



1 injunctive relief (“first amended complaint”) in the San Diego Superior Court. (ECF  
2 No. 1-2 at 2). On January 8, 2013, Plaintiff served the amended complaint and  
3 summons on Defendant San Diego Police Department. (ECF No. 1-2 at 12).

4 On July 5, 2013, Plaintiff served an amended complaint for violation of civil  
5 rights and other wrongs (“second amended complaint”) on Defendant City Attorney of  
6 San Diego. (ECF No. 1-3).<sup>1</sup>

7 Plaintiff’s second amended complaint alleges that “[o]n May 3rd, 2011 and  
8 August 19, 2011, the plaintiff was subjected to unnecessary and excessive force by  
9 various defendant police officers, including unwarranted, indiscriminate and excessive  
10 application of pain compliance holds, carotid restraints and Tasers.” *Id.* at 1. The  
11 second amended complaint alleges that “Plaintiff was injured from improper use of  
12 force, including but not limited to the use of taser causing chest pain, carotid restraint  
13 causing neck pain and pain compliance techniques resulting in permanent ligament  
14 damage to finger.” *Id.* The second amended complaint alleges that Defendants “acted  
15 pursuant to an official unconstitutional policy of the County of San Diego.” *Id.* at 2.  
16 The second amended complaint sets forth the following causes of action against all  
17 Defendants: (1) violation of First and Fourteenth Amendments to the United States  
18 Constitution under 42 U.S.C. § 1983; (2) violation of Fourth and Fourteenth  
19 Amendments to the United States Constitution under 42 U.S.C. § 1983; (3(a))<sup>2</sup> violation  
20 of Fourteenth Amendment to the United States Constitution under 42 U.S.C. § 1983;  
21 (3(b)) violation of Eighth Amendment to the United States Constitution under 42 U.S.C.  
22 § 1983; (4) denial of California constitutional rights; (5) assault and battery; (6) false  
23 arrest and false imprisonment; (7) Cal. Civil Code Section 51.7; (8) Cal. Civil Code  
24 Section 52.1; (9) Cal. Civil Code Section 49; (10) Cal. Civil Code 50; (11) intentional  
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26 <sup>1</sup> The second amended complaint appears to have been filed in state court on June  
27 27, 2013.

28 <sup>2</sup> The second amended complaint lists two causes of action labeled “three.” The  
Court has listed the two separate causes of action as 3(a) and 3(b) to avoid confusion.

1 infliction of emotional distress; (12) negligence; (13) defamation/slander; (14) abuse  
2 of process; and (15) conspiracy. *Id.* at 5–8.

3 On July 29, 2013, Defendant Jan Goldsmith, City Attorney of San Diego,  
4 (“Defendant Goldsmith”) filed notice of removal of civil action in this Court. (ECF No.  
5 1). On August 8, 2013, Defendant Goldsmith filed motion to dismiss and motion for  
6 more definite statement. (ECF No. 2). On August 14, 2013, Plaintiff filed motion  
7 opposing notice of removal of civil action. (ECF No. 4). On August 28, 2013, Plaintiff  
8 filed response opposing motion to dismiss. (ECF No. 6).

9 Plaintiff’s Motion Opposing Notice of Removal

10 Plaintiff contends that removal of the action is time-barred. Plaintiff asserts that  
11 the notice of removal filed on July 29, 2013 is untimely, on the grounds that the 30-day  
12 window from the filing of the first amended complaint passed over ten months before  
13 the notice of removal was filed. Plaintiff further asserts that his claims under the Unruh  
14 Civil Rights Act are non-removable.

15 Defendant Goldsmith contends that removal of the case was proper under 28  
16 U.S.C. § 1441(a). Defendant Goldsmith asserts that he was served with the second  
17 amended complaint on July 9, 2013. Defendant Goldsmith contends that the notice of  
18 removal was filed within thirty days of receipt of the second amended complaint and  
19 is timely.

20 A defendant seeking to remove a case from state court to federal court must file  
21 a notice of removal within thirty days of receiving “a copy of the initial pleading . . . or  
22 within 30 days after the service of summons upon the defendant if such initial pleading  
23 has then been filed in court and is not required to be served on the defendant, whichever  
24 period is shorter.” 28 U.S.C. § 1446(b)(1). The removal statute also provides: “If  
25 defendants are served at different times, and a later-served defendant files a notice of  
26 removal, any earlier-served defendant may consent to the removal even though that  
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1 earlier-served defendant did not previously initiate or consent to removal.” 28 U.S.C.  
2 § 1446(b)(2)(c). The Court of Appeals for the Ninth Circuit has adopted the “later-  
3 served defendant rule,” which provides that “each defendant is entitled to thirty days  
4 to exercise his removal rights after being served.” *Destfino v. Reiswig*, 630 F.3d 952,  
5 956 (9th Cir. 2011).

6 In this case, Defendant Goldsmith became a defendant in the case when Plaintiff  
7 served a copy of the second amended complaint on the City Attorney of San Diego on  
8 July 5, 2013. *See* ECF No. 1-3 at 10. Under the “later-served defendant rule,”  
9 Defendant Goldsmith was afforded thirty days from July 5, 2013 to file a notice of  
10 removal, which renders the notice of removal Defendant Goldsmith filed on July 29,  
11 2013 timely.

12 Supplemental jurisdiction is proper over Unruh Civil Rights Act claims when  
13 these claims are filed in conjunction with federal causes of action. *See Bass v. County*  
14 *of Butte*, 458 F.3d 978, 979 (9th Cir. 2006) (implicitly approving district’s court’s  
15 exercise of supplemental jurisdiction over plaintiff’s Unruh Civil Rights Act claim);  
16 *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1025 (9th Cir. 2003) (same); *Martin v.*  
17 *Int’l Olympic Comm.*, 740 F.2d 670, 673 (9th Cir. 1984) (same); *Id.* (Pregerson, J.,  
18 dissenting) (“The action was originally filed in the California state courts but was  
19 removed to the federal district court under federal question jurisdiction. . . . We have  
20 pendent jurisdiction over the Unruh Act claim.”). The Court finds that Plaintiff’s  
21 claims were properly removed. Plaintiff’s motion opposing notice of removal is denied.

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23 Motion to Dismiss

24 Defendant Goldsmith contends that Plaintiff’s complaint fails to state a ground  
25 upon which relief may be granted because the allegations are too vague and conclusory.  
26 Defendant Goldsmith asserts that Plaintiff has not identified the role of each Defendant  
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1 in the alleged violation of Plaintiff's rights and that Plaintiff has not pled facts adequate  
2 to establish the required elements of any of the causes of action.

3 Plaintiff contends that the second amended complaint states a sufficient factual  
4 basis to establish plausibility for each cause of action.

5 Under Federal Rule of Civil Procedure 12(b)(6), a pleading may be dismissed if  
6 it fails "to state a claim upon which relief can be granted." A district court may dismiss  
7 a claim if the complaint (1) fails to state a "cognizable legal theory" or (2) lacks  
8 "sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250  
9 F.3d 729, 732 (9th Cir. 2001). "To survive a motion to dismiss, a plaintiff's complaint  
10 must have sufficient facts to state a facially plausible claim to relief." *Conservation*  
11 *Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotation marks and  
12 citation omitted). "A claim has facial plausibility when the plaintiff pleads factual  
13 content that allows the court to draw the reasonable inference that the defendant is liable  
14 for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "When  
15 reviewing a dismissal for failure to state a claim pursuant to Rule 12(b)(6) all  
16 allegations of material fact are taken as true and construed in the light most favorable  
17 to the non-moving party." *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 695 (9th  
18 Cir. 1999). "The standard used to evaluate a motion to dismiss is a liberal one,  
19 particularly when the action has been filed pro se." *Ivey v. Board of Regents*, 673 F.2d  
20 266, 268 (9th Cir. 1982). "However, a liberal interpretation of a civil rights complaint  
21 may not supply essential elements of the claim that were not initially pled. Vague and  
22 conclusory allegations of official participation in civil rights violations are not sufficient  
23 to withstand a motion to dismiss." *Id.* (finding complaint was properly dismissed  
24 where plaintiff's allegations "were not supported by reference to any specific actions,  
25 practices or policies" of the defendants).

26 In this case, Plaintiff has alleged sixteen causes of action against all named  
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1 Defendants. In order for Plaintiff to establish a Section 1983 violation, Plaintiff must  
2 show that a defendant acted under color of law and that a defendant’s conduct deprived  
3 Plaintiff of particular rights under the United States Constitution. *Williams v. Gorton*,  
4 529 F.2d 668, 670–71 (9th Cir. 1976). However, the complaint alleges that Defendants  
5 acted pursuant to “an official unconstitutional policy of the County of San Diego,”  
6 rather than referencing any specific practice or policy. (ECF No. 1-3 at 2). The  
7 complaint does not identify conduct by any specific Defendant which deprived Plaintiff  
8 of any particular rights under the United States Constitution. Plaintiff’s “[v]ague and  
9 conclusory allegations of official participation in civil rights violations are insufficient  
10 to withstand a motion to dismiss.” *Ivey*, 673 F.2d at 268. Plaintiff’s allegations are “not  
11 supported by reference to any specific . . . practices or policies.” *Id.* The Court finds  
12 that Plaintiff has not pled facts adequate to establish the required elements of Plaintiff’s  
13 claims. Plaintiff’s claims are dismissed for failure to state a claim upon which relief can  
14 be granted.

15 Defendant Goldsmith contends that Plaintiff’s state law claims seeking monetary  
16 relief are time-barred on the grounds that Plaintiff failed to follow the claims  
17 presentation requirement under the California Tort Claims Act (“the Act”). The  
18 complaint does not allege that Plaintiff has filed a claim with the City of San Diego in  
19 compliance with the claims presentation requirement of the Act. Plaintiff has requested  
20 an opportunity to amend his complaint. The Court grants Plaintiff an opportunity to  
21 amend his complaint.


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**CONCLUSION**

IT IS HEREBY ORDERED that the motion opposing notice of removal of civil action filed by Plaintiff (ECF No. 4) is DENIED. Defendant's motion to dismiss (ECF No. 2) is GRANTED. Plaintiff's claims are DISMISSED WITH LEAVE TO AMEND within 45 days. If no amended complaint is filed, the Clerk of the Court shall close this case.

DATED: November 8, 2013

  
**WILLIAM Q. HAYES**  
United States District Judge