

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TONJA BROWN, as an Individual; and
TONJA BROWN, administratrix of the
Estate of Nolan Klein,

Plaintiff,

v.

STATE OF NEVADA ex rel. The
Department of Corrections, et al.,

Defendants.

Case No. 3:13-cv-00351-MMD-WGC

ORDER

(Def's Motion to Dismiss – dkt. no. 12)

I. SUMMARY

Before the Court is Defendants State of Nevada ex rel. the Nevada Department of Corrections (“NDOC”), Board of Prison Commissioners, Attorney General Catherine Cortez-Masto, Director James “Greg” Cox, Senior Deputy Attorney General William Geddes, Deputy Attorney General Kara Krause, Secretary of State Ross Miller, and Governor Brian Sandoval’s Motion to Dismiss (the “Motion”). (Dkt. no. 12.) For the reasons set out below, the Motion is granted.

II. BACKGROUND

Plaintiff Tonja Brown filed the Complaint on June 28, 2013. (Dkt. no. 1.) Plaintiff is proceeding *pro se*. The Complaint alleges that Plaintiff attended a Board of Prison Commissioners meeting on December 5, 2011. At the meeting, Plaintiff spoke to “publicly expose” Defendant Geddes for withholding exculpatory evidence in a criminal matter involving Plaintiff’s brother, Nolan Klein. (*Id.* at 2.) Plaintiff had an ongoing lawsuit

1 brought on behalf of Klein against the NDOC. A settlement agreement was executed in
2 that suit ("Settlement Agreement"). (See dkt. no. 15, Ex. 1.) At the Board of Prison
3 Commissioners meeting, Plaintiff referenced deposition testimony and discovery
4 documents from that suit. After she "finished with her comments," Plaintiff sought to
5 introduce these documents into the public record. (Dkt. no. 1 at 4.) Defendant Geddes,
6 speaking on behalf of the Attorney General's office and the NDOC, stated that the
7 NDOC reserves the right to strike from the public record any confidential material read or
8 submitted by Plaintiff. (Dkt. no. 15 at 22.)

9 At the next Board of Prison Commissioners meeting on May 17, 2012, the
10 minutes for the December 5, 2011, meeting were passed and stated: "Due to a
11 settlement agreement, several documents submitted for posting with these minutes have
12 been specified as confidential and therefore will not be posted. Additionally, information
13 on several other documents needs to be redacted before posting. The settlement
14 agreement affects documents listed as attachments 2 and 12. Once the documents in
15 question have been reviewed, all allowable documents will be placed in this record."
16 (Dkt. no. 1 at 19.)

17 Plaintiff asserts claims under 42 U.S.C. §§ 1983 and 1985 for violation of her First
18 Amendment rights and conspiracy to violate her First Amendment rights. Plaintiff also
19 asserts state law claims for negligent infliction of emotional distress and violation of open
20 meeting law.

21 **III. DISCUSSION**

22 **A. Legal Standard**

23 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
24 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
25 "a short and plain statement of the claim showing that the pleader is entitled to relief."
26 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
27 Rule 8 does not require detailed factual allegations, it demands more than "labels and
28 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*

1 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
2 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
3 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
4 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at
5 678 (internal citation omitted).

6 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
7 apply when considering motions to dismiss. First, a district court must accept as true all
8 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
9 to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a
10 cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.
11 Second, a district court must consider whether the factual allegations in the complaint
12 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the
13 plaintiff’s complaint alleges facts that allow a court to draw a reasonable inference that
14 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does
15 not permit the court to infer more than the mere possibility of misconduct, the complaint
16 has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal
17 quotation marks omitted). When the claims in a complaint have not crossed the line from
18 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

19 A complaint must contain either direct or inferential allegations concerning “all the
20 material elements necessary to sustain recovery under some viable legal theory.”
21 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
22 1106 (7th Cir. 1989) (emphasis in original)). Mindful of the fact that the Supreme Court
23 has “instructed the federal courts to liberally construe the ‘inartful pleading’
24 of *pro se* litigants,” *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987), the Court will
25 view Plaintiff’s pleadings with the appropriate degree of leniency.

26 **B. Plaintiff’s Federal Law Claims**

27 Plaintiff asserts claims under 42 U.S.C. §§ 1983 and 1985 for violation of her First
28 Amendment rights and conspiracy to violate her First Amendment rights. There are two

1 essential elements to a § 1983 claim: “(1) the defendants acted under color of law, and
2 (2) their conduct deprived [plaintiff] of a constitutional right.” *Stein v. Ryan*, 662 F.3d
3 1114, 1118 (9th Cir. 2011) (citing *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir.
4 1985)).

5 The Complaint states that Defendants breached the Settlement Agreement “IN
6 WHICH SUCH A BREACH IMPLICATES THE First Amendment of the constitution.”
7 (Dkt. no. 1 at 18.) Plaintiff argues that, under the terms of the Settlement Agreement, the
8 Relevant Documents were not confidential. (Dkt. no. 15 at 24.) To the extent that Plaintiff
9 seeks remedy for violation of the terms of the Settlement Agreement, the proper course
10 of action is to bring a claim for breach of contract in state court.¹ The Court will consider,
11 however, whether Plaintiff’s First Amendment rights were violated by the Board of Prison
12 Commissioners’ decision to not enter all of Plaintiff’s documents into the public record.

13 In order to plead a First Amendment violation, the allegations in the Complaint
14 must establish that Defendants “took action that would chill or silence a person of
15 ordinary firmness from future First Amendment activities. *Martin v. Naval Criminal*
16 *Investigative Serv.*, 539 F. App’x 830, 831 (9th Cir. 2013) (internal quotations and
17 citations omitted); see also *Mendocino Env’tl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283,
18 1300 (9th Cir. 1999). The deterrence of protected activity must be a substantial and
19 motivating factor in Defendants’ conduct. See *Martin*, 539 F. App’x at 831 (citing *Sloman*
20 *v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir.1994)).

21 The Court finds that the facts alleged in the Complaint do not establish that a
22 person of ordinary firmness would be deterred from future First Amendment activity. The

23 ¹In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-81 (1994), the
24 Supreme Court held that federal courts do not have inherent or ancillary jurisdiction to
25 enforce a settlement agreement simply because the subject of that settlement was a
26 federal lawsuit. When the initial action is dismissed, federal jurisdiction terminates. *Id.* A
27 motion to enforce the settlement agreement is a separate contract dispute requiring its
28 own independent basis for jurisdiction. *Id.* Therefore, “absent an express retention by a
district court of jurisdiction to enforce a settlement agreement reached in a case pending
before it, such ‘enforcement of the settlement agreement is for the state courts, unless
there is some independent basis for federal jurisdiction.’” *Camacho v. City of San Luis*,
359 F. App’x 794, 798 (9th Cir. 2009) (quoting *Kokkonen*, 511 U.S. at 381-82).

1 Complaint does not allege that Plaintiff was silenced at the meeting. To the contrary, it
2 states that Plaintiff "finished with her comments." (Dkt. no. 1 at 4.) The transcript of the
3 December 5, 2011, meeting offered by Plaintiff demonstrates that Plaintiff concluded her
4 comments and Defendant Geddes spoke after Governor Sandoval asked if somebody
5 else would like to provide public comment. (Dkt. no. 15, Ex. 2 at 11.) The Complaint
6 does not allege that all of Plaintiff's public comments or all of her documents were
7 stricken from the public record or deemed confidential. The allegations in the Complaint
8 indicate that only those documents deemed confidential as a result of the Settlement
9 Agreement were affected. (Dkt. no. 1 at 19.)

10 It appears that the only deterring effect of Defendants' actions is that, going
11 forward, Plaintiff may be concerned about publishing documents related to her lawsuit as
12 they may be deemed confidential under the terms of the Settlement Agreement. Indeed,
13 public availability of the documents appears to be Plaintiff's chief concern. Plaintiff points
14 out that, due to the fact that some of the documents were not entered into the public
15 record, inmates that want to sue Defendants will not have easy access to important
16 evidence. (*Id.* at 24.) The Court understands and appreciates this concern but the
17 question, then, is whether the Relevant Documents are confidential under the terms of
18 the Settlement Agreement. That is a matter of contract interpretation but it is not a First
19 Amendment issue in this case.

20 The Court concludes that the Complaint has not sufficiently alleged that a person
21 of ordinary firmness would be chilled from exercising First Amendment rights in the
22 future as a result of the Board of Prison Commission's decision to treat some of
23 Plaintiff's documents as confidential under the terms of the Settlement Agreement.

24 As the Complaint fails to allege a violation of a constitutional right, Plaintiff's
25 claims under §§ 1983 and 1985 must be dismissed. See *Cassettari v. Nev. Cnty., Cal.*,
26 824 F.2d 735, 739 (9th Cir. 1987) (dismissing a § 1985 claim where the claim was based
27 on the same insufficient allegations as plaintiff's § 1983 claim).

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


C. Plaintiff's State Law Claims

The Court may *sua sponte* raise the issue of lack of subject matter jurisdiction and must dismiss a case if no subject matter jurisdiction exists. Fed. R. Civ. P. 12(h)(3). Even where neither party contests subject matter jurisdiction, courts are "bound to address it *sua sponte* if it is questionable." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991) (citing *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988)). Plaintiff alleges jurisdiction over the state law claims based solely on supplemental jurisdiction. (Dkt. no. 1 at 1-2.) As Plaintiff's claims under federal law are dismissed, however, the Court does not have supplemental jurisdiction over Plaintiff's state law claims. Plaintiff's claims under state law are therefore dismissed due to lack of subject matter jurisdiction.

IV. CONCLUSION

It is hereby ordered that Defendants' Motion to Dismiss (dkt. no. 12) is granted. The Complaint is dismissed without prejudice. Plaintiff, if she chooses to do so, may file a motion for leave to file an amended complaint within thirty (30) days. Plaintiff is advised that under Local Rule 15-1 any amended complaint filed must be complete in itself without reference to prior filings. Thus, any allegations, parties, or requests for relief from prior papers that are not carried forward in the amended complaint no longer will be before the Court.

DATED THIS 18th day of March 2014.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE