54, 56, 95. The ambiguity is compounded by the
19 fact that the complaint includes allegations concerning pre-March 10, 2020 events that Dr. Joseph
20 now contends are not the subject of the present lawsuit. Because this Court cannot rule out the
21 possibility that any claim for alleged excessive fines may be clarified on amendment, this Court
22 concludes that the City defendants’ motion to dismiss should be granted, with leave to amend as to
23 any alleged excessive fines.

24 **10. Tenth Claim for Relief: “Violation of the Fourteenth Amendment (42**
25 **U.S.C. § 1981.5 § 1983)”**

26 In this claim, Dr. Joseph alleges that “[a]s detailed in [the 2019 Action], Plaintiff was
27 initially targeted and falsely charged because of his sexuality, religion, and race.” Dkt. No. 1
28 ¶ 173. The complaint further alleges that the City and other defendants committed acts that

1 exposed him to the corona virus and also targeted his trees “for castration and mutilation because
2 Defendants knew Plaintiff loved these trees and viewed them with religious reverence. Further,
3 the demand that the trees, which have a phallic shape, be castrated, can be construed as a direct
4 assault on Plaintiff’s sexuality, masculinity and gender.” Id. ¶ 177. Broadly construing this claim
5 as one for denial of equal protection under 42 U.S.C. § 1983, the City defendants contend that the
6 complaint fails to allege sufficient facts to support a plausible claim for relief.

7 “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall
8 ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a
9 direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne*
10 *Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). A
11 plaintiff alleging denial of equal protection under 42 U.S.C. § 1983 must plead intentional
12 unlawful discrimination or allege facts that are at least susceptible of an inference of
13 discriminatory intent. See *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1026 (9th
14 Cir. 1998). Here, although Dr. Joseph generally alleges that defendants’ actions denied him equal
15 protection of the laws, he does not allege sufficient facts to support such a claim. Although he
16 broadly claims that he was targeted because of his “sex, gender, religion, race” (Dkt. No. 1 ¶ 173),
17 Dr. Joseph does not allege facts plausibly suggesting that he was treated differently than other
18 similarly situated persons of different races, religions, or genders, much less any facts suggesting
19 that defendants acted with discriminatory intent. Rather, the complaint merely alleges in
20 conclusory fashion that Dr. Joseph was treated “differently from other citizens.” Dkt. No. 1 ¶ 176.
21 The complaint’s passing reference to an alleged violation of Dr. Joseph’s right to “due process” is
22 equally vague and conclusory. See *id.* ¶ 178. Because it is not clear whether these deficiencies
23 may be cured on amendment, this Court recommends that the City defendants’ motion to dismiss
24 this claim should be granted, with leave to amend

25 **11. Eleventh Claim for Relief: “Monell Liability, Constitutional Torts,**
26 **Violation of Fourteenth Amendment (42 U.S.C. § 1983)**

27 This claim, which is premised on alleged violation of “Plaintiff’s 1st, 4th, 5th, 8th [and]
28 14th Amendment rights,” alleges that the City has “general policies or customs” that “caused the

1 constitutional violations at issue in this case because they (1) maintained an unconstitutional
2 policy, custom, and practice and (2) failed to properly train, supervise, or discipline officers.”
3 Dkt. No. 1 ¶¶ 188, 195. The complaint further alleges that collectively, Messrs. Sykes and Doyle
4 and Ms. Hughey “approved and established a City policy whose only purpose was to target,
5 discriminate against, and selectively cause Plaintiff harm and violate his Constitutional and Civil
6 rights.” Id. ¶ 184. The City defendants move to dismiss this claim, arguing that the complaint’s
7 allegations are too vague and conclusory to state a plausible claim for relief.

8 As discussed above, the complaint fails to sufficiently allege a basis for any underlying
9 constitutional violation. Thus, there is no basis for a Monell claim. See generally *Villegas v.*
10 *Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 957 (9th Cir. 2008) (“Because there is no
11 constitutional violation, there can be no municipal liability.”). However, even if Dr. Joseph had
12 alleged an underlying constitutional violation, the claim fails to sufficiently allege a basis to hold
13 the City liable under Monell.

14 Local governments are “persons” subject to liability under 42 U.S.C. § 1983 where official
15 policy or custom causes a constitutional tort. *Monell*, 436 U.S. at 690. However, a city or county
16 may not be held vicariously liable for the unconstitutional acts of its employees under the theory
17 of respondeat superior. See *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 403 (1997); *Monell*,
18 436 U.S. at 691; *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995). “Instead, it is
19 when execution of a government’s policy or custom, whether made by its lawmakers or by those
20 whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the
21 government as an entity is responsible under § 1983.” *Monell*, 436 U.S. at 694. “The ‘official
22 policy’ requirement was intended to distinguish acts of the municipality from acts of employees of
23 the municipality, and thereby make clear that municipal liability is limited to action for which the
24 municipality is actually responsible.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

25 To impose municipal liability under § 1983 for a violation of constitutional rights, a
26 plaintiff must show that: (1) the plaintiff possessed a constitutional right of which he or she was
27 deprived; (2) the municipality had a policy; (3) this policy amounts to deliberate indifference to
28 the plaintiff’s constitutional rights; and (4) the policy is the moving force behind the constitutional

1 violation. See *Plumeau v. School Dist. # 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir.1997).
2 Liability based on a municipal policy may be satisfied in one of three ways: (1) by demonstrating
3 that a municipal employee committed the alleged constitutional violation under a formal
4 governmental policy or longstanding practice or custom that is the customary operating procedure
5 of the local government entity; (2) by demonstrating that the individual who committed the
6 constitutional tort was an official with final policymaking authority and that the challenged action
7 itself was an act of official governmental policy which was the result of a deliberate choice made
8 from among various alternatives, or (3) by proving that an official with final policymaking
9 authority either delegated policymaking authority to a subordinate or ratified a subordinate's
10 unconstitutional decision or action and the basis for it. *Gillette v. Delmore*, 979 F.2d 1342, 1346-
11 47 (9th Cir.1992), cert. denied, 510 U.S. 932 (1993). “In order to withstand a motion to dismiss
12 for failure to state a claim, a Monell claim must consist of more than mere ‘formulaic recitations of
13 the existence of unlawful policies, conducts or habits.’” *Cook v. Cty. of Contra Costa*, No. 15-cv-
14 05099-TEH, 2015 WL 9204292, at *4 (N.D. Cal. Dec. 17, 2015) (quoting *Bedford v. City of*
15 *Hayward*, No. 12-cv-00294-JCS, 2012 WL 4901434, at *12 (N.D. Cal. Oct. 15, 2012)).

16 **a. Custom, Policy, or Practice Allegations**

17 A municipality may be held liable on the basis of an unconstitutional policy if the plaintiff
18 is “able to prove the existence of a widespread practice that, although not authorized by written
19 law or express municipal policy, is ‘so permanent and well settled as to constitute a ‘custom or
20 usage’ with the force of law.’” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting
21 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)). Such a policy may be evidenced by
22 a pattern of similar acts or incidents. *Gillette*, 979 F.2d at 1349. Proof of random acts or isolated
23 incidents, however, are insufficient to establish custom, *Trevino v. Gates*, 99 F.3d 911, 918 (9th
24 Cir.1996), and “[a] single constitutional deprivation ordinarily is insufficient to establish a
25 longstanding practice or custom,” *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999).
26 However, an isolated constitutional violation may be sufficient to establish a municipal policy
27 where (1) “the person causing the violation has ‘final policymaking authority,’” (2) “the final
28 policymaker ‘ratified’ a subordinate’s actions,” or (3) “the final policymaker acted with deliberate

1 indifference to the subordinate’s constitutional violations.” Christie, 176 F.3d at 1235, 1238,
2 1240.

3 Here, Dr. Joseph has generally alleged a policy “whose only purpose was to target,
4 discriminate against, and selectively cause Plaintiff harm and violate his Constitutional and Civil
5 rights” and “that harmed and which has sought to cause future harm to this Plaintiff[.]” Id. ¶¶ 184,
6 187. These allegations do not go beyond incidents concerning Dr. Joseph and therefore are
7 insufficient to establish a plausible Monell claim based on the existence of a policy that was
8 widespread or so permanent and well settled as to constitute a custom, policy or practice with the
9 force of law. See Estate of Adomako v. City of Fremont, No. 17-cv-06386-DMR, 2018 WL
10 2234179, at *3 (N.D. Cal. May 16, 2018) (concluding that the plaintiff failed to sufficiently allege
11 a pattern, policy, or custom where the complaint only alleged facts pertaining to the plaintiff).

12 To the extent the complaint appears to allege Monell liability based on ratification by a
13 “final policymaker,” the complaint’s allegations also fall short. While a single decision by a
14 municipal final policymaker may be sufficient to trigger liability under Monell, such liability
15 attaches only where “a deliberate choice to follow a course of action is made from among various
16 alternatives by the official or officials responsible for establishing final policy with respect to the
17 subject matter in question.” Pembaur, 475 U.S. at 483. To show ratification, a plaintiff must
18 show that the “authorized policymakers approve a subordinate’s decision and the basis for it.”
19 Christie, 176 F.3d at 1239 (quoting Praprotnik, 485 U.S. at 127). In the present case, Dr. Joseph
20 alleges that Mr. Sykes “is the final policy maker,” (Dkt. No. 1 ¶ 187), but there are no allegations,
21 other than purely conclusory ones, giving rise to a plausible inference that Mr. Sykes made a
22 deliberate choice to follow a course of action from among various alternatives or approved the
23 basis for the alleged unconstitutional conduct.

24 Accordingly, this Court recommends that Dr. Joseph’s Monell claim be dismissed to the
25 extent it is based on an alleged unconstitutional custom or practice. However, as it is not clear
26 whether the deficiencies described above may be cured, this Court recommends that Dr. Joseph be
27 given leave to amend.
28

1 **b. Failure to Train Allegations**

2 “In limited circumstances, a local government’s decision not to train certain employees
3 about their legal duty to avoid violating citizens’ rights may rise to the level of an official
4 government policy for purposes of § 1983.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011).
5 However, “[a] municipality’s culpability for a deprivation of rights is at its most tenuous where a
6 claim turns on a failure to train.” *Id.* A municipality may be held liable based on a failure to train
7 only where it “amount[s] to ‘deliberate indifference to the rights of persons with whom the
8 [untrained employees] come into contact.’” *Id.* (quoting *City of Canton, Ohio v. Harris*, 489 U.S.
9 378, 388 (1989)). Deliberate indifference “is a stringent standard of fault, requiring proof that a
10 municipal actor disregarded a known or obvious consequence of his action.” *Id.* (internal
11 quotations and citation omitted). The Supreme Court has described the analysis as follows:

12 In resolving the issue of a city’s liability, the focus must be on
13 adequacy of the training program in relation to the tasks the
14 particular officers must perform. That a particular officer may be
15 unsatisfactorily trained will not alone suffice to fasten liability on
16 the city, for the officer’s shortcomings may have resulted from
17 factors other than a faulty training program. It may be, for example,
18 that an otherwise sound program has occasionally been negligently
19 administered. Neither will it suffice to prove that an injury or
20 accident could have been avoided if an officer had had better or
21 more training, sufficient to equip him to avoid the particular injury-
22 causing conduct. Such a claim could be made about almost any
23 encounter resulting in injury, yet not condemn the adequacy of the
24 program to enable officers to respond properly to the usual and
25 recurring situations with which they must deal. And plainly,
26 adequately trained officers occasionally make mistakes; the fact that
27 they do says little about the training program or the legal basis for
28 holding the city liable.

21 *City of Canton*, 489 U.S. 390-91.

22 Here, Dr. Joseph alleges that the City “failed to properly train” Messrs. Munoz and
23 Gibilesco “and/or familiarize them with the law and this training deficiency was so egregious that
24 it ‘amount[ed] to deliberate indifference to the rights of persons with whom the ‘officers come into
25 contact.’” Dkt. No. 1 ¶ 185. The complaint further alleges that defendants “Hughey, Gibilesco
26 and Munoz do not even know the difference between a tree vs a bush or shrub and do not have the
27 ability to accurately read, understand, or enforce Municipal (and relevant) California Codes,” and
28 that the City, Messrs. Sykes and Doyle and Ms. Hughey “were and are willfully indifferent to the

1 fact no one working for the City is a trained California Certified Code Enforcement Officer.” Id.
 2 These allegations are entirely conclusory, and the complaint does not allege specific facts
 3 regarding the type of training that was deficient, or how the allegedly unconstitutional conduct of
 4 Messrs. Sykes and Doyle and Ms. Hughey resulted from that training. This Court finds that the
 5 allegations in Dr. Joseph’s complaint are not sufficient to give rise to a plausible inference that the
 6 City may be held liable on the basis of any inadequate training program. Accordingly, the City
 7 defendants’ motion to dismiss this claim should be granted. However, as it is not clear whether
 8 the deficiencies described above may be cured, this Court recommends that Dr. Joseph be given
 9 leave to amend.

10 **12. Twelfth Claim for Relief: “Violations of Bane Act (Cal. Civ. Code**
 11 **§ 52.1), Ralph Act (Cal. Civ. Code § 51.7), 42 U.S.C. § 1983”**

12 “The Bane Act prohibits interference or attempted interference with a person’s rights under
 13 federal or California law by ‘threats, intimidation, or coercion.’” *Wyrzykowski v. Cty. of Marin*,
 14 No. 3:14-cv-03825-LB, 2015 WL 3613645, at *11 (N.D. Cal. June 9, 2015) (quoting Cal. Civ.
 15 Code § 52.1(a)). “The statute authorizes a claim for relief ‘against anyone who interferes, or tries
 16 to do so, by threats, intimidation, or coercion, with an individual’s exercise or enjoyment of rights
 17 secured by federal or state law.’” Id. (quoting *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 331 (1998)).
 18 “To obtain relief under this statute, a plaintiff must prove that a defendant tried to, or did, prevent
 19 the plaintiff from doing something that he had the right to do under the law, or to force plaintiff to
 20 do something that he was not required to do under the law.” Id. (citing *Austin B. v. Escondido*
 21 *Union Sch. Dist.*, 149 Cal. App. 4th 860, 883 (2007)).

22 Section 51.7 of the California Ralph Civil Rights Act (“Ralph Act”) provides that “[a]ll
 23 persons . . . have the right to be free from any violence, or intimidation by threat of violence
 24 committed against their persons or property” on the basis of a wide variety of protected
 25 characteristics, including race, gender and religion. Cal. Civ. Code §§ 51.7, 51(b). “In order to
 26 establish a section 51.7 claim, a plaintiff must show (1) the defendant threatened or committed
 27 violent acts against the plaintiff; (2) the defendant was motivated by his perception of plaintiff’s
 28 [protected characteristic]; (3) the plaintiff was harmed; and (4) the defendant’s conduct was a

1 substantial factor in causing the plaintiff's harm." *Warren v. Marcus*, 78 F. Supp. 3d 1228, 1248
 2 (N.D. Cal. 2015) (internal quotations and citation omitted).

3 The City defendants contend that the complaint's allegations are too conclusory to state a
 4 plausible claim for relief under the Bane Act or the Ralph Act. The Court agrees. The Bane
 5 Act/Ralph Act claim appears to be based on the same insufficient allegations recited in support of
 6 several of Dr. Joseph's other claims and these allegations do not support a plausible claim that Dr.
 7 Joseph was forced by any of the City defendants to do anything he was not required to do under
 8 the law, or that any of his rights have been violated based on a protected characteristic such as his
 9 race, gender or religion. However, as it is not clear whether the deficiencies described above may
 10 be cured, this Court recommends that Dr. Joseph be given leave to amend.

11 **13. Thirteenth Claim for Relief: "Negligence (42 U.S.C. § 1983) 'Willful
 12 Indifference' — Constitutional Torts"**

13 This claim fails insofar as it seeks to hold the City defendants liable for negligence under
 14 42 U.S.C. § 1983. "Section 1983 imposes liability for violations of rights protected by the
 15 Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443
 16 U.S. 137, 146 (1979); *see also Godfrey v. Oakland Police Dep't*, No. 17-cv-06560-KAW, 2018
 17 WL 1536756, at *3 (N.D. Cal. Mar. 29, 2018) (dismissing a § 1983 claim based on negligence and
 18 other state tort law, stating that "state law tort claims cannot form the basis for Plaintiff's § 1983
 19 claim."). Moreover, to the extent Dr. Joseph's Eleventh Claim for relief appears to be based on
 20 liability under 42 U.S.C. § 1983, the Thirteenth Claim is duplicative. Accordingly, the City
 21 defendants' motion to dismiss this claim should be granted without leave to amend.

22 **14. Fourteenth Claim for Relief: "Intentional Infliction of Emotional
 23 Distress, Malice, Harassment"**

24 To state a claim for intentional infliction of emotional distress, a plaintiff must plead facts
 25 demonstrating "(1) extreme and outrageous conduct by the defendant with the intention of
 26 causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's
 27 suffering severe or extreme emotional distress; and (3) actual and proximate causation of the
 28 emotional distress by the defendant's outrageous conduct." *Hughes v. Pair*, 46 Cal. 4th 1035,

1 1050 (2009) (citations omitted). “A defendant’s conduct is ‘outrageous’ when it is so extreme as
2 to exceed all bounds of that usually tolerated in a civilized community.” Id. at 1050-51 (citation
3 omitted). “And the defendant’s conduct must be intended to inflict injury or engaged in with the
4 realization that injury will result.” Id. at 1051. “Liability for intentional infliction of emotional
5 distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or
6 other trivialities.” Id.

7 This claim fails insofar as it is based on the conduct supporting Dr. Joseph’s other claims
8 which this Court recommends be dismissed as insufficiently pled. Moreover, even accepting Dr.
9 Joseph’s allegations as true, he cites nothing to show that the conduct at issue here rises to the
10 level of extreme and outrageous conduct, and it is not apparent from the record presented that the
11 pleading could be cured by the allegations of additional facts on amendment. Accordingly, the
12 City defendants’ motion to dismiss this claim should be granted without leave to amend.

13 **15. Fifteenth Claim for Relief: “Fraud: Lucy Koh, City of San Jose.”**

14 This claim ostensibly is based on alleged fraud by Judge Koh and the City. The
15 allegations, however, focus on Judge Koh. Dkt. No. 1 ¶¶ 216-226. The complaint fails to allege
16 any facts concerning the City and thus fails to sufficiently plead a claim for relief that fairly puts
17 the City on notice of Dr. Joseph’s claim. Moreover, for the reasons discussed above, this claim
18 also fails insofar as it seeks to hold the City liable for the conduct of its employees. Accordingly,
19 this Court concludes that the City defendants’ motion to dismiss this claim should be granted
20 without leave to amend.

21 **III. CONCLUSION**

22 Based on the foregoing, IT IS ORDERED THAT this case be reassigned to a district judge,
23 with the RECOMMENDATION that the City’s defendants’ motion to dismiss be granted as
24 follows: The motion to dismiss should be granted as to all claims for relief. Dr. Joseph should be
25 permitted to amend his claims based on alleged violation of the Fourth, Eighth and Fourteenth
26 Amendments, his claim based on Monell liability, his claim for alleged violation of the Bane Act
27 and the Ralph Act, and his claim for declaratory and injunctive relief, consistent with the findings
28 and recommendations set out above. The City defendants’ motion to dismiss should otherwise be

1 granted without leave to amend as to all other claims for relief.

2 Additionally, this Court recommends that the City defendants' motion to stay discovery
3 (Dkt. No. 16) be granted and that discovery be stayed at least through the resolution of the present
4 motion to dismiss.

5 Any party may serve and file objections to this Report and Recommendation within 14
6 days after being served. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Civ. L.R. 72-3.

7 **IT IS SO ORDERED.**

8 Dated: September 9, 2020

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VIRGINIA K. DEMARCHI
United States Magistrate Judge

United States District Court
Northern District of California