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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BRUCE THOMAS,

12 Plaintiff,

13 v.

14 COUNTY OF SAN DIEGO, et al.,

15 Defendants.

Case No.: 17-CV-2587 JLS (AGS)

**ORDER GRANTING MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

(ECF No. 29)

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17 Presently before the Court is Defendant Callan E. Smith's Motion to Dismiss
18 ("Mot.," ECF No. 29). Plaintiff Bruce Thomas has not filed an Opposition in the more
19 than six months since Defendant filed her Motion.¹ The Court vacated the hearing on the
20 Motion and took the matter under submission without oral argument pursuant to Civil

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24 ¹ Civil Local Rule 7.1(e)(2) requires "each party opposing a motion" to file its opposition and serve the
25 movant at least fourteen days before the noticed hearing date. Civil Local Rule 7.1(f)(3)(c) provides that,
26 "[i]f an opposing party fails to file the papers in the manner required by Civil Local Rule 7.1.e.2, that
27 failure may constitute a consent to the granting of a motion or other request for ruling by the court."
28 Consequently, by virtue of Civil Local Rule 7.1(f)(3)(c), Mr. Thomas has consented to dismissal of his
First Amended Complaint. *See United States v. Warren*, 601 F.2d 471, 473 (9th Cir. 1979) (upholding
dismissal of indictments pursuant to a district court local rule stating that failure to timely oppose motions
is deemed consent to the motion). In light of Mr. Thomas' *pro se* status, however, the Court addresses
Defendant's arguments on the merits.

1 Local Rule 7.1(d)(1). ECF No. 30. Having considered the Parties’ arguments and the law,
2 the Court **GRANTS** Defendant’s Motion.

3 **BACKGROUND²**

4 Plaintiff filed his initial complaint against the County of San Diego, Bonnie M.
5 Dumanis, Drew W. Garrison, and Callan E. Smith on December 28, 2017. ECF No. 1.
6 Defendants moved to dismiss the Complaint, ECF No. 7, and, while their motion was
7 pending, Plaintiff filed a First Amended Complaint against only Mr. Garrison and
8 Ms. Smith. ECF No. 13 (“FAC”). Plaintiff subsequently withdrew one of his claims
9 against Ms. Smith. ECF No. 23.

10 Defendants moved to dismiss Plaintiff’s FAC, ECF No. 14, which Plaintiff opposed.
11 ECF No. 21. The Court granted the Defendants’ motion and dismissed without prejudice
12 Plaintiff’s FAC. ECF 27.

13 Plaintiff filed his operative Second Amended Complaint (“SAC”) on September 11,
14 2018, alleging a single claim for deceit pursuant to 42 U.S.C. § 1983 and California Civil
15 Code § 1710 against Ms. Smith in her individual capacity. *See generally* ECF No. 28.
16 According to his SAC, Plaintiff was charged with “one count of court order disobedience
17 [under California Penal Code section]166(a)(4).” SAC ¶ 6. Plaintiff pled not guilty and
18 requested to be self-represented, a request that the state court granted. *Id.* Ms. Smith
19 subsequently “went before a judge without Plaintiff present and charged Plaintiff with
20 resisting arrest[under California Penal Code section]148(a)(1).” *Id.* ¶ 7. On the morning
21 of May 17, 2017, Plaintiff and Ms. Smith went before Judge Carlos O. Armour, who
22 “denied Plaintiff’s motion to continue his trial and sent Ms. Smith and Plaintiff to begin
23 trial in the afternoon of May 17, 2017, before Judge Whitney in Department 21.” *Id.* ¶ 8.

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27 ² The facts alleged in Plaintiff’s operative Second Amended Complaint (“SAC,” ECF No. 28) are accepted
28 as true for the purpose of this Motion. *See Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir.
2007) (holding that, in ruling on a motion to dismiss, the Court must “accept all material allegations of
fact as true”).

1 Plaintiff left the courtroom and Ms. Smith proceeded to try Plaintiff in his absence,
2 “bringing forth a unilateral trial for court order disobedience and resisting arrest charges.”
3 *Id.* ¶ 9. The judge “ordered two arrest warrants having total bail set at \$200,000.00 for
4 Plaintiff failing to appear” and, when the Plaintiff returned to court later in the afternoon,
5 he was arrested. *Id.*

6 LEGAL STANDARD

7 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
8 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
9 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
10 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
11 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
12 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
13 allegations,’ . . . it [does] demand more than an unadorned, the-defendant-unlawfully-
14 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
15 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to
16 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
17 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
18 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A
19 complaint will not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual
20 enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

21 To survive a motion to dismiss, “a complaint must contain sufficient factual matter,
22 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
23 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
24 when the facts pled “allow the court to draw the reasonable inference that the defendant is
25 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
26 556). That is not to say that the claim must be probable, but there must be “more than a
27 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent
28 with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting

1 *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions”
2 contained in the complaint. *Id.* This review requires context-specific analysis involving
3 the Court’s “judicial experience and common sense.” *Id.* at 678 (citation omitted).
4 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
5 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
6 pleader is entitled to relief.’” *Id.*

7 Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to
8 amend unless it determines that no modified contention “consistent with the challenged
9 pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,
10 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
11 1393, 1401 (9th Cir. 1986)).

12 ANALYSIS

13 Defendant moves to dismiss Plaintiff’s sole claim for deceit under 42 U.S.C. § 1983
14 and California Civil Code section 1710 on the basis of absolute immunity, arguing she has
15 “immunity from § 1983 damages liability for conduct intimately associated with the
16 judicial phase of the criminal process.”³ Mot. at 3. In his SAC, Plaintiff claims that the
17 Defendant is not entitled to immunity because she acted outside of the judicial phase by
18 “[j]oining a charge ex parte and then pleading ex parte for issuance of warrants.” SAC
19 ¶ 14.

20 The United States Supreme Court has held immunity protects eligible government
21 officials who perform functions “intimately associated with the judicial phase of the
22 criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). “Such immunity applies
23 even if it leaves the genuinely wronged [plaintiff] without civil redress against a prosecutor
24 whose malicious or dishonest action deprives him of liberty.” *Ashelman v. Pope*, 793 F.2d
25 1072, 1075 (9th Cir. 1986) (internal quotations omitted). A prosecutor is protected by
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27 ³ Ms. Smith also notes that “Plaintiff has actually not obtained personal jurisdiction over Ms. Smith in her
28 individual (as opposed to official) capacity, but she agrees that “[a]ny jurisdictional issue will be moot if
[her] motion is granted.” Mot. 2.

1 absolute immunity for any actions that are “quasi-judicial” in nature and are performed
2 “within the scope of [the prosecutor’s] authority.” *Ybarra v. Reno Thunderbird Mobile*
3 *Home Vill.*, 723 F.2d 675, 678 (9th Cir.1984). This covers acts by the prosecutor “in
4 initiating a prosecution and in presenting the state’s case.” *Imbler*, 424 U.S. at 430–31.
5 When it comes to what a prosecutor says and does while presenting the State’s case at trial,
6 absolute immunity bars the claim. *Imbler*, 424 U.S. at 431; *see also Mansanares v.*
7 *Arizona*, No. CV 11-1521-PHX-JAT (LOA), 2011 WL 5924349, at *4 (D. Ariz. Nov. 22,
8 2011) (“Immunity also extends to a prosecutor ‘eliciting false or defamatory testimony
9 from witnesses’ or for making false and defamatory statements during, and related to
10 judicial proceedings.”) (quoting *Buckley*, 509 U.S. at 270).

11 In response to Defendant’s claim of immunity, Plaintiff argues that Ms. Smith’s acts
12 were outside her role as an advocate, relying on both *Kalina v. Fletcher*, 522 U.S. 118
13 (1997),⁴ and *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009). In *Kalina*, the Supreme
14 Court distinguished a prosecutor’s role as an advocate from that of a complaining witness
15 and held that absolute immunity does not apply when a prosecutor acts as the latter in
16 obtaining a warrant. 522 U.S. at 130–31. In *Van de Kamp*, the Supreme Court held that
17 even some administrative tasks of prosecutors are subject to absolute immunity, including
18 those that “require legal knowledge and the exercise of related discretion,” and
19 distinguished such tasks from those that are purely administrative, such as hiring and
20 payroll. 555 U.S. at 344.

21 These cases do not support Plaintiff’s argument. Plaintiff’s claim relates to
22 Ms. Smith’s actions in presenting the State’s case against Plaintiff, actions that are
23 “intimately associate[d] with the judicial phase of the criminal process.” *Imbler*, 424 U.S.
24 at 430. While Ms. Smith was present when Judge Whitney ordered a bench warrant, she
25 was acting within her role as an advocate, not as a witness. When Ms. Smith filed a second
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28 ⁴ Plaintiff cites *Kalina v. Fletcher*, 132 U.S. (1997), but the Court and the Defendant have construed this
as referencing *Kalina v. Fletcher*, 522 U.S. 118 (1997).

1 charge against Plaintiff, she was initiating a prosecution and presenting the State’s case,
2 not acting either as a witness or in an administrative capacity. Absolute immunity is
3 provided to prosecutors specifically because “defendant[s] often will transform [their]
4 resentment at being prosecuted into the ascription of improper and malicious actions to the
5 State’s advocate.” *Imbler*, 424 U.S. at 425. While the Plaintiff may not approve of
6 Ms. Smith’s conduct in presenting a case against him, absolute immunity bars his claim
7 because it relates to actions of a district attorney in prosecuting a case. The Court therefore
8 **GRANTS** Ms. Smith’s Motion and **DISMISSES** Plaintiff’s sole remaining cause of
9 action.

10 The Court previously indicated that it “entertain[ed] serious doubts concerning
11 Plaintiff’s ability to cure the deficiencies in his Complaint.” *See* ECF No. 27 at 9.
12 Although courts generally take a liberal approach to amendment, particularly in cases
13 prosecuted by *pro se* litigants, leave to amend is properly denied where—as here—
14 amendment would be futile. *See, e.g., Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)
15 (“[A] district court should grant leave to amend even if no request to amend the pleading
16 was made, unless it determines that the pleading could not possibly be cured by the
17 allegation of other facts.”); *Davis v. Powell*, 901 F. Supp. 2d 1196, 1222 (S.D. Cal. 2012)
18 (“Because [Plaintiff] could not plead any additional facts to cure the deficiencies in his
19 pleadings and has already been given leave to amend, he should not be given
20 further leave to amend his claims.”). Here, Plaintiff has already been granted leave to
21 amend his claim and he will be unable to cure the deficiencies because his claim is barred
22 by absolute immunity. Accordingly, the Court **DISMISSES WITH PREJUDICE**
23 Plaintiff’s SAC.

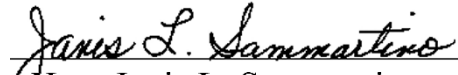
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1 **CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Defendant’s Motion to Dismiss (ECF
3 No. 29) and **DISMISSES WITH PREJUDICE** Plaintiff’s Second Amended Complaint.
4 Because this Order concludes the litigation in this matter, the Clerk of the Court **SHALL**
5 **CLOSE** the file.

6 **IT IS SO ORDERED.**

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8 Dated: April 22, 2019


9 Hon. Janis L. Sammartino
10 United States District Judge
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