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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 ARTHUR D. MAYO,

11 Plaintiff,

12 v.

13 OFFICER TRACY, *et al.*,

14 Defendants.
15

Case No. 2:15-cv-01906-LDG (GWF)

ORDER

16 Defendants Brian Williams, Minor Adams, Daniel Tracy, the State of Nevada,
17 Nevada Department of Corrections, and Southern Desert Correctional Center move to
18 dismiss (ECF No. 44) plaintiff Arthur Mayo's Second Amended Complaint (ECF No. 43).
19 Mayo opposes the motion (ECF No. 49), and has also filed a sur-reply (ECF No. 56)
20 without leave of the Court. The defendants move to strike the sur-reply (ECF No. 57),
21 which Mayo opposes (ECF No. 58). The Court will strike the sur-reply, and will grant
22 defendant's motion to dismiss the Second Amended Complaint as set forth below.

23 **Motion to Dismiss**

24 The defendants' motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),
25 challenges whether the plaintiff's complaint states "a claim upon which relief can be
26 granted." In ruling upon this motion, the court is governed by the relaxed requirement of

1 Rule 8(a)(2) that the complaint need contain only “a short and plain statement of the claim
2 showing that the pleader is entitled to relief.” As summarized by the Supreme Court, a
3 plaintiff must allege sufficient factual matter, accepted as true, “to state a claim to relief that
4 is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), *Landers*
5 *v. Quality Communications, Inc.*, 771 F.3d 638, 641 (9th Cir. 2015). Nevertheless, while a
6 complaint “does not need detailed factual allegations, a plaintiff’s obligation to provide the
7 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
8 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at
9 555, *Landers*, 771 F.3d at 642. In deciding whether the factual allegations state a claim,
10 the court accepts those allegations as true, as “Rule 12(b)(6) does not countenance . . .
11 dismissals based on a judge’s disbelief of a complaint’s factual allegations.” *Neitzke v.*
12 *Williams*, 490 U.S. 319, 327 (1989). Further, the court “construe[s] the pleadings in the
13 light most favorable to the nonmoving party.” *Outdoor Media Group, Inc. v. City of*
14 *Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

15 However, bare, conclusory allegations, including legal allegations couched as
16 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555, *Landers*, 771
17 F.3d at 641. “[T]he tenet that a court must accept as true all of the allegations contained in
18 a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
19 (2009). “While legal conclusions can provide the framework of a complaint, they must be
20 supported by factual allegations.” *Id.* at 679. Thus, this court considers the conclusory
21 statements in a complaint pursuant to their factual context.

22 To be plausible on its face, a claim must be more than merely possible or
23 conceivable. “[W]here the well-pleaded facts do not permit the court to infer more than the
24 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the
25 pleader is entitled to relief.” *Id.* (citing Fed. R. Civ. P. 8(a)(2)). Rather, the factual
26 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*,

1 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely
2 explained by lawful behavior, do not plausibly establish a claim. *Id.* at 567.

3 When a petitioner proceeds *pro se*, the complaint is held to less stringent standards
4 than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972),
5 *Ward v. Ryan*, 623 F.3d 807, 810 n.4 (9th Cir. 2010). In such a case, the court must
6 “construe the pleadings liberally and afford the petitioner the benefit of any doubt.” *Chavez*
7 *v. Robinson*, 817 F.3d 1162, 1167 (9th Cir. 2016). That being said, sweeping conclusory
8 allegations do not suffice. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

9 Claims and Defendants Previously Dismissed with Prejudice

10 Mayo’s Second Amended Complaint consists of a photocopy of his Amended
11 Complaint plus two additional pages, the first titled as Amended New Claims and the
12 second titled Supplemental New Claims. The Court previously screened the Amended
13 Complaint. As a result of that screening, the Court dismissed with prejudice Mayo’s
14 excessive force claims against Tracy, Williams, and Adams. The Court further dismissed
15 with prejudice Mayo’s claim of deliberate indifference. The Court also dismissed with
16 prejudice defendants State of Nevada, Nevada Department of Corrections, and Southern
17 Desert Correctional Center. As the Second Amended Complaint re-alleges claims and
18 defendants that the Court has previously dismissed with prejudice, the Court will again
19 dismiss those claims and defendants with prejudice.

20 Negligence of Defendants while Acting in their Official Capacity

21 In his complaint, Mayo alleges that defendant Tracy, while acting in his official
22 capacity, acted negligently by sending the defendant back to Unit #8, and that defendants
23 Williams and Adams, while acting in their official capacity, acted negligently by not
24 personally responding to Unit #8, but instead sending Sargent Wilson to the unit. These
25 defendants correctly note that they cannot be sued for monetary damages in their official
26 capacity. They further note that Mayo has not sought injunctive relief as a remedy for this

1 claim. Accordingly, to the extent that Mayo has alleged his claim for negligence against
2 these defendants while acting in their official capacity, the claim must be dismissed with
3 prejudice.

4 Negligence of Defendants while Acting in their Individual Capacity

5 The Court must construe defendant's complaint liberally. As such, the Court will
6 construe Mayo's negligence claim as also being brought against the defendants in their
7 individual capacity. As presently alleged, Mayo's complaint alleges only that Tracy sent the
8 defendant back to Unit #8, and alleges only that Williams and Adams were negligent in
9 sending Wilson to Unit #8, who used force by spraying "Bear Mace" in Mayo's eyes. As
10 noted by the defendants, Mayo's complaint (even as supplemented or amended) lacks any
11 allegations establishing a causal connection between their actions and the actions of
12 Wilson. That is, the complaint lacks any allegation from which the Court can plausibly infer
13 that the defendants knew, or reasonably should have known, that their actions (sending the
14 inmates back to Unit #8, and sending Wilson to Unit #8) would result in Wilson spraying the
15 defendant with "Bear Mace." The Court will dismiss this claim, but with leave to amend.

16 Reckless Endangerment and Malicious Infliction of Emotional Distress

17 Construing Mayo's complaint liberally, the Court will treat Mayo's claims of "Reckless
18 Endangerment" and "Malicious Infliction of Emotional Distress" as a claim for Intentional
19 Infliction of Emotional Distress. To recover on a claim of intentional infliction of emotional
20 distress, a plaintiff must establish the following elements: (1) that the defendant's conduct
21 was extreme and outrageous; (2) that the defendant either intended or recklessly
22 disregarded the causing of emotional distress; (3) that the plaintiff actually suffered severe
23 or extreme emotional distress; and (4) that the defendant's conduct actually or proximately
24 caused the distress. *Star v. Rabello*, 97 Nev. 124, 625 P.2d 90 (1981). Absent from
25 Mayo's complaint are any allegations that would plausibly suggest that these individual
26 defendants engaged in conduct that was extreme and outrageous, that they intended

1 Wilson's conduct in spraying the "Bear Mace," or that their conduct was the actual or
2 proximate cause of Mayo's emotional distress resulting from being subjected to the Bear
3 Mace. (The Court further notes that Mayo has not alleged that he suffered emotional
4 distress. However, Mayo has alleged he suffered significant physical distress. In light of
5 the Court's liberal construction of these claims, the Court will assume that Mayo could
6 sufficiently allege that he suffered emotional distress.) The Court will dismiss these claims
7 with prejudice as against these defendants.

8 Retaliation

9 In his Second Amended Complaint, Mayo alleges a new cause of action for
10 retaliation. More specifically, he alleges that on February 21, 2016, he was subjected to
11 the retaliatory act of his personal property (including his legal work product) being seized.
12 Mayo further generally alleges that each of the defendants is liable for this act of retaliation.
13 In his Second Amended Complaint, Mayo does not allege any facts suggesting that these
14 defendants participated in or knew of the alleged act.

15 As further noted by Mayo in his Second Amended Complaint, he previously
16 submitted a "Notice of Retaliation" regarding this incident. The Court struck that notice
17 because, as alleged by Mayo, the individuals who engaged in the retaliatory acts were
18 individuals who were not named as defendants in this lawsuit. The Court specifically
19 instructed Mayo that if he desired to file a new claim regarding this unrelated incident, he
20 should do so by opening a new case and filing a new application to proceed in forma
21 pauperis.

22 As Mayo has asserted, to this Court, that the alleged retaliatory act was committed
23 by persons other than those named as defendants in this suit, and as his present claim for
24 retaliation does not allege any conduct by the defendants, but merely asserts that they are
25 liable for the conduct of others, the Court will dismiss this claim with prejudice.

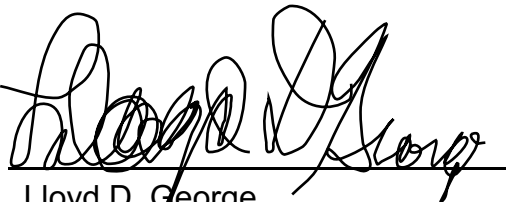
26 Therefore, for good cause shown,

1 THE COURT **ORDERS** that Defendants Brian Williams, Minor Adams, Daniel Tracy,
2 the State of Nevada, Nevada Department of Corrections, and Southern Desert Correctional
3 Center's Motion to Dismiss (ECF No. 44) is GRANTED as follows:

- 4 1) Defendants State of Nevada, Nevada Department of Corrections, and
5 Southern Desert Correctional Center are DISMISSED with PREJUDICE from
6 this action;
- 7 2) Plaintiff Arthur Mayo's Excessive Force claim is DISMISSED with
8 PREJUDICE as against Defendants Brian Williams, Minor Adams, and Daniel
9 Tracy;
- 10 3) Plaintiff Arthur Mayo's Deliberate Indifference claim is DISMISSED with
11 PREJUDICE;
- 12 4) Plaintiff Arthur Mayo's Reckless Endangerment and Malicious Infliction of
13 Emotional Distress claims are DISMISSED with PREJUDICE;
- 14 5) Plaintiff Arthur Mayo's Retaliation claim is DISMISSED with PREJUDICE;
- 15 6) Plaintiff Arthur Mayo's Negligence claim is DISMISSED without prejudice.

16 THE COURT FURTHER **ORDERS** that Defendants' Motion to Strike (ECF No. 57) is
17 GRANTED. The Clerk of the Court is instructed to STRIKE Plaintiff Arthur Mayo's Sur-
18 reply to Motion to Dismiss (ECF No. 57).

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21 DATED this 21 day of September, 2017.

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24 Lloyd D. George
25 United States District Judge
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