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7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 THE COYOTE VALLEY BAND OF POMO)
INDIANS OF CALIFORNIA, et al.,)

12 Plaintiffs,)

13 v.)

14 UNITED STATES DEPARTMENT OF)
15 TRANSPORTATION, et al.,)

16 Defendants.)

NO. 4:15-cv-04987-JSW

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION AND
MALCOLM DOUGHERTY’S NOTICE
OF MOTION AND MOTION TO
DISMISS AND/OR STRIKE
PLAINTIFFS’ FIRST AMENDED
COMPLAINT**

Date: December 2, 2016
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Dept.: Courtroom 5

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21 **NOTICE OF MOTION AND MOTION**

22 Defendants California Department of Transportation and Malcolm Dougherty (“Caltrans”)
23 move to dismiss Plaintiffs’ First Amended Complaint, ECF No. 66, pursuant to Rules 8(a), 8(d), and
24 41(b) of the Federal Rules of Civil Procedure or, in the alternative, to strike portions of the First
25 Amended Complaint pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Caltrans also
26 moves to strike Plaintiffs’ request for damages as barred by sovereign immunity. Caltrans’ motion is
27

1 scheduled for December 2, 2016, at 9:00 a.m., in Courtroom No. 5, U.S. Courthouse, Oakland,
2 California, before the Honorable Jeffrey S. White.

3 This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and
4 Authorities filed herewith, the complete files and records in this case, and upon such evidence and
5 oral argument as may be presented at the hearing on this motion.

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7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 State Defendants California Department of Transportation and Malcolm Dougherty
10 (“Caltrans”) move to dismiss Plaintiffs’ First Amended Complaint pursuant to Rules 8(a), 8(d), and
11 41(b) of the Federal Rules of Civil Procedure, because the amended pleading fails to comply with
12 the express conditions of this Court’s order allowing it to be filed. In particular, in contravention of
13 the Court’s August 2, 2016, order (ECF 58), significant portions of the First Amended Complaint,
14 including Plaintiffs’ claims, refer to all Defendants collectively rather than making specific
15 allegations as to each defendant. As a result of the First Amended Complaint’s failure to allege
16 which defendants engaged in what activity and when, defendants do not have fair notice of the
17 claims against them. Plaintiffs’ First Amended Complaint therefore should be dismissed for
18 noncompliance with the Court’s order and violation of Rules 8(a) and (d).¹ In the alternative,
19 pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, Caltrans moves to strike all portions
20 of Plaintiffs’ First Amended Complaint which refer to Defendants collectively.

21 Additionally, while the amended pleading now seeks damages against Caltrans only,
22 Plaintiffs have not asserted any legal theory pursuant to which damages can be claimed against a
23 state entity. Plaintiffs’ request for damages against Caltrans therefore is barred by sovereign
24 immunity and should be stricken.

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27 ¹ All references to rules herein refer to the Federal Rules of Civil Procedure.

1 II. FACTUAL AND PROCEDURAL BACKGROUND

2 On October 30, 2015, Plaintiffs filed a 59-page Complaint against Federal Defendants and
3 Caltrans pursuant to various environmental statutes including the National Environmental Policy Act
4 (“NEPA”), 42 U.S.C. sections 4321, *et seq.*, and the National Historic Preservation Act (“NHPA”),
5 54 U.S.C. sections 300101, *et seq.* ECF 1. Federal Defendants filed a motion to dismiss the
6 Complaint pursuant to Rules 12(b)(1) and 12(b)(6), pointing out, among other things, that the
7 allegations in Plaintiffs’ Complaint often referred to Defendants as a whole rather than specifying
8 which parties have taken or failed to take certain actions. ECF 58 at 14:15-16.

9 On August 2, 2016, the Court issued an order granting, in part, the Federal Defendants’
10 motion to dismiss without prejudice.² ECF 58. In granting Plaintiffs leave to amend, the Court
11 expressly ordered that, “If Plaintiffs choose to amend their claims, the Court HEREBY ORDERS
12 them to specifically identify which defendant has acted, or failed to act, in particular manner.
13 Plaintiffs shall not refer to the Defendants collectively in an amended complaint.” ECF 58 at 7:7-10
14 [emphasis added], *see also* 8:13-16.

15 On August 24, 2016, Plaintiffs filed a 70-page First Amended Complaint adding a number of
16 new allegations (see, ECF 66 at ¶¶ 12-14, 175-207) and specifying that the damages claims are
17 against Caltrans, only, but leaving the rest of the complaint and its numerous references to collective
18 Defendants essentially unchanged.³

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24 ² “Federal Defendants” refers to Defendants the United States Department of Transportation,
25 Secretary of Transportation Anthony Foxx, the Federal Highway Administration, and FHWA
Administrator Gregory G. Nadeau.

26 ³ The Court had also expressly ordered that if Plaintiffs were to amend their claims against Federal
27 Defendants, “they shall do so by no later than August 23, 2016.” Plaintiffs filed their First Amended
28 Complaint on August 24, 2016. ECF 65. Then, due to a captioning error, Plaintiffs re-filed their
First Amended Complaint on August 26, 2016. ECF 66.

1 III. ARGUMENT

2 A. Legal Standards

3 Rule 41(b) of the Federal Rules of Civil Procedure provides: “If the plaintiff fails to...comply
4 with these rules or a court order, a defendant may move to dismiss the action or any claim against
5 it.” A judge has the discretion to dismiss a complaint if the pleading violates the court’s order to
6 state which wrongs were committed by which defendants. *McHenry v. Renne*, 84 F.3d 1172, 1177,
7 1179 (9th Cir. 1996).

8 A court may also dismiss a complaint pursuant to Rule 41(b) if the pleading fails to comply
9 with the Federal Rules of Civil Procedure. Rule 8 requires plaintiffs to “plead a short and plain
10 statement of the elements of his or her claim.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840
11 (9th Cir. 2000). Rule 8 requires each allegation to be “simple, concise, and direct.” Fed. R. Civ. P.
12 8(d)(1). Where the allegations in a complaint are “argumentative, prolix, replete with redundancy
13 and largely irrelevant,” the complaint is properly dismissed for failure to comply with Rule 8(a).
14 *McHenry*, 84 F.3d at 1177, 1178-79; *see also Nevijel v. North Coast Life Ins. Co.*, 661, 673-74 (9th
15 Cir. 1981) (affirming dismissal of complaint that was “verbose, confusing and almost entirely
16 conclusory”). “Something labeled a complaint but...prolix in evidentiary detail, yet without
17 simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform
18 the essential functions of a complaint,” and “impose[s] unfair burdens on litigants and judges.”
19 *McHenry*, 84 F.3d at 1179-80 [emphasis added]. A failure to specifically identify which defendant
20 has acted, or failed to act, in a particular manner, is therefore a violation of Rule 8.

21 A complaint that fails to comply with Rule 8 may be dismissed pursuant to Federal Rule of
22 Civil Procedure 41(b). “The propriety of dismissal for failure to comply with Rule 8 does not
23 depend on whether the complaint is wholly without merit.” *McHenry*, 84 F.3d at 1179. Even if the
24 factual elements of the cause of action are present, but are scattered throughout the complaint and
25 are not organized into a “short and plain statement of the claim,” dismissal for failure to satisfy Rule
26 8 is proper. *Id.*

1 Rule 12(f) provides that the Court “may order stricken from any pleading any insufficient
2 defense or any redundant, immaterial, impertinent, or scandalous material.” Fed.R.Civ.P. 12(f).
3 Immaterial matter “is that which has no essential or important relationship to the claim for relief or
4 the defenses being pleaded.” *Cal. Dept. of Toxic Substance Control v. AL CO Pac., Inc.*, 217
5 F.Supp.2d 1028, 1032 (C.D.Cal. 2002) (internal citations and quotations omitted). Impertinent
6 material “consists of statements that do not pertain, or are not necessary, to the issues in question.
7 *Id.*

8 The Court may properly grant motions to strike when a defense or claim is insufficient as a
9 matter of law, *see Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d
10 1045, 1057 (5th Cir. 1982), and may strike any part of the prayer for relief when damages are not
11 recoverable as a matter of law, *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669 (C.D.Cal. 2000).
12 Additionally, the possibility that issues will be unnecessarily complicated is the type of prejudice
13 that is sufficient to support the granting of a motion to strike. *California Dept. of Toxic Substances*
14 *Control*, 217 F.Supp. at 1028. To determine whether to grant a motion to strike, a district court shall
15 view the pleadings in the light most favorable to the pleader. *See Taylor v. Quall*, 471 F.Supp.2d
16 1053, 1059 (C.D.Cal. 2007). Ultimately, the decision as to whether to strike allegations is a matter
17 within the Court’s discretion. *Nurse v. U.S.*, 226 F.3d 996, 1000 (9th Cir. 2000).

18 B. The First Amended Complaint Violates the Court’s August 2, 2016, Order and the
19 Federal Rules of Civil Procedure by Referring to the Defendants Collectively.

20 Contrary to the Court’s August 2, 2016, order expressly requiring that “Plaintiffs shall not
21 refer to Defendants collectively in an amended complaint” (ECF 58 at 7, 8 [emphasis added]),
22 Plaintiffs’ First Amended Complaint does just that. In fact, the amended pleading leaves nearly all
23 of the original complaint’s references to Defendants as a collective group virtually unchanged. The
24 First Amended Complaint remains replete with dozens of collective references to “Defendants,” and
25 does not specifically identify which defendant has acted, or failed to act, in a particular manner, as
26 the Court had ordered Plaintiffs to do. *See, e.g.*, ECF 66 at ¶¶ 21, 22, 43-46, 54, 91, 100, 101, 108,
27 110, 112, 117, 118, 129, 161-168. These collective references make it unclear what the alleged

1 violation is, who is allegedly responsible, and what relief Plaintiffs seek. For example, Plaintiffs
2 refer to the alleged failure to comply with Section 106 of the NHPA in multiple contexts: at the final
3 EIS/EIR stage, when ground-disturbing activities commenced, when additional archaeological sites
4 were discovered, during negotiation of the Memorandum of Agreement or Programmatic
5 Agreement, with respect to post-review discovery and monitoring, and during government-to-
6 government consultations in general, but fail to identify which defendant allegedly did what. *See*,
7 *e.g.*, ECF 66 at ¶¶ 91, 100, 101, 108, 112, 117, 118. As stated in the preceding section, under
8 Federal Rule of Civil Procedure 41(b), an action or claim may be dismissed if the plaintiff fails to
9 comply with a court order. *See McHenry*, 84 F.3d at p. 1181. Plaintiffs' First Amended Complaint
10 does not comply with the Court's August 2, 2016, order and therefore should be dismissed pursuant
11 to Rule 41(b).

12 In addition to noncompliance with the Court order, the failure of the 70-page amended
13 pleading to allege which defendants engaged in what activity and when is improper under Rule 8.
14 *See, e.g., Bravo v. County of San Diego*, 2014 WL 555195, *2 (N.D.Ca. February 10, 2014).
15 Wholesale allegations, which group the defendants together, do not provide the defendants fair
16 notice of the claims against them. *See In re Sagent Tech, Inc.*, 278 F.Supp.2d 1079, 1094 (N.D. Cal.
17 2003) (“[T]he complaint fails to state a claim because plaintiffs do not indicate which individual
18 defendant or defendants were responsible for which alleged wrongful act”); *see also Gauvin v.*
19 *Trombatore*, 682 F.Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple defendants in one
20 broad allegation fails to satisfy notice requirement of Rule 8(a)); *Corazon v. Aurora Loan Services,*
21 *LLC*, 2011 WL 1740099, *4 (N.D. Cal. May 5, 2011) (“Undifferentiated pleading against multiple
22 defendants is improper”) (quotation marks and citation omitted).

23 Moreover, confusing complaints which refer to defendants collectively impose unfair
24 burdens on litigants and judges. *McHenry*, 84 F.3d at p. 1179. As a practical matter, the judge and
25 opposing counsel, in order to perform their responsibilities, must determine for themselves who is
26 being sued for what. *Id.* at p. 1180. Defendants are then put at risk of having made a determination
27 that differs from the judge's, that plaintiffs will surprise them with something new at trial, and that

1 *res judicata* effects of settlement or judgment will be different from what they reasonably expected.
2 *Id.* A complaint which lacks clarity as to whom plaintiffs are suing for what wrongs “fails to
3 perform the essential functions of a complaint.” *Id.* Therefore, Plaintiffs’ First Amended Complaint
4 should also be dismissed for failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

5 In the alternative, even if the First Amended Complaint as a whole is not dismissed, the
6 portions of the amended pleading referring to Defendants collectively should be stricken pursuant to
7 Rule 12(f).

8 C. Plaintiffs’ Prayer/Request for Damages Against Caltrans Is Barred by Sovereign
9 Immunity.

10 Plaintiffs’ request for damages “as against Caltrans only” is barred by sovereign immunity
11 and should therefore be stricken. ECF 66, Prayer for Relief ¶ 5. The Eleventh Amendment to the
12 U.S. Constitution provides that “The Judicial power of the United States shall not be construed to
13 extend to any suit in law or equity, commenced or prosecuted against one of the United States by
14 Citizens of another State, or by Citizens or Subjects of any Foreign State.” This Amendment grants
15 sovereign immunity to the states against suits in federal court absent the state’s consent or waiver.
16 *Hans v. Louisiana*, 134 U.S. 1 (1890). Exceptions allowing suits against the State or its officials
17 arise only in limited circumstances – not present as to any request for damages in this case – where
18 there is a waiver of sovereign immunity, when Congress has expressed clear congressional intent to
19 abrogate state immunity in an underlying statute, and when a claim for prospective injunctive relief
20 is brought against state actors violating federal law under *Ex parte Young*, 209 U.S. 123 (1908).

21 Here, there has been no waiver of sovereign immunity by Caltrans with respect to claims for
22 damages. While Caltrans has accepted a limited assignment of federal authority and attendant
23 narrow waiver of sovereign immunity with respect to NEPA review and the NHPA for the Willits
24 Bypass Project, ECF 58 at 3:1-11, this waiver did not extend to any claims or requests for damages.
25 Waivers of sovereign immunity are strictly construed, and a waiver as to one claim does not transfer
26 to another. *Lane v. Peña*, 518 U.S. 187, 192 (1996); see also *United States v. Nordic Village*, 503
27

1 U.S. 30, 34 (1992). Moreover, none of the statutes to which Caltrans has waived its sovereign
2 immunity allow for damages as prayed for by Plaintiffs.

3 Nor does naming Malcolm Dougherty as a Defendant open the door to any *Ex parte Young*
4 exception to sovereign immunity. Although Plaintiffs purport to bring this action against Caltrans
5 Director Dougherty, the First Amended Complaint makes no specific claims against Director
6 Dougherty. ECF 66 at ¶ 67. A party cannot circumvent sovereign immunity by pretextually
7 pleading against a state official. *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030,
8 1033 (9th Cir. 1985).

9 Plaintiffs' request for damages against Caltrans should be stricken.

10 IV. CONCLUSION

11 For the foregoing reasons, Plaintiffs' First Amended Complaint should be dismissed, or, in
12 the alternative, the portions of the amended pleading referring to Defendants collectively should be
13 stricken. Plaintiffs' request for damages against Caltrans should also be stricken on the basis of
14 sovereign immunity.

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21 DATED: September 7, 2016

22 By: /s/ Stacy J. Lau
23 STACY J. LAU
24 Attorneys for Defendants
25 CALIFORNIA DEPARTMENT OF
26 TRANSPORTATION and MALCOLM
27 DOUGHERTY