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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GEORGE JERICICH,

Plaintiff,

v.

COUNTY OF MERCED, JOHN  
HERRELL, DEIRDRE KELSEY, JOHN  
L. FAGUNDES, LEON MARTINEZ,  
WILLIAM NICHOLSEN, LEO ROBERT  
AYERS, AND RICHARD GRAVES;  
DOES 1-10,

Defendants.

1:06-CV-00232-OWW-DLB

MEMORANDUM DECISION AND ORDER  
GRANTING IN PART AND DENYING  
IN PART DEFENDANTS' MOTION TO  
DISMISS

1. INTRODUCTION

Plaintiff George Jercich ("Jercich"), proceeding pro se, brought this action against County of Merced and various County employees ("County Defendants"), John L. Fagundes ("Fagundes"), and Robert L. Ayers ("Ayers"). County Defendants and Ayers move to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Plaintiff has not opposed the motions.

2. Procedural History

The complaint was filed on February 28, 2006. (Doc. 1-1, Complaint for Violation of George Jercich's Civil Rights ("Complaint").) County Defendants moved to dismiss on May 12, 2006. (Doc. 16, Mot. to Dismiss by Defs. County of Merced, John Herrell, Deirdre Kelsey, Leon Martinez, William Nicholson, and Richard Graves ("County Defs. Mot. to Dismiss").) Ayers moved to dismiss on May 24, 2006. (Doc. 18-3, Mem. of Points and

1 Authorities in Supp. of Mot. to Dismiss by Def. Robert L. Ayers  
2 ("Ayers Mot. to Dismiss".) Fagundes does not respond to  
3 Jercich's complaint. Jercich did not file an opposition to  
4 either motion to dismiss.

5 **3. Background**

6 Jercich alleges that the County of Merced, several County  
7 officers, including Fagundes, and Ayers, conspired to deprive  
8 Jercich of equal protection under the law and to commit fraud in  
9 the sale of the real property. (Doc. 1-1, Complaint ¶¶ 11-15.)  
10 Fagundes is the seller of real property to Jercich. (*Id.* ¶ 6.)  
11 Ayers is the president of TransCounty Title Company, the escrow  
12 company involved in the sale. (Doc. 18-2, Aff. of Robert L.  
13 Ayers ¶¶ 2, 6.) Jercich filed suit on February 28, 2006 against  
14 County Defendants, Fagundes, and Ayers. (Doc. 1-1, Complaint.)

15 County Defendants raised a statute of limitations defense.  
16 (Doc. 16, County Defs. Mot. to Dismiss at 7-8.) They also moved  
17 for a more definite statement under Rule 12(e), contending that  
18 Jercich incorrectly invokes federal jurisdictional grounds, makes  
19 only conclusory allegations, and fails to allege comprehensible  
20 claims. (*Id.* at 8-9.) Ayers moves to dismiss for lack of  
21 subject-matter jurisdiction under Rule 12(b)(1). (Doc. 18-3,  
22 Ayers Mot. to Dismiss at 2.) Ayers alternatively moves to  
23 dismiss pursuant to Rule 12(b)(7), failure to join an  
24 indispensable party under Rule 19, although he does not identify  
25 the absent party. (*Id.*) County Defendants and Ayers both move  
26 to dismiss the complaint for improper service of process, failure  
27 to comply with Rule 8, and failure to state a claim for relief as  
28 a § 1983 action. (Doc. 16, County Defs. Mot. to Dismiss at 2;

1 Doc. 18-3, Ayers Mot. to Dismiss at 2.)

2 **4. Factual History**

3 Fagundes originally owned 260 acres of land. (Doc. 1-1,  
4 Complaint ¶ 14.) In 1996, the County permitted Fagundes to  
5 subdivide his land into three parcels, one of which, 46 acres,  
6 was purchased by Jercich. (*Id.*) Prior to Fagundes' ownership,  
7 Jercich claims that Jercich's property had been "illegally  
8 backfilled under a permit issued by [Merced County] between 1969  
9 and 1971." (*Id.*) Plaintiff claims reasonable inspection of the  
10 property did not reveal this backfilling until thirty-one to  
11 thirty-four years later. (*Id.*) Fagundes described the property  
12 as a "residential parcel." (*Id.*) Jercich claims that much of  
13 his property is "unbuildable . . . without significant additional  
14 expenditures." (*Id.*)

15 In "late 2002," Jercich purchased from Fagundes the forty-  
16 six acre property located at 7800 Merced Falls Road. (Doc. 1-1,  
17 Complaint ¶ 12.) Jercich and Fagundes met Ayers during the  
18 escrow proceedings. (*Id.*) Ayers is the president of TransCounty  
19 Title Co., a privately-owned escrow company. (See Doc. 18-2,  
20 Aff. of Robert L. Ayers ¶¶ 2, 5, and 6.)

21 Some unspecified time afterwards, John Herrell ("Herrell"),  
22 deputy environmental health officer of Merced County, and Richard  
23 Graves ("Graves"), deputy building officer for Merced County  
24 Building Department, cited Jercich for various code violations.  
25 (Doc. 1-1, Complaint ¶ 4, 10, 13.) The violations included piles  
26 of "tires, wheels and other refuse" as well as Jercich's lack of  
27 a Certificate of Occupancy to live in his mobile home. (*Id.* ¶  
28 13.) Jercich explained that he was "compelled" to live there

1 because he was "robbed of significant personalty." (*Id.*)  
2 Jercich alleges that Graves and Herrell, his neighbors, engaged  
3 in numerous violations themselves, yet the County did not enforce  
4 land use regulations against them.<sup>1</sup> (*Id.*) In July of 2005,  
5 while hurrying to meet a deadline to dispose of his refuse,  
6 Jercich claims he was nearly "crushed to death" by a tractor.  
7 (*Id.*) As a result, he allegedly suffers from intense pain and is  
8 heavily medicated just to function at 60% of his pre-accident  
9 capability. (*Id.*)

10 At another unspecified time, Deirdre Kelsey ("Kelsey"), a  
11 County Supervisor, met with Leon Martinez ("Martinez"), former  
12 Chief Code Enforcement Officer of Merced County's Planning  
13 Department. (Doc. 1-1, Complaint ¶ 5, 7.) Jercich alleges they  
14 prevented him from subdividing his property. (*Id.* ¶ 15.) Prior  
15 to this, Kelsey's husband had sought to purchase a quantity of  
16 "saleable rock" from Jercich. (*Id.* ¶ 15.) Jercich refused  
17 because the offer was much less than the rock's supposed worth.  
18 (*Id.*) In retaliation, Jercich claims that Kelsey acted to "make  
19 certain [Jercich] could not subdivide his property" by "working  
20 behind the scenes" to influence the Board's vote on his proposed  
21 subdivision. (*Id.*) Kelsey recused herself from the Board vote,  
22 an act that Jercich labeled "specious." (*Id.*) Jercich had  
23 allegedly worked on his land for two years and had spent \$12,000  
24 in anticipation of receiving approval of his proposed  
25 subdivision. (*Id.*) Because his subdivision failed, Jercich

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27 <sup>1</sup> Examples of violations included illegal mobile home dwellings, illegal  
28 wood-burning stove, and "much more egregious piles of junk and tires" on their  
land. (Complaint ¶ 13.)

1 claims to have lost a pending business offer of \$250,000 for 12  
2 acres of his land. (*Id.*) He claims this lost opportunity caused  
3 him to file bankruptcy. (*Id.*)

4 Jercich seeks \$1,000,000 in damages and "further relief as  
5 is just." (*Id.* ¶ 17.) Jercich throughout his complaint makes  
6 conclusory statements as to the existence of conspiracies to  
7 deprive him of his civil rights and to defraud him. He does not  
8 state facts concerning the emotional distress he suffered.

9 Jercich alleges a civil rights violation for deprivation of  
10 his "equal protection under the law." (Doc. 1-1, Complaint ¶  
11 13.) Defendants assume *arguendo* that Jercich's claim is for  
12 violation of his civil rights under § 1983.<sup>2</sup> (See Doc. 16,  
13 County Defs. Mot. to Dismiss at 7; Doc. 18-3, Ayers Mot. to  
14 Dismiss at 3.)

15 Jercich served County Defendants by mail using a private  
16 process server. (See Docs. 5-8 & 10-11, Summons on County Defs.  
17 at 2.) The summons and complaint were sent by first Class U.S.  
18 Mail to 2222 M St., Merced, CA. (*Id.*) Whose address this is, is  
19 unknown. Jercich served Ayers by first class mail to Ayers'  
20 workplace. (See Doc. 12, Summons on Ayers at 2) (sent by First  
21 Class U.S. Mail to TransCounty, 633 W. 19th St., Merced, CA).  
22 Jercich did not seek waiver of service or provide acknowledgment  
23 or receipt of the mailed summons and complaint.

## 24 **5. Analysis**

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25  
26 <sup>2</sup> 42 U.S.C. § 1983 (2000) (Civil Action for Deprivation of Rights). For  
27 a successful § 1983 action, the conduct must be under color of state law, and  
28 the conduct must result in the denial of constitutional rights. *Parratt v.*  
*Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by*  
*Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

1 In deciding whether to grant a motion to dismiss, the court  
2 "accept[s] all factual allegations of the complaint as true and  
3 draw[s] all reasonable inferences" in the light most favorable to  
4 the nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th  
5 Cir. 1999); see also *Rodriguez v. Panayiotou*, 314 F.3d 979, 983  
6 (9th Cir. 2002). A court is not "required to accept as true  
7 allegations that are merely conclusory, unwarranted deductions of  
8 fact, or unreasonable inferences." *Spewell v. Golden State*  
9 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

10 In general, "a *pro se* complaint will be liberally construed  
11 and will be dismissed only if it appears beyond doubt that the  
12 plaintiff can prove no set of facts in support of his claim which  
13 would entitle him to relief." *Pena v. Gardner*, 976 F.2d 469, 471  
14 (9th Cir. 1992). However, "a liberal interpretation of a [pro  
15 se] complaint may not supply essential elements of the claim that  
16 were not initially pled." *Id.*

## 17 **6. Federal Claims**

### 18 **A. Federal Subject-Matter Jurisdiction**

19 A federal court has jurisdiction under 28 U.S.C. § 1331 when  
20 a "well-pleaded complaint" shows that federal law created the  
21 claim or that the plaintiff's relief depends on "a substantial  
22 question of federal law."<sup>3</sup> *Empire Health Choice Assur., Inc. v.*  
23 *McVeigh*, 126 S. Ct. 2121, 2131 (2006). A well-pled complaint  
24 means that the federal question must be apparent on the face of  
25 the complaint. See *Cal. ex. rel. Lockyer v. Dynegy, Inc.*, 375  
26

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27 <sup>3</sup> "District courts shall have original jurisdiction of all civil actions  
28 arising under the Constitution, laws, or treaties of the United States." 28  
U.S.C. § 1331 (2005). Diversity jurisdiction is not invoked.

1 F.3d 831, 838 (9th Cir. 2004); see also *Phillips Petroleum Co. v.*  
2 *Texaco, Inc.*, 415 U.S. 125, 127-28 (1974).

3 Parties can raise challenges to federal subject-matter  
4 jurisdiction as provided by a Rule 12(b)(1) motion to dismiss for  
5 lack of subject-matter jurisdiction. Even in the absence of a  
6 party challenge, federal courts have an obligation to determine  
7 whether subject-matter jurisdiction exists. See *Ruhrgas AG v.*  
8 *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). A federal question  
9 claim is properly dismissed for lack of subject-matter  
10 jurisdiction if it is "immaterial and solely for the purpose of  
11 obtaining federal jurisdiction" or "wholly insubstantial and  
12 frivolous." *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1244 n.10  
13 (2006) (citations omitted).

14 **1. Ayers' Motion to Dismiss for Lack of Subject-**  
15 **Matter Jurisdiction**

16 Jercich's allegations of an equal protection violation, as  
17 well as his filing suit in federal court, suggest that he brings  
18 suit under § 1983, which if applicable would satisfy federal-  
19 question jurisdiction under 28 U.S.C. §§ 1331 and 1334. Ayers  
20 moves to dismiss for lack of subject-matter jurisdiction. Ayers  
21 correctly argues that Jercich does not identify facts supporting  
22 federal subject-matter jurisdiction.<sup>4</sup> Ayers disputes federal  
23 jurisdiction, as no conduct under color of state law is alleged.

24 \_\_\_\_\_  
25 <sup>4</sup> Jercich erroneously brings his complaint under California Government  
26 Code Title 1, Division 3.6, entitled "Claims and Actions Against Public  
27 Employees and Public Entities." (Doc. 1-1, Complaint.) He cites 28 U.S.C. §  
28 157(b)(2)(1), a nonexistent section, for federal subject-matter jurisdiction.  
*Id.* Title 28 U.S.C. § 157(b)(1) provides for what sort of cases and "core  
proceedings" a *bankruptcy* judge may hear. Section 157(b)(2) provides the  
definition of "core proceedings." Neither of these sections gives  
jurisdiction in this matter.

1 *Parratt*, 451 U.S. at 535. He contends Jercich's complaint does  
2 not allege Ayers is a state actor.

3 Ayers conflates federal subject-matter jurisdiction with a  
4 plaintiff's need to prove the defendant liable under federal law,  
5 a "merit-based determination." See *Arbaugh*, 126 S. Ct. at 1242  
6 (citations omitted). Jercich's complaint on its face claims an  
7 equal protection deprivation by County Defendants and Ayers  
8 acting in concert in their alleged selective prosecution of  
9 Jercich's code violations and the denial of his subdivision plan  
10 to deprive him 14th Amendment of his due process right to  
11 enjoying free ownership and use of his real property by virtue of  
12 his differential treatment from others similarly situated. This  
13 is sufficient to invoke federal subject-matter jurisdiction to  
14 hear this claim pursuant to § 1331. Whether these allegations  
15 sufficiently state a claim is a separate issue. Ayers' motion to  
16 dismiss pursuant to Rule 12(b)(1) is **DENIED**.

17 **B. Service of Process**

18 Jercich does not state whether he sues County Defendants and  
19 Ayers in their official and/or individual capacity. Both are  
20 assumed.

21 Rule 4 of the Federal Rules of Civil Procedure governs  
22 service of process. Plaintiff must cause a copy of the summons  
23 and the complaint to be delivered to the defendants. Fed. R.  
24 Civ. P. 4(c)(1). Rule 4(e) pertains to service on individuals  
25 and states in relevant part:

26 Unless otherwise provided by federal law,  
27 service upon an individual from whom a waiver  
28 has not been obtained and filed . . . may be  
effected in any judicial district of the  
United States:

1 (1) pursuant to the law of the state in  
2 which the district court is located, or  
3 in which service is effected, for the  
4 service of a summons upon the defendant  
5 in an action brought in the courts of  
6 general jurisdiction of the State; or

7 (2) by delivering a copy of the summons and  
8 of the complaint to the individual  
9 personally or by leaving copies thereof  
10 at the individual's dwelling house or  
11 usual place of abode with some person of  
12 suitable age and discretion then  
13 residing therein or by delivering a copy  
14 of the summons and of the complaint to  
15 an agent authorized by appointment or by  
16 law to receive service of process.

17 Fed. R. Civ. P. 4(e).

18 Rule 4(j) (2) pertains to service on municipal governments  
19 and states in relevant part:

20 Service upon a state, municipal corporation,  
21 or other governmental organization subject to  
22 suit, shall be effected by delivering a copy  
23 of the summons and of the complaint to its  
24 chief executive officer or by serving the  
25 summons and complaint in the manner  
26 prescribed by the law of that state for the  
27 service of summons or other like process upon  
28 any such defendant.

Fed. R. Civ. P. 4(j) (2). If service is not waived, proof of  
service shall be made by affidavit by the person effecting  
service if that person is not a U.S. marshal. *Id.* 4(l). Failure  
to prove service does not affect the validity of service. *Id.*

Proper service of process is required for federal courts to  
obtain personal jurisdiction over a defendant. *Action Embroidery  
Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir.  
2004); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986). Unless  
there is "substantial compliance with Rule 4," actual notice  
alone will not suffice to establish personal jurisdiction.  
*Cranford v. United States*, 359 F. Supp. 2d 981, 983-84 (E.D. Cal.

1 2005) (*citing Benny*, 799 F.2d at 492). Rule 4 should be  
2 liberally construed as long as there is "sufficient notice of the  
3 complaint." *United Food & Commercial Workers Union v. Alpha Beta*  
4 *Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984); *Cranford*, 359 F. Supp.  
5 2d at 983.

6 Under the sufficient notice exception, failure to personally  
7 serve does not result in dismissal of the complaint if (a) the  
8 party to be served personally received actual notice, (b) the  
9 defendant suffers no prejudice from the service defect, and (c)  
10 the plaintiff would be severely prejudiced if his complaint were  
11 dismissed. *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 512  
12 (9th Cir. 2001); *accord Cranford*, 359 F. Supp. 2d at 985. If a  
13 plaintiff falls within the sufficient notice exception, he has  
14 "substantially complied" with Rule 4. *Borzeka v. Heckler*, 739  
15 F.2d 444, 447 n.1 (9th Cir. 1984). Service at a person's place  
16 of employment is generally insufficient if the claim is against a  
17 defendant in his individual capacity alone. *Daly-Murphy v.*  
18 *Winston*, 837 F.2d 348, 355 (9th Cir. 1987).

19 County Defendants and Ayers move to dismiss for improper  
20 service pursuant to Rule 12(b)(5) because Jercich did not  
21 personally effect service on the Defendants pursuant to Rule 4.

22 **1. Individual Service of Process**

23 If a plaintiff does not seek a waiver of service, Rule 4(e)  
24 of the Federal Rules of Civil Procedure requires that a complaint  
25 be personally served on individual defendants. The rule lists  
26 five ways in which service is effected:

- 27 (1) pursuant to the law of the state in  
28 which the district court is located;

- 1 (2) Or pursuant to the law of the state in  
2 which service is effected;
- 3 (3) delivering a copy of the summons and of  
4 the complaint to the individual  
5 personally;
- 6 (4) leaving copies of the summons and  
7 complaint with some person of suitable  
8 age residing at the individual's  
9 dwelling house or usual place of abode;  
10 or
- 11 (5) delivering a copy to an agent authorized  
12 to receive service of process.

13 Fed. R. Civ. P. 4(e).

14 The facts do not show that Jercich personally delivered the  
15 summons to the Defendants, nor left the summons with a  
16 responsible person at their abodes. However, Rule 4(e) provides  
17 other means to effect service, the most relevant of which is  
18 pursuant to California law, the state in which the district court  
19 is located and service is to be affected.

20 **a. Rule 4(e) and Pursuant to the Law of the State**

21 Under California law, service on an individual may be  
22 effected by delivering a copy to the individual or an authorized  
23 agent. Cal. Civ. Proc. Code § 416.90 (Deering 2006). California  
24 law provides for three means to effect service:

- 25 (1) Personally delivering to the individual  
26 or someone authorized to receive service  
27 (the agent). *Id.* § 415.10.
- 28 (2) Leaving a copy of the summons and  
complaint with a responsible person at  
the individual's (or agent's) usual  
home, office, place of abode, or mailing  
address and afterward mailing a copy to  
the individual (or agent) at such home,  
office, place of abode, or mailing  
address. *Id.* § 415.20(b).
- (3) Mailing a copy to the individual (or  
agent) with notice and acknowledgment

1 form.<sup>5</sup> *Id.* § 415.30.

2 Jercich used service by mail. The facts fail to show  
3 whether the person who effected service for Jercich is legally  
4 authorized to do so. See Fed. R. Civ. P. 4(c)(2) (service  
5 effected by anyone who is not a party and at least 18 years of  
6 age). To serve the County Defendants, Jercich's process server  
7 mailed the summons and complaint to 2222 M Street, Merced, CA.  
8 It is unclear if this is the address of an authorized agent to  
9 receive service of process for County Defendants. The facts also  
10 fail to show whether an acknowledgment form was sent with the  
11 copy of the summons and complaint as required by California Civil  
12 Procedure Code Section 415.30.

13 When serving Ayers, Jercich's process server sent the  
14 service by mail to TransCounty Title Company, a private company,  
15 Ayers' place of business. It is unclear if the process server  
16 included an acknowledgment of service form as required by law.  
17 Jercich's claim against Ayers is in reference to his individual  
18 and official capacity as the president of TransCounty. It cannot  
19 be determined on this record if Jercich complied with all the  
20 requirements of Section 415.30. Jercich has failed to provide  
21 evidence of proper service. Ayers' motion to dismiss the  
22 complaint for insufficient service of process is **GRANTED WITH**

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24 <sup>5</sup> Service by mail requires that a copy of the summons and complaint be  
25 sent by first-class mail to the person to be served, with two copies of the  
26 notice and acknowledgment of receipt, and a pre-paid return envelope,  
27 addressed to sender. Cal. Civ. Proc. Code § 415.30(a) (Deering 2006).  
28 Service is complete when acknowledgment of receipt of summons is executed and  
returned to sender. *Id.* § 415.30(c). If the person who is served by this  
means refuses to complete and return the acknowledgment form within 20 days  
from the date of mailing, this person is liable for the extra costs of service  
by another method. *Id.* § 415.30(d).

1 **LEAVE TO AMEND.**

2 **2. Service of Process on Merced County**

3 Rule 4(j)(2) governs service on a public entity  
4 municipality. Service is effected by (1) delivering a copy of  
5 the summons and complaint to the public entity's chief executive  
6 officer or (2) service pursuant to the law of the state. Fed. R.  
7 Civ. P. 4(j)(2).

8 Under California law, service is effected on a municipality  
9 by delivery of summons and complaint to the "clerk, secretary,  
10 president, presiding officer, or other head of its body." Cal.  
11 Civ. Proc. Code § 416.50 (Deering 2006). Service is proper when:

- 12 (1) The summons is personally served. *Id.* §  
13 415.10;
- 14 (2) The summons is left "during usual office  
15 hours in his or her office . . . with  
16 the person who is apparently in charge .  
17 . . . thereafter mailing a copy of the  
18 summons and complaint." *Id.* §  
19 415.20(a); or
- 20 (3) The summons is sent by first-class mail  
21 to the designated individual, pursuant  
22 to California Civil Procedure Code  
23 Section 415.30.

24 The facts fail to show whether or not Jercich's process  
25 server mailed Jercich's summons to the correct person or address.  
26 It is unknown if she sent an acknowledgment form in compliance  
27 with Section 415.30. Defendant Merced County's motion to dismiss  
28 for insufficient service of process is **GRANTED WITH LEAVE TO  
AMEND.**

**C. Motion for More Definite Statement Pursuant to Fed. R. Civ.**

**P. 12(e)**

A motion for more definite statement attacks an

1 unintelligible complaint, not a complaint that lacks detail.  
2 *Neveau v. City of Fresno*, 392 F. Supp. 2d 1159, 1169 (E.D. Cal.  
3 2005). Courts will deny the motion if the complaint is specific  
4 enough to give notice to the defendants of the substance of the  
5 claim asserted. See *id.*; *Beery v. Hitachi Home Elecs. (Am.)*, 157  
6 F.R.D. 477, 480 (C.D. Cal. 1993). A 12(e) motion is proper only  
7 if the complaint is "so vague or ambiguous that the opposing  
8 party cannot respond, even with a simple denial, in good faith or  
9 without prejudice to himself." *Cellars v. Pac. Coast Packaging,*  
10 *Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1999); see *Bautista v. L.A.*  
11 *County*, 216 F.3d 837, 843 n.1 (9th Cir. 2000) (Reinhardt, J.,  
12 concurring) (party can move for more definite statement on those  
13 rare occasions where a complaint is so vague or ambiguous that  
14 party cannot reasonably frame a responsive pleading); see also  
15 *Sagan v. Apple Computer*, 874 F. Supp. 1072, 1077 (C.D. Cal.  
16 1994).

17 Rule 12(e) motions "should not be used to test an opponent's  
18 case by requiring him to allege certain facts or retreat from his  
19 allegations." *Neveau*, 392 F. Supp. 2d at 1169 (*citing Palm*  
20 *Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 464-  
21 65 (C.D. Cal. 1986)). If the facts sought by a motion for a more  
22 definite statement are obtainable by discovery, the motion should  
23 be denied. See *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir.  
24 1996) (granting 12(e) motion if complaint does not provide  
25 defendants "a fair opportunity to frame a responsive pleading");  
26 see also *Neveau*, 392 F. Supp. 2d at 1169-70 (12(e) motion should  
27 be denied if discovery can obtain the desired facts); *Sagan*, 874  
28 F. Supp. at 1077 ("Parties are expected to use discovery, not the

1 pleadings, to learn the specifics of the claims being asserted");  
2 *Beery*, 157 F.R.D. at 180 (finding a 12(e) motion should be denied  
3 if detail sought is obtainable through discovery).

4 A Rule 12(e) motion is considered in light of Rule 8's  
5 liberal pleading standards. See, e.g., *Bureerong v. Uvawas*, 922  
6 F. Supp. 1450, 1461 (C.D. Cal. 1996) (citing *Sagan*, 874 F. Supp.  
7 at 1077). Rule 8(a)(2) of the Federal Rules of Civil Procedure  
8 only requires "a short and plain statement of the claim"  
9 sufficient to give the defendant fair notice of what the  
10 plaintiff's claim is and on what grounds it rests. *Swierkiewicz*  
11 *v. Sorema N.A.*, 534 U.S. 506, 512 (U.S. 2002) (citing *Conley v.*  
12 *Gibson*, 355 U.S. 41, 47-48 (U.S. 1957)). Because of the minimal  
13 federal pleading requirements, 12(e) motions are viewed with  
14 disfavor. *Sagan*, 874 F. Supp. at 1077. A motion for more  
15 definite statement is more likely granted when there is ambiguity  
16 as to the nature of the claim or the party claimed against. *Id.*  
17 Unlike pleadings drafted by lawyers, pleadings by pro se  
18 plaintiffs are liberally construed. See *Hearns v. Terhune*, 413  
19 F.3d 1036, 1040 (9th Cir. 2005) (citing *Hughes v. Rowe*, 449 U.S.  
20 5, 9 (1980)); Analysis, *infra*.

21 County Defendants bring a 12(e) motion for more definite  
22 statement as an alternative to their 12(b)(6) motion. They  
23 contend that Jercich makes only conclusory allegations and that  
24 his complaint is so poorly written they do not know what he is  
25 claiming.

26 Jercich makes several claims. He raises general allegations  
27 of a civil right deprivation, which implicate § 1983. He  
28 contends his civil rights were violated by the County's selective

1 prosecution in its enforcement of land use violations. He makes  
2 conclusory allegations that Defendants Fagundes, Herrell, Graves,  
3 and others are responsible for these deprivations. Jercich also  
4 contends that Kelsey and Martinez conspired to deny approval of  
5 his subdivision, denying him Equal Protection under the law,  
6 without providing any grounds for claim. Likewise, Jercich  
7 alleges that Ayers, Fagundes, and other Defendants named in the  
8 complaint sought to defraud him through their "speech, acts and  
9 omissions." Such conclusory statements, fail to give Defendants  
10 fair notice of Jercich's claims. Motion for more definite  
11 statement is **GRANTED WITH LEAVE TO AMEND.**<sup>6</sup>

12 **D. Motion to Dismiss for Failure to Join a Party**

13 Rule 12(b)(7) is a motion to dismiss for failure to join a  
14 party pursuant to Rule 19. Rule 19 governs compulsory joinder of  
15 parties. Fed. R. Civ. P. 19. In relevant part, Rule 19(a)  
16 provides that

17 [a] person who is subject to service of  
18 process and whose joinder will not deprive  
19 the court of jurisdiction over the subject-  
matter of the action shall be joined as a  
party in the action if

- 20 (1) in the person's absence complete relief  
21 cannot be accorded among those already  
parties, or
- 22 (2) the person claims an interest relating  
23 to the subject of the action and is so  
situated that the disposition of the  
24 action in the person's absence may  
25 (i) as a practical matter impair or  
impede the person's ability to  
26 protect that interest or  
(ii) leave any of the persons already

---

27 <sup>6</sup> Similarly, Defendants' motion that Plaintiff violates Rule 8(e)(1),  
28 which directs a claim be short, concise, and direct, is GRANTED WITH LEAVE TO  
AMEND.

1 parties subject to a substantial  
2 risk of incurring double, multiple,  
3 or otherwise inconsistent  
obligations by reason of the  
4 claimed interest . . .

5 If the joined party objects to venue and  
6 joinder of that party would render the venue  
of the action improper, that party shall be  
7 dismissed from the action.

8 There is a three-step process to determine whether Rule 19  
9 applies:

- 10 (1) Is the nonparty necessary, as described  
11 in Rule 19(a)? See *EEOC v. Peabody W.  
12 Coal Co.*, 400 F.3d 774, 779 (9th Cir.  
13 2005) (citing *United States v. Bowen*,  
14 172 F.3d 682, 688 (9th Cir. 1999)).
- 15 (2) If the absent party is necessary, is  
16 joinder feasible? See Fed. R. Civ. P.  
17 19(a) (joinder unfeasible if improper  
18 venue, nonparty not subject to personal  
jurisdiction, or joinder would destroy  
subject-matter jurisdiction); *Peabody W.  
Coal Co.*, 400 F.3d at 779.
- 19 (3) If joinder is not feasible, is the  
20 absent party indispensable? See Fed. R.  
21 Civ. P. 19(b); *Bowen*, 172 F.3d at 688  
22 ("whether 'in equity and good  
23 conscience' the action can continue  
24 without the party").

25 Ayers moves to dismiss pursuant to Rule 12(b)(7). However,  
26 he fails to identify the absent necessary party who must be  
27 joined under Rule 19. The purpose of Rule 19 is to "consummate .  
28 . . . relief as to those already parties, and with precluding  
multiple lawsuits on the same cause of action." *Peabody W. Coal  
Co.*, 400 F.3d at 780 (citations omitted). As Ayers is already a  
party to this action, Rule 19 does not apply to him. The Motion  
to dismiss for failure to join a necessary party pursuant to Rule  
12(b)(7) is **DENIED**.

//

1 **E. 12(b)(6) Motion to Dismiss**

2 Fed. R. Civ. P. 12(b)(6) provides that a motion to dismiss  
3 may be made if the plaintiff fails "to state a claim upon which  
4 relief can be granted." The question is not whether the  
5 plaintiff will ultimately prevail; rather, whether the plaintiff  
6 could prove any set of facts in support of his claim that would  
7 entitle him to relief. See *Hishon v. King & Spalding*, 467 U.S.  
8 69, 73 (1984). "A complaint should not be dismissed unless it  
9 appears beyond doubt that plaintiff can prove no set of facts in  
10 support of his claim which would entitle him to relief." *Van*  
11 *Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002)  
12 (citations omitted).

13 **1. 1983 Action**

14 To establish liability under § 1983, a plaintiff must show  
15 1) that he has been deprived of a right secured by the United  
16 States Constitution or a federal law and 2) that the deprivation  
17 was effected "under color of state law." *Broam v. Bogan*, 320  
18 F.3d 1023, 1028 (9th Cir. 2003). Ayers contends that he did not  
19 act under color of state law. County Defendants contend that  
20 selective prosecution is not an actionable claim under 1983.

21 **a. Deprivation of a Secured Right**

22 Equal Protection is a right secured by the United States  
23 Constitution. See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S.  
24 562, 564 (2000) (Equal Protection clause intended to protect  
25 every person within a state from intentional and arbitrary  
26 discrimination). Jercich claims that his Equal Protection right  
27 is being deprived by the County, implicating the first prong of a  
28 § 1983 action.

1 An Equal Protection claim is usually brought because of an  
2 irrational law or by a member of a protected class. See *Esmail*  
3 *v. McCrane*, 53 F.3d 176, 178 (7th Cir. 1995). Where state action  
4 does not affect a fundamental right or protected classification,  
5 plaintiffs can establish an Equal Protection claim as a "class of  
6 one". See *Vill. of Willowbrook*, 528 U.S. at 564. For a  
7 successful Equal Protection action under § 1983, "class of one,"  
8 a plaintiff must still show he was 1) intentionally treated  
9 differently from others similarly situated and 2) there is no  
10 rational basis for the different treatment. *Id.*; see also *Squaw*  
11 *Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 943-44 (9th Cir. 2004)  
12 (1983 action brought by "class of one" plaintiff for Equal  
13 Protection violation).

14 In order to survive the rational basis test, government  
15 actions must implicate legitimate goals and the means chosen must  
16 bear a rational relationship to those goals. See, e.g., *Lyng v.*  
17 *Int'l Union*, 485 U.S. 360, 375 (1988). Under the rational basis  
18 test, there is a strong presumption of validity; government  
19 actions are valid so long as there is a legitimate government  
20 interest. See *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1185  
21 (9th Cir. 2004); *McLean v. Crabtree*, 173 F.3d 1176, 1186 (9th  
22 Cir. 1999). There is no rational basis for state conduct that is  
23 clearly "malicious, irrational, or plainly arbitrary." *Squaw*  
24 *Valley Dev. Co.*, 375 F.3d at 944 (citation omitted). Jercich  
25 does not allege entitlement to protection as a protected class.

26 //

27 //

28 //

**I. Selective Prosecution through Code Enforcement**

Jercich alleges a deprivation of his Equal Protection right to use and enjoy his real property for development by the County's enforcement of code violations against him and not his neighbors. County Defendants move to dismiss, arguing that selective prosecution is not a cognizable claim under § 1983, citing *Esmail v. McCrane*, 53 F.3d 176, 178-79 (7th Cir. 1995) (stating that failure to prosecute all known lawbreakers is not actionable under Equal Protection). See also *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement . . . and may undermine prosecutorial effectiveness.").

County Defendants misinterpret the law. Selective prosecution is limited by constitutional restraints. *Wayte*, 470 U.S. at 608. The law in the Ninth Circuit recognizes selective prosecution as a viable basis for a 1983 action. See, e.g., *Squaw Valley Dev. Co.*, 375 F.3d at 944; *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Selective prosecution is judged according to ordinary standards of Equal Protection: Plaintiff must show that 1) others similarly situated have not been prosecuted and that 2) the prosecution has an impermissible motive. *Freeman*, 68 F.3d at 1187; see also *Squaw Valley Dev. Co.*, 375 F.3d at 944 (to satisfy the second prong, selective prosecution claim by "class of one" plaintiff requires showing of irrationality in the challenged conduct). "Selective enforcement of valid laws, without more, does not make the defendants'

1 actions irrational." *Freeman*, 68 F.3d at 1188.

2 Jercich does satisfy the first prong: he claims his  
3 neighbors have not been prosecuted for similar violations, but  
4 alleges no facts to show they are similarly situated. He does  
5 not satisfy the second prong because he does not plead an  
6 irrational basis for this alleged differential treatment, other  
7 than conclusory conspiracy statements. Though not explicitly  
8 stated by the County Defendants, the County has a legitimate  
9 interest in enforcement of code violations and land use laws  
10 against Jercich. Jercich can dispute this by showing that such  
11 rational basis is a pretext for an "impermissible motive." *Squaw*  
12 *Valley Dev. Co.*, 375 F.3d at 944 (internal citations omitted).  
13 He alleges motive.

14 In *Squaw Valley*, an executive officer of a water regulation  
15 board enforced water code violations against a ski resort. The  
16 plaintiff ski resort argued it was 1) subjected to more  
17 regulations than neighboring resorts, 2) had a higher standard of  
18 regulation than its neighbors, and 3) had every violation  
19 enforced against it while substantial violations by its neighbors  
20 were not enforced. *Id.* at 945. These reasons, however, had a  
21 rational basis: the ski resort had resisted lesser regulatory  
22 efforts and had a history of non-compliance. *Id.*

23 The Ninth Circuit found other allegations that indicated the  
24 rational basis was pretextual. The officer had a long history of  
25 disputes with the ski resort management, and was verbally  
26 aggressive with them. *Id.* at 946. The neighboring resorts  
27 commented on the obviousness of the selective treatment by the  
28 officer. *Id.* Despite stating the resort's history of non-

1 compliance as the reason for the disparate treatment, the officer  
2 could not name a single instance of non-compliance. *Id.* The  
3 court held that the ski resort successfully raised triable issues  
4 of fact about the executive officer's animus against the resort.  
5 *Id.* at 947.

6 Jercich's complaint does not allege an irrational motive or  
7 animus, other than conclusory conspiracy claims. Though Jercich  
8 alleges selective enforcement, the County Defendants had a  
9 rational basis for their actions: he was in violation of various  
10 codes. Unlike *Squaw Valley*, the facts do not show a history of  
11 conflict between Jercich and the County Defendants for these code  
12 violations or the operation of his real property. The facts do  
13 not show any evidence of personal animosity between the County  
14 Defendants and Jercich. The, motion to dismiss for failure to  
15 state a claim for an equal protection § 1983 action is **GRANTED**  
16 **WITH LEAVE TO AMEND.**

17 **II. Denial of Subdivision by Kelsey and**  
18 **Martinez**

19 Jercich claims that the denial of his subdivision  
20 application resulted in a deprivation of his constitutional  
21 rights. He alleges that Kelsey, a County Supervisor, and  
22 Martinez, the Chief Code Enforcement Officer, conspired behind  
23 the scenes to do so. However, Jercich does not allege a  
24 constitutional deprivation by either Kelsey or Martinez or their  
25 unlawful purpose.

26 To establish an Equal Protection violation, Jercich must  
27 allege that he was intentionally treated differently from others  
28 similarly situated and that there was no rational basis for this

1 difference in treatment. *Squaw Valley Dev. Co.*, 375 F.3d at 944.  
2 Jercich fails to allege or identify others similarly situated who  
3 were treated differently than him, i.e., people with various code  
4 violations whose similar subdivision applications were approved.

5 Jercich acknowledges that Kelsey did not participate in the  
6 vote that denied his subdivision. Martinez is not a Supervisor  
7 so he did not vote. Even if Jercich was treated differently from  
8 others similarly situated, there is a rational basis for Kelsey  
9 not voting: her husband had prior dealings with Jercich. (Doc. 1-  
10 1, Complaint ¶ 15). To mitigate any claims of impropriety,  
11 Kelsey recused herself. The facts do not show how either Kelsey  
12 or Martinez exercised their authority as County officials to deny  
13 Jercich his subdivision in an unconstitutional manner. The  
14 denial of his subdivision approval is not actionable under § 1983  
15 on the facts alleged. Nor are any facts stated that would show a  
16 basis for liability on the part of Kelsey or Martinez.

17 **b. Under Color of State Law**

18 To act under color of state law requires that the defendant  
19 in a § 1983 action has exercised power "possessed by virtue of  
20 state law and made possible only because the wrongdoer is clothed  
21 with the authority of state law." *West v. Atkins*, 487 U.S. 42,  
22 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326  
23 (1941)). *Id.* If defendant's conduct satisfies the state action  
24 requirement of the Fourteenth Amendment, "that conduct [is] also  
25 action under color of state law and will support a suit under §  
26 1983." *Id.* In such circumstances, defendant's alleged  
27 infringement of plaintiff's federal rights is "fairly  
28 attributable to the State." *Id.*

1 To constitute state action, the deprivation must be caused  
2 by the exercise of some right or privilege created by the State  
3 or by a person for whom the State is responsible, and the party  
4 charged with the deprivation must be a person who may fairly be  
5 said to be a state actor. *Id.*; see also *Am. Mfrs. Mut. Ins. Co.*  
6 *v. Sullivan*, 526 U.S. 40, 50 (1999). It is firmly established  
7 that a defendant in a § 1983 suit acts under color of state law  
8 when he abuses the position given to him by the State. *Atkins*,  
9 487 U.S. at 49. Generally, a public employee acts under color of  
10 state law while acting in his official capacity or while  
11 exercising his responsibilities pursuant to state law. *Id.*

12 **I. Suit Against Ayers As Private Individual**

13 The United States Supreme Court has held an individual's  
14 conduct is equivalent to government action if there is a nexus  
15 between the State and the action such that "seemingly private  
16 behavior may be fairly treated as that of the State itself."  
17 *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S.  
18 288, 295 (2001) (citation omitted). The Supreme Court has  
19 identified four factors that influence a finding of state action  
20 by a private individual:

- 21 (1) The government compelled the action  
22 using its coercive power, or significant  
23 overt or covert encouragement. *Single*  
24 *Moms, Inc. v. Mont. Power Co.*, 331 F.3d  
25 743, 747 (9th Cir. 2003) (citing *Blum v.*  
26 *Yaretsky*, 457 U.S. 991, 1004 (1982));
- 27 (2) The government and the private actor  
28 wilfully participated in joint activity.  
*Id.* (citing *Lugar v. Edmondson Oil Co.*,  
457 U.S. 922, 936 (1982));
- (3) The government controlled a nominally  
private actor. *Id.* (citing *Pennsylvania*  
*v. Bd. of Dir. of City Trusts*, 353 U.S.

1 230, 231 (1957)); or

2 (4) The government delegated a public  
3 function to the private actor. *Id.*  
(citing *Atkins*, 487 U.S. at 56).

4 See also *Kirtley v. Rainey*, 326 F.3d 1088, 1094-95 (9th Cir.  
5 2003) (replacing the nominally private actor factor with the  
6 *Brentwood* nexus factor: seemingly private behavior that may be  
7 fairly considered state action).

8 Of these four factors, Jercich's complaint refers to the  
9 second, willful participation in a joint activity by the  
10 government and the private actor. Jercich does not provide facts  
11 to show where there was joint activity. Under the joint action  
12 test, a plaintiff must show that the state "has so far insinuated  
13 itself into a position of interdependence with the private  
14 entity" that the act must be recognized as a joint activity. See  
15 *Kirtley*, 326 F.3d at 1093 (citation omitted). A plaintiff may  
16 demonstrate interdependence by showing a conspiracy or wilful  
17 participation by the private entity and the state. See *Franklin*  
18 *v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002). Courts generally  
19 require a substantial degree of cooperation before imposing  
20 liability on private actors. *Id.*

21 Jercich's complaint does not state a § 1983 action against  
22 Ayers. Jercich does not provide facts that show joint action  
23 between County Defendants and Ayers to deprive him of  
24 constitutional rights. He fails to allege a "substantial degree  
25 of cooperation" between Ayers and County Defendants. There are  
26 no facts to support a finding that the County acted  
27 interdependently in Ayers' activities. Ayers' motion to dismiss  
28 pursuant to 12(b)(6) with regards to a 1983 action is **GRANTED**

1 **WITH LEAVE TO AMEND.**

2 **II. Suit Against Merced County As Local**  
3 **Government**

4 Local governments are persons subject to suit for  
5 constitutional torts under a 1983 action. *Haugen v. Brosseau*,  
6 339 F.3d 857, 874 (9th Cir. 2003) (citing *Monell v. Dep't of Soc.*  
7 *Servs.*, 436 U.S. 658, 691 n.55 (1978)). Local governments can be  
8 sued for monetary, declaratory, or injunctive relief where such  
9 suits arise from unconstitutional actions that execute a  
10 governmental policy or custom. *Monell*, 436 U.S. at 690-91.

11 A municipality cannot be held liable solely on a respondeat  
12 superior theory, i.e., merely because it employs a tortfeasor.  
13 *Id.* at 691; see *Lytle v. Carl*, 382 F.3d 978, 988 (9th Cir. 2004).  
14 For a successful complaint against a local government, a  
15 plaintiff must satisfy any of the following three theories:

- 16 1) The employee acted pursuant to an  
17 expressed official policy;
- 18 2) The employee acted according to a long-  
19 standing practice or custom; or
- 20 3) The employee acted as a final policy-  
21 maker (even in cases where only one  
22 constitutional violation occurred).

23 See *Lytle*, 382 F.3d at 982; *Webb v. Sloan*, 330 F.3d 1158, 1164  
24 (9th Cir. 2003). The policy must come from a deliberate choice  
25 by a policy-making official and can be inferred from widespread  
26 practice or repeated constitutional violations for which the  
27 offending officer received no punishment. See *Brass v. County of*  
28 *L.A.*, 328 F.3d 1192, 1199 (9th Cir. 2003); *Nadal v. Las Vegas*  
*Metro Police Dep't*, 268 F.3d 924, 929 (9th Cir. 2001).

In *Lytle v. Carl*, the plaintiff was a teacher who brought a

1 1983 action against the superintendent of the school district in  
2 which she worked. The court found that the superintendent had  
3 fired the teacher in retaliation for the teacher's criticism of  
4 the district. *Lytle*, 382 F.3d at 981. The plaintiff did not  
5 allege there was an official policy or custom by the school  
6 district. *Id.* at 982. However, the plaintiff successfully  
7 argued that the superintendent was a final policymaker, making  
8 the district liable. *Id.* at 986. To determine final  
9 policymaking authority, the court must find the individual has  
10 authority in a particular area or issue. *Id.* at 983. In *Lytle*,  
11 the court found that the superintendent was not constrained by  
12 policies other than his own, and he was not subject to review by  
13 anyone within the district, which made the superintendent a final  
14 policymaker with respect to teacher employment. *Id.* at 985-86.

15 Like *Lytle*, Jercich does not allege that the County  
16 officials violated a constitutional right in accordance with any  
17 policy or custom of Merced County. The present complaint is  
18 distinguishable from *Lytle* in that there are no facts to support  
19 a finding that any of the County Defendants are final  
20 policymakers. Herrell and Graves, the County officials who  
21 allegedly conspired to deprive Jercich of his Equal Protection  
22 right through their selective prosecution, are more accurately  
23 described as subordinate enforcement officers, not policymakers.  
24 Jercich's complaint is insufficient against the County under §  
25 1983.

### 26 **III. Suits Against Government Officials**

#### 27 **i. Official Capacity**

28 "Claims against government officials in their official

1 capacities are really suits against the governmental employer  
2 because the employer must pay any damages awarded." *Butler v.*  
3 *Elle*, 281 F.3d 1014, 1023 (9th Cir. 2002) (internal citations  
4 omitted). The United States Supreme Court has held that official  
5 capacity suits generally represent only another way of pleading  
6 an action against the entity which employs the agent. *Wolfe v.*  
7 *Strankman*, 392 F.3d 358, 364-65 (9th Cir. 2004) (citing *Hafer v.*  
8 *Melo*, 502 U.S. 21, 25 (1991)). An official capacity suit is  
9 treated as a suit against the government entity "as long as the  
10 [entity] receives notice and an opportunity to respond."  
11 *Ruvalcaba v. City of L.A.*, 167 F.3d, 514, 524 n.3 (9th Cir. 1999)  
12 (quoting *Ky. v. Graham*, 473 U.S. 159, 166 (1985)).

13 Because Jercich's complaint does not allege a County policy  
14 or custom deprived him of his constitutional rights, nor does he  
15 allege the actions were that of a final policymaker, Jercich's  
16 suit against Merced County was dismissed. Since lawsuits against  
17 County officials in their official capacity are actually suits  
18 against the County, Jercich's suit against the County Defendants  
19 in their official capacity is likewise **DISMISSED**.<sup>7</sup>

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21 <sup>7</sup> County Defendants contend that as a legislator, Kelsey is immune from  
22 suit in 1983 actions in her official duties as a legislator. *Bogan v. Scott-*  
23 *Harris*, 523 U.S. 44, 49 (1999). An act is legislative by the nature of the  
24 act, and not by motive or intent. *Kaahumanu v. County of Maui*, 315 F.3d 1215,  
25 1219 (9th Cir. 2003) (citing *Bogan*, 523 U.S. at 54). Courts determine whether  
26 an act is legislative by four factors: (1) Does it involve ad hoc decision  
27 making or policy formation?; (2) Does it apply to a few individuals, or the  
28 public?; (3) Is it formally legislative in character?; (4) Does it bear the  
hallmarks of legislation? *Id.* at 1220. The burden of proof lies with the  
party raising it. *Id.*

26 Defendants have not established that Kelsey acts as a legislator when  
27 she votes on a subdivision proposal. Jercich's subdivision proposal is more  
28 ad hoc than public policy-oriented, is applicable to him primarily or a single  
property, and is not formally legislative in its character. The lack of  
legislative nature does not factor here because Kelsey is not liable under §  
1983.

**ii. Individual Capacity**

Individual capacity suits impose personal liability upon a governmental official for actions taken under color of state law. *Dittman v. Cal.*, 191 F.3d 1020, 1027 (9th Cir. 1999) (citing *Graham*, 473 U.S. at 165). Color of state law means "pretense of law." *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir. 2000) (citation omitted). This includes acts by government officers in performing their official duties, whether or not authorized by the local government. *Id.* The challenged acts "must bear some similarity to the nature of powers and duties assigned." *Id.* (citation omitted).

Officials sued in their personal capacity may assert personal immunity defenses such as "objectively reasonable reliance on existing law." *Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992) (quoting *Graham*, 473 U.S. at 166-67). Individuals are not immune under qualified immunity if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." See *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Winning an individual capacity suit is a victory against the individual, not the employing entity. *Cerrato v. S.F. Comty. Coll. Dist.*, 26 F.3d 968, 973 (9th Cir. 1994) (citing *Graham*, 473 U.S. at 166-67).

Jercich's claim against County Defendants in their individual capacity satisfies color of state law. He alleges that they abused their positions as County officials to deprive him of his Equal Protection right. To prosecute Jercich for his various code violations, County Defendants use their power as

1 County officials, which necessarily indicates that County  
2 Defendants act under color of state law. County Defendants do  
3 not raise qualified immunity as a defense.

4 **2. Conspiracy to Deprive Plaintiff of his Civil Rights**

5 To prove a conspiracy, Plaintiff must show "an agreement or  
6 'meeting of the minds' to violate constitutional rights."  
7 *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) (citations  
8 omitted). Each individual does not need to know the plan;  
9 sharing the common purpose of the conspiracy is sufficient. *Id.*  
10 A private individual may be liable if he conspired with a state  
11 actor. *Id.* (internal citations omitted).

12 The elements of a civil conspiracy are (1) the formation and  
13 operation of a conspiracy, (2) wrongful conduct in furtherance of  
14 the conspiracy, and (3) damages arising from wrongful conduct.  
15 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th  
16 503, 511 (Cal. 1994). A conspiracy does not stand as an  
17 independent claim, rather it is a legal doctrine to establish  
18 joint liability by the conspirators for the underlying tort. See  
19 *Entm't Research Group v. Genesis Creative Group*, 122 F.3d 1211,  
20 1228 (9th Cir. 1997) (citing *Applied Equipment Corp.*, 7 Cal. 4th  
21 at 511). Each member of the conspiracy must be able to commit  
22 the underlying tort, intend the success of the purpose of the  
23 conspiracy, and all the elements of that tort must be satisfied.  
24 7 Cal. 4th at 511. If a plaintiff fails to plead the underlying  
25 claim, the corresponding conspiracy claim must also fail. See  
26 *id.* ("It is the acts done and not the conspiracy to do them which  
27 should be regarded as the essence of a civil action.") (internal  
28 citation omitted).

1 In order to show a conspiracy, Plaintiff must first  
2 successfully allege the underlying 1983 action. Jercich must  
3 show the deprivation of a secured right under color of state law.  
4 Since Jercich has not successfully alleged a 1983 action against  
5 any Defendants, the conspiracy claim likewise fails. Further,  
6 Jercich does not show facts that support the existence of a  
7 conspiracy among any Defendants, such as the formation and  
8 wrongful acts in furtherance of the conspiracy. Labeling conduct  
9 a conspiracy is not enough. Jercich's claim for conspiracy  
10 pursuant to § 1983 fails.

11 Jercich's conspiracy claim cannot implicate 42 U.S.C. §  
12 1985(3), conspiracy to interfere with civil rights. Elements of  
13 a 1985(3) claim are: (1) existence of a conspiracy to deprive  
14 Plaintiff of equal protection under the law; (2) an act in  
15 furtherance of the conspiracy; and (3) a resulting injury.  
16 *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1141 (9th Cir. 2000)  
17 (*citing Scott v. Ross*, 140 F.3d 1275, 1284 (9th Cir. 1998)).

18 An essential requirement for a 1985(3) claim is that there  
19 must be some racial or otherwise class-based "invidious  
20 discriminatory animus" for the conspiracy. *Bray v. Alexandria*  
21 *Women's Health Clinic*, 506 U.S. 263, 268-69 (1993) (*citing*  
22 *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Section  
23 1985(3) was not meant to apply to all tortious conspiracies to  
24 deprive the rights of another. *Id.* Section 1985(3) does not  
25 extend to classes beyond race unless that class can show that the  
26 government has determined that class members "require and warrant  
27 special federal assistance in protecting their civil rights."  
28 *Orin v. Barclay*, 272 F.3d 1207, 1217 n.4 (9th Cir. 2001).

1 Jercich cannot assert a § 1985(3) action because he does not  
2 claim a racially-motivated animus, nor that he is a member of any  
3 class requiring special federal protection. Section 1985(3) was  
4 not meant to apply to tortious actions such as Jercich's.  
5 Further, the complaint does not allege the elements of a 1985(3)  
6 action, a race, or class based conspiracy. Section 1985(3) has  
7 no application. County Defendants' and Ayers' motions to dismiss  
8 for conspiracy is **GRANTED WITH LEAVE TO AMEND.**

9 **3. Statute of Limitations for 1983 Actions**

10 The United States Supreme Court has held the limitation  
11 period for 1983 actions to be the same as the personal injury  
12 claim limitation period of the state in which such action is  
13 brought. *Wilson v. Garcia*, 471 U.S. 261, 279 (U.S. 1985). The  
14 9th Circuit has adopted this approach. *McDougal v. County of*  
15 *Imperial*, 942 F.2d 668, 673 (9th Cir. 1991) (statute of  
16 limitations for 1983 actions same as that of personal injury  
17 actions). If a state has more than one limitation period for  
18 personal torts, the United States Supreme Court has determined  
19 that the statute of limitations for general personal injury  
20 claims governs for 1983 actions. *Silva v. Crain*, 169 F.3d 608,  
21 610 (9th Cir. 1999) (*citing Owens v. Okure*, 488 U.S. 235, 249-50  
22 (1989)).

23 The pertinent state statute is California Civil Procedure  
24 Code Section 335.1, which gives a two-year limitation period.  
25 Though state law determines the statute of limitations, "federal  
26 law determines when a civil rights claim accrues." *Morales v.*  
27 *City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000).  
28 Accrual occurs when "a plaintiff knows or has reason to know of

1 the injury which is the basis of the action." *Id.* at 1154.

2 The statute of limitations is an affirmative defense. Fed.  
3 R. Civ. P. 8(c). A defendant raising a statute of limitations  
4 defense has the burden of proof. *Cal. Sansome Co. v. United*  
5 *States Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995). In a 1983  
6 action, a defendant has the burden of showing that the alleged  
7 wrongdoing and injury occurred outside the limitation period.  
8 *See id.*

9 County Defendants contend that Jercich's § 1983 selective  
10 prosecution claim is barred by the statute of limitations. While  
11 Plaintiff does not allege many dates, Defendants as the moving  
12 party must show how the statute of limitations applies. *Id.*  
13 Jercich vaguely alleges that he sought county action in late  
14 2002. Jercich is under an obligation to allege dates or tolling  
15 facts that save his cause from the statute of limitations period.  
16 It is unclear when the alleged wrongful acts occurred. The  
17 Motion to dismiss on statute of limitations grounds is **GRANTED**  
18 **WITH LEAVE TO AMEND.**

## 19 7. Non-Federal Claims

### 20 A. Supplemental Jurisdiction

21 Title 28 U.S.C. § 1367(a) provides in pertinent part:

22 "In any civil action of which the district  
23 courts have original jurisdiction, the  
24 district court shall have supplemental  
25 jurisdiction over all other claims that are  
26 so related to the claims in the action within  
such original jurisdiction that they form  
part of the same case or controversy under  
Article III of the United States  
Constitution."

27 A court can choose to decline supplemental jurisdiction if "the  
28 district court has dismissed all claims over which it had

1 original jurisdiction." 28 U.S.C. § 1367(c) (3) (2000).

2 The United States Supreme Court has interpreted "same case  
3 or controversy" as state and federal claims that derive from a  
4 "common nucleus of operative facts" such that a plaintiff "would  
5 ordinarily be expected to try them all in a single judicial  
6 proceeding." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715,  
7 725 (1966); see *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1173  
8 (9th Cir. 2002).

9 Jercich brings claims of fraud and conspiracy to commit  
10 fraud under California law. County Defendants and Ayers do not  
11 specifically address the fraud claim. However, they do move to  
12 dismiss for failure to state a claim. Jercich's allegations of  
13 conspiracy extend from the fraud committed during the sale to the  
14 selective prosecution and denial of his subdivision by the  
15 County. He thus contends a wide-spread conspiracy to defraud him  
16 and violate his equal protection rights. The fraud claim derives  
17 from the same case or controversy as the 1983 action. However,  
18 if a § 1983 claim does not exist there will be no federal subject  
19 matter jurisdiction and no reason for the court to retain this  
20 action.

21 **B. Fraud**

22 To successfully plead fraud, Plaintiff must show a 1) false  
23 representation, 2) knowledge of its falsity, 3) intent to  
24 defraud, 4) justifiable reliance, and 5) damages. *Moore v.*  
25 *Brewster*, 96 F.3d 1240, 1245 (9th Cir. 1996) (quotations  
26 omitted). Pursuant to Rule 9(b) of the Federal Rules of Civil  
27 Procedure, "[i]n all averments of fraud . . . the circumstances  
28 constituting fraud . . . shall be stated with particularity."

1 The fraud allegations must be specific enough to give defendant  
2 notice of the particular misconduct so that the defendant can  
3 defend against it. *Bly-Magee v. California*, 236 F.3d 1014, 1019  
4 (9th Cir. 2001) (citing *Neubronner v. Milken*, 6 F.3d 666, 672  
5 (9th Cir. 1993)). This includes time, place, and nature of the  
6 actions, and why the actions are false. *Decker v. Glenfed, Inc.*  
7 (*In re Glenfed, Inc., Sec. Litig.*), 42 F.3d 1541, 1548 (9th Cir.  
8 1994).

9 Plaintiff accuses Ayers and the County Defendants of fraud.  
10 He fails to state any specifics regarding when or how the fraud  
11 was perpetrated by Fagundes, the County, and Ayers or what  
12 constitutes the fraud. Plaintiff's only mention of Ayers and the  
13 County is in paragraphs 9 and 12 of the Complaint, a conclusory  
14 allegation of conspiracy to defraud Plaintiff. This does not  
15 meet the more particular pleading requirements of Rule 9(b).

16 The motion to dismiss for failure to state a claim with  
17 regard to the fraud claim is **GRANTED WITH LEAVE TO AMEND.**

18 **C. Conspiracy to Commit Fraud**

19 Civil conspiracy elements are (1) the formation and  
20 operation of a conspiracy, (2) wrongful conduct in furtherance of  
21 the conspiracy, and (3) damages arising from wrongful conduct).  
22 See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.  
23 4th 503, 511 (Cal. 1994). Conspiracy is a legal doctrine to  
24 establish joint and vicarious liability by the conspirators for  
25 the underlying tort. See *Entm't Research Group v. Genesis*  
26 *Creative Group*, 122 F.3d 1211, 1228 (9th Cir. 1997) (citing  
27 *Applied Equipment Corp.*, 7 Cal. 4th at 511). Each member of the  
28 conspiracy must be able to commit the underlying tort, and all

1 the elements of that tort must be satisfied. 7 Cal. 4th at 511.  
2 If Plaintiff fails to plead a claim for fraud, the corresponding  
3 conspiracy claim must also fail. See *id.* ("It is the acts done  
4 and not the conspiracy to do them which should be regarded as the  
5 essence of a civil action.") (citation omitted).

6 Jercich failed to allege fraud with sufficient particularity  
7 as required by Rule 9(b). Since Jercich failed to show the  
8 underlying fraud action, there is no liability for conspiracy to  
9 commit fraud. Motion to dismiss for conspiracy to commit fraud  
10 is **GRANTED WITH LEAVE TO AMEND.**

11 **D. Emotional Distress**

12 To state a claim for intentional infliction of emotional  
13 distress, under state law, a plaintiff must allege 1) extreme and  
14 outrageous conduct by the defendant, with the intent or reckless  
15 disregard of the probability of causing emotional distress, 2)  
16 plaintiff suffered severe emotional distress and 3) that  
17 defendant was the cause of the emotional distress. *Ess v.*  
18 *Eskaton Properties, Inc.*, 97 Cal. App. 4th 120, 129 (Cal. Ct.  
19 App. 2002).

20 To state a claim for negligent infliction of emotional  
21 distress under state law requires that a plaintiff show 1)  
22 serious emotional distress, 2) actually and proximately caused by  
23 3) wrongful conduct 4) by a defendant who should have foreseen  
24 that the conduct would cause such distress. *Austin v. Terhune*,  
25 367 F.3d 1167, 1172 (9th Cir. 2004). It is well settled that  
26 negligent infliction of emotional distress is not an independent  
27 tort; rather it is the tort of negligence to which the duty  
28 element applies. *Marlene F. v. Affiliated Psychiatric Med.*

1 *Clinic, Inc.*, 48 Cal. 3d 583, 588 (Cal. 1989); *Friedman*, 107 Cal.  
2 App. 4th at 464.

3 Where injury such as mental and emotional distress is caused  
4 by the constitutional violation, that injury is compensable under  
5 § 1983. *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir.  
6 1988); *Carey v. Phipus*, 435 U.S. 247, 263-264 (1978). It is not  
7 a stand alone federal claim. Awards for emotional distress  
8 damages require proof that such injury actually occurred. See  
9 *Carey*, 435 U.S. at 264.

10 Jercich alleges that he suffered emotional distress from the  
11 Equal Protection violation and the fraud. The only facts he  
12 alleges describe a tractor incident in July 2005. (Doc. 1-1,  
13 Complaint ¶ 13). However, that incident does not implicate  
14 County Defendants or Ayers, as Jercich was hurrying to meet the  
15 County's disposal deadline, the County did not cause the tractor  
16 to allegedly nearly crush him. The facts do not show how County  
17 Defendants or Ayers are responsible for the actions of the  
18 tractor. Even if Defendants caused a constitutional deprivation,  
19 that deprivation did not cause the alleged injury Jercich  
20 suffered from the tractor. Nor do the facts rise to the level of  
21 outrageous conduct required by state law. The complaint fails to  
22 state a claim for emotional distress. Defendants' motion to  
23 dismiss Jercich's emotional distress claims is **GRANTED WITH LEAVE**  
24 **TO AMEND.**

## 25 **8. Conclusion**

26 (1) Ayers' motion to dismiss pursuant to Rule 12(b)(1) for  
27 lack of subject-matter jurisdiction is **DENIED.**

28 (2) County Defendants' and Ayers' motions to dismiss

1 pursuant to Rule 12(b)(5) for insufficient service of process are  
2 **GRANTED WITH LEAVE TO AMEND.**

3 (3) County Defendants' and Ayers' motions to dismiss  
4 pursuant to Rule 8 and for more definite statement pursuant to  
5 Rule 12(e) are **GRANTED WITH LEAVE TO AMEND.**

6 (4) Defendants motion to dismiss on Rule 8(e)(1) grounds is  
7 **GRANTED WITH LEAVE TO AMEND.**

8 (5) Ayers' motion to dismiss for failure to join a party  
9 pursuant to Rule 12(b)(7) is **DENIED.**

10 (6) County Defendants' and Ayers' motions to dismiss for  
11 failure to state a claim pursuant to Rule 12(b)(6) regarding the  
12 1983 action are **GRANTED WITH LEAVE TO AMEND.**

13 (7) County Defendants' and Ayers' motion to dismiss for  
14 conspiracy pursuant to a 1983 action is **GRANTED WITH LEAVE TO**  
15 **AMEND.**

16 (8) County Defendants' motion to dismiss on statute of  
17 limitation grounds for a 1983 action is **GRANTED WITH LEAVE TO**  
18 **AMEND.**

19 (9) County Defendants' and Ayers' motions to dismiss  
20 regarding the fraud claim are **GRANTED WITH LEAVE TO AMEND.**

21 (10) County Defendants' and Ayers' motion to dismiss for  
22 conspiracy to commit fraud are **GRANTED WITH LEAVE TO AMEND.**

23 (11) Defendants' motion to dismiss Jercich's emotional  
24 distress claims is **GRANTED WITH LEAVE TO AMEND**

25 Any amended complaint shall be granted within twenty (20)  
26 days of the date of service of this decision.

27 **IT IS SO ORDERED.**

28 **Dated: December 18, 2006**

/s/ Oliver W. Wanger

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UNITED STATES DISTRICT JUDGE

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