8:24-cv-00933-JVS-JDE
Ace Kuumealoha Kelly v. County of Orange et al

**TENTATIVE Order Regarding Motion to Dismiss [17]**

Defendants County of Orange (the "County"), Matthew LeFlore ("LeFlore"), Arthur Tiscareno ("Tiscareno"), Benjamin Laguna ("Laguna"), and Rene De la Rosa ("De la Rosa") (collectively "Defendants") move to partially dismiss Plaintiff Ace Kuumealoha Kelly's ("Kelly") Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Mot., Dkt. No. 17.) Kelly opposed the Motion, (Opp'n, Dkt. No. 28), and Defendants responded, (Reply, Dkt. No. 29.)

For the following reasons, the Court **GRANTS in part and DENIES in part** Defendants' Motion to Dismiss. Kelly shall have twenty-one (21) days leave to amend the claims specified below.

## I. BACKGROUND

This case arise from a series of incidents, beginning October 19, 2020, in which Defendants allegedly fabricated evidence, then deliberately used that falsified evidence to procure Kelly's prosecution. (See generally Compl., Dkt. No. 1.) All four individually named Defendants were employees of the County, specifically the Orange County Sheriff's Department, at the time the alleged violations of Kelly's civil rights occurred. (Id. ¶¶ 5–8.)

On October 19, 2020, Kelly was renting room 130 at the Coral Motel in Buena Park, California. (Id. ¶ 16.) Defendants LeFlore and Tiscareno were conducting surveillance on the motel, specifically of the occupant of room 131, Royal Baker, who they believed was selling methamphetamine. (Id. ¶¶ 19–20.) LeFlore also knew Kelly was staying at the motel and that he was on probation. (Id. ¶ 22.) LeFlore and Tiscareno searched room 131 and found various amounts of illicit narcotics, including 52.2 grams of heroin and 179.9 grams of methamphetamine. (Id. ¶¶ 23–24.) This evidence was labeled as being collected from room 131. (Id. ¶ 25.)

Defendants LeFlore and Tiscareno, knowing Kelly was on probation, decided to conduct a search of his room as well. (Id. ¶ 30.) The search turned up

less than one gram of methamphetamine and approximately 1/8 of an ounce of marijuana. (Id. ¶ 34.) Kelly also had approximately $5,000 in the room, $1,000 in his wallet and $4,000 on the nightstand. (Id. ¶ 35.) As Kelly did not possess any narcotics for sale, (id. ¶¶ 36–38), LeFlore and Tiscareno released him from their custody, (id. ¶ 40.) They took Kelly's $5,000 with them when they left. (Id. ¶ 41.)

The interaction between Kelly and Deputies LeFlore and Tiscareno on October 19, 2020, was documented in a Orange County Sheriff's Department incident report, dated October 20, 2020. (Id. ¶ 42.) This report contained numerous false claims about the type and quantity of drugs found in Kelly's room. (Id. ¶¶ 43–47.) It also only described seizing the $1,000 from Kelly's wallet, but not the $4,000 from his nightstand. (Id. ¶¶ 52–53.) Defendant De la Rosa approved the report on November 10, 2020, and it was then forwarded to the Orange County District Attorney's Office ("District Attorney"). (Id. ¶ 54.) The District Attorney opened a criminal prosecution of Kelly in December 2020. (Id. ¶ 55.)

Through a series of discovery motions, Kelly discovered that evidence from the County's case against Royal Baker had been transferred to his case on November 4, 2020. (Id. ¶¶ 71–73.) Specifically, the methamphetamine from room 131, which was originally booked as evidence in Baker's case, was re-assigned as evidence in Kelly's case by Defendant Laguna. (Id. ¶¶ 75–77.) Laguna moved this evidence with "the assistance and approval of defendant[] De la Rosa," who was acting at the request of LeFlore and Tiscareno . (Id. ¶ 94.) This moving of evidence caused the wrongful prosecution of Kelly, (id. ¶ 92), who was charged with various counts of felony in possession for sale of a controlled substance under California law, (id. ¶ 55.)

After a succeeding an another motion to compel under Brady v. Maryland, 373 U.S. 83 (1963), Kelly received from the County photographs of evidence envelopes allegedly booked by LeFlore and Tiscareno in the case against Kelly, (id. ¶¶ 96, 98). Despite LeFlore and Tiscareno claims to have booked all the evidence against Kelly both in the incident report, (id. ¶ 48), and in open court, (id. ¶ 60), the photographs revealed the evidence envelopes were filed by different officers, (id. ¶ 99.) Yet, the incident report did not indicate either of these officers were involved in the collecting or booking of evidence in Kelly's case. (Id. ¶ 100.) In addition, the envelopes indicated the evidence was collected in room 131,

where Baker was staying, not room 130, where Kelly was staying. (Id. ¶ 101.) Although, on one of the envelopes someone altered the room 131 notation with black marker and wrote room 130 over it. (Id. ¶ 102.)

Kelly made another discovery request on June 1, 2023, seeking handwriting exemplars from the County employees involved with his case. (Id. ¶ 103.) On approximately August 3, 2023, the District Attorney dropped the case against Kelly and dismissed all charges. (Id. ¶ 104.) Kelly believes this occurred because the District Attorney realized the basis for the case was the false incident report and fabrication of evidence by the individual Defendants. (Id. ¶ 105.) Although Kelly recovered the $1,000 that was seized from his wallet, the County never returned the $4,000 taken from his nightstand. (Id. ¶¶ 108–09.)

Kelly filed his Complaint on May 1, 2024, asserting five claims. (See generally id.) He asserts the following due process claims under 42 U.S.C. § 1983 against all the individual Defendants: (1) deliberate fabrication of evidence and concealment of exculpatory evidence in violation of the Fourteenth Amendment, and (2) malicious prosecution in violation of the Fourth, Ninth, and Fourteenth Amendments. (Id. ¶¶ 110–79, 384–417.) He asserts similar claims under a theory of municipal liability against the County. (Id. ¶¶ 180–383, 418–440.) He also asserts a claim against LeFlore and Tiscareno under § 1983 for deprivation of property and unlawful seizure of property in violation of the Fourth and Fourteenth Amendments. (Id. ¶¶ 441–453.) Defendants now seek to dismiss Kelly's first and third claims against De la Rosa and the fifth claim against LeFlore and Tiscareno for failure to state a claim. (See Mot. at 15–20.) They also seek to dismiss all five claims "to the extent [Kelly] alleges a 'conspiracy' to violate [his] civil rights." (See id. at 10.)

## II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a Rule 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept "all well-pleaded" factual allegations as true, and construe such allegations "in the light most favorable to the non-moving party." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). Moreover, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Id. (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

## III. DISCUSSION

Defendants argue much of their conduct is protected under the doctrine of qualified immunity. These acts include: all conduct allegedly involving an alleged conspiracy, all conduct by Defendant De la Rosa, and Defendants Leflore and Tiscareno's alleged theft of Kelly's property.

### *A. Whether Defendants are Entitled to Qualified Immunity*

The doctrine of qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity shields an official even if the conduct resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law. . . . [If] officers of reasonable competence could disagree on th[e] issue [of whether a chosen course of action is constitutional], immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

The Ninth Circuit applies a two-pronged inquiry to resolve claims of qualified immunity. First, the court determines whether the officer's conduct violated a constitutional right. Robinson v. York, 566 F.3d 817, 821 (9th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). This concerns the reasonableness of an officer's mistake of fact. Torres v. City of Madera, 648 F.3d 1119, 1127 (9th Cir. 2011). While an officer's actions are not judged "with the 20/20 vision of hindsight," the court must ask "whether a reasonable officer would have or *should* have accurately perceived that fact." Id. at 1124 (citations omitted). Second, the court must determine whether the constitutional right at issue was "clearly established in light of the specific context of the case" at the time of the events in question. Mattos v. Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (citing Robinson, 566 F.3d at 821). While the Saucier sequence is often appropriate, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, 555 U.S. at 236.

A right is clearly established if "a reasonable officer would recognize that his or her conduct violates that right under the circumstances faced, and in light of the law that existed at that time." Kennedy v. City of Ridgefield, 439 F.3d 1055, 1065–66 (9th Cir. 2006); see also Saucier, 533 U.S. at 202. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). A case need not be directly on point, but existing binding or persuasive precedent "must have placed the statutory or constitutional question beyond debate." Mattos, 661 F.3d at 442 (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011)); see Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (permitting use of persuasive authority). Officials can "be on notice that their conduct violates established law even in novel factual circumstances," because otherwise, they "would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." Mattos, 661 F.3d at 442 (citations omitted). Nonetheless, the Court should "apply the 'clearly established' rule in such a way that faithfully guards 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" Id. (quoting Harlow, 457 U.S. at 807). The plaintiff has the burden

of establishing that constitutional right was "clearly established" at the time of the alleged violation. Clairmont v. Sound Mental Health, 632 F.3d 1091, 1109 (9th Cir. 2011).

1. Civil Conspiracy

Defendants first move to dismiss all of Kelly's claims to the extent that he brings them under a theory that the individual Defendants participated in a conspiracy to frame him. (Mot. at 10.) To establish liability for a conspiracy to violate civil rights, a plaintiff must demonstrate the "existence of 'an agreement or meeting of the minds to violate constitutional rights.'" Mendocino Env't Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th Cir. 1999) (quoting United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540–41 (9th Cir. 1989) (en banc)). The defendants must have, "by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose of harming another which results in damage." Id. (citation omitted). This agreement "need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." Id. (citation omitted). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." United Steelworkers of Am., 865 F.2d at 1541. "Whether defendants were involved in an unlawful conspiracy is generally a factual issue." Mendocino Env't Ctr., 192 F.3d at 1301. That question should be resolved by the jury, "so long as there is a possibility that the jury can infer from the circumstances (that the alleged conspirators) had a meeting of the minds and thus reached a understanding to achieve the conspiracy's objectives." Id. at 1301–02 (citation omitted).

Defendants argue, citing Ziglar v. Abbasi, 582 U.S. 120, 153 (2017), that Kelly's "conspiracy" claim fails because the individual Defendants are entitled to qualified immunity under the intracorporate-conspiracy doctrine. (Mot. at 11.) Under the intracorporate-conspiracy doctrine, "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." Ziglar, 582 U.S. at 153. In Ziglar, the Supreme Court noted that circuits are split as to whether the intracorporate-conspiracy doctrine applies to 42 U.S.C. § 1985(3) violations. Id. Without deciding whether it does, the Court held that as a result of the lack of clarity as to whether the doctrine applies to § 1985(3) violations, the officers "would not have known with

any certainty that the alleged agreements were forbidden by law" and therefore were entitled to qualified immunity. Id. at 155. The Ninth Circuit took a similar approach in Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1060 (9th Cir. 2020), rev'd on other grounds, 595 U.S. 344 (2022), where it found that the lack of clarity as to whether the intracorporate-conspiracy doctrine applied entitled individual defendants to qualified immunity. That lack of clarity continues because the Ninth Circuit has still not ruled on the issue of whether the doctrine applies to civil rights actions. Armstrong v. Reynolds, 22 F.4th 1058, 1085, n.8 (9th Cir. 2022) ("[T]his court has expressly reserved the question 'whether individual members of a single government entity can form a 'conspiracy' within the meaning of section 1985.'" (citation omitted)).

Kelly contends that Defendants' interpretation of Ziglar is "woefully misguided" because they interpret the Supreme Court's qualified immunity ruling too broadly when claiming it applies to conspiracy claims under § 1983. (Opp'n at 6.) He further asserts that Ziglar is "inapplicable" to his claims for a variety of reasons, including that his claims are brought under § 1983, not § 1985. (Id. at 8–10.) In reply, Defendants aver that Kelly misses the point. (Reply at 8.) The question is not whether the intercorporate-conspiracy doctrine is applicable or not, but whether it is clearly established "that intra-corporate conspiracies are actionable under § 1983." (Id. at 9.) They assert Kelly fails to meet his burden of showing such "clearly established" law; therefore, his claims under a theory of conspiracy are barred by qualified immunity. (Id. at 10.)

Defendants' position is more persuasive. The individual Defendants are entitled to qualified immunity on a theory of civil conspiracy because Kelly has "not identified any case demonstrating that it was clearly established that the intracorporate-conspiracy doctrine does not apply in the context of a § 1983 conspiracy claim." Lobato v. Las Vegas Metro. Police Dep't, No. 22-16440, 2023 WL 6620306, at *2 (9th Cir. Oct. 11, 2023); see also Long v. Weeks, No. 23-55004, 2024 WL 1672258, at *1 (9th Cir. Apr. 18, 2024) ("Appellants are entitled to qualified immunity on the conspiracy claim because it is not clearly established that the intracorporate conspiracy doctrine is inapplicable to Section 1983 claims." (citing Ziglar, 582 U.S. at 153)); Faulk v. City of St. Louis, 30 F.4th 739, 750 (8th Cir. 2022) (ruling police officers were entitled to qualified immunity because not clearly established whether intercorporate-conspiracy doctrine applied

to § 1983 conspiracy claims). It is the lack of clarity about the applicability of the intracorporate-conspiracy doctrine to § 1983 claims that is dispositive.

While a majority of circuits have concluded the doctrine does apply to such claims, see, e.g., Jackson v. City of Cleveland, 925 F.3d 793, 818 (6th Cir. 2019) ("We join the Eleventh Circuit and hold that the intracorporate conspiracy doctrine applies in § 1983 suits to bar conspiracy claims where two or more employees of the same entity are alleged to have been acting within the scope of their employment when they allegedly conspired together to deprive the plaintiff of his rights." (citing Grider v. City of Auburn, 618 F.3d 1240, 1261–62 (11th Cir. 2010)); Bowie v. Maddox, 642 F.3d 1122, 1130 (D.C. Cir. 2011) (collecting cases showing seven circuits apply intracorporate-conspiracy doctrine to civil right conspiracies compared to only two that do not), at least two circuits have decided the opposite, see Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1127 (10th Cir. 1994); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1256–59 (3d Cir. 1978 (en banc), vacated on other grounds, 442 U.S. 366 (1979), and the Ninth Circuit has thus far declined to decide the doctrine's applicability in civil rights cases, see Armstrong, 22 F.4th at1085, n.8; Mustafa v. Clark Cnty. Sch. Dist., 157 F.3d 1169, 1181 (9th Cir. 1998).

As the Supreme Court recognized in the qualified immunity context, "[w]hen the courts are divided on an issue . . . a reasonable official lacks the notice required before imposing liability." Ziglar, 582 U.S. at 154; see also Wilson v. Layne, 526 U.S. 603, 618 (1999) (noting that it would be "unfair" to subject officers to damages liability when even "judges . . . disagree"). Although Kelly points out several reasons for why Ziglar is inapplicable, (Opp'n at 8–10), he does not meet his burden of showing that it was "clearly established" that the intracorporate-conspiracy doctrine does not apply in the § 1983 context, Clairmont, 632 F.3d at 1109. Given the present split among the circuits and the Ninth Circuit's lack of ruling on the matter, it seems doubtful that he would be able to do so. Therefore, qualified immunity bars all Kelly's claims to the extent they are brought under a theory of civil conspiracy. See Ziglar, 582 U.S. at 154–55; Lobato, 2023 WL 6620306, at *2; Faulk, 30 F.4th at 750.

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss all Kelly's claims insofar as he brings them under a theory that the individual Defendants participated in a conspiracy to violate his civil rights.

2. De la Rosa

Defendants also separately move to dismiss Kelly's claims against Defendant De la Rosa, which they claim are barred by qualified immunity.[1] (Mot. at 15.) In his first claim, Kelly alleges De la Rosa is liable for falsifying evidence and suppressing exculpatory evidence, both violations of his right to due process under the Fourteenth Amendment. (Compl. ¶¶ 110–79.) In his third claim, he alleges De la Rosa is liable for his malicious prosecution, another due process violation under the Fourteenth Amendment. (Id. ¶¶ 384–417.) He brings these claims via § 1983.

On the Court's reading, Defendants limit their argument for dismissal to Kelly's claim against De la Rosa for fabrication of evidence. (See Mot. at 15–18.) There is no mention of why Kelly's allegations about De la Rosa's efforts to suppress the exculpatory evidence against Kelly or participation in his malicious prosecution should be dismissed. (See id.) Therefore, the Court's analysis focuses primarily on the fabrication arguments. Specifically, whether Kelly's claims plausibly allege De la Rosa is liable for both personally falsifying evidence and supervising the other individual Defendants' fabrications of that same evidence, as Kelly contends. (Opp'n at 15.)

**a. Fabrication of Evidence**

"[T]here is a clearly established constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government." Devereaux v. Abbey, 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc). "To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty." Spencer v. Peters, 857 F.3d 789, 798 (9th Cir. 2017) (citation omitted). To establish the second element of causation, the plaintiff must show two things. First, that the act was the cause in fact of the deprivation of liberty, meaning that

[1]Defendants contend that Kelly's "shotgun" style pleading is "unfairly confusing" because it incorporates allegations from earlier in the Complaint into each of his claims. (Mot. at 15, n.2.) The Court disagrees. While lengthy, it found Kelly's Complaint neither confusing or difficult to understand. Therefore, it declines to take any action on these grounds.

the injury would not have occurred in the absence of the conduct. Id. Second, that the act was the "proximate cause" or "legal cause" of the injury, meaning that the injury is of a type that a reasonable person would see as a likely result of the conduct in question. Id.

As the "clearly established" prong of the qualified immunity analysis is clearly met, see Devereaux, 263 F.3d at 1074–75, the question is whether De la Rosa's conduct violated Kelly's constitutional rights, Robinson, 566 F.3d at 821.

Defendants argue that Kelly's allegations are conclusory and fail to specify what role, if any, De la Rosa played in fabricating evidence or if he even knew there may have been fabricated evidence in the incident report filed by LeFlore. (Mot. at 18.) They further assert that merely being part of a group that allegedly participated in unlawful conduct is not enough to state a claim. (Id.) In response, Kelly contends that his Complaint clearly lays out allegations that De la Rosa is liable both for his individual participation and role as a supervisor. (Opp'n at 15.) He specifically identifies allegations where, he claims, De la Rosa's illegal conduct is identified, including that he knew Defendants LeFlore and Tiscareno fabricated the evidence used to initiate Kelly's prosecution by the District Attorney. (Id.) In reply, Defendants reiterate that Kelly's allegations fail to demonstrate that De la Rosa knowingly adopted a false report or that he consciously participated in any wrongdoing. (Reply at 11–12.) They contend that Kelly's argument should be rejected because he claims that, by merely being in a supervisory position, it should be assumed De la Rosa knew about the fabricated evidence. (Id. at 14.) However, Kelly fails to provide any specific allegations illustrating this awareness. (Id.)

*i. Personal Participation*

Kelly asserts that the Complaint sufficiently alleges that De la Rosa is liable for his personal participation in the fabrication of evidence used in the case against him. (Opp'n at 15.) For this argument to be true, the Kelly must plausibly allege that De la Rosa's conduct meets the standard laid out in Spencer. See 857 F.3d at 798. Kelly fails to do so.

From the outset, the Court finds that Kelly fails to satisfy the second Spencer element, because he does not allege that he was deprived of his liberty as

a result of the deliberate fabrication of evidence by any Defendant. (See generally Compl.) At most, he alleges he was handcuffed and detained by Defendants LeFlore and Tiscareno when the searched his room at the Coral Motel. (Id. ¶ 33.) However, this occurred before the Defendants allegedly fabricated any evidence and filed a falsified incident report.[2] Therefore, his fabrication claim against De la Rosa as an individual fails because he does not adequately allege the required elements of the claim. See Spencer, 857 F.3d at 798.

Beyond this insurmountable factual deficiency, Kelly's allegations also fall short for other reasons. He claims De la Rosa assisted and provided inputs to Defendant LeFlore when the latter was drafting the incident report containing numerous falsities about the contents of Kelly's room at the Coral Motel. (Compl. ¶ 121 ("[O]n October 20, 2020, defendant LeFlore, with the assistance and input of . . . De la Rosa . . . drafted an Incident Report, Orange County Sheriff's Department Case Number DR# 20-035204, falsely alleging that on October 19, 2020, said defendants found large amounts of methamphetamine, heroin, and fentanyl in in [sic] plaintiff Kelly's possession in Room #130, and that plaintiff Kelly possessed these substances for sale in violation of Cal. H&S Code §§ 11351 and 11378."); see also id. ¶¶ 123–32, 135–37, 169 (similar).)[3] These allegations, as related to De la Rosa, are conclusory and do not allow the Court to "draw the reasonable inference that [De la Rosa] is liable" as an individual participant in the deliberate fabrication of evidence. See Iqbal, 556 U.S. at 678. For example, Kelly does not specify how De la Rosa assisted LeFlore in drafting the falsified incident report or what "input[s]" he made. Rather, the allegations appear to be "[t]hreadbare recitals of the elements of" a deliberate fabrication claim, see Spencer, 857 F.3d at 798, which will "not suffice[,]" Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

[2]Kelly was detained during the search on October 19, 2020. (Compl. ¶¶ 19, 29, 33.) Defendant LeFlore did not start drafting the incident report until the next day, October 20, 2020. (Id. ¶ 42.)

[3]The remaining allegations pertaining to De la Rosa are more properly categorized as relating to supervisor liability, which the Court addresses below. (See, e.g., Compl. ¶ 54 (alleging De la Rosa "approved" LeFlore's fabricated report).)

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Kelly's first claim for fabrication of evidence against Defendant De la Rosa insofar as it pertains to his role as an individual participant in the alleged fabrication.

*ii. Supervisor Liability*

Kelly also argues that he plausibly alleges De la Rosa is liable for fabricating evidence under a theory of supervisor liability. (Opp'n at 15.) A defendant may be held liable as a supervisor under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (citation omitted). "The requisite causal connection can be established . . . by setting in motion a series of acts by others," or by "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury." Id. at 1207–08 (alterations in original) (citations omitted). "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." Id. at 1208 (quoting Watkins v. City of Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998)). Supervisors need not be physically present at the scene or actively participating in the constitutional violation. Larez v. City of Los Angeles, 946 F.3d 630, 646 (9th Cir. 1991).

To start, Defendants do not challenge the sufficiency of the allegations against the other individual Defendants regarding Kelly's fabrication of evidence claim. (See generally Mot.) Because the Court must accept "all well-pleaded" factual allegations as true, and construe such allegations "in the light most favorable to the non-moving party" when assessing a Motion to Dismiss under Rule 12(b)(6), Daniels-Hall, 629 F.3d at 998, the Court accepts the allegations that Defendants LeFlore, Tiscareno, and Laguna are liable for fabricating evidence as true. It, therefore, assesses the allegations against De la Rosa for supervisor liability through that lens.

As discussed above, Kelly fails to allege that he was deprived of his liberty as a result of the deliberate fabrication of evidence by any Defendant. Therefore, his fabrication claim against De la Rosa under a theory of supervisor liability also

fails because he does not adequately allege the required elements of the claim. See Spencer, 857 F.3d at 798.

Subject to remedying this dispositive factual deficiency, Kelly may bring a supervisor liability claim under the Fourteenth Amendment because his remaining allegations are sufficient to state a claim. Defendants attempt to minimize De la Rosa's role as a supervisor is unconvincing. (See Mot. at 17.) Kelly alleges that De la Rosa "approved" LeFlore's allegedly fabricated report and "forwarded it" to the District Attorney "to procure criminal charges against" Kelly. (Compl. ¶¶ 54, 164.) He further alleges De la Rosa did this with the knowledge that Defendants LeFlore and Tiscareno "had not timely collected or booked the subject narcotics" evidence and that they "improperly obtained the narcotics" evidence from the case against Barker and falsely claimed that they seized it from Kelly. (Id. ¶ 166.) Kelly also asserts that De la Rosa approved the fabricated incident report knowing that LeFlore and Tiscareno had "a long history of deliberately mishandling evidence . . . of framing innocents by fabricating incriminating evidence." (Id. ¶ 167.) Put another way, Kelly alleges De la Rosa "knew" Kelly was innocent of the crimes he was charged with by the District Attorney and "committed the actions" in the Complaint "to knowingly frame" Kelly. (Id. ¶ 168.)

These factual allegations are enough "to state a claim to relief" for supervisor liability "that is plausible on its face." Twombly, 550 U.S. at 570. Although Defendants question how De la Rosa was supposed to know about the alleged fabrications by his subordinates, (Reply at 14), the allegations are sufficient because they claim De la Rosa had personal knowledge of and acquiesced to the constitutional violations that led to Kelly's injuries, see Starr, 652 F.3d at 1208 (finding plaintiff plausibly alleged supervisor liability when defendant has been given clear notice of specific unconstitutional conditions); see also Hydrick v. Hunter, 669 F.3d 937, 942 (9th Cir. 2012) (ruling that "Plaintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates" to properly allege supervisor liability); but cf. Henry A. v. Willden, 678 F.3d 991, 1004 (9th Cir. 2012) (finding allegation of supervisory liability insufficient where complaint "does not allege . . . any personal knowledge of the specific constitutional violations that led to Plaintiffs' injuries"). Moreover, he alleges De la Rosa had prior awareness of LeFlore and Tiscareno's proclivity for fabricating evidence and, not only did not stop it, but approved their behavior. See Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007)

(finding theory of supervisor liability could proceed when allegations claimed school administrator had prior knowledge of abuse but did not report or attempt to stop it).

In sum, at this stage, Kelly must plead factual allegations that plausibly give rise to an entitlement to relief. Iqbal, 556 U.S. at 679. The allegations in the Complaint, if not for the failure to allege deprivation of liberty, allow the Court to reasonably infer that De la Rosa is liable for fabrication of evidence under a theory of supervisor liability. Alleged acts such as De la Rosa approving the fabricated incident report when he knew LeFlore and Tiscareno improperly moved evidence from Baker's case to Kelly's and had a history of similar misconduct, (Compl. ¶¶ 166–67), would be sufficient for the Court to conclude that De la Rosa, through his "own culpable action or inaction in the . . . supervision, or control of his subordinates" and "his acquiescence in the constitutional deprivation[,]" is plausibly liable for supervisor liability under § 1983, see Starr, 652 F.3d at 1208. However, because Kelly has not sufficiently alleged that De la Rosa's acquiescence of LeFlore, Tiscareno, and Laguna's deliberate fabrication of evidence is what "caused [his] deprivation of liberty," the Court must dismiss his claim. See Spencer, 857 F.3d at 798.

Consequently, the Court **GRANTS** Defendants' Motion to Dismiss Kelly's first claim for fabrication of evidence against Defendant De la Rosa insofar as it pertains to his role as a supervisor of the other individual Defendants.

### b. Suppression of Exculpatory Evidence

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). The elements of a civil Brady claim against a police officer are: "(1) the officer suppressed evidence that was favorable to the accused from the prosecutor and the defense, (2) the suppression harmed the accused, and (3) the officer 'acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors.'" Mellen v. Winn, 900 F.3d 1085, 1096 (9th Cir. 2018) (quoting Tennison v. City and Cnty. of S.F., 570 F.3d 1078, 1087, 1089 (9th Cir. 2009)).

As mentioned, Defendants make no argument about why Kelly's claim for suppression of exculpatory evidence against De la Rosa should be dismissed. (See generally Mot.) The cursory effort of simply moving to dismiss a claim without argument will not suffice. Cf. Vasquez v. Rackauckas, 734 F.3d 1025, 1054 (holding courts "do not consider issues raised for the first time in reply briefs." (citation omitted)). The Court will not undertake an effort to dismiss Kelly's claim on grounds the Defendants did not properly raise. Therefore, the Court finds Defendants do not show that Kelly fails to state a claim for relief. Accordingly, the Court **DENIES** Defendants' Motion to Dismiss Kelly's claim for suppression of exculpatory evidence against De la Rosa.

### c. Malicious Prosecution

"In order to prevail on a Section 1983 claim of malicious prosecution, a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.'" Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004) (alterations in original) (citation omitted). Moreover, "a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in plaintiff's favor." Heck v. Humphrey, 512 U.S. 477, 489 (1994).

"Malicious prosecution actions are not limited to suits against prosecutors but may be brought . . . against other persons who have wrongfully caused the charges to be filed." Awabdy, 368 F.3d at 1066 (citing Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119, 1126–27 (9th Cir. 2002)). However, the Ninth Circuit applies an evidentiary presumption that the prosecutor used independent judgment in choosing to prosecute. Id. at 1067; Borunda v. Richmond, 885 F.2d 1384, 1390 (9th Cir. 1988). That presumption can be rebutted "by evidence that the investigating officers made material omissions or gave false information to the prosecutor." Borunda, 885 F.2d at 1390; see also Awabdy, 368 F.3d at 1067 ("T]he presumption of prosecutorial independence does not bar a subsequent § 1983 claim against state or local officials who improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings." (citing Galbraith, 307 F.3d at 1126–27)). Thus, the prosecutor's charging decision may not shield the officer from liability. Awabdy, 368 F.3d at 1067; Tatum v. Moody, 768 F.3d 806,

819 (9th Cir. 2014) ("'If police officers have been instrumental in the plaintiff's continued confinement or prosecution, . . . they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." (quoting Jones v. City of Chi., 856 F.2d 985, 994 (7th Cir. 1988)).

Similar to Kelly's suppression of exculpatory evidence claim, Defendants make no argument for why his malicious prosecution claim against De la Rosa should be dismissed. (See generally Mot.) As discussed, such a cursory effort by Defendants is insufficient. Accordingly, the Court **DENIES** Defendant's Motion to Dismiss Kelly's third claim against Defendant De la Rosa.

3. Unlawful Seizure of Personal Property

Kelly's fifth claim is brought under both the Fourth and Fourteenth Amendments via § 1983 for deprivation and unlawful seizure of property against Defendants LeFlore and Tiscareno. (Compl. ¶¶ 441–453.) LeFlore and Tiscareno contend this claim is barred by qualified immunity because "such property-based claims do not give rise to a viable federal cause of action." (Mot. at 19.) Specifically, LeFlore and Tiscareno claim the Supreme Court has found that the intentional deprivation of property by government actors "does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available" under state tort law. (Id. (quoting Hudson v. Palmer, 468 U.S. 517, 533 (1984).) Because California provides for an adequate post-deprivation remedy for tort claims against public entities, LeFlore and Tiscareno assert that Kelly was required to pursue relief for the $4,000 through that channel, instead of a claim under § 1983. (Id. at 19–20.)

Kelly counters that his claim is one of substantive, not procedural due process. (Opp'n at 20.) The standard for violating substantive due process rights, according to Kelly, is showing the government's conduct was "arbitrary and unreasonable" with "no substantial relation to the public health, safety, morals, or general welfare." (Id.) Viewed through that lens, he argues Defendants LeFlore and Tiscareno's conduct in taking the $4,000 clearly violated this established law. (Id.) Thus, they should not be entitled to qualified immunity. (Id.)

In reply, LeFlore and Tiscareno argue that Kelly failed to establish that there is clearly established law that officers who allegedly stole seized property violate one's substantive due process rights. (Reply at 15.) To illustrate this point, they identify a Ninth Circuit case, Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019), where that court found that it was not clearly established law that officers stealing property violated the substantive due process clause of the Fourteenth Amendment. (Id. at 16.) Given that Kelly has the burden of showing that a constitutional right was "clearly established" at the time of the alleged violation, LeFlore and Tiscareno reiterate their contention that his fifth claim is barred by qualified immunity. (Id.)

To begin, Kelly has not met his burden of establishing that there was a "clearly established" substantive due process right to be free from theft of his property under the Fourteenth Amendment at the time of the alleged violation. See Clairmont, 632 F.3d at 1109. Indeed, the Ninth Circuit has recently held that it has never found "officers violate the substantive due process clause of the Fourteenth Amendment when they steal property" after legally seizing it. Jessop, 936 F.3d at 943; see also Lee v. City of Chi., 330 F.3d 456, 466–68 (7th Cir. 2003) (holding that Fourteenth Amendment's substantive due process clause does not provide relief when government refuses to return lawfully seized property). Kelly fails to identify any authority contravening the Ninth Circuit's ruling in Jessop. Thus, the Court concludes Kelly failed to meet his burden of establishing such a right was "clearly established." The Court therefore finds that Defendants LeFlore and Tiscareno are entitled to qualified immunity for the alleged theft of Kelly's $4,000 on Fourteenth Amendment grounds and **GRANTS** their Motion under that theory of relief.

LeFlore and Tiscareno, however, do not address the Fourth Amendment grounds for Kelly's claim. The sole focus of their arguments in both the Motion and Reply is the Fourteenth Amendment. Therefore, because LeFlore and Tiscareno offer no reason for why the claim should be dismissed on Fourth Amendment grounds, the Court finds that dismissal of Kelly's claim on that basis is inappropriate.

Even if they had addressed the Fourth Amendment aspect of Kelly's claim, the result would not be as clear cut as it is on Fourteenth Amendment grounds. Although Jessop found that there was no "clearly established" Fourth Amendment right to have lawfully seized property returned, it did so because the alleged

incident in that case took place before the Ninth Circuit's decision in Brewster v. Beck, 859 F.3d 1194 (9th Cir 2017). Jessop, 936 F.3d at 942 ("Even if the facts and reasoning of Brewster would dictate the outcome of this case, however, it was not clearly established law when the City Officers executed the search warrant. The City Officers seized Appellants' property in 2013, but Brewster was not decided until 2017."). In other words, the Jessop's court reasoning for applying qualified immunity to the plaintiff's Fourth Amendment claim was that "the law was not clearly established at the time of the incident." Id. The same cannot be said here. The alleged theft of Kelly's $4,000 occurred in October 2020, three years after Brewster. (Compl. ¶ 442.)

Judge Smith, the author of both the majority and concurring opinions in Jessop, questioned the accuracy of Brewster, but acknowledged that under its rationale, the alleged theft of Jessop's property by officers "might have been a Fourth Amendment seizure."[4] Id. at 941. This makes sense because Brewster held that "[a] seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification." 859 F.3d at 1197. Moreover, that court found that "[t]he Fourth Amendment doesn't become irrelevant once an initial seizure has run its course." Id. (citations omitted). While the precise question of whether officers failing to return lawfully seized money after the justification for that seizure expires was not addressed in Brewster, the Court finds it is sufficiently bound by its precedent that the government must cease its seizure of private property when its justification runs its course. See Mattos, 661 F.3d at 442. Accepting Kelly's well-pleaded allegations as true, the Court finds that both prongs of the qualified immunity inquiry are met because he alleges his $4,000 was not returned even after the charges were dropped and any justification for retaining the money ended. Under Brewster, it was "clearly established" that such conduct was unconstitutional. See 859 F.3d at 1197. Therefore, dismissal of Kelly's fifth claim on Fourth Amendment grounds is unwarranted. Consequently,

[4]Judge Smith's concurrence raises several points about whether Brewster properly interprets Supreme Court precedent about the point when a seizure by the government is complete. Jessop, 936 F.3d at 943 (Smith, J., concurring). That said, as Judge Smith's majority opinion implicitly recognizes, neither that panel, nor for that matter this Court, are in a position to overrule or abrogate Brewster. See id. at 942; see also Day v. Apoliona, 496 F.3d 1027, 1031 (9th Cir. 2007) (finding that district courts cannot disregard circuit precedent unless intervening Supreme Court authority is clearly irreconcilable with prior circuit authority).

the Court **DENIES** the Motion to Dismiss Kelly's fifth claim to the extent that it is brought under the Fourth Amendment.

Accordingly, the Court **GRANTS in part and DENIES in part** the Motion to Dismiss Kelly's fifth claim for unlawful seizure of personal property under the doctrine of qualified immunity.

*B. Leave to Amend*

Kelly requests that, if the Court rules his Complaint is insufficient in any way, that he be given leave to amend to cure any defects. (Opp'n at 21.) Based on the Ninth Circuit's "long-established liberal policy toward amendment," see, e.g., In re Sambo's Rests., Inc., 754 F.2d 811, 816 (9th Cir. 1985), the Court will allow Kelly to amend his allegations, in part. As "there is a clearly established constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government," see Devereaux, 263 F.3d at 1074–75, the Court grants Kelly **leave to amend** his allegations against De la Rosa as to whether the latter's conduct violated Kelly's constitutional rights, Robinson, 566 F.3d at 821.

As amendment could not cure the non-existence of clearly established law, the dismissal of all Kelly's claims under a theory of civil conspiracy and his fifth claim for alleged theft of property on Fourteenth Amendment grounds is **without leave to amend**. See Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth the standard of review and stating that leave to amend may be denied where amendment would be futile); Armstrong v. Reynolds, 22 F.4th 1058, 1071 (9th Cir. 2022) ("[P]laintiffs should be granted leave to amend their complaints unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." (citations omitted)).

## IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** Defendants' Motion to Dismiss. Kelly shall have twenty-one (21) days leave to amend the claims specified above.

**IT IS SO ORDERED.**