

App. 1

APPENDIX A CONTENTS The order(s) of the
United States District Court Central District of California
Interim Report(s) Recommendation(s) Final Report
And Recommendation And Judgment Pages 1 – 67

No.

**In The
Supreme Court Of The United States**

JOSE MANUEL LOPEZ, Plaintiff-Appellant,

PETITIONER

vs.

CITY OF SANTA ANA A MUNICIPAL CORPORATION,

CITY OF SANTA ANA POLICE DEPARTMENT,

CITY OF SANTA ANA POLICE DEPARTMENT

POLICE OFFICER A. GARCIA #3233, Defendants

Respondents, *RESPONDENTS*.

**ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,
13 vs.
14 CITY OF SANTA ANA, ET AL.,
15 Defendants.

CASE NO. SA CV 14-1369 SVW (RZ)

MEMORANDUM AND ORDER
DISMISSING COMPLAINT WITH
LEAVE TO AMEND

16
17 Plaintiff appears to claim that he was wrongfully arrested for an unspecified
18 alleged parole violation, never proven, and not released until he had spent 67 days in a
19 dangerous and substandard jail. He sues several officials and the City of Santa Ana for a
20 morass of claims and quasi-claims. The Court will dismiss the overlong, speechifying and
21 confusing civil rights complaint, with leave to amend, for several reasons discussed below,
22 but principally because Plaintiff states no "short and plain" entitlement to relief.
23

24 I.

25 NO "SHORT AND PLAIN" STATEMENT

26 A. Applicable Law

27 Federal Rule of Civil Procedure 8(a) requires that "[a] pleading which sets
28 forth a claim for relief . . . shall contain . . . a short and plain statement of the claim

1 showing that the pleader is entitled to relief.” “A claim is the ‘aggregate of operative facts
2 which give rise to a right enforceable in the courts.’” *Bautista v. Los Angeles County*, 216
3 F.3d 837, 840 (9th Cir. 2000) (quoting *Original Ballet Russe, Ltd. v. Ballet Theatre, Inc.*,
4 133 F.2d 187, 189 (2d Cir. 1943)). To comply with the Rule, a plaintiff must plead a short
5 and plain statement of the elements of his or her claim, “identifying the transaction or
6 occurrence giving rise to the claim and the elements of a prima facie case,” which elements,
7 of course, will vary depending on the species of claim being asserted. *See Bautista*, 216
8 F.3d at 840.

9 Here, the complaint is neither “short” nor “plain.” Even though some of its
10 pages improperly are not double-spaced, *see* CIV. L.R. 11-3.6, it is 55 pages long. But it
11 is not the complaint’s length *per se* that troubles the Court. What is troubling is how much
12 shorter the pleading could be without losing any clarity (although it likely would thereby
13 gain much). The Court refers Plaintiff to the admonitions of Circuit Judge Arthur Alarcón:

14
15 . . . Plaintiff must identify as a defendant only persons who personally
16 participated in a substantial way in depriving plaintiff of a federal
17 constitutional right. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a
18 person subjects another to the deprivation of a constitutional right if he does
19 an act, participates in another’s act or omits to perform an act he is legally
20 required to do that causes the alleged deprivation). If plaintiff contends he
21 was the victim of a conspiracy, he must identify the participants and allege
22 their agreement to deprive him of a specific federal constitutional right.

23 . . .

24 Plaintiff’s claims must be set forth in short and plain terms, simply,
25 concisely and directly. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514,
26 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (“Rule 8(a) is the starting point of a
27 simplified pleading system, which was adopted to focus litigation on the
28 merits of a claim.”); FED. R. CIV. P. 8.

1 **Plaintiff must eliminate from plaintiff's pleading all preambles,**
2 **introductions, argument, speeches, explanations, stories, griping,**
3 **vouching, evidence, attempts to negate possible defenses, summaries, and**
4 **the like.** *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) (affirming
5 dismissal of § 1983 complaint for violation of Rule 8 after warning); *see*
6 *Crawford-El v. Britton*, 523 U.S. 574, 597, 118 S.Ct. 1584, 140 L.Ed.2d 759
7 (1998) (reiterating that "firm application of the Federal Rules of Civil
8 Procedure is fully warranted" in prisoner cases).

9 A district court must construe pro se pleading "liberally" to determine
10 if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in his
11 complaint and give a plaintiff an opportunity to cure them. *See Lopez v.*
12 *Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). However, the "[f]actual
13 allegations must be enough to raise a right to relief above the speculative level
14 on the assumption that all the allegations in the complaint are true (even if
15 doubtful in fact)." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555,
16 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted).

17 **The court (and any defendant) should be able to read and**
18 **understand Plaintiff's pleading within minutes.** *McHenry*, 84 F.3d at
19 1177. A long, rambling pleading, including many defendants with
20 unexplained, tenuous or implausible connection to the alleged constitutional
21 injury or joining a series of unrelated claims against many defendants very
22 likely will result in delaying the review required by 28 U.S.C. § 1915 and an
23 order dismissing plaintiff's action pursuant to FED. R. CIV. P. 41 for violation
24 of these instructions.

25
26 *Clayburn v. Schirmer*, No. CIV S 06-2182 ALA P, 2008 WL 564958, slip op. at 3-4 (E.D.
27 Cal. Feb. 28, 2008) (Alarcón, Circuit J., sitting by designation) (**emphasis in bold added**).
28

1 What is a "short and plain" statement of a claim? The Ninth Circuit in
2 *McHenry*, one of the cases cited by Circuit Judge Alarcón above, illustrated this by quoting
3 from an official federal form, one for negligence, as follows:
4

5 The complaints in the official Appendix of Forms are dramatically short and
6 plain. For example, the standard negligence complaint consists of three short
7 paragraphs:
8

9 1. [Allegation of jurisdiction.]

10 2. On June 1, 1936, in a public highway called Boylston
11 Street in Boston, Massachusetts, defendant negligently drove a
12 motor vehicle against plaintiff, who was then crossing said
13 highway.

14 3. As a result plaintiff was thrown down and had his leg
15 broken, and was otherwise injured, was prevented from
16 transacting his business, suffered great pain of body and mind,
17 and incurred expenses for medical attention and hospitalization
18 in the sum of one thousand dollars.

19 Wherefore plaintiff demands judgment against defendant
20 in the sum of _____ dollars and costs.
21

22 FED. R. CIV.P. Form 9. This complaint fully sets forth who is being sued, for
23 what relief, and on what theory, with enough detail to guide discovery. It can
24 be read in seconds and understood in minutes.
25

26 *McHenry*, 84 F.3d at 1177. "By contrast," the *McHenry* court lamented, "the complaint
27 in the case at bar is argumentative, prolix, replete with redundancy and largely irrelevant.
28 It consists largely of immaterial background information." *Id.*

1 **B. Discussion**

2 Just so here. Instead of alleging the operative facts simply and without
3 argument, Plaintiff devotes much of the complaint to “preambles, introductions, argument,
4 speeches, explanations, stories, griping, vouching, evidence, attempts to negate possible
5 defenses, summaries, and the like.” Instead of beginning with the main point – “I was
6 falsely arrested on a rape accusation¹ that the defendants should have known was baseless,
7 then jailed in poor conditions,” for example – and then supporting the point factually,
8 Plaintiff circles and circles rhetorically, only coming to the main point dozens of pages
9 later, if at all. To cite only a few examples:

10 * Plaintiff introduces himself with the following two paragraphs better suited
11 to a social introduction than a legal complaint:
12
13
14

15
16 ¹ In contrast with Plaintiff, who appears never to indicate the stated basis for his arrest,
17 the California Court of Appeal got right to the point in discussing what happened to him – or a
18 person with the same name as Petitioner and similar predicament – in this June 2013 opinion:

19 Jose Manuel Lopez appeals from an order denying his petition made under
20 Penal Code section 851.8, to seal and destroy records and to find him factually
21 innocent. The decision made by the trial court was based on conflicting evidence.
22 It is the trial court’s duty, not ours, to decide credibility issues. We therefore affirm
23 the order.

24 **Defendant admittedly engaged in a sexual encounter with a woman he**
25 **had picked up at a bus stop. He claimed it was consensual; she denied consent.**
26 The trial court reviewed extensive documentation, permitted defendant, who
27 appeared in pro. per., to give an extensive unsworn statement, heard testimony of
28 defendant’s brother, and thereafter ruled “there is reasonable cause that you were
arrested and reasonable cause that you are not factually innocent in the matter. So
your motion is denied.” The fact the district attorney declined to prosecute him does
not establish his factual innocence.

29 *People v. Lopez*, No. G047176, 2013 WL 2608698 (Cal. Ct. App. 4 Dist., June 12, 2013)
30 (emphasis added).

1 14. The Plaintiff In Pro Se Jose Manuel Lopez, is a 38 years
2 of age male who has enjoyed a life full of inner successes.
3 Reflective at being in promotion of education, good health,
4 prosperity, joy, moderation, fairness, equality and a pursuit of
5 happiness.

6 15. He is spiritual, has core beliefs and values in living
7 righteously. The plaintiff believes justice is correct and is law
8 abiding.
9

10 * Plaintiff frequently quotes lengthy, irrelevant passages from handbooks,
11 manuals, charters and similar tomes, thus wasting paper, ink and time. For example,
12 he devotes a full page of boilerplate to introducing the City of Santa Ana.
13 Apparently cribbing from the City's charter, he alleges that "The City has all other
14 rights, powers and privileges which are not prohibited by, or in conflict with, the
15 State Constitution or this charter and which it would be proper to specifically set
16 forth in this charter, even though such are not herein set forth." Comp. ¶ 8; *see*
17 *generally* Santa Ana, Cal., Ordinances Pt. I (Charter) (portion quoted is Pt. I, art. II,
18 § 200 (Powers of the City), available at [https://library.municode.com/HTML/](https://library.municode.com/HTML/14452/level2/PTITHCH_ARTIPOCI.html)
19 [14452/level2/PTITHCH_ARTIPOCI.html](https://library.municode.com/HTML/14452/level2/PTITHCH_ARTIPOCI.html)). None of this has any relevance to any
20 claim against the City or any other Defendant.
21

22 * Plaintiff routinely applies opinionated labels to descriptions that are supposed
23 to be entirely factual. For example, in paragraph 25 of the complaint, Plaintiff
24 describes, in overlong, repetitive fashion, a communication he received in jail three
25 days after his arrest:
26

27 [T]he plaintiff received one . . . Inmate Message Slip dated
28 February 08, 201[2]. Indicating to the plaintiff that the only

1 reason. As to why the plaintiff was in the custody of the
2 Sheriff's Department. Was that the plaintiff's former Parole
3 Agent Jesse Ordaz. The State of California Department of
4 Corrections and Rehabilitation Was holding the plaintiff at
5 jail as a direct result of the defendant's [sic] false allegations
6 made against the plaintiff.
7

8 (Emphasis added.) Plaintiff does not explain how the allegations were false. He simply
9 states this conclusion. Worse, this paragraph raises more questions than it answers. Who
10 is "the defendant" who allegedly accused Plaintiff falsely? Plaintiff is not suing the
11 complaining witness who presumably reported a rape. Moreover, if Plaintiff asserts that
12 Parole Agent Ordaz *knew* Plaintiff to have been innocent yet had Plaintiff arrested anyway,
13 then why is Ordaz not among the defendants? But perhaps the most important question is
14 why Plaintiff pleads in this manner. Why, at the above-quoted point – only ten pages into
15 a 55-page complaint – has Plaintiff still not mentioned the word "rape" or otherwise stated
16 in any clear terms just what happened to him other than that he was falsely arrested for
17 nefarious reasons, for which several *unsued* persons are responsible, among others.

18 To avoid repetition of this kind of pleading, any First Amended Complaint
19 (1AC) shall not exceed 15 pages, exclusive of exhibits, and shall conform to the other
20 admonitions noted in this Order.
21

22 II.

23 FAILURE TO STATE SEPARATE LEGAL CLAIMS (Claims 1 and 3)

24 Even in *pro se* cases, plaintiffs must state their various claims, each
25 identifying a discrete alleged violation of the Constitution. *See Bautista v. Los Angeles*
26 *County*, 216 F.3d 837, 839-40 (9th Cir. 2000). Separating the complaint into discrete,
27 readily-identifiable claims serves the purpose of clarity:
28

1 Experience teaches that, unless cases are pleaded clearly and precisely, issues
2 are not joined, discovery is not controlled, the trial court's docket becomes
3 unmanageable, the litigants suffer and society loses confidence in the court's
4 ability to administer justice.

5
6 *Id.* at 840-41 (*quoting Anderson v. District Bd. of Trustees*, 77 F.3d 364, 367 (11th Cir.
7 1996)) (*citing* FED. R. CIV. P. 10(b) and JAMES W. MOORE, ET AL., MOORE'S FEDERAL
8 PRACTICE, § 10.03[2][a] (3d ed. 1997)).

9 Here, although Plaintiff's six claims are physically "separate," his first claim
10 is a many-headed hydra:

11
12 **FIRST CLAIM FOR RELIEF**

13 **42 U.S.C. § 1983**

14 **Denial of Rights Violation(s) [*sic*] of Eighth & Fourteenth Amendment**

15 **To The United States Constitution**

16 **Civil Rights Violations**

17 **Freedom of Speech, Assembly and Association**

18 **Freedom From Cruel and Unusual Punishment and From the State Occasioned**
19 **Harm**

20
21 He then devotes ten full pages – an astonishing indulgence, in light of the fact that Claim 1
22 already incorporates the preceding 25 *pages* of loose factual allegations – to setting forth
23 essentially *the same story he just finished telling*: he was wrongfully arrested by a
24 conspiracy of government agents, threatened that he might spend a long time in prison,
25 kept in a Dickensian jail, and so on, and on.

26 Similarly, Plaintiff bases Claim 3 on not only the Equal Protection Clause but
27 also the Due Process Clause of the Constitution. Perhaps he can state a valid claim based
28 on each provision, but he must do so in separate claims.

1 In any amended complaint, Plaintiff must state *separate* claims for relief, each
2 including –

- 3 (1) a *single* civil right, not two or more, that defendant(s) allegedly violated, *e.g.*, the
4 right not to be subjected to Cruel and Unusual Punishment under the Eighth
5 Amendment; and
6 (2) *as to each count of each claim*, the specific events and other facts that give rise to,
7 and that make out a prima facie case of, *that specific claim*.

8 (In fairness to Plaintiff, he appears to limit Claims 2, 4, 5 and 6 to single legal bases.)
9

10 III.

11 OTHER INFIRMITIES APPEAR TO EXIST

12 Before concluding, the Court stresses that the foregoing flaws may not be an
13 exhaustive list. Indeed, the Court doubts that it is. (For example, although Claim 4 is
14 captioned as being based on *federal* due process concerns, Plaintiff's supporting allegations
15 immediately turn to assertions that the *California* constitution was violated – and, later, to
16 yet another recitation that he suffered “cruel and unusual punishment.” *See* Comp. ¶¶ 113-
17 114, 117. Plaintiff must only assert legal claims for which he can allege sufficient specific
18 factual support, rather than venting his using quasi-legal terminology.) But the flaws
19 already noted, particularly the long and confusing nature of the complaint, make it
20 unreasonably difficult for the Court to screen for additional shortcomings.
21

22 IV.

23 CONCLUSION

24 Based on the foregoing, the Court hereby DISMISSES the complaint, and
25 leave to amend is granted. More specifically, Plaintiff has three options:

- 26 (1) **Plaintiff may pursue this action further** by filing an original and one copy of a
27 pleading captioned as his First Amended Complaint (1AC), bearing the current case
28 number, within 30 days of the filing date of this Order. To withstand another

1 dismissal, the 1AC must correct the deficiencies identified in this Order – including
2 the 15-page length limitation, among others – and must comply with the Federal
3 Rules of Civil Procedure and this Court’s Local Rules. The 1AC must be complete
4 in itself and must not refer to any prior version of the complaint.

5 (2) **Plaintiff may file a “Notice of Intent Not to Amend Complaint” within 30 days**
6 of the filing date of this Order. If Plaintiff timely files such a Notice, then the
7 undersigned will recommend to the assigned District Judge that this action be
8 dismissed, freeing Plaintiff to appeal the dismissal on the grounds cited above. *See*
9 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063-66 (9th Cir. 2004).

10 (3) **Plaintiff may do nothing** in response to this Order. If Plaintiff does not file a
11 document pursuant to either option 1 or 2 above within the 30-day deadline, then the
12 Court shall deem him to have consented to dismissal of this action for failure to
13 prosecute and for failure to comply with this Order. *See id.*

14 **The Court cautions Plaintiff that if he fails to file a timely amended**
15 **complaint or otherwise fails to comply substantially with the terms of this Order, then**
16 **this action may be dismissed.**

17 **IT IS SO ORDERED.**

18
19 **DATED: September 10, 2014**

20
21 
22 **RALPH ZAREFSKY**
23 **UNITED STATES MAGISTRATE JUDGE**
24
25
26
27
28

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,
13 vs.
14 CITY OF SANTA ANA, ET AL.,
15 Defendants.
16

CASE NO. SA CV 14-1369 SVW (RZ)

FIRST INTERIM REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

17 Pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States
18 District Court for the Central District of California, the undersigned submits this First
19 Interim Report and Recommendation to the Honorable Stephen V. Wilson, United States
20 District Judge. Because Plaintiff seeks damages from state officials whom he sues solely
21 in their official capacity, the Eleventh Amendment bars this Court's jurisdiction over those
22 defendants. The Court thus should dismiss the state-official defendants from the action.

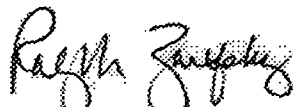
23 Plaintiff claims he was wrongfully arrested for an alleged parole violation,
24 never proven, and not released until he had spent 67 days in a dangerous and substandard
25 jail. He sues several officials and the City of Santa Ana for arresting him, prosecuting him
26 and failing to release him sooner, for he contends they should have known he was innocent.

1 Among the defendants are three state officials sued solely in their official
2 capacity. They are California Attorney General Kamala Harris, Deputy Attorney General
3 Jill Vander Borcht and Supervising Deputy Attorney General Rene Lucaric. The Eleventh
4 Amendment provides that the federal judiciary power "shall not be construed to extend to
5 any suit in law or equity, commenced against one of the United States by Citizens of
6 another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
7 The Supreme Court has held that the Amendment bars suits brought against a state by that
8 state's own citizens. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100
9 (1984). Suits against state officials in their *official* capacity are tantamount to actions
10 against the state itself, *see Hafer v. Melo*, 502 U.S. 21, 25 (1991), and federal courts thus
11 lack jurisdiction to entertain such suits, at least for monetary damages. *Id.* The Court thus
12 must dismiss the three state-official defendants from the action.

13 For the foregoing reasons, IT IS RECOMMENDED that the District Court
14 issue an Order:

- 15 (1) accepting the findings and conclusions in this First Interim Report and
16 Recommendation; and
17 (2) dismissing the following Defendants from the action without prejudice for
18 lack of jurisdiction: California Attorney General Kamala Harris, Deputy
19 Attorney General Jill Vander Borcht and Supervising Deputy Attorney
20 General Rene Lucaric.

21
22 DATED: October 10, 2014

23
24 
25 _____
26 RALPH ZAREFSKY
27 UNITED STATES MAGISTRATE JUDGE
28

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE MANUEL LOPEZ,

12 Plaintiff,

13 vs.

14 CITY OF SANTA ANA, ET AL.,

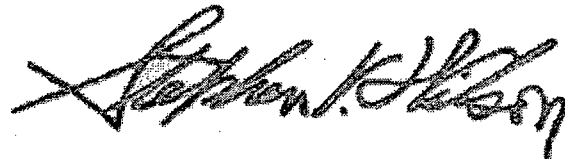
15 Defendants.
16

CASE NO. SA CV 14-01369 SVW (RZ)

ORDER ACCEPTING FIRST INTERIM
REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

17 The Court has reviewed the file in this matter, and has read and reviewed the
18 First Interim Report and Recommendation of United States Magistrate Judge ("Report").
19 Further, the Court has engaged in a de novo review of those portions of the Report to which
20 Plaintiff has objected. The Court accepts the findings and recommendations in the Report.
21

22 DATED: February 10, 2015
23



24
25 STEPHEN V. WILSON
26 UNITED STATES DISTRICT JUDGE
27
28

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE MANUEL LOPEZ,

12 Plaintiff,

13 vs.

14 CITY OF SANTA ANA, ET AL.,

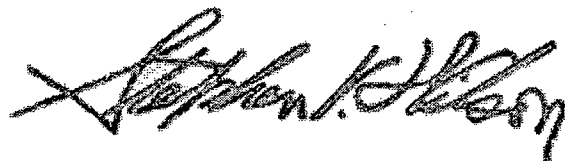
15 Defendants.
16

CASE NO. SA CV 14-01369 SVW (RZ)

17 **AMENDED ORDER ACCEPTING**
18 **FIRST INTERIM**
19 **REPORT AND RECOMMENDATION**
20 **OF UNITED STATES MAGISTRATE**
21 **JUDGE**

22 The Court has reviewed the file in this matter, and has read and reviewed the
23 First Interim Report and Recommendation of United States Magistrate Judge ("Report").
24 Further, the Court has engaged in a de novo review of those portions of the Report to which
25 Plaintiff has objected. The Court accepts the findings and recommendations in the Report.
26 As recommended in the Report, the Court DISMISSES the following defendants from the
27 action without prejudice for lack of jurisdiction: California Attorney General Kamala
28 Harris, Deputy Attorney General Jill Vander Borgh and Supervising Deputy Attorney
General Rene Lucaric.

DATED: April 30, 2015



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-1369 SVW (RZ)

Date April 10, 2015

Title JOSE MANUEL LOPEZ v. CITY OF SANTA ANA, et al.

Present: The Honorable RALPH ZAREFSKY, U.S. MAGISTRATE JUDGE

Ilene Bernal

N/A

Deputy Clerk

Court Reporter / Recorder

Attorney Present for Plaintiff:

Attorney Present for Defendants:

N/A

N/A

Proceedings: In Chambers –
Defendant City of Santa Ana's Motion for Judgment on the Pleadings
Filed April 8, 2015 - Doc 112

At the outset, this case was referred to the Magistrate Judge pursuant to General Order 05-07. Defendant therefore has inappropriately noticed this motion for hearing before Judge Wilson on May 18, 2015 at 1:30 p.m. The motion date and hearing time are vacated. Plaintiff shall have 30 days to respond to the motion. Defendant shall have 14 days thereafter to file a reply. Upon completion of briefing, a hearing date may be set.

IT IS SO ORDERED.

Initials of Preparer

ib

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,
13 v.
14 CITY OF SANTA ANA, et al.,
15 Defendants.

Case No. CV 14-01369 SVW (RAO)

**SECOND INTERIM REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

16
17 This Second Interim Report and Recommendation is submitted to the
18 Honorable Steven V. Wilson, United States District Judge, pursuant to 28 U.S.C
19 § 636 and General Order 05-07 of the United States District Court for the Central
20 District of California.

21 **I. INTRODUCTION**

22 On August 26, 2014, Plaintiff Jose Manuel Lopez ("Plaintiff"), an individual
23 proceeding *pro se*, lodged a civil rights complaint pursuant to 42 U.S.C. §§ 1983
24 and 1985 against the City of Santa Ana, the Santa Ana Police Department, and
25 several officials. ECF No. 1. On October 1, 2014, Plaintiff filed a first amended
26 complaint ("FAC"). ECF No. 10. On April 30, 2015, the Court dismissed
27 defendants California Attorney General Kamala Harris, Deputy Attorney General
28 Jill Vander Borgh, and Supervising Deputy Attorney General Rene Lucaric from

1 the action for lack of jurisdiction. *See* ECF No. 115.

2 One of the remaining defendants in this action, the City of Santa Ana
3 (“Defendant”), filed the instant Motion for Judgment on the Pleadings (“Motion”)
4 on April 8, 2015. ECF No. 112. Plaintiff filed an Opposition to the Motion on
5 May 6, 2015 (“Pl. Opp.”). ECF No. 117. Defendant filed a Reply in support of its
6 Motion on May 18, 2015. ECF No. 122. Plaintiff filed an *ex parte* motion for
7 leave to file a sur-opposition on June 1, 2015.¹ ECF No. 125.

8 **II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

9 Liberally construed, Plaintiff claims that he was wrongfully arrested on a
10 rape violation, never proven, and not released until he had spent 67 days in a
11 dangerous and substandard jail. FAC, ¶¶ 14-15, 17, 25. Plaintiff claims that the
12 defendants falsely arrested and imprisoned him because they knew or should have
13 known that he was innocent. *Id.*, ¶ 15.

14 The FAC also alleges that the defendants were unresponsive to Plaintiff’s
15 reports of airborne attacks by private residents, particularly his neighbors, during
16 the time period of September 2009 through September 2014. FAC, ¶ 23. Plaintiff
17 claims to have contacted a number of entities, including Defendant, for help – but
18 none responded or commenced an investigation. *Id.*, ¶¶ 23-24.

19 Plaintiff asserts nine causes of action against the named defendants: (1)
20 violation of the Eighth Amendment right to freedom from cruel and unusual
21 punishment; (2) violation of the Fourteenth Amendment right to due process and
22 equal protection of the law; (3) violation of the Fourth Amendment right to freedom
23 from unreasonable search and seizure and warrantless arrest on private property; (4)
24 false arrest and false imprisonment under California Penal Code §§ 236-37; (5)
25 violation of his right to be free from violence pursuant to California Civil Code

26
27 ¹ The Court has taken into consideration Plaintiff’s lodged 83-page sur-opposition
28 for purposes of evaluating Defendant’s Motion. Accordingly, the Court grants
Plaintiff’s *ex parte* motion for leave to file the sur-opposition.

1 § 51.7; (6) violation of his right to be free from interference of rights pursuant to
2 California Civil Code § 52.1; (7) intentional infliction of emotional distress; (8)
3 breach of the Portable Uniform Contemporary Citizen Based Social Contract²; and
4 (9) violation of 42 U.S.C. § 1985 for conspiracy to interfere with civil rights. FAC,
5 ¶¶ 26-34. Plaintiff asserts his constitutional claims under 42 U.S.C. § 1983. *See*
6 *id.*, ¶¶ 35-43.

7 **III. STANDARD FOR JUDGMENT ON THE PLEADINGS**

8 A motion for judgment on the pleadings may be brought “[a]fter the
9 pleadings are closed but within such time as to not delay the trial.” Fed. R. Civ. P.
10 12(c). When a Rule 12(c) motion is brought to challenge the legal sufficiency of
11 the opposing party’s pleadings, the motion is treated in the same manner as a Rule
12 12(b)(6) motion. *See, e.g., Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th
13 Cir. 2012) (noting that “Rule 12(b)(6) and Rule 12(c) motions are functionally
14 equivalent”) (citation omitted). Thus, a dismissal on the pleadings for failure to
15 state a claim is proper only if the “movant clearly establishes that no material issue
16 of fact remains to be resolved and that he is entitled to judgment as a matter of
17 law.” *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984)
18 (quotations and citation omitted). In other words, a motion for judgment on the
19 pleadings will be granted only if the movant establishes that “no relief could be
20 granted under any set of facts that could be proven consistent with the allegations.”
21 *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59
22 (1984).

23 In reviewing a Rule 12(c) motion, the Court must determine “whether the
24

25 ² Plaintiff fails to cite to the Constitution or a statute that provides a right of action
26 for breach of the “Portable Uniform Contemporary Citizen Based Social Contract.”
27 The Court believes Plaintiff is seeking to assert a claim under the fundamental
28 principle of political theory that an individual gives his otherwise unrestricted
liberty to a sovereign in return for the sovereign’s protection from others. *See*
Davis v. Fulton County, Ark., 884 F. Supp. 1245, 1253 n.7 (E.D. Ark. 1995).

1 complaint at issue contains ‘sufficient factual matter, accepted as true, to state a
2 claim of relief that is plausible on its face.’” *Harris*, 682 F.3d at 1131 (quoting
3 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).
4 All allegations of fact in the complaint at issue are accepted as true. *Doleman*, 727
5 F.2d at 1482. However, “[m]ere conclusory statements in a complaint and
6 ‘formulaic recitation[s] of the elements of a cause of action’ are not sufficient.”
7 *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (quoting *Bell Atl.*
8 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).
9 “A claim has facial plausibility when the plaintiff pleads factual content that allows
10 the court to draw the reasonable inference that the defendant is liable for the
11 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

12 **IV. DISCUSSION**

13 **1. Defendant’s Motion Contains A Proper Subscription.**

14 As a prefatory matter, Plaintiff asserts a procedural challenge against
15 Defendant’s Motion, claiming that it is defective because the Motion contains no
16 signature attributed to a specific attorney for Defendant. Pl. Opp. at p. 52. In
17 particular, the Motion contains a “/s/” on the signature line, with three attorneys
18 listed below. See Motion at p. 17. Plaintiff argues that the signature does not
19 comply with Federal Rule of Civil Procedure 11, and thus, the Motion is invalid.
20 Pl. Opp. at p. 52.

21 Local Rule 11-1 states that “[a]ll documents, except declarations, shall be
22 signed by the attorney for the party or the party appearing pro se.” However, if an
23 attorney files a document electronically through his or her CM/ECF login and
24 password, such filing shall function as the signatory’s signature. Local Rule 5-
25 4.3.4(a)(1). Here, the Motion was filed electronically by Eileen Maralian, an
26 attorney for Defendant, using her CM/ECF login and password. See ECF No. 112.
27 Defendant has thus met the signature requirement.

28 The Court shall now turn to the merits of Defendant’s Motion.

1 **2. Plaintiff's False Arrest Claims Brought Under 42 U.S.C. §§ 1983 And**
2 **1985 (Claims 1, 3, and 9) Are Barred By The Statute Of Limitations.**

3 Defendant first argues that Plaintiff's false arrest claims are time barred.
4 Motion at pp. 3-5. Defendant notes that the Complaint alleges Plaintiff was falsely
5 arrested on February 5, 2012. Plaintiff disagrees that his claims are time barred,
6 appearing to argue at one point that the statute of limitations is three years
7 according to California Code of Civil Procedure § 338. See Pl. Opp. at p. 49.

8 For any claim brought under 42 U.S.C. § 1983, the forum state's statute of
9 limitations controls. See, e.g., *Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014)
10 ("For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of
11 limitations for personal injury actions ...") (citation omitted); *Taylor v. Regents of*
12 *Univ. of Cal.*, 993 F.2d 710, 711-12 (9th Cir. 1993) (stating that the "statute of
13 limitations for personal injury actions govern claims brought pursuant to 42 U.S.C.
14 §§ 1981, 1983, and 1985"). In California, the statute of limitations for § 1983
15 claims is two years. *Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017, 1023-
16 24 (E.D. Cal. 2004) (discussing applicability of the statute of limitations in Cal.
17 Civ. Proc. Code § 335.1 to false arrest claims under § 1983); Cal. Civ. Proc. Code
18 § 335.1 (providing that the statute of limitations for personal injury actions is two
19 years). In addition, any claim brought under 42 U.S.C. § 1985 is "governed by the
20 same statute of limitations as actions under § 1983." *McDougal v. County of*
21 *Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

22 Notwithstanding the application of state law regarding the statute of
23 limitations for claims brought under §§ 1983 and 1985, federal law governs when
24 claims accrue. *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d
25 973 (2007). "Under federal law, accrual occurs when the plaintiff has a complete
26 and present cause of action and may file a suit to obtain relief." *Pouncil v. Tilton*,
27 704 F.3d 568, 573 (2012) (citations omitted). Generally, a cause of action accrues
28 when the plaintiff "knows or has reason to know of the injury which is the basis of

1 the action.” *Morales v. City of Los Angeles*, 214 F.3d 1151, 1154 (9th Cir. 2000)
2 (quotations and citation omitted). With false arrest claims, however, the limitations
3 period begins to run after the false imprisonment ends. *See Wallace*, 549 U.S. at
4 389 (discussing when limitations period for false imprisonment claims begins to
5 run) (emphasis included).

6 Here, Plaintiff’s arrest occurred on February 5, 2012. FAC, ¶¶ 15, 17.
7 Plaintiff was detained as a result of that arrest until April 12, 2012. *See id.*, ¶ 25.
8 Plaintiff thus had until April 12, 2014 to pursue his false arrest and imprisonment
9 claims within the limitations period. However, he lodged his initial complaint in
10 the instant action on August 26, 2014, after the two-year statute of limitations had
11 ended.³ Plaintiff fails to allege any facts that would plausibly warrant equitable
12 tolling, and accordingly, the Court finds that his claims arising out of his false arrest
13 and imprisonment are time barred.

14 **3. Plaintiff Fails To State A Claim Under 42 U.S.C. § 1983 Regarding**
15 **Defendant’s Failure To Investigate Or Protect Plaintiff (Claims 2 and**
16 **8).**

17 Defendant next argues that Plaintiff’s allegations regarding its failure to
18 investigate reports and protect Plaintiff from airborne chemical, biological, and gas
19 warfare by private residents are insufficient to state a viable claim under 42 U.S.C.
20 § 1983. Motion at pp. 7-10. While unclear, Plaintiff appears to contend that the
21

22 ³ The Court notes that Plaintiff previously commenced a case in this district that
23 appears to have asserted similar allegations against the same defendants found in
24 the instant action. *See Fed. R. Evid. 201; Harris*, 682 F.3d at 1131-32 (noting that a
25 court may take judicial notice of court records). In Case No. 14-CV-0738, Plaintiff
26 filed a complaint on May 12, 2014, and subsequently filed a first amended
27 complaint on June 19, 2014. The Court denied Plaintiff’s request to proceed
28 without prepayment of filing fee and terminated that case. Even if the Court were
to consider Plaintiff’s May 12, 2014 complaint for purposes of the statute of
limitations, Plaintiff’s false arrest and imprisonment claims would still be barred as
untimely.

1 allegations sufficiently show or infer that Defendant violated his due process and
2 equal protection rights. See Pl. Opp. at pp. 51-52, 53.

3 To prove a violation under § 1983, a plaintiff must show that: (1) a
4 defendant's conduct deprived the plaintiff of a right, privilege, or immunity secured
5 by the Constitution or laws of the United States; and (2) the defendant committed
6 the act under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250,
7 101 L. Ed. 2d 40 (1988). The threshold question then is "whether the plaintiff has
8 alleged a deprivation of a constitutional right at all." *County of Sacramento v.*
9 *Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).⁴

10 a. Due Process

11 The Fourteenth Amendment does not, as a general matter, "require[] the
12 State to protect the life, liberty, and property of its citizens against invasion by
13 private actors." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S.
14 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Indeed, "the Fourteenth
15 Amendment's Due Process Clause ... does not confer any affirmative right to
16 governmental aid and typically does not impose a duty on the state to protect
17 individuals from third parties." *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir.
18 2012) (quotations and citation omitted).

19 This general rule, however, is subject to two exceptions. First, the
20 government may be liable for its failure to protect if a special relationship exists
21

22 ⁴ Likewise, when asserting a "Monell" claim against a city under § 1983, the
23 analysis of whether there is a basis for imposing municipal liability for the violation
24 of a plaintiff's federally protected rights requires the separation of two different
25 issues: "(1) whether the plaintiff's harm was caused by a constitutional violation,
26 and (2) if so, whether the city is responsible for that violation." *Collins v. City of*
27 *Harker Heights*, 503 U.S. 115, 120, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).
28 Because the Court finds Defendant has not deprived Plaintiff his constitutional
rights directly or through a policy, practice, or custom, see *infra*, there can be no
municipal liability. Consequently, Plaintiff's § 1983 claim against Defendant must
be dismissed.

1 between it and the individual. *Campbell v. State of Washington Dep't of Social &*
2 *Health Servs.*, 671 F.3d 837, 842 (9th Cir. 2011). The government creates a
3 "special relationship" when it acts to "restrain an individual's freedom to act on his
4 own behalf, either through an incarceration, institutionalization, or other similar
5 restraint of personal liberty." *DeShaney*, 489 U.S. at 199. In other words, this
6 exception "is created when 'the State takes a person into its custody and holds him
7 there against his will.'" *Campbell*, 671 F.3d at 841 (quoting *DeShaney*, 489 U.S. at
8 199-200).

9 Second, the government may be liable for its failure to protect "where the
10 state action affirmatively places the plaintiff in a position of danger, that is, where
11 state action creates or exposes an individual to a danger which he or she would not
12 have otherwise faced." *Henry A.*, 678 F.3d at 1002 (quotations and citations
13 omitted). To determine whether this "state-created danger" exception applies, the
14 Court reviews: "(1) whether any affirmative actions of the official placed the
15 individual in danger he otherwise would not have faced; (2) whether the danger was
16 known or obvious; and (3) whether the officer acted with deliberate indifference to
17 that danger." *Id.* (citation omitted).

18 Here, Plaintiff has failed to plausibly plead a claim under either exception.
19 Plaintiff makes no allegation that he was in some form of involuntary custody at the
20 time he had reported the airborne attacks for the special relationship exception to
21 apply. *See Estate of Amos ex rel. Amos v. City of Page, Ariz.*, 257 F.3d 1086, 1090-
22 91 (9th Cir. 2001) (holding that special relationship exception did not apply
23 because the decedent was not in defendants' custody).

24 Plaintiff likewise fails to allege facts to show the state-created danger
25 exception applies. Very liberally construed, Plaintiff alleges that Defendant,
26 through its police department, failed to respond to his reports of "airborne chemical,
27 biological and gas warfare" coming from his private neighbors. FAC, ¶¶ 23-24.
28 While accepting as true Plaintiff's allegation of danger, Defendant "had no part in

1 [its] creation, nor did it do anything to render him any more vulnerable to [it].”
2 *Estate of Amos*, 257 F.3d at 1091 (quoting *DeShaney*, 489 U.S. at 201). Indeed,
3 Defendant is not alleged to have *affirmatively* placed Plaintiff in the way of a
4 danger that it had created. This alone is sufficient to find that the state-created
5 danger exception does not apply here. See *Campbell*, 671 F.3d at 845 n.8
6 (declining to address the other two factors of the state-created danger exception
7 because the plaintiff failed to show the defendant had created the alleged danger).

8 b. Equal Protection

9 “The Equal Protection Clause of the Fourteenth Amendment commands that
10 no State shall deny to any person within its jurisdiction the equal protection of the
11 laws, which is essentially a direction that all persons similarly situated should be
12 treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105
13 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (quotations and citation omitted). This
14 requires a plaintiff to show that he was intentionally treated differently because of
15 his membership in an identifiable group or a constitutionally suspect class. See,
16 e.g., *DeShaney*, 489 U.S. at 197 n.3 (“The State may not, of course, selectively
17 deny its protective services to certain disfavored minorities without violating the
18 Equal Protection Clause.”) (citation omitted); *Ariz. Dream Act Coal. v. Brewer*, 757
19 F.3d 1053, 1064 (9th Cir. 2014) (stating that a classification group “must be
20 comprised of similarly situated persons so that the factor motivating the alleged
21 discrimination can be identified”) (quotations and citation omitted).

22 The Equal Protection Clause also protects individuals who would constitute a
23 “class of one.” *Village Of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct.
24 1073, 145 L. Ed. 2d 1060 (2000). To proceed on the class-of-one theory, the
25 plaintiff must allege that he “has been intentionally treated differently from others
26 similarly situated and that there is no rational basis for the difference in treatment.”
27 *Id.* at 564. Essentially, a claim can be sustained where the plaintiff has shown he
28 “has been irrationally singled out as a so-called ‘class of one.’” *Engquist v. Oregon*

1 *Dept. of Agr.*, 553 U.S. 591, 601, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

2 Here, Plaintiff fails to allege any facts showing that he was treated differently
3 than others similarly situated to him or was irrationally singled out. Without
4 specific allegations showing that Defendant treated Plaintiff differently because of
5 his *membership* in an identifiable group or constitutionally suspect class, or that
6 Defendant *irrationally* used its discretion to not investigate or protect Plaintiff from
7 purported airborne attacks by private residents, there is no factual basis for his
8 equal protection claim. *See, e.g., Le Fay v. Le Fay*, Case No. 13-CV-1362, 2015
9 WL 106262, *7 (E.D. Cal. 2015) (dismissing equal protection claims because
10 plaintiffs failed to allege any facts that the police acted with malice when failing to
11 respond to a domestic violence incident and plaintiffs failed to describe a class of
12 persons with whom they compare themselves); *Vinatieri v. Mosley*, 787 F. Supp. 2d
13 1022, 1029-31 (N.D. Cal. 2011), *aff'd*, 532 F. App'x 762 (9th Cir. 2013)
14 (dismissing equal protection claim because the complaint did not allege any facts
15 showing that a police officer's failure to arrest a private individual was an improper
16 exercise of the officer's discretion or otherwise constituted unconstitutional,
17 differential treatment).

18 Because Plaintiff has failed to allege a plausible deprivation of a
19 constitutional right from Defendant's failure to respond or protect him, the Court
20 dismisses Plaintiff's § 1983 claim. By extension, Plaintiff does not assert a viable
21 claim for breach of the Portable Uniform Contemporary Citizen Based Social
22 Contract, if such claim even exists. *See Davis*, 884 F. Supp. at 1253 n.7 (noting
23 that while a state's failure to provide protection to its citizens may violate its
24 obligations under its own laws, it does not run afoul of any obligation imposed by
25 the U.S. Constitution because the "Founding Fathers only vested the federal
26 government with the responsibility of safeguarding the national security ...").

27 ///

28 ///

1 **4. Plaintiff Also Fails To State A Claim Under 42 U.S.C. § 1985**
2 **Regarding Defendant's Failure To Investigate Or Protect Plaintiff**
3 **(Claim 9).**

4 Defendant further contends that the Complaint is without sufficient facts to
5 plausibly show that Defendant participated in a conspiracy in violation of 42 U.S.C.
6 § 1985. Motion at pp. 12-15. While again unclear, Plaintiff appears to contend that
7 the allegations sufficiently show or infer that Defendant conspired to deprive his
8 constitutional rights. See Pl. Opp. at p. 52-53. In particular, Plaintiff argues that
9 Defendant participated in a RICO conspiracy against him and thus violated § 1985.
10 *Id.*; see also FAC, ¶¶ 21, 24.⁵

11 A claim for conspiracy to violate constitutional rights under 42 U.S.C.
12 § 1985 cannot survive without a cognizable violation of constitutional rights under
13 § 1983. *Olsen v. Idaho State Bd. Of Med.*, 363 F.3d 916, 930 (9th Cir. 2004)
14 (citation omitted). Because Plaintiff fails to state a cognizable § 1983 claim against
15 Defendant, his § 1985 claim predicated on the same allegations also fails. *Thornton*
16 *v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) (quotation and citation
17 omitted). The Court thus dismisses Plaintiff's § 1985 claim.

18 **5. The Court Declines To Exercise Supplemental Jurisdiction Over**
19 **Plaintiff's State-law Claims (Claims 4-7).**

20 Absent any independent basis of federal subject matter jurisdiction against
21 Defendant, this Court does not have supplemental jurisdiction to hear Plaintiff's
22 state-law claims against it. See 28 U.S.C. § 1367(c)(3) (district court may decline
23 supplemental jurisdiction over claims where "court has dismissed all claims over
24

25 ⁵ The Court notes that although the Complaint is replete with conclusory allegations
26 of a RICO conspiracy, Plaintiff does not assert a RICO claim against Defendant.
27 See FAC, ¶¶ 26-34 (listing nine claims for relief). However, if Plaintiff did intend
28 to assert a RICO claim against Defendant, it would fail because government entities
 cannot form the requisite criminal intent to be sued under RICO. *Pedrina v. Chun*,
 97 F.3d 1296, 1300 (9th Cir. 1996).

1 which it has original jurisdiction”); *Acri v. Varian Associates, Inc.*, 114 F.3d 999,
2 1001 (9th Cir. 1997) (en banc) (“[I]n the usual case in which all federal-law claims
3 are eliminated before trial, the balance of factors ... will point toward declining to
4 exercise jurisdiction over the remaining state-law claims.”) (citation and quotations
5 omitted).

6 **V. DISMISSAL WITHOUT LEAVE TO AMEND**

7 “Dismissal of a *pro se* complaint without leave to amend is proper only if it
8 is absolutely clear that the deficiencies of the complaint could not be cured by
9 amendment.” *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007). However,
10 “district courts are only required to grant leave to amend if a complaint can possibly
11 be saved. Courts are not required to grant leave to amend if a complaint lacks merit
12 entirely.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

13 Here, it is absolutely clear that Plaintiff cannot cure the deficiencies in the
14 First Amended Complaint through additional allegations. The Court has carefully
15 reviewed Plaintiff’s 54-page opposition and 83-page sur-opposition to ascertain
16 whether he might be able to allege facts rising to a constitutional violation, but has
17 found none. Thus, amendment would be futile. *See Lipton v. Pathogenesis Corp.*,
18 284 F.3d 1027, 1039 (9th Cir. 2002) (“Because any amendment would be futile,
19 there was no need to prolong the litigation by permitting further amendment.”); *see*
20 *also Bolden v. California Dept. of Corrections and Rehabilitation*, Case No. 12-
21 CV-2344, 2012 WL 5838993, *2 (E.D. Cal. Nov. 15, 2012) (dismissing complaint
22 without leave to amend on the basis that amendment would be futile where plaintiff
23 alleged mental anguish as a result of using negligently manufactured soap
24 containing a trace chemical issued by the Prison Industry Authority).

25 **VI. RECOMMENDATION**

26 IT IS RECOMMENDED that the District Court issue an Order (1) accepting
27 and adopting this Report and Recommendation; (2) granting Defendant City of
28 Santa Ana’s Motion for Judgment on the Pleadings; and (3) dismissing Plaintiff’s

1 First Amended Complaint without leave to amend as against Defendant City of
2 Santa Ana.

3
4 DATED: July 2, 2015

Rozella A. Oliver

5
6 ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

7
8
9 **NOTICE**

10
11 Reports and Recommendations are not appealable to the Court of Appeals,
12 but may be subject to the right of any party to file objections as provided in Local
13 Civil Rule 72 and review by the District Judge whose initials appear in the docket
14 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
15 should be filed until entry of the Judgment of the District Court.
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 14-01369 SVW (RAO) Date: October 13, 2015
Title: Jose Manuel Lopez v. City of Santa Ana, et al.

Present: The Honorable ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE

Gay Roberson
Deputy Clerk

N/A
Court Reporter / Recorder

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

N/A

N/A

Proceedings: (In Chambers) ORDER TO SHOW CAUSE

On October 1, 2014, Plaintiff Jose Manuel Lopez ("Plaintiff") filed a first amended complaint against City of Santa Ana, Santa Ana Police Department, and several officials. Several of the defendants were dismissed on April 30, 2015. One of the remaining defendants, City of Santa Ana, filed a motion for judgment on the pleadings on April 8, 2015.

The Court issued a Second Interim Report and Recommendation on July 2, 2015, recommending that the motion for judgment on the pleadings be granted. On October 8, 2015, United States District Judge Stephen V. Wilson accepted the Report and ordered that the motion for judgment on the pleadings be granted and that Plaintiff's first amended complaint be dismissed without leave to amend as to City of Santa Ana.

Based on the Second Interim Report and Recommendation, the Court notes that the same deficiencies exist with Plaintiff's claims against the remaining defendants – *i.e.* Santa Ana Police Department and Officer A. Garcia. In particular, it appears that: (1) Plaintiff's false arrest claims brought under 42 U.S.C. §§ 1983 and 1985 are barred by the statute of limitations; and (2) Plaintiff fails to state a claim under 42 U.S.C. §§ 1983 and 1985 regarding Santa Ana Police Department's and Officer A. Garcia's failure to investigate or protect Plaintiff.

In light of the foregoing, IT IS HEREBY ORDERED that Petitioner shall show cause in writing, on or before **October 30, 2015**, why the remaining defendants should not be dismissed.

Plaintiff is expressly warned that failure to timely file a response to this Order will result in a recommendation that this action be dismissed with prejudice for his failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 14-01369 SVW (RAO) Date: October 13, 2015
Title: Jose Manuel Lopez v. City of Santa Ana, et al.

Initials of Preparer gr

5 / 5 - 10054257

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,

13 v.

14 CITY OF SANTA ANA, et al.,
15 Defendants.
16

Case No. CV 14-01369 SVW (RAO)

**SECOND INTERIM REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

17 This Second Interim Report and Recommendation is submitted to the
18 Honorable Steven V. Wilson, United States District Judge, pursuant to 28 U.S.C
19 § 636 and General Order 05-07 of the United States District Court for the Central
20 District of California.

21 **I. INTRODUCTION**

22 On August 26, 2014, Plaintiff Jose Manuel Lopez ("Plaintiff"), an individual
23 proceeding *pro se*, lodged a civil rights complaint pursuant to 42 U.S.C. §§ 1983
24 and 1985 against the City of Santa Ana, the Santa Ana Police Department, and
25 several officials. ECF No. 1. On October 1, 2014, Plaintiff filed a first amended
26 complaint ("FAC"). ECF No. 10. On April 30, 2015, the Court dismissed
27 defendants California Attorney General Kamala Harris, Deputy Attorney General
28 Jill Vander Borgh, and Supervising Deputy Attorney General Rene Lucaric from

1 the action for lack of jurisdiction. (*See* ECF No. 115.)

2 On April 8, 2015, Defendant City of Santa Ana filed a Motion for Judgment
3 on the Pleadings. (ECF No. 112.) On July 2, 2015, the undersigned Magistrate
4 Judge issued her Report and Recommendation (“July 2015 Report and
5 Recommendation”), recommending that the Motion for Judgment on the Pleadings
6 be granted and dismissing Plaintiff’s FAC without leave to amend as against City
7 of Santa Ana. (*See* ECF No. 133.) The Court accepted the July 2015 Report and
8 Recommendation and dismissed Plaintiff’s claims against City of Santa Ana
9 without leave to amend on October 8, 2015. (*See* ECF No. 154.)

10 On October 13, 2015, the Court issued an Order to Show Cause (“October
11 2015 Order”) directing Plaintiff to show cause in writing on or before October 30,
12 2015, why the instant action should not be dismissed as to Defendants Santa Ana
13 Police Department and Officer A. Garcia (“Remaining Defendants”) for the reasons
14 stated in the July 2015 Report and Recommendation in dismissing City of Santa
15 Ana without leave to amend. (*See* ECF No. 156.) On October 29, 2015, Plaintiff
16 filed a Response to the October 2015 Order (“Pl. Resp.”). (ECF No. 169.)

17 **II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

18 Liberally construed, Plaintiff claims that he was wrongfully arrested on a
19 rape violation, never proven, and not released until he had spent 67 days in a
20 dangerous and substandard jail. (FAC, ¶¶ 14-15, 17, 25.) Plaintiff claims that the
21 defendants falsely arrested and imprisoned him because they knew or should have
22 known that he was innocent. (*Id.*, ¶ 15.)

23 The FAC also alleges that the defendants were unresponsive to Plaintiff’s
24 reports of airborne attacks by private residents, particularly his neighbors, during
25 the time period of September 2009 through September 2014. (FAC, ¶ 23.) Plaintiff
26 claims to have contacted a number of entities, including the named defendants, for
27 help – but none responded or commenced an investigation. (*Id.*, ¶¶ 23-24.)

28 Plaintiff asserts nine causes of action against the named defendants:

1 (1) violation of the Eighth Amendment right to freedom from cruel and unusual
2 punishment; (2) violation of the Fourteenth Amendment right to due process and
3 equal protection of the law; (3) violation of the Fourth Amendment right to freedom
4 from unreasonable search and seizure and warrantless arrest on private property;
5 (4) false arrest and false imprisonment under California Penal Code §§ 236-37;
6 (5) violation of his right to be free from violence pursuant to California Civil Code
7 § 51.7; (6) violation of his right to be free from interference of rights pursuant to
8 California Civil Code § 52.1; (7) intentional infliction of emotional distress;
9 (8) breach of the Portable Uniform Contemporary Citizen Based Social Contract¹;
10 and (9) violation of 42 U.S.C. § 1985 for conspiracy to interfere with civil rights.
11 (FAC, ¶¶ 26-34.) Plaintiff asserts his constitutional claims under 42 U.S.C. § 1983.
12 (*See id.*, ¶¶ 35-43.)

13 **III. LEGAL STANDARD**

14 Judgment on the pleadings may be granted by the Court *sua sponte* in favor
15 of non-moving defendants based on the facts and law presented by the moving
16 defendants. *See, e.g., Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742
17 (9th Cir. 2008) (holding district court properly granted motion for judgment on the
18 pleadings as to unserved defendants where such defendants were in a position
19 similar to served defendants against whom claim for relief could not be stated);
20 *Silverton v. Dep't of the Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding
21 district court may dismiss an action as to defendants who have not moved to
22 dismiss where such defendants are in a position similar to that of moving
23 defendants).

24
25 ¹ Plaintiff fails to cite to the Constitution or a statute that provides a right of action
26 for breach of the "Portable Uniform Contemporary Citizen Based Social Contract."
27 The Court believes Plaintiff is seeking to assert a claim under the fundamental
28 principle of political theory that an individual gives his otherwise unrestricted
liberty to a sovereign in return for the sovereign's protection from others. *See*
Davis v. Fulton County, Ark., 884 F. Supp. 1245, 1253 n.7 (E.D. Ark. 1995).

1 A motion for judgment on the pleadings may be brought “[a]fter the
2 pleadings are closed but within such time as to not delay the trial.” Fed. R. Civ. P.
3 12(c). When a Rule 12(c) motion is brought to challenge the legal sufficiency of
4 the opposing party’s pleadings, the motion is treated in the same manner as a Rule
5 12(b)(6) motion. *See, e.g., Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th
6 Cir. 2012) (noting that “Rule 12(b)(6) and Rule 12(c) motions are functionally
7 equivalent”) (citation omitted). Thus, a dismissal on the pleadings for failure to
8 state a claim is proper only if the “movant clearly establishes that no material issue
9 of fact remains to be resolved and that he is entitled to judgment as a matter of
10 law.” *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984)
11 (quotations and citation omitted). In other words, a motion for judgment on the
12 pleadings will be granted only if the movant establishes that “no relief could be
13 granted under any set of facts that could be proven consistent with the allegations.”
14 *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59
15 (1984).

16 In reviewing a Rule 12(c) motion, the Court must determine “whether the
17 complaint at issue contains ‘sufficient factual matter, accepted as true, to state a
18 claim of relief that is plausible on its face.’” *Harris*, 682 F.3d at 1131 (quoting
19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).
20 All allegations of fact in the complaint at issue are accepted as true. *Doleman*, 727
21 F.2d at 1482. However, “[m]ere conclusory statements in a complaint and
22 ‘formulaic recitation[s] of the elements of a cause of action’ are not sufficient.”
23 *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (quoting *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).
25 “A claim has facial plausibility when the plaintiff pleads factual content that allows
26 the court to draw the reasonable inference that the defendant is liable for the
27 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

28 ///

1 **IV. DISCUSSION**

2 **A. Plaintiff's False Arrest Claims Brought Under 42 U.S.C. §§ 1983**
3 **And 1985 (Claims 1, 3, and 9) Are Barred By The Statute Of**
4 **Limitations.**

5 For any claim brought under 42 U.S.C. § 1983, the forum state's statute of
6 limitations controls. *See, e.g., Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014)
7 ("For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of
8 limitations for personal injury actions ...") (citation omitted); *Taylor v. Regents of*
9 *Univ. of Cal.*, 993 F.2d 710, 711-12 (9th Cir. 1993) (stating that the "statute of
10 limitations for personal injury actions govern claims brought pursuant to 42 U.S.C.
11 §§ 1981, 1983, and 1985"). In California, the statute of limitations for § 1983
12 claims is two years. *Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017, 1023-
13 24 (E.D. Cal. 2004) (discussing applicability of the statute of limitations in Cal.
14 Civ. Proc. Code § 335.1 to false arrest claims under § 1983); Cal. Civ. Proc. Code
15 § 335.1 (providing that the statute of limitations for personal injury actions is two
16 years). In addition, any claim brought under 42 U.S.C. § 1985 is "governed by the
17 same statute of limitations as actions under § 1983." *McDougal v. County of*
18 *Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

19 Notwithstanding the application of state law regarding the statute of
20 limitations for claims brought under §§ 1983 and 1985, federal law governs when
21 claims accrue. *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d
22 973 (2007). "Under federal law, accrual occurs when the plaintiff has a complete
23 and present cause of action and may file a suit to obtain relief." *Pouncil v. Tilton*,
24 704 F.3d 568, 573 (2012) (citations omitted). Generally, a cause of action accrues
25 when the plaintiff "knows or has reason to know of the injury which is the basis of
26 the action." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1154 (9th Cir. 2000)
27 (quotations and citation omitted). With false arrest claims, however, the limitations
28 period begins to run after the false imprisonment ends. *See Wallace*, 549 U.S. at

1 389 (discussing when limitations period for false imprisonment claims begins to
2 run).

3 Here, Plaintiff's arrest occurred on February 5, 2012. (FAC, ¶¶ 15, 17.)
4 Plaintiff was detained as a result of that arrest until April 12, 2012. (*See id.*, ¶ 25.)
5 Plaintiff thus had until April 12, 2014 to pursue his false arrest and imprisonment
6 claims within the limitations period. However, he lodged his initial complaint in
7 the instant action on August 26, 2014, after the two-year statute of limitations had
8 ended.² Plaintiff fails to allege any facts that would plausibly warrant equitable
9 tolling, and accordingly, his claims arising out of his false arrest and imprisonment
10 are time barred.

11 Plaintiff contends, however, that his false arrest and imprisonment claims are
12 timely because he continues to be harmed. (*See, e.g.*, Pl. Resp. at 13-14, 29-30, 35,
13 49, 61.) In particular, he argues that the Remaining Defendants have not corrected
14 their alleged wrongdoing and have ignored Plaintiff's complaints to date. (*See id.*)
15 Plaintiff essentially claims that there is a "continuing violation" of his rights, which
16 delays the accrual of his claims to date. (*See id.* at 61, 91-92.)

17 Contrary to Plaintiff's contention, the continuing violations theory does not
18 save his false arrest and imprisonment claims. Prior to the United States Supreme
19 Court's decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,
20 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), a plaintiff could bring claims for
21

22 ² The Court notes that Plaintiff previously commenced a case in this district that
23 appears to have asserted similar allegations against the same defendants found in
24 the instant action. *See* Fed. R. Evid. 201; *Harris*, 682 F.3d at 1131-32 (noting that a
25 court may take judicial notice of court records). In Case No. 14-CV-0738, Plaintiff
26 filed a complaint on May 12, 2014, and subsequently filed a first amended
27 complaint on June 19, 2014. The Court denied Plaintiff's request to proceed
28 without prepayment of filing fee and terminated that case. Even if the Court were
to consider Plaintiff's May 12, 2014 complaint for purposes of the statute of
limitations, Plaintiff's false arrest and imprisonment claims would still be barred as
untimely.



1 discriminatory acts occurring outside the limitations period if he could show a
2 series of related acts one or more of which are within the limitations period. In
3 *Morgan*, however, the Supreme Court rejected the “related acts” theory, holding
4 that discrete discriminatory acts are “not actionable if time barred, even when they
5 are related to acts alleged in timely filed charges.” 536 U.S. at 113. Instead, each
6 discriminatory act “starts a new clock for filing charges alleging that act.” *Id.*
7 Consequently, each discrete act gives rise to a separate constitutional claim for
8 purposes of the statute of limitations. *See Carpinteria Valley Farms, Ltd. v. County*
9 *of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003).

10 As a result, the statute of limitations begins to run when the false arrest and
11 imprisonment results in a damage – which, in this case, was when Plaintiff was
12 released without charge. *See, e.g., Wallace*, 549 U.S. at 389 (limitations period on
13 false imprisonment claim begins to run when alleged false imprisonment ends);
14 *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983) (“[W]here false arrest ...
15 is alleged, the conduct and asserted injury are discrete and complete upon
16 occurrence, and the cause of action can reasonably be deemed to have accrued
17 when the wrongful act occurs.”). That the Remaining Defendants allegedly have
18 not corrected their alleged wrongdoing and ignored Plaintiff’s complaints do not
19 amount to discrete acts resulting in a new accrual date. *See Ward v. Caulk*, 650
20 F.2d 1144, 1147 (9th Cir. 1981) (a “continuing violation is occasioned by continual
21 unlawful acts, not by continual ill effects from an original violation”).

22 In sum, Plaintiff’s claims arising out of his false arrest and imprisonment are
23 time barred.

24 **B. Plaintiff Fails To State A Claim Under 42 U.S.C. § 1983 Regarding**
25 **The Remaining Defendants’ Failure To Investigate Or Protect**
26 **Plaintiff (Claims 2 and 8).**

27 To prove a violation under § 1983, a plaintiff must show that: (1) a
28 defendant’s conduct deprived the plaintiff of a right, privilege, or immunity secured

1 by the Constitution or laws of the United States; and (2) the defendant committed
2 the act under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250,
3 101 L. Ed. 2d 40 (1988). The threshold question then is “whether the plaintiff has
4 alleged a deprivation of a constitutional right at all.” *County of Sacramento v.*
5 *Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

6 1. Due Process

7 The Fourteenth Amendment does not, as a general matter, “require[] the
8 State to protect the life, liberty, and property of its citizens against invasion by
9 private actors.” *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S.
10 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Indeed, “the Fourteenth
11 Amendment’s Due Process Clause ... does not confer any affirmative right to
12 governmental aid and typically does not impose a duty on the state to protect
13 individuals from third parties.” *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir.
14 2012) (quotations and citation omitted); *cf. Doe v. County of San Mateo*, Case Nos.
15 C-07-05596-SI and C-08-02541-SI, 2009 WL 735149, at *5 (N.D. Cal. Mar. 19,
16 2009) (“There is ... no right to a response or any particular action when a citizen
17 petitions the government for redress of grievances.”).

18 This general rule, however, is subject to two exceptions. First, the
19 government may be liable for its failure to protect if a special relationship exists
20 between it and the individual. *Campbell v. State of Washington Dep’t of Social &*
21 *Health Servs.*, 671 F.3d 837, 842 (9th Cir. 2011). The government creates a
22 “special relationship” when it acts to “restrain an individual’s freedom to act on his
23 own behalf, either through an incarceration, institutionalization, or other similar
24 restraint of personal liberty.” *DeShaney*, 489 U.S. at 199. In other words, this
25 exception “is created when ‘the State takes a person into its custody and holds him
26 there against his will.’” *Campbell*, 671 F.3d at 841 (quoting *DeShaney*, 489 U.S. at
27 199-200).

28 Second, the government may be liable for its failure to protect “where the

1 state action affirmatively places the plaintiff in a position of danger, that is, where
2 state action creates or exposes an individual to a danger which he or she would not
3 have otherwise faced.” *Henry A.*, 678 F.3d at 1002 (quotations and citations
4 omitted). To determine whether this “state-created danger” exception applies, the
5 Court reviews: “(1) whether any affirmative actions of the official placed the
6 individual in danger he otherwise would not have faced; (2) whether the danger was
7 known or obvious; and (3) whether the officer acted with deliberate indifference to
8 that danger.” *Id.* (citation omitted).

9 Here, Plaintiff has failed to plausibly plead a claim under either exception.
10 Plaintiff makes no allegation that he was in some form of involuntary custody at the
11 time he had reported the airborne attacks for the special relationship exception to
12 apply. *See Estate of Amos ex rel. Amos v. City of Page, Ariz.*, 257 F.3d 1086, 1090-
13 91 (9th Cir. 2001) (holding that special relationship exception did not apply
14 because the decedent was not in defendants’ custody).

15 Plaintiff likewise fails to allege any facts showing the state-created danger
16 exception applies. Very liberally construed, Plaintiff alleges that the Remaining
17 Defendants failed to respond to his reports of “airborne chemical, biological and
18 gas warfare” coming from his private neighbors. (FAC, ¶¶ 23-24.) While
19 accepting as true Plaintiff’s allegation of danger, the Remaining Defendants “had
20 no part in [its] creation, nor did [they] do anything to render him any more
21 vulnerable to [it].” *Estate of Amos*, 257 F.3d at 1091 (quoting *DeShaney*, 489 U.S.
22 at 201). Indeed, the Remaining Defendants are not alleged to have affirmatively
23 placed Plaintiff in the way of a danger that they had created. This alone is
24 sufficient to find that the state-created danger exception does not apply here. *See*
25 *Campbell*, 671 F.3d at 845 n.8 (declining to address the other two factors of the
26 state-created danger exception because the plaintiff failed to show the defendant
27 had created the alleged danger).

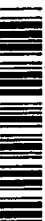
28 ///

1 2. Equal Protection

2 “The Equal Protection Clause of the Fourteenth Amendment commands that
3 no State shall deny to any person within its jurisdiction the equal protection of the
4 laws, which is essentially a direction that all persons similarly situated should be
5 treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439,
6 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (quotations and citation omitted). This
7 requires a plaintiff to show that he was intentionally treated differently because of
8 his membership in an identifiable group or a constitutionally suspect class. *See*,
9 *e.g.*, *DeShaney*, 489 U.S. at 197 n.3 (“The State may not, of course, selectively
10 deny its protective services to certain disfavored minorities without violating the
11 Equal Protection Clause.”) (citation omitted); *Ariz. Dream Act Coal. v. Brewer*, 757
12 F.3d 1053, 1064 (9th Cir. 2014) (stating that a classification group “must be
13 comprised of similarly situated persons so that the factor motivating the alleged
14 discrimination can be identified”) (quotations and citation omitted).

15 The Equal Protection Clause also protects individuals who would constitute a
16 “class of one.” *Village Of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct.
17 1073, 145 L. Ed. 2d 1060 (2000). To proceed on the class-of-one theory, the
18 plaintiff must allege that he “has been intentionally treated differently from others
19 similarly situated and that there is no rational basis for the difference in treatment.”
20 *Id.* at 564. Essentially, a claim can be sustained where the plaintiff has shown he
21 “has been irrationally singled out as a so-called ‘class of one.’” *Engquist v. Oregon*
22 *Dept. of Agr.*, 553 U.S. 591, 601, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

23 Here, the FAC fails to allege any facts showing that Plaintiff was treated
24 differently than others similarly situated to him or was irrationally singled out.
25 Without specific allegations showing that the Remaining Defendants treated
26 Plaintiff differently because of his membership in an identifiable group or
27 constitutionally suspect class, or that the Remaining Defendants irrationally used
28 their discretion to not investigate or protect Plaintiff from purported airborne



1 attacks by private residents, there is no factual basis for his equal protection claim.
2 *See, e.g., Le Fay v. Le Fay*, Case No. 13-CV-1362, 2015 WL 106262, at *7 (E.D.
3 Cal. 2015) (dismissing equal protection claims because plaintiffs failed to allege
4 any facts that the police acted with malice when failing to respond to a domestic
5 violence incident and plaintiffs failed to describe a class of persons with whom they
6 compare themselves); *Vinatieri v. Mosley*, 787 F. Supp. 2d 1022, 1029-31 (N.D.
7 Cal. 2011), *aff'd*, 532 F. App'x 762 (9th Cir. 2013) (dismissing equal protection
8 claim because the complaint did not allege any facts showing that a police officer's
9 failure to arrest a private individual was an improper exercise of the officer's
10 discretion or otherwise constituted unconstitutional, differential treatment).

11 In his Response, Plaintiff raises a new allegation that he was treated
12 differently because he is a member of a protected class of former parolees. (*See,*
13 *e.g., Pl. Resp. at 5, 7, 9, 21-22, 32-33.*) Courts, however, have uniformly found that
14 parolees do not constitute a constitutionally suspect class warranting heightened
15 scrutiny. *See, e.g., Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008) (finding that
16 "status as a parolee is not considered a 'suspect class' for equal-protection
17 purposes"); *Bratton v. N.Y. State Div. of Parole*, Case No. 05-CV-0950, 2008 WL
18 1766744, at *11 (N.D.N.Y. Apr. 14, 2008) ("Parolees do not constitute a suspect or
19 quasi-suspect class, requiring heightened scrutiny for the purpose of equal
20 protection analysis.") (citation omitted). And despite Plaintiff's conclusory
21 allegation that the Remaining Defendants had discriminatory animus against him
22 because of his parole status, Plaintiff fails to allege any facts plausibly showing that
23 the Remaining Defendants intentionally treated him differently from others
24 similarly situated without any rational basis.

25 Plaintiff also raises for the first time the allegation that he was treated
26 differently because he filed numerous complaints against the Remaining
27 Defendants. (*See Pl. Resp. at 31-32.*) His allegations, though, are conclusory. The
28 allegations that Plaintiff filed numerous complaints against the Remaining

1 Defendants and that the Remaining Defendants have not investigated or protected
2 him do not in combination support an inference of discrimination and/or irrational
3 behavior. Plaintiff simply alleges no facts plausibly showing that the Remaining
4 Defendants denied their protective services in retaliation for his complaints. *See*
5 *Iqbal*, 556 U.S. at 683 (finding “respondent’s complaint does not contain any
6 factual allegations sufficient to plausibly suggest petitioners’ discriminatory state of
7 mind”).

8 Because Plaintiff fails to allege a plausible deprivation of a constitutional
9 right from the Remaining Defendants’ failure to respond or protect him, the Court
10 dismisses Plaintiff’s § 1983 claim. By extension, Plaintiff does not assert a viable
11 claim for breach of the Portable Uniform Contemporary Citizen Based Social
12 Contract, if such claim even exists. *See Davis*, 884 F. Supp. at 1253 n.7 (noting
13 that while a state’s failure to provide protection to its citizens may violate its
14 obligations under its own laws, it does not run afoul of any obligation imposed by
15 the U.S. Constitution because the “Founding Fathers only vested the federal
16 government with the responsibility of safeguarding the national security ...”).

17 Accordingly, the Court dismisses Plaintiff’s § 1983 claim regarding the
18 Remaining Defendants’ failure to investigate or protect.

19 **C. Plaintiff Also Fails To State A Claim Under 42 U.S.C. § 1985**
20 **Regarding The Remaining Defendants’ Failure To Investigate Or**
21 **Protect Plaintiff (Claim 9).**

22 A claim for conspiracy to violate constitutional rights under 42 U.S.C.
23 § 1985 cannot survive without a cognizable violation of constitutional rights under
24 § 1983. *Olsen v. Idaho State Bd. Of Med.*, 363 F.3d 916, 930 (9th Cir. 2004)
25 (citation omitted). Because Plaintiff fails to state a cognizable § 1983 claim against
26 the Remaining Defendants, his § 1985 claim predicated on the same allegations also
27 fails. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005)
28 (quotation and citation omitted). The Court thus dismisses Plaintiff’s § 1985 claim.

1 **D. The Court Declines To Exercise Supplemental Jurisdiction Over**
2 **Plaintiff's State-law Claims (Claims 4-7).**

3 Absent any independent basis of federal subject matter jurisdiction against
4 the Remaining Defendants, this Court does not have supplemental jurisdiction to
5 hear Plaintiff's state-law claims against them. *See* 28 U.S.C. § 1367(c)(3) (district
6 court may decline supplemental jurisdiction over claims where "court has dismissed
7 all claims over which it has original jurisdiction"); *Acri v. Varian Associates, Inc.*,
8 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) ("[I]n the usual case in which all
9 federal-law claims are eliminated before trial, the balance of factors ... will point
10 toward declining to exercise jurisdiction over the remaining state-law claims.")
11 (citation and quotations omitted).

12 **V. DISMISSAL WITHOUT LEAVE TO AMEND**

13 "Dismissal of a pro se complaint without leave to amend is proper only if it is
14 absolutely clear that the deficiencies of the complaint could not be cured by
15 amendment." *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007). However,
16 "district courts are only required to grant leave to amend if a complaint can possibly
17 be saved. Courts are not required to grant leave to amend if a complaint lacks merit
18 entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

19 Here, it is absolutely clear that Plaintiff cannot cure the deficiencies in the
20 First Amended Complaint through additional allegations. The Court has carefully
21 reviewed Plaintiff's 93-page Response to ascertain whether he might be able to
22 allege facts rising to a constitutional violation, but has found none. Thus,
23 amendment would be futile. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027,
24 1039 (9th Cir. 2002) ("Because any amendment would be futile, there was no need
25 to prolong the litigation by permitting further amendment."); *see also Bolden v.*
26 *California Dept. of Corrections and Rehabilitation*, Case No. 12-CV-2344, 2012
27 WL 5838993, at *2 (E.D. Cal. Nov. 15, 2012) (dismissing complaint without leave
28 to amend on the basis that amendment would be futile where plaintiff alleged

1 mental anguish as a result of using negligently manufactured soap containing a
2 trace chemical issued by the Prison Industry Authority).

3 **VI. RECOMMENDATION**

4 For the reasons discussed above, IT IS RECOMMENDED that the District
5 Court issue an Order (1) accepting and adopting this Report and Recommendation;
6 (2) granting Judgment on the Pleadings for Defendants Santa Ana Police
7 Department and Officer A. Garcia; and (3) dismissing Plaintiff's First Amended
8 Complaint without leave to amend as against Defendants Santa Ana Police
9 Department and Officer A. Garcia.

10
11
12 DATED: December 21, 2015

Rozella A. Oliver

13
14 ROZELLA A. OLIVER
15 UNITED STATES MAGISTRATE JUDGE
16

17 **NOTICE**

18 Reports and Recommendations are not appealable to the Court of Appeals,
19 but may be subject to the right of any party to file objections as provided in Local
20 Civil Rule 72 and review by the District Judge whose initials appear in the docket
21 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
22 should be filed until entry of the Judgment of the District Court.
23
24
25
26
27
28

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,

13 v.

14 CITY OF SANTA ANA, et al.,
15 Defendants.
16

Case No. CV 14-01369 SVW (RAO)

FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

17 This Final Report and Recommendation is submitted to the Honorable
18 Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and
19 General Order 05-07 of the United States District Court for the Central District of
20 California.

21 **I. INTRODUCTION**

22 On August 26, 2014, Plaintiff Jose Manuel Lopez ("Plaintiff"), an individual
23 proceeding *pro se*, lodged a civil rights complaint pursuant to 42 U.S.C. §§ 1983
24 and 1985 against the City of Santa Ana, the Santa Ana Police Department, and
25 several officials. (ECF No. 1.) On October 1, 2014, Plaintiff filed a first amended
26 complaint ("FAC"). (ECF No. 10.) On April 30, 2015, the Court dismissed
27 Defendants California Attorney General Kamala Harris, Deputy Attorney General
28 Jill Vander Borch, and Supervising Deputy Attorney General Rene Lucaric from

1 the action for lack of jurisdiction. (*See* ECF No. 115.)

2 On April 8, 2015, Defendant City of Santa Ana filed a Motion for Judgment
3 on the Pleadings. (ECF No. 112.) On July 2, 2015, the undersigned Magistrate
4 Judge issued her Report and Recommendation (“July 2015 Report and
5 Recommendation”), recommending that the Motion for Judgment on the Pleadings
6 be granted and dismissing Plaintiff’s FAC without leave to amend as against City
7 of Santa Ana. (*See* ECF No. 133.) The Court accepted the July 2015 Report and
8 Recommendation and dismissed Plaintiff’s claims against City of Santa Ana
9 without leave to amend on October 8, 2015. (*See* ECF No. 154.)

10 On October 13, 2015, the Court issued an Order to Show Cause (“October
11 2015 Order”) directing Plaintiff to show cause in writing on or before October 30,
12 2015, why the instant action should not be dismissed as to Defendants Santa Ana
13 Police Department and Officer A. Garcia (“Remaining Defendants”) for the reasons
14 stated in the July 2015 Report and Recommendation in dismissing City of Santa
15 Ana without leave to amend. (*See* ECF No. 156.) On October 29, 2015, Plaintiff
16 filed a Response to the October 2015 Order (“Pl. Resp.”). (ECF No. 169.)

17 **II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

18 Liberally construed, Plaintiff claims that he was wrongfully arrested on a
19 rape violation, never proven, and not released until he had spent 67 days in a
20 dangerous and substandard jail. (FAC, ¶¶ 14-15, 17, 25.) Plaintiff claims that the
21 defendants falsely arrested and imprisoned him because they knew or should have
22 known that he was innocent. (*Id.*, ¶ 15.)

23 The FAC also alleges that the defendants were unresponsive to Plaintiff’s
24 reports of airborne attacks by private residents, particularly his neighbors, during
25 the time period of September 2009 through September 2014. (FAC, ¶ 23.) Plaintiff
26 claims to have contacted a number of entities, including the named defendants, for
27 help – but none responded or commenced an investigation. (*Id.*, ¶¶ 23-24.)

28 Plaintiff asserts nine causes of action against the named defendants:

1 (1) violation of the Eighth Amendment right to freedom from cruel and unusual
2 punishment; (2) violation of the Fourteenth Amendment right to due process and
3 equal protection of the law; (3) violation of the Fourth Amendment right to freedom
4 from unreasonable search and seizure and warrantless arrest on private property;
5 (4) false arrest and false imprisonment under California Penal Code §§ 236-37;
6 (5) violation of his right to be free from violence pursuant to California Civil Code
7 § 51.7; (6) violation of his right to be free from interference of rights pursuant to
8 California Civil Code § 52:1; (7) intentional infliction of emotional distress;
9 (8) breach of the Portable Uniform Contemporary Citizen Based Social Contract¹;
10 and (9) violation of 42 U.S.C. § 1985 for conspiracy to interfere with civil rights.
11 (FAC, ¶¶ 26-34.) Plaintiff asserts his constitutional claims under 42 U.S.C. § 1983.
12 (*See id.*, ¶¶ 35-43.)

13 **III. LEGAL STANDARD**

14 Judgment on the pleadings may be granted by the Court *sua sponte* in favor
15 of non-moving defendants based on the facts and law presented by the moving
16 defendants. *See, e.g., Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742
17 (9th Cir. 2008) (holding district court properly granted motion for judgment on the
18 pleadings as to unserved defendants where such defendants were in a position
19 similar to served defendants against whom claim for relief could not be stated);
20 *Silverton v. Dep't of the Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding
21 district court may dismiss an action as to defendants who have not moved to
22 dismiss where such defendants are in a position similar to that of moving
23 defendants).

24
25 ¹ Plaintiff fails to cite to the Constitution or a statute that provides a right of action
26 for breach of the "Portable Uniform Contemporary Citizen Based Social Contract."
27 The Court believes Plaintiff is seeking to assert a claim under the fundamental
28 principle of political theory that an individual gives his otherwise unrestricted
liberty to a sovereign in return for the sovereign's protection from others. *See*
Davis v. Fulton County, Ark., 884 F. Supp. 1245, 1253 n.7 (E.D. Ark. 1995).

1 A motion for judgment on the pleadings may be brought “[a]fter the
2 pleadings are closed but within such time as to not delay the trial.” Fed. R. Civ. P.
3 12(c). When a Rule 12(c) motion is brought to challenge the legal sufficiency of
4 the opposing party’s pleadings, the motion is treated in the same manner as a Rule
5 12(b)(6) motion. *See, e.g., Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th
6 Cir. 2012) (noting that “Rule 12(b)(6) and Rule 12(c) motions are functionally
7 equivalent”) (citation omitted). Thus, a dismissal on the pleadings for failure to
8 state a claim is proper only if the “movant clearly establishes that no material issue
9 of fact remains to be resolved and that he is entitled to judgment as a matter of
10 law.” *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984)
11 (quotations and citation omitted). In other words, a motion for judgment on the
12 pleadings will be granted only if the movant establishes that “no relief could be
13 granted under any set of facts that could be proven consistent with the allegations.”
14 *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59
15 (1984).

16 In reviewing a Rule 12(c) motion, the Court must determine “whether the
17 complaint at issue contains ‘sufficient factual matter, accepted as true, to state a
18 claim of relief that is plausible on its face.” *Harris*, 682 F.3d at 1131 (quoting
19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).
20 All allegations of fact in the complaint at issue are accepted as true. *Doleman*, 727
21 F.2d at 1482. However, “[m]ere conclusory statements in a complaint and
22 ‘formulaic recitation[s] of the elements of a cause of action’ are not sufficient.”
23 *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (quoting *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).
25 “A claim has facial plausibility when the plaintiff pleads factual content that allows
26 the court to draw the reasonable inference that the defendant is liable for the
27 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

28 ///

1 **IV. DISCUSSION**

2 **A. Plaintiff's False Arrest Claims Brought Under 42 U.S.C. §§ 1983**
3 **And 1985 (Claims 1, 3, and 9) Are Barred By The Statute Of**
4 **Limitations.**

5 For any claim brought under 42 U.S.C. § 1983, the forum state's statute of
6 limitations controls. *See, e.g., Jackson v. Barnes*, 749 F.3d 755, 761 (9th Cir. 2014)
7 ("For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of
8 limitations for personal injury actions ...") (citation omitted); *Taylor v. Regents of*
9 *Univ. of Cal.*, 993 F.2d 710, 711-12 (9th Cir. 1993) (stating that the "statute of
10 limitations for personal injury actions govern claims brought pursuant to 42 U.S.C.
11 §§ 1981, 1983, and 1985"). In California, the statute of limitations for § 1983
12 claims is two years. *Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017, 1023-
13 24 (E.D. Cal. 2004) (discussing applicability of the statute of limitations in Cal.
14 Civ. Proc. Code § 335.1 to false arrest claims under § 1983); Cal. Civ. Proc. Code
15 § 335.1 (providing that the statute of limitations for personal injury actions is two
16 years). In addition, any claim brought under 42 U.S.C. § 1985 is "governed by the
17 same statute of limitations as actions under § 1983." *McDougal v. County of*
18 *Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

19 Notwithstanding the application of state law regarding the statute of
20 limitations for claims brought under §§ 1983 and 1985, federal law governs when
21 claims accrue. *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d
22 973 (2007). "Under federal law, accrual occurs when the plaintiff has a complete
23 and present cause of action and may file a suit to obtain relief." *Pouncil v. Tilton*,
24 704 F.3d 568, 573 (2012) (citations omitted). Generally, a cause of action accrues
25 when the plaintiff "knows or has reason to know of the injury which is the basis of
26 the action." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1154 (9th Cir. 2000)
27 (quotations and citation omitted). With false arrest claims, however, the limitations
28 period begins to run after the false imprisonment ends. *See Wallace*, 549 U.S. at

1 389 (discussing when limitations period for false imprisonment claims begins to
2 run).

3 Here, Plaintiff's arrest occurred on February 5, 2012. (FAC, ¶¶ 15, 17.)
4 Plaintiff was detained as a result of that arrest until April 12, 2012. (*See id.*, ¶ 25.)
5 Plaintiff thus had until April 12, 2014 to pursue his false arrest and imprisonment
6 claims within the limitations period. However, he lodged his initial complaint in
7 the instant action on August 26, 2014, after the two-year statute of limitations had
8 ended.² Plaintiff fails to allege any facts that would plausibly warrant equitable
9 tolling, and accordingly, his claims arising out of his false arrest and imprisonment
10 are time barred.

11 Plaintiff contends, however, that his false arrest and imprisonment claims are
12 timely because he continues to be harmed. (*See, e.g.*, Pl. Resp. at 13-14, 29-30, 35,
13 49, 61.) In particular, he argues that the Remaining Defendants have not corrected
14 their alleged wrongdoing and have ignored Plaintiff's complaints to date. (*See id.*)
15 Plaintiff essentially claims that there is a "continuing violation" of his rights, which
16 delays the accrual of his claims to date. (*See id.* at 61, 91-92.)

17 Contrary to Plaintiff's contention, the continuing violations theory does not
18 save his false arrest and imprisonment claims. Prior to the United States Supreme
19 Court's decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,
20 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), a plaintiff could bring claims for
21

22 ² The Court notes that Plaintiff previously commenced a case in this district that
23 appears to have asserted similar allegations against the same defendants found in
24 the instant action. *See* Fed. R. Evid. 201; *Harris*, 682 F.3d at 1131-32 (noting that a
25 court may take judicial notice of court records). In Case No. 14-CV-0738, Plaintiff
26 filed a complaint on May 12, 2014, and subsequently filed a first amended
27 complaint on June 19, 2014. The Court denied Plaintiff's request to proceed
28 without prepayment of filing fee and terminated that case. Even if the Court were
to consider Plaintiff's May 12, 2014 complaint for purposes of the statute of
limitations, Plaintiff's false arrest and imprisonment claims would still be barred as
untimely.

1 discriminatory acts occurring outside the limitations period if he could show a
2 series of related acts one or more of which are within the limitations period. In
3 *Morgan*, however, the Supreme Court rejected the “related acts” theory, holding
4 that discrete discriminatory acts are “not actionable if time barred, even when they
5 are related to acts alleged in timely filed charges.” 536 U.S. at 113. Instead, each
6 discriminatory act “starts a new clock for filing charges alleging that act.” *Id.*
7 Consequently, each discrete act gives rise to a separate constitutional claim for
8 purposes of the statute of limitations. *See Carpinteria Valley Farms, Ltd. v. County*
9 *of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003).

10 As a result, the statute of limitations begins to run when the false arrest and
11 imprisonment results in a damage – which, in this case, was when Plaintiff was
12 released without charge. *See, e.g., Wallace*, 549 U.S. at 389 (limitations period on
13 false imprisonment claim begins to run when alleged false imprisonment ends);
14 *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983) (“[W]here false arrest ...
15 is alleged, the conduct and asserted injury are discrete and complete upon
16 occurrence, and the cause of action can reasonably be deemed to have accrued
17 when the wrongful act occurs.”). That the Remaining Defendants allegedly have
18 not corrected their alleged wrongdoing and ignored Plaintiff’s complaints do not
19 amount to discrete acts resulting in a new accrual date. *See Ward v. Caulk*, 650
20 F.2d 1144, 1147 (9th Cir. 1981) (a “continuing violation is occasioned by continual
21 unlawful acts, not by continual ill effects from an original violation”).

22 In sum, Plaintiff’s claims arising out of his false arrest and imprisonment are
23 time barred.

24 **B. Plaintiff Fails To State A Claim Under 42 U.S.C. § 1983 Regarding**
25 **The Remaining Defendants’ Failure To Investigate Or Protect**
26 **Plaintiff (Claims 2 and 8).**

27 To prove a violation under § 1983, a plaintiff must show that: (1) a
28 defendant’s conduct deprived the plaintiff of a right, privilege, or immunity secured

1 by the Constitution or laws of the United States; and (2) the defendant committed
2 the act under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250,
3 101 L. Ed. 2d 40 (1988). The threshold question then is “whether the plaintiff has
4 alleged a deprivation of a constitutional right at all.” *County of Sacramento v.*
5 *Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

6 1. Due Process

7 The Fourteenth Amendment does not, as a general matter, “require[] the
8 State to protect the life, liberty, and property of its citizens against invasion by
9 private actors.” *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S.
10 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Indeed, “the Fourteenth
11 Amendment’s Due Process Clause ... does not confer any affirmative right to
12 governmental aid and typically does not impose a duty on the state to protect
13 individuals from third parties.” *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir.
14 2012) (quotations and citation omitted); cf. *Doe v. County of San Mateo*, Case Nos.
15 C-07-05596-SI and C-08-02541-SI, 2009 WL 735149, at *5 (N.D. Cal. Mar. 19,
16 2009) (“There is ... no right to a response or any particular action when a citizen
17 petitions the government for redress of grievances.”).

18 This general rule, however, is subject to two exceptions. First, the
19 government may be liable for its failure to protect if a special relationship exists
20 between it and the individual. *Campbell v. State of Washington Dep’t of Social &*
21 *Health Servs.*, 671 F.3d 837, 842 (9th Cir. 2011). The government creates a
22 “special relationship” when it acts to “restrain an individual’s freedom to act on his
23 own behalf, either through an incarceration, institutionalization, or other similar
24 restraint of personal liberty.” *DeShaney*, 489 U.S. at 199. In other words, this
25 exception “is created when ‘the State takes a person into its custody and holds him
26 there against his will.’” *Campbell*, 671 F.3d at 841 (quoting *DeShaney*, 489 U.S. at
27 199-200).

28 Second, the government may be liable for its failure to protect “where the

1 state action affirmatively places the plaintiff in a position of danger, that is, where
2 state action creates or exposes an individual to a danger which he or she would not
3 have otherwise faced.” *Henry A.*, 678 F.3d at 1002 (quotations and citations
4 omitted). To determine whether this “state-created danger” exception applies, the
5 Court reviews: “(1) whether any affirmative actions of the official placed the
6 individual in danger he otherwise would not have faced; (2) whether the danger was
7 known or obvious; and (3) whether the officer acted with deliberate indifference to
8 that danger.” *Id.* (citation omitted).

9 Here, Plaintiff has failed to plausibly plead a claim under either exception.
10 Plaintiff makes no allegation that he was in some form of involuntary custody at the
11 time he had reported the airborne attacks for the special relationship exception to
12 apply. *See Estate of Amos ex rel. Amos v. City of Page, Ariz.*, 257 F.3d 1086, 1090-
13 91 (9th Cir. 2001) (holding that special relationship exception did not apply
14 because the decedent was not in defendants’ custody).

15 Plaintiff likewise fails to allege any facts showing the state-created danger
16 exception applies. Very liberally construed, Plaintiff alleges that the Remaining
17 Defendants failed to respond to his reports of “airborne chemical, biological and
18 gas warfare” coming from his private neighbors. (FAC, ¶¶ 23-24.) While
19 accepting as true Plaintiff’s allegation of danger, the Remaining Defendants “had
20 no part in [its] creation, nor did [they] do anything to render him any more
21 vulnerable to [it].” *Estate of Amos*, 257 F.3d at 1091 (quoting *DeShaney*, 489 U.S.
22 at 201). Indeed, the Remaining Defendants are not alleged to have affirmatively
23 placed Plaintiff in the way of a danger that they had created. This alone is
24 sufficient to find that the state-created danger exception does not apply here. *See*
25 *Campbell*, 671 F.3d at 845 n.8 (declining to address the other two factors of the
26 state-created danger exception because the plaintiff failed to show the defendant
27 had created the alleged danger).

28 ///

1 2. Equal Protection

2 “The Equal Protection Clause of the Fourteenth Amendment commands that
3 no State shall deny to any person within its jurisdiction the equal protection of the
4 laws, which is essentially a direction that all persons similarly situated should be
5 treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439,
6 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (quotations and citation omitted). This
7 requires a plaintiff to show that he was intentionally treated differently because of
8 his membership in an identifiable group or a constitutionally suspect class. *See*,
9 *e.g.*, *DeShaney*, 489 U.S. at 197 n.3 (“The State may not, of course, selectively
10 deny its protective services to certain disfavored minorities without violating the
11 Equal Protection Clause.”) (citation omitted); *Ariz. Dream Act Coal. v. Brewer*, 757
12 F.3d 1053, 1064 (9th Cir. 2014) (stating that a classification group “must be
13 comprised of similarly situated persons so that the factor motivating the alleged
14 discrimination can be identified”) (quotations and citation omitted).

15 The Equal Protection Clause also protects individuals who would constitute a
16 “class of one.” *Village Of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct.
17 1073, 145 L. Ed. 2d 1060 (2000). To proceed on the class-of-one theory, the
18 plaintiff must allege that he “has been intentionally treated differently from others
19 similarly situated and that there is no rational basis for the difference in treatment.”
20 *Id.* at 564. Essentially, a claim can be sustained where the plaintiff has shown he
21 “has been irrationally singled out as a so-called ‘class of one.’” *Engquist v. Oregon*
22 *Dept. of Agr.*, 553 U.S. 591, 601, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

23 Here, the FAC fails to allege any facts showing that Plaintiff was treated
24 differently than others similarly situated to him or was irrationally singled out.
25 Without specific allegations showing that the Remaining Defendants treated
26 Plaintiff differently because of his membership in an identifiable group or
27 constitutionally suspect class, or that the Remaining Defendants irrationally used
28 their discretion to not investigate or protect Plaintiff from purported airborne

1 attacks by private residents, there is no factual basis for his equal protection claim.
2 *See, e.g., Le Fay v. Le Fay*, Case No. 13-CV-1362, 2015 WL 106262, at *7 (E.D.
3 Cal. 2015) (dismissing equal protection claims because plaintiffs failed to allege
4 any facts that the police acted with malice when failing to respond to a domestic
5 violence incident and plaintiffs failed to describe a class of persons with whom they
6 compare themselves); *Vinatieri v. Mosley*, 787 F. Supp. 2d 1022, 1029-31 (N.D.
7 Cal. 2011), *aff'd*, 532 F. App'x 762 (9th Cir. 2013) (dismissing equal protection
8 claim because the complaint did not allege any facts showing that a police officer's
9 failure to arrest a private individual was an improper exercise of the officer's
10 discretion or otherwise constituted unconstitutional, differential treatment).

11 In his Response, Plaintiff raises a new allegation that he was treated
12 differently because he is a member of a protected class of former parolees. (*See,*
13 *e.g., Pl. Resp. at 5, 7, 9, 21-22, 32-33.*) Courts, however, have uniformly found that
14 parolees do not constitute a constitutionally suspect class warranting heightened
15 scrutiny. *See, e.g., Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008) (finding that
16 "status as a parolee is not considered a 'suspect class' for equal-protection
17 purposes"); *Bratton v. N.Y. State Div. of Parole*, Case No. 05-CV-0950, 2008 WL
18 1766744, at *11 (N.D.N.Y. Apr. 14, 2008) ("Parolees do not constitute a suspect or
19 quasi-suspect class, requiring heightened scrutiny for the purpose of equal
20 protection analysis.") (citation omitted). And despite Plaintiff's conclusory
21 allegation that the Remaining Defendants had discriminatory animus against him
22 because of his parole status, Plaintiff fails to allege any facts plausibly showing that
23 the Remaining Defendants intentionally treated him differently from others
24 similarly situated without any rational basis.

25 Plaintiff also raises for the first time the allegation that he was treated
26 differently because he filed numerous complaints against the Remaining
27 Defendants. (*See Pl. Resp. at 31-32.*) His allegations, though, are conclusory. The
28 allegations that Plaintiff filed numerous complaints against the Remaining

1 Defendants and that the Remaining Defendants have not investigated or protected
2 him do not in combination support an inference of discrimination and/or irrational
3 behavior. Plaintiff simply alleges no facts plausibly showing that the Remaining
4 Defendants denied their protective services in retaliation for his complaints. *See*
5 *Iqbal*, 556 U.S. at 683 (finding “respondent’s complaint does not contain any
6 factual allegations sufficient to plausibly suggest petitioners’ discriminatory state of
7 mind”).

8 Because Plaintiff fails to allege a plausible deprivation of a constitutional
9 right from the Remaining Defendants’ failure to respond or protect him, the Court
10 dismisses Plaintiff’s § 1983 claim. By extension, Plaintiff does not assert a viable
11 claim for breach of the Portable Uniform Contemporary Citizen Based Social
12 Contract, if such claim even exists. *See Davis*, 884 F. Supp. at 1253 n.7 (noting
13 that while a state’s failure to provide protection to its citizens may violate its
14 obligations under its own laws, it does not run afoul of any obligation imposed by
15 the U.S. Constitution because the “Founding Fathers only vested the federal
16 government with the responsibility of safeguarding the national security ...”).

17 Accordingly, the Court dismisses Plaintiff’s § 1983 claim regarding the
18 Remaining Defendants’ failure to investigate or protect.

19 **C. Plaintiff Also Fails To State A Claim Under 42 U.S.C. § 1985**
20 **Regarding The Remaining Defendants’ Failure To Investigate Or**
21 **Protect Plaintiff (Claim 9).**

22 A claim for conspiracy to violate constitutional rights under 42 U.S.C.
23 § 1985 cannot survive without a cognizable violation of constitutional rights under
24 § 1983. *Olsen v. Idaho State Bd. Of Med.*, 363 F.3d 916, 930 (9th Cir. 2004)
25 (citation omitted). Because Plaintiff fails to state a cognizable § 1983 claim against
26 the Remaining Defendants, his § 1985 claim predicated on the same allegations also
27 fails. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005)
28 (quotation and citation omitted). The Court thus dismisses Plaintiff’s § 1985 claim.

1 **D. The Court Declines To Exercise Supplemental Jurisdiction Over**
2 **Plaintiff's State-law Claims (Claims 4-7).**

3 Absent any independent basis of federal subject matter jurisdiction against
4 the Remaining Defendants, this Court does not have supplemental jurisdiction to
5 hear Plaintiff's state-law claims against them. *See* 28 U.S.C. § 1367(c)(3) (district
6 court may decline supplemental jurisdiction over claims where "court has dismissed
7 all claims over which it has original jurisdiction"); *Acri v. Varian Associates, Inc.*,
8 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) ("[I]n the usual case in which all
9 federal-law claims are eliminated before trial, the balance of factors ... will point
10 toward declining to exercise jurisdiction over the remaining state-law claims.")
11 (citation and quotations omitted).

12 **V. DISMISSAL WITHOUT LEAVE TO AMEND**

13 "Dismissal of a pro se complaint without leave to amend is proper only if it is
14 absolutely clear that the deficiencies of the complaint could not be cured by
15 amendment." *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007). However,
16 "district courts are only required to grant leave to amend if a complaint can possibly
17 be saved. Courts are not required to grant leave to amend if a complaint lacks merit
18 entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

19 Here, it is absolutely clear that Plaintiff cannot cure the deficiencies in the
20 First Amended Complaint through additional allegations. The Court has carefully
21 reviewed Plaintiff's 93-page Response to ascertain whether he might be able to
22 allege facts rising to a constitutional violation, but has found none. Thus,
23 amendment would be futile. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027,
24 1039 (9th Cir. 2002) ("Because any amendment would be futile, there was no need
25 to prolong the litigation by permitting further amendment."); *see also Bolden v.*
26 *California Dept. of Corrections and Rehabilitation*, Case No. 12-CV-2344, 2012
27 WL 5838993, at *2 (E.D. Cal. Nov. 15, 2012) (dismissing complaint without leave
28 to amend on the basis that amendment would be futile where plaintiff alleged

1 mental anguish as a result of using negligently manufactured soap containing a
2 trace chemical issued by the Prison Industry Authority).

3 **VI. RECOMMENDATION**

4 For the reasons discussed above, IT IS RECOMMENDED that the District
5 Court issue an Order (1) accepting and adopting this Report and Recommendation;
6 (2) granting Judgment on the Pleadings for Defendants Santa Ana Police
7 Department and Officer A. Garcia; and (3) dismissing Plaintiff's First Amended
8 Complaint without leave to amend as against Defendants Santa Ana Police
9 Department and Officer A. Garcia.

10
11
12 DATED: December 21, 2015

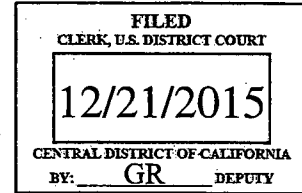
Rozella A. Oliver

13 _____
14 ROZELLA A. OLIVER
15 UNITED STATES MAGISTRATE JUDGE
16

17 **NOTICE**

18 Reports and Recommendations are not appealable to the Court of Appeals,
19 but may be subject to the right of any party to file objections as provided in Local
20 Civil Rule 72 and review by the District Judge whose initials appear in the docket
21 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
22 should be filed until entry of the Judgment of the District Court.
23
24
25
26
27
28





UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Jose Manuel Lopez,

PLAINTIFF(s) / PETITIONER(s)

v.

City of Santa Ana A Municipal Corporation et al,

DEFENDANT(s) / RESPONDENT(s)

CASE NUMBER:

SA 14-1369-SVW-RAO

NOTICE OF FILING OF
MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

TO: All Parties of Record

You are hereby notified that the Magistrate Judge's Report and Recommendation has been filed on
December 21, 2015.

Any party having Objections to the Report and Recommendation and/or order shall, not later than
January 14, 2016, file and serve a written statement of Objections with points and authorities in
support thereof before the Honorable Rozella A. Oliver, U.S. Magistrate Judge. A party may respond to
another party's Objections within 14 days after being served with a copy of the Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of
fact. Upon receipt of Objections and any Response thereto, or upon expiration of the time for filing Objections
or a Response, the case will be submitted to the District Judge for disposition. Following entry of Judgment
and/or Order, all motions or other matters in the case will be considered and determined by the District Judge.

The Report and Recommendation of a Magistrate Judge is not a Final Appealable Order. A Notice of
Appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a Judgment
and/or Order by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: December 21, 2015

By: G. Roberson
Deputy Clerk

4/4 - 10065926

1 **STEVEN J. ROTHANS, SBN 106579**
2 **JILL WILLIAMS, SBN 221793**
3 **JOHNNY RUNDELL, SBN 289480**
4 **CARPENTER, ROTHANS & DUMONT**
5 **888 South Figueroa Street, Suite 1960**
6 **Los Angeles, California 90017**
7 **Tel: (213) 228-0400 / Facsimile: (213) 228-0401**
8 **srothans@crdlaw.com / jwilliams@crdlaw.com / jrundell@crdlaw.com**

9 Attorneys for Defendants

10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 **JOSE MANUEL LOPEZ,**
15 **Plaintiff,**

16 **vs.**

17 **CITY OF SANTA ANA, et. al.,**
18 **Defendant.**

Case No.: CV14-1369 SVW (RAO)

**NOTICE OF ENTRY OF
JUDGMENT OF DISMISSAL**

19 PLEASE TAKE NOTICE that following the Court's Order Accepting the
20 Final Report and Recommendation of United States Magistrate Judge, on January
21 26, 2016, the Honorable Stephen V. Wilson entered judgment in favor of the
22 defendants and against the plaintiff and dismissed this entire action without leave to
23 amend. A copy of the signed judgment is attached hereto as Exhibit "A"

24 DATED: January 27, 2016

CARPENTER, ROTHANS & DUMONT
/s/

By:

25
26 **STEVEN J. ROTHANS**
27 **JILL WILLIAMS**
28 **JOHNNY RUNDELL**
Attorneys for Defendants

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

PROOF OF SERVICE

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 888 S. Figueroa Street, Suite 1960, Los Angeles, California 90017.

On January 27, 2016, I served the foregoing document described as follows:

NOTICE OF NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

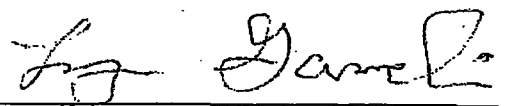
on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Jose Manuel Lopez
1238 South Van Ness Street
Santa Ana, California 92707

BY U.S. MAIL I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 27, 2016, at Los Angeles, California.


Lynn Gandhi

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

Exhibit “A”

JS-6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOSE MANUEL LOPEZ,
Plaintiff,

v.

CITY OF SANTA ANA, et al.,
Defendants.

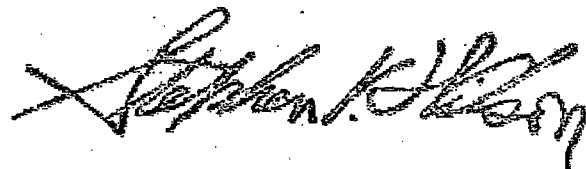
Case No. CV 14-01369 SVW (RAO)

JUDGMENT

Pursuant to the Court's Order Accepting Final Report and Recommendation
of United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the First Amended Complaint and
this action are dismissed without leave to amend.

DATED: January 26, 2016



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE MANUEL LOPEZ,
Plaintiff,

v.

CITY OF SANTA ANA, et al.,
Defendants.

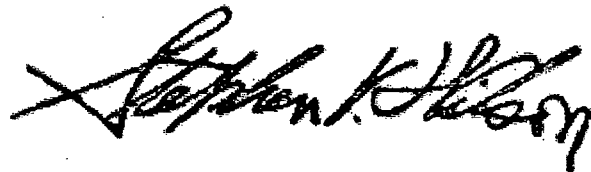
Case No. CV 14-01369 SVW (RAO)

JUDGMENT

Pursuant to the Court's Order Accepting Final Report and Recommendation
of United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the First Amended Complaint and
this action are dismissed without leave to amend.

DATED: January 26, 2016



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE



1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 JOSE MANUEL LOPEZ,
12 Plaintiff,

13 v.

14 CITY OF SANTA ANA, et al.,
15 Defendants.
16

Case No. CV 14-01369 SVW (RAO)

**ORDER ACCEPTING
FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended
18 Complaint, all the records and files herein, and the Final Report and
19 Recommendation of United States Magistrate Judge ("Final Report"). Further, the
20 Court has engaged in a *de novo* review of those portions of the Final Report to
21 which Plaintiff has objected to. The Court accepts and adopts the findings,
22 conclusions, and recommendations of the Magistrate Judge.

23 ///

24 ///

25 ///

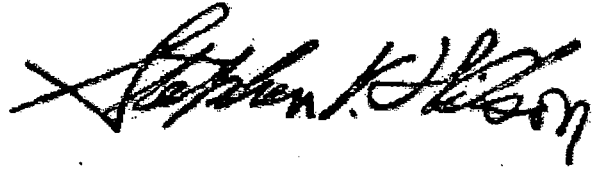
26 ///

27 ///

28 ///

1 IT IS ORDERED that judgment on the pleadings is granted for Defendants
2 Santa Ana Police Department and Officer A. Garcia and Judgment shall be entered
3 dismissing the First Amended Complaint and this action without leave to amend.
4

5 DATED: January 26, 2016



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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

15-10071912
7/11-10074616



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE MANUEL LOPEZ,
Plaintiff,

v.

CITY OF SANTA ANA, et al.,
Defendants.

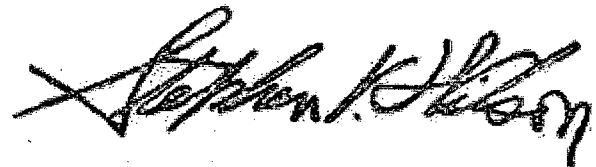
Case No. CV 14-01369 SVW (RAO)

JUDGMENT

Pursuant to the Court's Order Accepting Final Report and Recommendation
of United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the First Amended Complaint and
this action are dismissed without leave to amend.

DATED: January 26, 2016



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

App. 2

APPENDIX B CONTENTS

Ninth Circuit U. S. Court Of Appeal Memorandum

Disposition appears at Appendix__B__to the petition

numbered page(s) 1 - 4

No.

In The

Supreme Court Of The United States

JOSE MANUEL LOPEZ, Plaintiff-Appellant,

PETITIONER

vs.

CITY OF SANTA ANA A MUNICIPAL CORPORATION,

CITY OF SANTA ANA POLICE DEPARTMENT,

CITY OF SANTA ANA POLICE DEPARTMENT

POLICE OFFICER A. GARCIA #3233, Defendants

Respondents, *RESPONDENTS.*

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

App. 1

APPENDIX A CONTENTS The order(s) of the
United States District Court Central District of California
Interim Report(s) Recommendation(s) Final Report
And Recommendation And Judgment Pages 1 – 67

No.

In The

Supreme Court Of The United States

JOSE MANUEL LOPEZ, Plaintiff-Appellant,

PETITIONER

vs.

CITY OF SANTA ANA A MUNICIPAL CORPORATION,

CITY OF SANTA ANA POLICE DEPARTMENT,

CITY OF SANTA ANA POLICE DEPARTMENT

POLICE OFFICER A. GARCIA #3233, Defendants

Respondents, *RESPONDENTS.*

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSE MANUEL LOPEZ,

Plaintiff-Appellant,

v.

CITY OF SANTA ANA, a Municipal
Corporation; et al.,

Defendants-Appellees.

NOT
FOR
PUBLIC
ATION

UNITED
STATES
COURT
OF
APPEAL
S

No. 16-55216

FILED

U OCT 6 2017

MOLLY C. DWYER, CLERK U.S.
COURT OF APPEALS

FOR THE NINTH CIRCUIT

D.C. No. 8:14-cv-01369-SVWRAO

MEMORANDUM¹

Appeal from the United States District Court for
the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted September 26, 2017²

¹ This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

² The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Jose Manuel Lopez appeals pro se from the district court's judgment dismissing his 42 U.S.C. §§ 1983 and 1985 action alleging federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Fed. R. Civ. P. 12(c). *United States v. Teng Jiao Zhou*, 815 F.3d 639, 642 (9th Cir. 2016). We affirm.

The district court properly dismissed Lopez's §§ 1983 and 1985 claims for false arrest and false imprisonment on the basis of the applicable statute of limitations because Lopez's claims accrued more than two years before he filed this action. *See Wallace v. Kato*, 549 U.S. 384, 397, 389 (2007) (§ 1983 claim arising from false arrest "begins to run at the time the claimant becomes detained pursuant to legal process," and a false imprisonment claim begins to run when the alleged false imprisonment ends); *see also* Cal. Civ. Proc. Code § 335.1 (two-year statute of limitations for personal injury claims); *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (California's statute of limitations for personal injury torts applies to §§ 1983 and 1985 claims).

The district court properly dismissed Lopez's claims under the Eighth

Amendment, Fourteenth Amendment, and conspiracy claim under § 1985 because Lopez failed to allege facts sufficient to state plausible claims for relief. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are to be liberally construed, plaintiff must present factual allegations sufficient to state a plausible claim for relief).

The district court properly dismissed Lopez's claim for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), because governmental entities cannot form the necessary criminal intent to commit a RICO violation. *See Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996).

The district court did not abuse its discretion by denying Lopez's motion for summary judgment without prejudice in order to first resolve a pending motion for judgment on the pleadings. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002) ("District courts have 'inherent power' to control their dockets." (citation omitted)).

The district court did not abuse its discretion by declining to exercise supplemental jurisdiction over Lopez's state law claims. *See Ove v. Gwinn*, 264 F.3d 817, 821, 826 (9th Cir. 2001) (setting forth standard of review and explaining that "[a] court may decline to exercise supplemental jurisdiction over related

statelaw claims once it has dismissed all claims over which it has original jurisdiction” (citation and internal quotation marks omitted)). We treat the dismissal of the state law claims as a dismissal without prejudice. *See Gini v. Las Vegas Metro. Police Dep’t*, 40 F.3d 1041, 1046 (9th Cir. 1994) (“When . . . the court dismisses the federal claim leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice.” (citation and internal quotation marks omitted)).

We reject as without merit Lopez’s contentions regarding the continuing violation doctrine and that the district court improperly considered matters outside the pleadings.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions and requests are denied.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

FEB 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE MANUEL LOPEZ,

Plaintiff-Appellant,

v.

CITY OF SANTA ANA, a Municipal
Corporation; et al.,

Defendants-Appellees.

No. 16-55216

D.C. No. 8:14-cv-01369-SVW-
RAO

Central District of California,
Santa Ana

ORDER

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Lopez's petition for rehearing en banc and request for publication of the memorandum disposition (Docket Entry Nos. 32 and 35) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 09 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE MANUEL LOPEZ,

Plaintiff - Appellant,

v.

CITY OF SANTA ANA, a Municipal
Corporation; et al.,

Defendants - Appellees.

No. 16-55216

D.C. No. 8:14-cv-01369-SVW-RAO
U.S. District Court for Central
California, Santa Ana

MANDATE

The judgment of this Court, entered October 06, 2017, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7