

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TROY MELNEK,
Plaintiff,
vs.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, et. al.,
Defendants.

Case No.: 2:23-cv-01303-GMN-MDC
ORDER GRANTING MOTIONS TO
DISMISS

Pending before the Court is a Motion to Dismiss, or in the alternative, Motion for Summary Judgment, (ECF Nos. 8, 9), filed by Defendants Las Vegas Metropolitan Police Department ("LVMPD") and Joseph Lombardo, (collectively "LVMPD Defendants"). Plaintiff Troy Melnek filed Responses, (ECF Nos. 12, 13), to which the LVMPD Defendants filed Replies, (ECF Nos. 18, 19).¹

Further pending before the Court is a Motion to Dismiss, (ECF No. 16), filed by Defendants Division of Public and Behavioral Health of the Department of Health and Human Services, Jo Malay, and Cody Phinney, (collectively "DPBH Defendants"). Plaintiff Troy Melnek filed a Response, (ECF No. 17), to which the DPBH Defendants filed a Reply, (ECF No. 26).

For the following reasons, the Court GRANTS both Motions to Dismiss and DENIES the Motion for Summary Judgment as MOOT.

I. BACKGROUND

Plaintiff spent 82 days in custody after the state court found that he was found incompetent to stand trial. (Compl. ¶¶ 13-14, ECF No. 1). Plaintiff was charged with

¹ Because the Motion, Response brief, and Reply brief, were docketed twice, the Court will refer to the lowest ECF number in this Order.

1 possession of a stolen vehicle and referred to competency court a few months later. (*Id.* ¶¶ 11–
2 12). After Plaintiff was found incompetent to stand trial, the state court filed an order of
3 commitment on June 25, 2022, requiring the Sheriff to convey Plaintiff “forthwith” to the
4 custody of Defendant Administrator of the Division of Public and Behavioral Health of the
5 Department of Health and Human Services (“DPBH”). (*Id.* ¶¶ 13–15). Plaintiff alleges that
6 DPBH had seven days to make a bed available so that he could receive treatment, but DPBH
7 did not timely transfer him to one of the two forensic psychiatric hospitals because the hospitals
8 had reached capacity. (*Id.* ¶¶ 21–23). Due to the shortage of space, Defendant remained at
9 Clark County Detention Center until his transfer in September 2022. (*Id.* ¶ 25).

10 Plaintiff brings a 42 U.S.C. § 1983 claim against all Defendants for violation of his due
11 process rights. (*Id.* ¶¶ 26–30). The LVMPD Defendants move to dismiss Plaintiff’s claim, or in
12 the alternative, move for summary judgment. (ECF Nos. 8, 9). The DPBH Defendants also
13 move to dismiss the claim against them. (ECF No. 16).

14 **II. LEGAL STANDARD**

15 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
16 which relief can be granted. Fed. R. Civ. P. 12(b)(6). A pleading must give fair notice of a
17 legally cognizable claim and the grounds on which it rests, and although a court must take all
18 factual allegations as true, legal conclusions couched as factual allegations are insufficient. *Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Accordingly, Rule 12(b)(6) requires “more
20 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will
21 not do.” *Id.* “To survive a motion to dismiss, a complaint must contain sufficient factual
22 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
23 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
24 plausibility when the plaintiff pleads factual content that allows the court to draw the
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1 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard
2 “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

3 **III. DISCUSSION**

4 Restorative treatment for incapacitated criminal defendants is a Fourteenth Amendment
5 Due Process right. *See Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003)
6 (holding that incapacitated defendants “have liberty interests in freedom from incarceration and
7 in restorative treatment”). When a court finds a defendant incompetent, “the judge shall order
8 the sheriff to convey the defendant forthwith, together with a copy of the complaint, the
9 commitment and the physicians’ certificate, if any, into the custody of the Administrator or the
10 Administrator’s designee for detention and treatment at a division facility that is secure.” NRS
11 § 178.425(1). Past consent decrees have interpreted the term “forthwith” to require transport
12 within seven days, and the Nevada Supreme Court held that this seven-day compliance
13 deadline was not arbitrary. *See State HHS, Div. of Pub. & Behavioral Health v. Eighth Jud.*
14 *Dist. Ct.*, 534 P.3d 706, 712 (Nev. 2023). The LVMPD Defendants and DPBH Defendants
15 move to dismiss Plaintiff’s claim against them. The Court examines each motion in turn.

16 **A. Motion to Dismiss or for Summary Judgment by LVMPD Defendants**

17 The LVMPD Defendants move to dismiss on the grounds that the Complaint fails to
18 include sufficient factual allegations against either Defendant LVMPD or Defendant Former
19 Sheriff Lombardo. (LVMPD Mot. Dismiss 6:18–19, ECF No. 8). The Court agrees.

20 Plaintiff argues that the Complaint alleges sufficient facts; namely, that the LVMPD
21 Defendants violated their statutory duty by failing to remand and convey him “forthwith” to the
22 DPBH. (Resp. 9:3–11, ECF No. 12). Plaintiff points to page 4, lines 6 through 21 of his
23 Complaint. (*Id.* 9:6–7). Lines 6 through 17 describe the requirements of NRS § 178.425(1) but
24 contain no factual allegations regarding what the LVMPD Defendants did or did not do in this
25 case. Similarly, lines 18 through 21 allege that the Competency Order was filed and served on

1 the Sheriff, and states that DPBH has a duty to accept detainees, but again lacks any factual
2 allegation regarding the actions or failures of the Sheriff or LVMPD as they pertain to this
3 particular Plaintiff. As written, Plaintiff’s Complaint contains merely a recital of the statute
4 and cause of action, which is insufficient. *See Twombly*, 550 U.S. at 555.

5 Further, Plaintiff’s 42 U.S.C. § 1983 claim against all Defendants alleges violations by
6 DPBH but makes no mention of a violation by the Sheriff or LVMPD. (*See Compl.* ¶¶ 26–30).
7 The Complaint does not allege that the LVMPD Defendants had a statutory duty that was
8 subsequently violated. Plaintiff’s Response includes additional facts and allegations, but
9 “[n]ew averments in a brief cannot cure a complaint’s shortcomings.” *See Fin. Indem. Co. v.*
10 *Messick*, 606 F. Supp. 3d 996, 1002 (E.D. Cal. 2022). Plaintiff’s Complaint must include
11 sufficient facts to allow the Court to draw a reasonable inference that LVMPD and the Sheriff
12 are liable for their alleged failure to convey Plaintiff to DPBH. The Court cannot do so here,
13 and the Court therefore dismisses the claim against the LVPMD Defendants.

14 The Court must now decide whether to dismiss the claim against the LVMPD
15 Defendants with or without prejudice. The LVMPD Defendants argue in their Reply that the
16 Court should dismiss the claim against them with prejudice because they are not the proper
17 defendants. (Reply, 5:10–18, ECF No. 18). They base this argument on a previous District of
18 Nevada case, *Lee v. Williams*. (*Id.*). Like Plaintiff here, the inmate plaintiff in *Lee* claimed that
19 LVMPD violated his constitutional rights by failing to timely transfer him to a treatment
20 facility after being found incompetent to stand trial. *Lee v. Williams*, No. 2:14-cv-01426-JAD-
21 CWH, 2016 WL 7190536, at *2 (D. Nev. Dec. 12, 2016). But unlike the inmate Plaintiff in this
22 case, Lee admitted that LVMPD placed him on a waiting list to be transferred, and he only
23 remained at Clark County Detention Center because DPBH was at capacity. *Id.* Because
24 LVMPD stated it did not have control over the acceptance of patients into the facility, the court
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1 granted summary judgment in favor of LVMPD, noting that it was DPBH, not LVMPD, that
2 had a “duty to accept mentally incapacitated defendants for evaluation and treatment.”

3 The Court does not interpret the *Lee* decision to mean that LVMPD may *never* be the
4 proper defendant in a delayed-transfer case. Rather, LVMPD may not be the proper defendant
5 when they take timely action to screen the inmate and inform DPBH that the inmate is ready for
6 transfer. While DPBH has the duty to accept mentally incapacitated inmates into their facility,
7 the language of the statute also requires the sheriff to take action by conveying the defendant
8 “forthwith . . . into the custody of the Administrator or the Administrator’s designee for
9 detention and treatment.” *See* NRS § 178.425(1).

10 As part of their Motion for Summary Judgment, LVMPD submitted the declaration of
11 Aimee Hill, the LVMPD Detention Transition Services Coordinator, which states that Plaintiff
12 was medically screened and cleared to be transferred within five days of their receipt of the
13 court’s competency order. (Hill Decl. Ex. A to LVMPD Mot. Dismiss, ECF No. 8-1). But Hill
14 does not state that Plaintiff was promptly placed on a transfer list, like the inmate in *Lee*, nor
15 does she say on which date LVMPD alerted DPBH that Plaintiff had been medically cleared.
16 Thus, without more, the Court is unable to find definitively at this time that LVMPD and the
17 Sheriff are not the proper defendants in this case.²

18 The Court therefore GRANTS the Motion to Dismiss but allows Plaintiff leave to amend
19 his Complaint to remedy the deficiencies identified in this Order. Because the Motion to
20 Dismiss is granted, the Court further DENIES the Motion for Summary Judgment as moot.

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24 ² Lastly, the LVMPD Defendants argue they are entitled to qualified immunity. (Mot. Dismiss 7:19–10:27). The qualified-
25 immunity defense is only resolvable at this early stage in the proceedings if the Court “can determine, based on the
complaint itself, that qualified immunity applies.” *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023) (quoting *O’Brien v.*
Wely, 818 F.3d 920, 936 (9th Cir. 2016)). Here, without any factual allegations regarding what LVMPD Defendants did or
did not do, the Court is unable to determine whether qualified immunity applies.

1 **B. Motion to Dismiss by DPBH Defendants**

2 Plaintiff also brings claims against the Division of Public and Behavioral Health
3 (“DPBH”), a state agency, and against DPBH employees Cody Phinney and Jo Malay, acting in
4 the course and scope of their employment. (*See* Compl. ¶¶ 6–8). The DPBH Defendants make
5 multiple arguments for dismissal. First, they argue that DPBH and Defendants Phinney and
6 Malay, in their official capacities, are entitled to immunity under the Eleventh Amendment.
7 (DPBH Mot. Dismiss 6:1–7:6, ECF No. 16). Second, they aver that to the extent the Complaint
8 could be construed as naming Phinney and Malay in their personal capacities, the Complaint is
9 devoid of allegations as to their personal involvement. (*Id.* 5:23–27). Finally, Defendants argue
10 that if Phinney and Malay are sued in their individual capacities, that they are entitled to
11 qualified immunity. (*Id.* 7:9–9:20).

12 Defendants are correct that DPBH, as a Nevada state agency, is immune from suit for
13 money damages under the Eleventh Amendment. “[A] suit against a state agency is considered
14 to be a suit against the state, and thus is barred by the Eleventh Amendment.” *Shaw v. State of*
15 *California Dep’t of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986). Plaintiff’s
16 Response does not address the argument that DPBH, a state agency, is immune from suit, and
17 thus the Court GRANTS the Motion to Dismiss as to DPBH. Under Nevada Local Rule 7-2(d),
18 “The failure of an opposing party to file points and authorities in response to any motion,
19 except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes a consent
20 to the granting of the motion.” This Court’s “failure-to-oppose rule does not apply solely to
21 failure to file a physical document, but also . . . failure to assert in an opposition, arguments that
22 oppose those presented in the motion.” *Knickmeyer v. Nevada ex re. Eighth Judicial Dist. Ct.*,
23 173 F. Supp. 3d 1034, 1044 (D. Nev. 2016) (citing cases). It is well-settled law in the District
24 of Nevada that a “party’s failure to respond to arguments presented in a motion constitutes
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1 consent to granting that motion.” *Layton v. Green Valley Village Comm. Ass’n*, No. 2:14-cv-
2 01347, 2022 WL 1748067, at *2 (D. Nev. May 27, 2022).

3 As to Defendants Phinney and Malay, regardless of whether they were acting in their
4 personal or official capacities, the Court must dismiss Plaintiff’s claim against them because
5 the Complaint lacks any factual allegations regarding how they allegedly violated his
6 Fourteenth Amendment right to due process. A complaint that fails to allege how each
7 defendant was involved in the alleged conduct may violate Rule 8. *See McHenry v. Renne*, 84
8 F.3d 1172, 1176 (9th Cir. 1996). The purpose of Rule 8 is “to give the defendant fair notice of
9 the factual basis of the claim[s]” asserted against it. *Skaff v. Meridien N. Am. Beverly Hills,*
10 *LLC*, 506 F.3d 832, 841–42 (9th Cir. 2007). So, the notice requirement of Rule 8(a)(2) is not
11 met if a complaint “lump[s] together” defendants in one broad allegation. *Gauvin v.*
12 *Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988). Nonetheless, allegations do not
13 automatically fail under Rule 8 if defendants are grouped together as long as the plaintiff
14 identifies “what action each Defendant took that caused Plaintiffs’ harm, without resort to
15 generalized allegations against Defendants as a whole.” *In re iPhone Application Litig.*, No.
16 11–MD–02250–LHK, 2011 WL 4403963, at *8 (N.D. Cal. Sept. 20, 2011).

17 In this case, Defendants are correct that the only mention of Phinney and Malay is in the
18 “Parties” section of the Complaint. The Complaint’s cause of action groups the Defendants
19 together without specifying which action was taken by each Defendant. (*See Compl.* ¶¶ 26–30).
20 Again, Plaintiff adds new factual allegations to his Response brief, but the Court is limited to
21 review only the face the Complaint under Rule 12(b)(6). *See Lee v. City of Los Angeles*, 250
22 F.3d 668, 688 (9th Cir. 2001). The claims against Defendants Phinney and Malay are therefore
23 DISMISSED. As mentioned above, the Court cannot yet determine whether Defendants
24 Phinney and Malay are entitled to qualified immunity because Plaintiff provided no factual
25 allegations against them.

1 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
2 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
3 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
4 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
5 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
6 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
7 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
8 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because it is not clear that
9 amendment would be futile, the Court GRANTS Plaintiff leave to amend his claim against
10 Defendants LVMPD, Sheriff Lombardo, Phinney, and Malay.

11 **V. CONCLUSION**

12 **IT IS HEREBY ORDERED** that the LVMPD Defendants’ Motion to Dismiss, (ECF
13 No. 8), is **GRANTED**.

14 **IT IS FURTHER ORDERED** that the LVMPD Defendants’ Motion for Summary
15 Judgment, (ECF No. 9), is **DENIED AS MOOT**.

16 **IT IS FURTHER ORDERED** that the DPBH Defendants’ Motion to Dismiss, (ECF
17 No. 16), is **GRANTED**.

18 **IT IS FURTHER ORDERED** that Plaintiff may have 21 days from the date of this
19 Order to file an Amended Complaint against Defendants LVMPD, Sheriff Lombardo, Phinney,
20 and Malay.

21 **DATED** this 10 day of May, 2024.

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25 Gloria M. Navarro, District Judge
UNITED STATES DISTRICT COURT