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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 Immanuel Price,

11 Plaintiff,

12 v.

13 J. Wiese,

14 Defendant.

Case No.: 16cv1174-CAB-KSC

**ORDER REGARDING MOTION TO
DISMISS [Doc. No. 51]**

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16 On December 28, 2018, Defendant J. Wiese filed a motion to dismiss the First
17 Amended Complaint (“FAC”). [Doc. No. 51.] On January 9, 2019, Plaintiff Immanuel
18 Price filed an opposition to the motion. [Doc. No. 52.] On January 24, 2019, Defendant
19 filed a reply to the opposition. [Doc. No. 53.] On February 1, 2019, Plaintiff filed a sur-
20 reply. [Doc. No. 55.] For the reasons set forth below, the motion is GRANTED IN
21 PART AND DENIED IN PART.

22 PROCEDURAL BACKGROUND

23 On May 12, 2016, Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983 against
24 City of La Mesa, City of San Diego, John Doe Officer K9 Handler, and John Doe Officer
25 K9. [Doc. No. 1.] Plaintiff alleges an unreasonable use of force during a search of
26 plaintiff’s residence in violation of his rights under the Fourth Amendment of the United
27 States Constitution. [Doc. No. 1, at p. 3.]
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1 On June 15, 2016, this Court issued an order (1) granting Plaintiff's motion to
2 proceed *in forma pauperis*, and (2) dismissing three defendants and directing the United
3 States Marshal to effect service of Complaint. [Doc. No. 3.] Pursuant to 28 U.S.C. §§
4 1915(e)(2)(B) and 1915A(b), the Court: (1) dismissed John Doe Officer K9 because the
5 canine is not a person for purposes of 42 U.S.C. § 1983; and (2) dismissed claims against
6 defendants City of La Mesa and City of San Diego for failure to state a claim upon which
7 relief may be granted. [Doc. No. 3.] The Court noted that before the United States
8 Marshal can execute service upon the surviving defendant, John Doe Officer K9 Handler,
9 Plaintiff must identify the defendant by his true name and substitute that individual
10 person in place of the Doe by amending his Complaint to identify that party. [Doc. No. 3,
11 at p. 8 n.l.] The Court also directed Plaintiff to complete a U.S. Marshal Form 285 as
12 completely and accurately as possible for each named defendant and to return them to the
13 United States Marshal to execute service. [Doc. No. 3, at p. 8.]

14 On September 19, 2016, Plaintiff filed a Notice of Defendants Failure to Identify
15 and Delaying Plaintiffs Process ("Notice"). [Doc. No. 12.] In the Notice, Plaintiff
16 claimed that he sent two requests to the La Mesa Police Department that identified
17 Plaintiff, the case number, and date of the incident giving rise to the Complaint, and
18 "requested all information pertaining to said incident given case number SCE 3383461."
19 [Doc. No. 12.] Plaintiff included a Proof of Service By Mail indicating that he sent a
20 letter to the La Mesa Police Department on August 17, 2016 requesting information.
21 Plaintiff claimed that because "the department has yet to respond to these requests," he
22 was unable to identify the John Doe Officer K9 Handler and complete the Form 285 as
23 directed by the Court. [Doc. No. 12.] Plaintiff requested an extension of time to obtain
24 the identifying information and "that the Court fashion an adequate remedy." [Doc. No.
25 12, at p. 2.]

26 On December 2, 2016, Magistrate Judge Karen Crawford issued an order
27 construing Plaintiff's "Notice" as an ex parte motion to expedite discovery, granted the
28 motion to conduct limited discovery for the sole purpose of identifying the Doe

1 defendant, directed the Clerk of Court to mail Plaintiff a subpoena duces tecum form, and
2 gave Plaintiff specific instructions on how to complete the form and return it to the
3 United States Marshal for service. [Doc. No. 16.]

4 On February 17, 2017, Plaintiff filed a Second Motion to Expedite Discovery
5 (“Second Motion”) with a request by Plaintiff to serve a subpoena on the San Diego
6 Sheriff’s Department to ascertain the identity of the unknown officer K9 handler who
7 allegedly violated his civil rights. [Doc. No. 23.] In Plaintiff’s Second Motion he
8 asserted that he “received notification from [] the U.S. Marshals service that the La Mesa
9 Police Department refused to accept service of the Subpoena to Produce.” [Doc. No. 23,
10 at p. 1.] Plaintiff contended that “[t]he LMPD Records Clerk specifically refused
11 because[,] according to the clerk[,] the K-9 Handler, active on 2/28/2014 whom Plaintiff
12 sought to identify was actually employed by the San Diego Sheriffs[’] Department.” *Id.*
13 In the Second Motion, Plaintiff requested another “subpoena to produce” so that it could
14 be served on the San Diego Sheriff’s Department for identification of the K-9 Handler in
15 question. *Id.* On May 30, 2017, Magistrate Judge Crawford granted Plaintiff’s Second
16 Motion, directed the Clerk of Court to mail Plaintiff a subpoena duces tecum form, and
17 gave Plaintiff specific instructions on how to complete the form and return it to the
18 United States Marshal for service. [Doc. No. 24.]

19 For the next ten months, there were no further filings and no indication that the
20 canine officer had been identified and/or served. On April 5, 2018, this Court issued an
21 order to show cause (“OSC”) regarding why the matter should not be dismissed for
22 failure to prosecute. [Doc. No. 26.] On May 3, 2018, Plaintiff filed a response to the
23 OSC, claiming that he did not recall receiving the second subpoena to serve upon the
24 Sheriff’s Department. [Doc. No. 27.] On May 9, 2018, this Court issued an order
25 granting Plaintiff one final opportunity to subpoena the San Diego Sheriff’s Department
26 regarding the identity of the K9 officer. [Doc. No. 28.] On July 17, 2018, the Court
27 received an unexecuted subpoena indicating the San Diego Sheriff’s Department rejected
28 the subpoena “due to incomplete form (missing date &time), also vagueness of request.”

1 [Doc. No. 32.] After reviewing the subpoena, and considering the documented
2 challenges associated with obtaining the identity of the K9 handler, the Court issued an
3 order directing the Clerk of Court to re-issue a subpoena to the San Diego Sheriff's
4 Department. [Doc. No. 33.] The Clerk-issued subpoena was served by the U.S. Marshal
5 on August 1, 2018. [Doc. No. 34 at 2.] On August 28, 2018, the San Diego Sheriff's
6 Department responded to the Clerk of Court and stated that a thorough search of their
7 files revealed no responsive records in their files. [Doc. No. 35.]

8 After reviewing the response to the subpoena, and other attempts by Plaintiff to
9 ascertain the identity of the K9 handler, and considering the documented challenges
10 associated with obtaining the identity of the K9 handler, the Court issued an order
11 directing the Clerk of Court to issue subpoenas to the San Diego Police Department and
12 the La Mesa Police Department to obtain identifying information of the K9 handler.
13 [Doc. No. 36.] On October 3, 2018, the Court received a response to its subpoena to the
14 La Mesa Police Department which produced documents containing identifying
15 information of the K9 handler. [Doc. No. 37.] On October 5, 2018, this Court issued a
16 minute order directing the Clerk of Court to use the identifying information to amend the
17 summons and complaint and direct the United States Marshal to serve the newly-
18 identified defendant. [Doc. No. 39.]

19 ALLEGATIONS OF FAC

20 In the FAC, Plaintiff alleges that on February 28, 2014, he and his spouse "got
21 into altercation" and then Plaintiff left the residence. [Doc. No. 50, at p. 3.] Plaintiff
22 claims he walked around "trying to burn off the heavy intoxication" and returned to the
23 residence around 2:00 a.m. *Id.* Plaintiff then "passed out" on the ground floor rest room."
24 *Id.*

25 Plaintiff alleges he was "awakened by scratching at the bathroom door" around
26 3:00 a.m. *Id.* When no one spoke, Plaintiff yelled, "I'm in here!" and claims that the
27 bathroom door was then kicked off of its hinges, hitting him in the head. *Id.* Plaintiff
28 alleges that "a dog followed by two officers rushed into the bathroom ordering Plaintiff to

1 the ground.” *Id.* Plaintiff claims the dog was not on a leash and bit his left hand. *Id.*
2 Plaintiff claims that “[o]ne officer dropped his full weight on to plaintiffs back,” and he
3 “pleaded that the officers ‘get the dog’” because “the dog had by that time had gained a
4 crushing lock on Plaintiff’s right forearm.” *Id.* Plaintiff claims the dog was restrained
5 after officers handcuffed Plaintiff. *Id.*

6 Plaintiff claims that the first dog bite “caused a long gash on Plaintiff’s left index
7 finger which flesh hung out of,” and the second bite “caused several puncture wounds to
8 the right forearm.” *Id.* Plaintiff seeks damages in the sum of \$300,000, and punitive
9 damages of \$300,000. *Id.*

10 DISCUSSION

11 A. Failure to serve pursuant to Rule 4(m).

12 Federal Rules of Civil Procedure, Rule 4(m) states in pertinent part:

13 If a defendant is not served within 90 days after the complaint is filed, the
14 court – on motion or on its own after notice to the plaintiff – must dismiss
15 the action without prejudice against that defendant or order that service be
16 made within a specified time. But if the plaintiff shows good cause for the
17 failure, the court must extend the time for service for an appropriate period. .

18 Defendant argues Plaintiff did not serve him within 90 days and, therefore,
19 the complaint should be dismissed. [Doc. No. 51-1 at 11-12.] However, a review
20 of the docket shows that, within four months of filing the original complaint,
21 Plaintiff filed various motions requesting the Court’s assistance in determining the
22 identity of the canine handler. In granting those requests, the Court necessarily
23 determined that Plaintiff had shown good cause for his failure to serve the
24 complaint, which he could not do until he determined the identity of the officer.
25 As the docket also reflects, the responses to the subpoenas served by both Plaintiff
26 and the Court, while truthful, were not forthcoming in identifying the officer
27 involved. Therefore, while there was a substantial delay in serving Defendant, it
28 was not without good cause, especially for a pro se incarcerated plaintiff.

1 Defendant also argues that Plaintiff did know the identity of Defendant,
2 because Plaintiff represented himself in the underlying criminal trial and therefore
3 had access to all of the police reports. However, incarcerated defendants do not
4 always have access to their court files, especially after conviction. It is entirely
5 possible Plaintiff did not remember the officer's identity or have immediate access
6 to any reports. Therefore, the fact that Plaintiff at one time had access to his
7 criminal file does not necessarily undermine his representations to this court that
8 he did not know the identity of the officer. Moreover, it seems nonsensical that
9 Plaintiff would intentionally delay his case by falsely claiming that he did not
10 know the identity of the only remaining defendant. Accordingly, there is no Rule
11 4(m) violation.

12 B. Individual capacity.

13 "Section 1983 creates a private right of action against individuals who, acting
14 under color of state law, violate federal constitutional or statutory rights." *Devereaux v.*
15 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 "is not itself a source of
16 substantive rights, but merely provides a method for vindicating federal rights elsewhere
17 conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks
18 and citations omitted).

19 "To state a claim under 42 U.S.C. § 1983, the plaintiff must allege two elements:
20 (1) that a right secured by the Constitution or laws of the United States was violated; and
21 (2) that the alleged violation was committed by a person acting under color of state law."
22 *Campbell v. Washington Dep't of Soc. Servs.*, 671 F.3d 837, 842 n.5 (9th Cir. 2011)
23 (citing *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987).

24 Here, Plaintiff has sufficiently stated an excessive force claim against Defendant
25 Wiese. Plaintiff claims that when he was in the bathroom he was not resisting arrest and,
26 therefore, it was unconstitutional to use the dog to restrain him. While Plaintiff refers to
27 "officers," he is only suing deputy Wiese as the dog handler. The allegations regarding
28 the use of the dog when Plaintiff was allegedly just "passed out" in the bathroom and not

1 resisting arrest are sufficient to put Defendant on notice as to the alleged constitutional
2 deprivation. Therefore, Plaintiff has stated a claim against Defendant Wiese in his
3 individual capacity.

4 C. Official capacity.

5 To the extent Plaintiff sues Defendant Wiese in his official capacity, such a claim
6 “is equivalent to a suit against the government entity itself,” and is assessed in the context
7 of liability under *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 691 n. 55 (1978). *See*
8 *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991). In *Monell*, the Supreme
9 Court held that a municipality cannot be held liable under a respondeat superior theory,
10 but may be liable under § 1983 for constitutional violations that result from enforcement
11 of the municipality’s official “policies and customs.” 436 U.S. at 694. In order to
12 withstand a motion to dismiss for failure to state a claim, a *Monell* claim must consist of
13 more than mere “formulaic recitations of the existence of unlawful policies, conducts or
14 habits.” *Warner v. County of San Diego*, No. 10–1057, 2011 WL 662993, *4 (S.D.Cal.
15 Feb.14, 2011).

16 Here, Plaintiff has failed to allege any municipal policies and customs, nor any
17 role Defendant may have had in enforcing such policies. In his opposition, Plaintiff
18 requests that the Court “disregard [his] official capacity suit against J. Wiese and focus
19 on the individual capacity suit only. . . .” [Doc. No. 52 at 11. The Court interprets this as
20 Plaintiff’s voluntary dismissal of the official capacity claim. Accordingly, the claim
21 against Defendant Wiese in his official capacity is DISMISSED WITHOUT LEAVE TO
22 AMEND.

23 D. Failure to comply with Rule 8.

24 Federal Civil Rules of Civil Procedure, Rule 8 set forth the pleading requirements
25 for the federal courts. Generally, a complaint is sufficient if it give the defendant “fair
26 notice of what the . . . claim is and the grounds upon which it rests.” *Bell v. Atlantic*
27 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For the reasons set forth in Section B,
28 above, the FAC sufficiently gives defendant fair notice of the excessive force claim.

1 E. Failure to satisfy Rule 41(b).

2 Defendant may move for dismissal of the action or of any claim against the
3 defendant “for failure of the plaintiff to prosecute” the action. FRCP 41(b). A dismissal
4 with prejudice is generally deemed “an extreme sanction which is to be used only when
5 plaintiff’s conduct has threatened the integrity of the judicial process [in a way which]
6 leav[es] the court no choice but to deny that plaintiff its benefits.” *McNeal v. Papasan*,
7 842 F.2d 787, 790 (5th Cir. 1988)(brackets in original). *See also Dahl v. City of*
8 *Hunington Beach*, 84 F.3d 363, 366 (9th Cir. 1996). For the reasons set forth above,
9 Plaintiff has been sufficiently diligent, if not immediately successful, in attempting to
10 ascertain the identity of defendant. While it is unfortunate that the 911 call from the
11 victim has been purged, it appears that the call would have been purged within 24 months
12 from the date of the incident, which was prior to the filing of this complaint. [Doc. No.
13 53-1 at ¶2.] Therefore, any prejudice to Defendant from not having the audio of the 911
14 call was not due to the delay in service. Moreover, other evidence does exist, as
15 demonstrated by the various police reports provided by Defendant in the Request for
16 Judicial Notice (“RFJN”). [Doc. No. 51-5.]¹ Accordingly, the Court declines to impose
17 the “extreme sanction” of dismissal. *McNeal*, 842 F.2d at 790.

18 F. Failure to adhere to Rule 11(b)(1).

19 Federal Rules of Civil Procedure, Rule 11(b)(1) requires representations to the
20 court by attorneys and unrepresented parties to be not of an improper purpose. Defendant
21 argues that Plaintiff’s multiple filings in his other cases show that he did not lack
22 resources, time or information, as alleged in his motions for relief to this Court. However
23 the fact that Plaintiff had multiple filings in other cases does not necessarily contradict his
24 request for time and assistance in this case. Therefore, there is no Rule 11 violation.

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28 ¹ The RFJN as to Exhibits 1, 2, 4-17 [Doc. No. 51-3, 51-4, 51-6 through 51-19] is **GRANTED** pursuant to Federal Rule of Evidence Rule 201.

1 CONCLUSION

2 For the reasons set forth above, the motion to dismiss is **GRANTED WITHOUT**
3 **LEAVE TO AMEND** as to the claims against Defendant Wiese in his official capacity;
4 otherwise the motion to dismiss is **DENIED**.

5 The FAC will proceed with regard to Plaintiff's excessive force claim against
6 Defendant Wiese in his individual capacity. Defendant shall respond to the FAC as set
7 forth in Fed.R.Civ.P. Rule 12(a)(4)(A).

8 **IT IS SO ORDERED.**

9 Dated: February 4, 2019

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12 Hon. Cathy Ann Bencivengo
13 United States District Judge
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