UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAY SHELTON,

Plaintiff,

v.

VIVIAN EKCHIAN; DARNEIKA WATSON, individually, and in her official capacity as Chief Human Resources and Operations Officer and Interim Superintendent; KATHLEEN CROSS, individually, and in her official capacity as a Board of Education member; INGRID GUNNELL, individually, and in her official capacity as a Board of Education member; SHANT SAHAKIAN, individually, and in her official capacity as a Board of Education member; JENNIFER FREEMON, individually, and in her official capacity as a Board of Education member; NAYIRI NAHABEDIAN, individually, and in her official capacity as a Board of Education member; KRISTINE TONOLI; and DOES 1-10, inclusive;

Defendant.

Case No.: 2:23-cv-10427-CBM-SSCx

ORDER RE: DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE SECOND AMENDED COMPLAINT [29]

The matter before the Court is Defendants' Motion to Dismiss and/or Strike Plaintiff's Second Amended Complaint. (Dkt No. 29 ("Motion").)

I. BACKGROUND

This is a civil rights case alleging causes of action under 42 U.S.C. § 1983, filed by Plaintiff Ray Shelton, a fifth-grade school teacher employed at the Mark Keppel Visual and Performing Arts Elementary School ("Mark Keppel") within Glendale United School District ("GUSD"), against GUSD; GUSD's Board of Education and individual defendants associated with GUSD (collectively, the "Board Defendants")); Vivian Ekchian (GUSD superintendent); Darneika Watson (GUSD Chief Human Resources and Operations Officer); Kristine Tonoli (Mark Keppel school principal); and DOES 1-10. Plaintiff alleges that Defendants retaliated against him for making a speech in opposition to certain policies GUSD recently adopted (the "Sex-Change Policies"). (*See* Dkt. No. 26 ("SAC").)

On December 13, 2023, Plaintiff filed his original Complaint. (Dkt. No. 1.) On April 2, 2024, Plaintiff filed an amended complaint ("FAC"). (Dkt. No. 11.) On April 25, 2024, Defendants filed a Motion to Dismiss Plaintiff's FAC and for a More Definite Statement. (Dkt. No. 16.) On July 12, 2024, the Court granted Defendants' motion to dismiss with leave to amend and granted in part the motion for a more definite statement, ordering Plaintiff to provide further factual bases regarding certain allegations stated in the FAC. (Dkt. No. 22.) On July 26, 2024, Plaintiff filed a Second Amended Complaint. (Dkt. No. 26 ("SAC").) The SAC includes two causes of action under § 1983 for violation of his First Amendment right to free speech and petition, based on theories of (1) viewpoint discrimination and (2) retaliation, a cause of action under § 1983 for conspiracy to retaliate against Plaintiff, and a new cause of action for violation of right to free speech under the California Constitution. (*Id.*) The SAC also adds GUSD as a Defendant. (*Id.*) On September 3, 2024, Defendants filed the instant Motion. (Dkt. No. 29.)

II. STATEMENT OF THE LAW

A. 12(b)(6) Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." "A complaint may be dismissed for failure to state a claim only when it fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories. *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of 'his entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* at 545.

The Court "must accept all well-pleaded material facts as true and draw all reasonable inferences in favor of the plaintiff." *Caltex Plastics, Inc.*, 824 F.3d at 1159 (citation omitted). However, legal conclusions are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680 (citation omitted). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

B. 12(b)(e) Motion to Strike

Rule 12(b)(e) allows parties to move for a more definite statement where the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(b)(e). "If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order." *Id*.

III. DISCUSSION

A. Requests for Judicial Notice

Both parties request judicial notice of certain documents. Under Federal Rule of Evidence 201, a court may take judicial notice of a "fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." While a court may take judicial notice of "the existence of [a] document or order," it may not take judicial notice of the "truth or the correctness of the factual content" therein. *Pellegrini v. Fresno Cnty.*, 742 F. App'x 209, 211 (9th Cir. 2018); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (holding district court erred when it took judicial notice of disputed matters of fact in the public record).

1. Defendants' Request

Defendants request judicial notice of the following materials:

- Ex. A – a March 3, 2023 "Certificated Retirement Form" from Plaintiff to GUSD requesting that his retirement "be made effective June 9, 2023."
- Portions of a recording of the April 18, 2023 GUSD Board meeting—specifically, the portions reflecting the speech Plaintiff made (starting at 43:59)—available at https://spectrumstream.com/streaming/gusd/2023_04_18.cfm

- Portions of a recording of the April 18, 2023 GUSD Board meeting—specifically, the portions reflecting remarks made by Defendant Gunnell (starting at 3:51:39)—available at https://spectrumstream.com/streaming/gusd/2023_04_18.cfm

- Ex. B – an April 19, 2023 letter from Defendant Watson to Plaintiff informing him that the school would be placing Plaintiff on paid administrative leave and investigating "allegations of misconduct made by another teacher" at GUSD.

- Ex. C – an April 19, 2023 email from Defendant Tonoli to the Mark Keppel Elementary School community regarding the conduct of an unnamed teacher.

- Exs. D and E – two October 10, 2023 letters from Kyle Bruich (Director of Human Resources at GUSD) to Plaintiff regarding a complaint filed by another teacher against Plaintiff.

- Ex. F – excerpts from the Voter Information Guide for the California General Election held on November 5, 1974, specifically as it pertains to Proposition 7, Declaration of Rights (pp. 26–29).

- Ex. G – excerpts from the Voter Information Guide for the California Primary Election held on June 3, 1980, specifically as it pertains to Proposition 5, Freedom of Press (pp. 18–19).

(Dkt. No. 29-1.)

Exhibits A, D, and E are not referenced in the SAC.[1] Judicial notice of these documents is not appropriate under Rule 201—they do not contain facts "generally known within the trial court's jurisdiction," nor can they be "accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Moreover, the documents involve a key factual dispute in the case regarding the reasons for Plaintiff's administrative leave—thus, judicial notice is inappropriate. *See Harris v. Allison*, 2023 WL 6784355, at *1 (9th Cir. Oct. 13, 2023), *cert. denied sub nom. Diaz v. Polanco*, 144 S. Ct. 2520 (2024) (denying request for judicial notice of documents because they were related to "key factual disputes" in the case);

[1] The SAC only references the fact that Plaintiff retired at the end of the 2023 school year—it does not reference the form submitted by Defendants. (SAC, ¶ 96.)

Cactus Corner, LLC v. U.S. Dep't of Agric., 346 F. Supp. 2d 1075, 1098 (E.D. Cal. 2004), *aff'd*, 450 F.3d 428 (9th Cir. 2006) ("A matter is not properly subject to judicial notice by the court if it involves a central and disputed issue").

Exhibits B and C are documents that are referenced in the Complaint. "[I]ncorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself. The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). Under this doctrine, a court can "consider a document if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154, 1162–63 (9th Cir. 2019) (internal quotations omitted). Exhibits B and C form the basis of Plaintiff's retaliation claim against Defendants and both documents are referenced in the SAC. Therefore, judicial notice of these documents is proper. For the same reasons, judicial notice of the portion of the recording of the Board meeting where Plaintiff made his speech is judicially noticeable as that speech is the basis of Plaintiff's First Amendment claims.

However, the portions of the recording of the Board meeting reflecting Defendant Gunnell's comments are not judicially noticeable for their truth. Defendants argue that the Court can take judicial notice of the fact that "Gunnell said" there was a swastika in the board room, not for the truth of whether there was indeed a swastika in the room. The limited fact that might be subject to judicial notice is irrelevant for purposes of the Motion to Dismiss. Moreover, Defendants attempt to use this material for the truth of the matter in their Motion. (*See* Mot. at 20.) The Court declines to take judicial notice of this portion of the recording.

Finally, while Exhibits F and G may be subject to judicial notice, these documents are unnecessary to resolving the Motion—Defendants only cite to them

as support for their argument that Plaintiff's new state-law claim for violation of the California Constitution fails. The Court finds these exhibits are unnecessary to resolve the state-law claim at issue.

In sum, the Court grants the Request as to Exhibits B, C, and the portion of the recording of the Board meeting reflecting the speech Plaintiff made, and otherwise denies the Request.

2. Plaintiff's Request

Plaintiff requests judicial notice of the following materials:

- Ex. A – GUSD's Board Policy 1000, "Community Relations – Concepts and Roles," available on the internet at https://www.gusd.net/8454_3
- Ex. B – GUSD's Board Policy 1100, "Communications With the Public," available on the internet at https://www.gusd.net/8454_3
- Ex. C – GUSD's Board Policy 1312.1, "Complaints Concerning District Employees," available on the internet at https://www.gusd.net/8454_3
- Ex. D – an April 19, 2023 email by Defendant Ekchian to the GUSD community titled "Hate Has No Place in Glendale Unified."
- Ex. E – a "meme" depicting four unaltered rainbow "Progress Pride Flags" in a pinwheel shape, available online at https://knowyourmeme.com/photos/2379345-lgbtq-pridemonth#trending-bar
- Ex. F – a photo depicting the profile of GUSD's official Instagram account, available online at https://www.instagram.com/glendaleusd/
- Ex. G – a photo of an October 11, 2022 post by GUSD's official Instagram account depicting a "Progress Pride Flag," available online at https://www.instagram.com/glendaleusd/
- Ex. H – a photo of an October 11, 2023 post by GUSD's official Instagram account depicting a "Progress Pride Flag," available online at https://www.instagram.com/glendaleusd/

- Ex. I – a "screen grab" of a video from an August 15, 2023 post by GUSD's official Instagram Account depicting Defendant Freemon wearing a "Progress Pride Flag" pin, available online at https://www.instagram.com/glendaleusd/

- Ex. J – GUSD Board Resolution No. 27 "PROCLAIMING JUNE 2023 as LGBTQ+ PRIDE MONTH IN GLENDALE UNIFIED SCHOOL DISTRICT," available online at https://s3.amazonaws.com/scschoolfiles/3165/2022-23_resolution_june_2023_as_lgbtq_plus_pride_month.pdf

Defendants do not oppose judicial notice of these documents.

Exhibits A-C are GUSD's Board policies that are publicly available online at GUSD's official website. "It is appropriate to take judicial notice of this information, as it was made publicly available by government entities (the school districts), and neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010). Exhibit D is an email from Defendant Ekchian, of which Defendants do not oppose judicial notice. Though Plaintiff argues that it is a public document because Ekchian sent it to the entire school district, that does not make it a fact "generally known within the [Court's] territorial jurisdiction." Fed. R. Evid. 201(b). But because it was sent by Ekchian, a party to this action, it can likely be accurately and readily determined as an authentic document. Therefore, the Court takes judicial notice of the email.

Exhibits F-I are Instagram posts from GUSD's official Instagram account and are likewise publicly available online. These materials are related to a key factual dispute, and in any case are not relevant or necessary to resolving the instant Motion. *See Harris*, 2023 WL 6784355 at *1 (denying request for judicial notice of documents because they were related to "key factual disputes" in the case and "[t]o the extent Defendants rely on the documents for other reasons . . . the documents are not relevant to the disposition" of the matter) (internal quotations omitted). Thus, the Court declines to take judicial notice of Exhibits F-I.

Similarly, Exhibit E is information available from a third-party website about an internet "meme." "As a general matter, courts are hesitant to take notice of information found on third party websites and routinely deny requests for judicial notice." *Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1028 (C.D. Cal. 2015) (denying judicial notice of documents from third party websites like Wikipedia, Answers.com, Deadline.com, and Slashfilm.com). The Court declines to take judicial notice of Exhibit E.

In sum, the Court grants Plaintiff's Request as to Exhibits A-D and otherwise denies the Request.

B. GUSD

"The Eleventh Amendment to the United States Constitution provides that '[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'" *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250 (9th Cir. 1992). "California law is well settled that providing public education is a state function." *Belanger*, 963 F.2d 248, 253 (9th Cir. 1992) (affirming district court ruling that Eleventh Amendment barred suit against a public school district); *see also Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 934 (9th Cir. 2017) (holding that "California school districts … remain arms of the state and continue to enjoy Eleventh Amendment immunity" after the passage of AB 97); *Benton-Flores v. Santa Barbara Unified Sch. Dist.*, 2021 WL 6752214, at *12 (C.D. Cal. Sept. 23, 2021), *report and recommendation adopted*, 2021 WL 6751910 (C.D. Cal. Dec. 6, 2021) (dismissing with prejudice plaintiff's § 1983 claims against SBUSD because of Eleventh Amendment immunity). Further, "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

Plaintiff argues that GUSD "does not enjoy immunity" because it is not an "arm of the state" under "the new test established by the Ninth Circuit in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (*en banc*)." (Dkt. No. 30 at 30.) In *Kohn*, the Ninth Circuit analyzed the factors established in *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 200 (9th Cir. 1988) for determining whether an entity is an "arm of the state" entitled to absolute immunity and concluded that "the *Mitchell* factors are out of step with current Supreme Court jurisprudence." 87 F. 4th at 1027. However, the *Kohn* court specifically stated that though its decision to implement a new test "represents a change in our jurisprudence, this new framework is unlikely to lead to different results in cases that previously applied the *Mitchell* factors and held an entity entitled to immunity," and that it had "no reason to believe that our decision today will substantially destabilize past decisions granting sovereign immunity to state entities within the Ninth Circuit." *Id*. at 1031–32. Since *Kohn*, the Ninth Circuit has reiterated that "the Eleventh Amendment protects California school districts as arms of the state." *Riley's Am. Heritage Farms v. Elsasser*, 2024 WL 1756101, at *1 (9th Cir. Apr. 24, 2024). At least one court in this district has found that California school districts remain arms of the state post-*Kohn*. *See T.L. v. Orange Unified Sch. Dist.*, 2024 WL 305387, at *8 (C.D. Cal. Jan. 9, 2024) (dismissing § 1983, § 1985, and state law claims against Orange Unified School District without leave to amend because claims were barred by the Eleventh Amendment).

The SAC seeks damages as well as preliminary and permanent injunctive relief. (SAC at 21.) The Court previously found that Plaintiff is limited to suing all Defendants in their official capacities for injunctive relief *only*, as the Eleventh Amendment otherwise bars his *Monell* claims. *See Belanger*, 963 F.2d 248, 253 (9th Cir. 1992) (affirming district court ruling that Eleventh Amendment barred suit against a public school district). Therefore, Plaintiff can maintain a claim against GUSD for injunctive relief *only*. However, Plaintiff cannot seek damages against

GUSD, the Board of Education, or any individual Defendants to the extent they are sued in their official capacities.

C. The Board Defendants

The Court previously found the allegations against the Board Defendants insufficient to state a claim because Plaintiff failed to specify which claim was brought against which Defendants and because his allegations against the Board Defendants were conclusory and largely made "upon information and belief." The SAC specifies that all claims are brought against all Defendants. The SAC also alleges facts, that are *not* made upon information and belief, explaining how the Board was involved in the actions giving rise to Plaintiff's claims—that "public statements of a sensitive and controversial nature like the one made by Tonoli in her email require approval by the District before they are disseminated to the entire community, which necessarily includes the Board, Ekchian, and Watson" (SAC, ¶ 70); that the Board was responsible for the decision to put Plaintiff on leave because they "witnessed [Plaintiff's] speech and set in motion the chain of events leading to his administrative leave the very next morning" (*id*., ¶ 74); and that GUSD's general counsel informed Plaintiff's counsel that the decision regarding whether to reinstate Plaintiff "had to be made by the School Board," and in early June 2023, the Board reviewed the decisions and refused to reinstate Plaintiff or "reverse his ban from the school" (*id*., ¶¶ 72-73). These facts provide a basis for Plaintiff's claim that the Board (and its individual members) retaliated against him for his speech.

Defendants' contentions that these facts do not meet the 12(b)(6) standard are unavailing—Plaintiff only need allege facts which plausibly state a claim. *See Ashcroft*, 556 U.S. at 678 (2009). Taking all facts alleged as true, it is plausible that the Board Defendants were involved in the alleged retaliatory acts against Plaintiff.

Plaintiff is not required to show more.[2] He is only required to "give the [Board Defendants] fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 554 (cleaned up).[3]

D. Defendants Tonoli, Ekchian, and Watson

The Court previously dismissed the claims against Tonoli, Ekchian, and Watson because the claims suffered from the same defects as the claims against the Board Defendants. These defects have been cured in the SAC, which, in addition to stating that Ekchian, Watson, and Tonoli were responsible for Plaintiff's administrative leave, also alleges facts supporting *how* they are responsible. (*See* SAC, ¶¶ 32 (alleging Watson punished Plaintiff for exercising his First Amendment rights by placing Plaintiff on leave); 35 (alleging the same about Tonoli); 70 (alleging that public statements like Tonoli's email required approval by the District, which necessarily includes Ekchian and Watson); 74 (alleging that Ekchian was responsible for taking disciplinary actions against teachers on the District's behalf and that Watson authored the letter placing Plaintiff on leave).) Regarding Tonoli, the SAC alleges that Tonoli pulled Plaintiff out of his class and into her

[2] Defendants' cite to *Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778 (9th Cir. 1997) is inapposite—in that case, the plaintiff's allegation that members of a Board of Supervisors "found out that he had been removed from his position and refused to overrule . . . and reinstate him" was not sufficient to state a claim because "[m]embers of a governing board cannot be vicariously liable under section 1983 for conduct by employees." *Id*. at 781. While Plaintiff cannot maintain a claim against the Board Defendants solely based on their failure to reinstate him, Plaintiff here has alleged that the Board was responsible for the decision place him on leave in the first instance because they witnessed his speech and "set in motion the chain of events leading to his administrative leave." (SAC, ¶ 74.)

[3] Defendants are also incorrect that the SAC fails to comply with this Court's order requiring Plaintiff to state when his leave and employment ended. The SAC alleges that Plaintiff retired at the end of the school year, ending his employment. (SAC, ¶ 96.) Plaintiff also explains that the SAC does not allege when his leave ended because "his leave never ended as Defendants never rescinded it" before Plaintiff retired. (Dkt. No. 30 at 32.)

office, where he was told he was being put on leave, and that Tonoli sent an email "disparag[ing]" Plaintiff and accusing him of hate speech at the Board meeting. (SAC, ¶¶ 60-62.) The SAC also clarifies that Tonoli "unlawfully revealed details regarding [Plaintiff's] private personnel matter" by sending the April 19, 2023 email, contrary to the letter Plaintiff received from Watson that "advised him that all information from the investigation should be kept confidential." (*Id*., ¶ 64-65.) This cures the defects in the FAC, which did not state that the email was the conduct that unlawfully revealed Plaintiff's personnel matter.

Defendants contend that the SAC's allegations against Ekchian and Watson are arguments, not facts. Allegations in a complaint are treated as facts and the Court "must accept all well-pleaded material facts." *Caltex Plastics, Inc.*, 824 F.3d at 1159 (citation omitted). To the extent Defendants contend these facts are still too conclusory, that is also incorrect. The facts alleged indicate it is plausible that Ekchian, Watson, and Tonoli were involved in the alleged retaliation. Plaintiff cannot be expected to know at this stage exactly what transpired between the Defendants in retaliating against him, and he cannot plead facts that are outside his knowledge.

E. Counts One and Two (Violations of the First Amendment)

Defendants argue that Plaintiff still fails to plead the elements of his § 1983 claims because he fails to plead petitioning activity, adverse employment action, or causation. To state a § 1983 claim for violation of the First Amendment, Plaintiff must allege that (1) he engaged in constitutionally protected speech, (2) Defendants took adverse employment action against him, and (3) his speech was a substantial or motivating factor for the adverse action. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). To establish viewpoint discrimination, Plaintiff must allege facts showing that Defendants restricted his protected speech "*because of* not merely in spite of [his] message." *Moss*, 572 F.3d at 970 (emphasis in original).

1. Petitioning Activity

Defendants argue that the SAC still provides no facts supporting that Plaintiff's speech before the Board constituted a petition. (Mot. at 22–23.) Plaintiff argues that his speech at the meeting "constitutes petitioning activity because it sought to influence GUSD to abandon its harmful Sex-Change Policies." However, this is not alleged in the SAC, nor do the SAC's allegations indicate that in making his speech, Plaintiff was petitioning the Board to change its policies (as opposed to a speech that expressed Plaintiff's disagreement with the policies). Therefore, Plaintiff has not pled petitioning activity. However, the Court previously found that Plaintiff has stated sufficient facts to show he engaged in protected speech at the Board meeting. Therefore, Plaintiff's failure to plead petitioning activity is not fatal to his claims.

2. Adverse Employment Action

Defendants argue that Plaintiff still hasn't pled an adverse employment action because the SAC "vaguely refers to" disciplinary measures but "never identifies any that were imposed," Plaintiff admits he was on *paid* administrative leave and "alleges no lost pay or promotional opportunities," and Tonoli's email never identified Plaintiff by name such that it could be an adverse action against him. (Mot. at 23–25.)

"By itself, [] criticism or 'bad-mouthing' does not constitute an adverse employment action sufficient for a First Amendment retaliation claim." *Dodge v. Evergreen School District #114*, 56 F.4th 767, 779 (9th Cir. 2022). But where a defendant goes "beyond criticizing [an individual's] political views," such as the school principal defendant did in *Dodge* when she "suggested that disciplinary action could occur if she saw Dodge with his [Make America Great Again] hat again by referencing the need for union representation," such action is enough to potentially constitute adverse action. *Id*. *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) held that "under some circumstances, placement on administrative leave

can constitute an adverse employment action" and specified that "[t]he inability to take a promotional exam, loss of pay and opportunities for investigative experience, as well as the general stigma resulting from placement on administrative leave" are "reasonably likely to deter employees from engaging in protected activity." *Dahlia*, 735 F.3d at 1079. Following *Dahlia*, the Ninth Circuit has clarified that "for purposes of a First-Amendment retaliation claim, being placed on involuntary paid leave can *itself* be an adverse employment action." *Campbell v. Hawaii Dep't of Educ.*, 892 F.3d 1005, 1016 (9th Cir. 2018) (emphasis in original).

Further, in the FAC, Plaintiff failed to allege sufficient facts about how Defendants "barred" him from school-related activities and events and which Defendants were responsible for this decision. (FAC, ¶ 67.) In the SAC, Plaintiff now alleges facts explaining that the letter he received from Watson "informed [him] that he was not to report to school or any other GUSD site until further notice from Defendants." (SAC, ¶ 62.) The SAC then alleges that this prevented him from attending his students' fifth-grade graduation ceremony. (*Id.*, ¶ 75.) The SAC also alleges that "[a]s a result of Defendants' actions, other GUSD teachers . . . engaged in a public campaign of harassment and personal attacks directed against [Plaintiff] because of his [opposition to the Sex-Change Policies]" (SAC, ¶ 86), provides specific examples of such personal attacks and alleges and that the "harassment campaign . . . caused [Plaintiff] to be bombarded with homophobic slurs and to receive death threats" (*id.*, ¶ 87), and alleges that Tonoli's email addressing Plaintiff's leave and accusing him of hate speech was "false and inflammatory" (*id.*, ¶ 71). These acts, combined with his leave, are sufficient to state an adverse action under *Dahlia*. *See Franks v. City of Santa Ana*, 2015 WL 13919157, at *4 (C.D. Cal. Apr. 27, 2015) (finding adverse action on a 12(b)(6) motion to dismiss where plaintiff alleged a combination of being put on paid administrative leave *and* the City "order[ing] her not to have contact with numerous potential witnesses in the investigation, including individuals that she alleges to be some of her 'closest

friends and support system'"); *Perez v. Brain*, 2016 WL 607770, at *12 (C.D. Cal. Jan. 8, 2016) (stating that *Dahlia* "explained that the proper inquiry in such cases is whether an action is 'reasonably likely to deter employees from engaging in protected activity'" and finding on summary judgment that plaintiff showed adverse action where her suspension barred her from being interviewed and participating on department activities and others were directed not to speak with her after she was placed on suspension).

Accordingly, Plaintiff has sufficiently pled an adverse employment action.

3. Substantial Motivating Factor

The Court previously found that the FAC did not allege sufficient facts to establish this element because "[a]lmost all of Plaintiff's allegations tying Defendants' actions to his leave and investigation are upon information and belief." (Dkt. No. 22 at 10.) In the SAC, however, Plaintiff no longer relies on allegations "upon information and belief" to establish his speech was a substantial motivating factor for Defendants' actions. The SAC establishes a factual basis for Watson, Ekchian, and the Board's involvement in both the decision to place Plaintiff on leave and the content of Tonoli's email. (SAC, ¶¶ 70, 74.) The SAC also clarifies that the factual basis for [Plaintiff's] allegation that Tonoli "admitted that Defendants' conduct against Plaintiff was in direct retaliation for the views he expressed at the school board meeting" (FAC, ¶ 63) was in fact her email to the Mark Keppel community. (SAC, ¶ 68.) This is enough to establish that Plaintiff's speech was a substantial motivating factor for the adverse actions taken against Plaintiff. Defendants' argument that the email cannot establish motivation because it does not explicitly name Plaintiff is unpersuasive—the facts alleged in the SAC are sufficient to show that it is plausible (indeed, likely) that Tonoli's email was in reference to Plaintiff and his speech at the Board meeting, as it was sent shortly after Plaintiff was put on administrative leave. At the motion to dismiss stage, the Court "must accept all well-pleaded material facts as true and draw all reasonable inferences in

favor of the plaintiff." *Caltex Plastics, Inc.*, 824 F.3d at 1159 (citation omitted). The Court cannot credit Defendants' version of events over what Plaintiff pleads in the SAC.

As for Plaintiff's viewpoint discrimination claim, the FAC alleged facts only "upon information and belief" about the Board changing the rules of its meetings and another instance of retaliation against a student and mother voicing their opposition to the Sex-Change Policies. (FAC, ¶¶ 79-80.) In the SAC, these allegations are no longer made upon information and belief and provide further detail regarding the harassment the student and mother faced, as well as how exactly the Board changed its rules to make it more difficult for those who opposed the Sex-Change Policies to speak out in opposition during Board meetings. (SAC, ¶ 93.)

* * *

Because Plaintiff has sufficiently pled the elements of his first and second causes of action, the Court denies Defendants' Motion as to Counts One and Two.

F. Count Three (Conspiracy)

"To prove a conspiracy … under section 1983, [a plaintiff] must show an agreement or meeting of the minds to violate constitutional rights." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540–41 (9th Cir. 1989) (internal quotations omitted). The SAC alleges facts showing how the Board members were involved with the decision to put Plaintiff on leave, as well as facts underlying his allegation that the Board "conspired with Tonoli regarding the content and publishing of the email." (SAC, ¶ 62 (the letter from Watson stated that the "District" was placing him on leave), 70 (explaining how the Board was involved with Tonoli's email), 74 (the Board was responsible for the decision to place him on leave).) The SAC explains that the Board, along with Ekchian and Watson, were "necessarily" involved because public statements "of a sensitive and controversial nature" like Tonoli's email require approval by GUSD, which includes Ekchian, Watson, and the Board. (*Id.*) At this stage, these allegations are

sufficient to establish a plausible meeting of the minds.

Accordingly, the Court denies the Motion as to Count Three.

G. *Monell* Liability

The Court previously held that Plaintiff failed to plead *Monell* liability because he did not specify what policy, custom, or practice violated his constitutional rights, and because his examples of disparate treatment were made "upon information and belief" only. (Dkt. No. 22 at 14–15.) In the SAC, Plaintiff alleges that GUSD had an "official policy, custom, or practice of silencing, censoring, and punishing those who opposed its Sex-Change Policies" (SAC, ¶ 95), and that the Board had final policymaking authority (*Id*., ¶ 23). The SAC now alleges further details in the allegations regarding disparate treatment, and these allegations are not made upon information and belief. (*Id*., ¶¶ 84-89, 92-94.) This is sufficient at the motion to dismiss stage to allege a *Monell* claim under a theory of an unlawful official policy, custom, or practice, by way of the Board's final policymaking authority. Regardless of whether GUSD actually had such a policy, custom, or practice, the allegations give Defendants "fair notice and enable the opposing party to defend [themselves] effectively" as to the policy, custom or practice on which Plaintiff's claims are based. *See AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636–637 (9th Cir. 2012).

Therefore, the Court denies Motion as to Plaintiff's claim of *Monell* liability.

H. Qualified Immunity

The Court previously denied without prejudice Defendants' motion to dismiss the FAC on qualified immunity grounds because Plaintiff had not alleged sufficient facts to state a claim. (Dkt. No. 22 at 17.) The Court's order on the motion to dismiss the FAC cited several district court cases where courts declined to analyze qualified immunity at the motion to dismiss stage, finding it premature when no factual record has been developed. *See NAACP of San Jose/Silicon Valley v. City of San Jose*, 562 F. Supp. 3d 382, 396 (N.D. Cal. 2021) ("because the

qualified immunity analysis often turns on the specific facts of each alleged violation, the court finds that the qualified immunity arguments are better suited to summary judgment"); *Chavez v. Wynar*, 421 F. Supp. 3d 891, 909 (N.D. Cal. 2019) (denying motion to dismiss on qualified immunity grounds because "it is premature at this juncture to decide whether qualified immunity applies because the factual record has not been developed"); *Garcia v. Cnty. of Riverside*, 2019 WL 1002522, at *5 (C.D. Cal. Jan. 11, 2019) (holding that "making a ruling on qualified immunity would be premature at the [motion to dismiss] stage of litigation"). The Ninth Circuit has also expressed that raising and immediately appealing a qualified immunity defense on a motion to dismiss is "not a wise choice in every case." *See Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004) (abrogated on other grounds).

Therefore, the Court declines to address the qualified immunity defense at this stage and denies Defendants' Motion on this ground without prejudice to Defendants raising qualified immunity at summary judgment.

I. Count Four (California Constitutional Right to Free Speech)

In the SAC, Plaintiff brings a new claim for violation of the California Constitution's right to free speech. (SAC, ¶¶ 123-130.) "The Eleventh Amendment protects states and state instrumentalities . . . from suit in federal court." *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1153 (9th Cir. 2018). "Under the *Ex parte Young* exception to that Eleventh Amendment bar, a party may seek prospective injunctive relief against an individual state officer in her official capacity. [citation]. However, the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant." *Id*. Therefore, to the extent Plaintiff brings this fourth claim against GUSD, the Board of Education, and any individual Defendants in their official capacity, those claims are barred from suit in federal court.

In *Porter v. Gore*, 354 F. Supp. 3d 1162, 1180 (S.D. Cal. 2018), a district court dismissed a plaintiff's claim for violation of the California Constitution's free speech provision against a sheriff because "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment" (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984)). "[T]his principle applies as well to state-law claims brought into federal court under pendent jurisdiction." *Pennhurst*, 465 U.S. at 121. Here, the SAC alleges the individual Defendants violated Plaintiff's free speech rights as they carried out their responsibilities as employees and agents of the school district. Even if Plaintiff is suing these Defendants in their individual capacities, "artful pleading will not bring [Plaintiff's] state-law claims over the Eleventh Amendment bar." *Porter*, 354 F. Supp. 3d at 1180. Therefore, the Court grants the Motion as to Count Four and dismisses this claim in its entirety against all Defendants. Because Plaintiff cannot cure the defects of his fourth cause of action, the Court dismisses Count Four without leave to amend.

J. Motion to Strike

Defendants move to strike the SAC on the grounds that Plaintiff has failed to comply with the Court's order for a more definite statement (Dkt. No. 22). "Motions to strike are generally regarded with disfavor." *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). "Given their disfavored status, courts often require a showing of prejudice by the moving party before granting the requested relief." *Id*. (internal quotations omitted). Though courts typically analyze motions to strike pleadings under a Rule 12(f) standard, the statutory test of Rule 12(e) is clear that if a party fails to obey an order for a more definite statement, a court *may* strike the pleading, but it is not required to do so.

The Court finds that Plaintiff has complied with its order for a more definite statement. Therefore, the Court denies Defendants' Motion to Strike.

IV. CONCLUSION

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Count Four without leave to amend; **DENIES** the Motion as to Counts One, Two, and Three; and **DENIES** Defendants' Motion to Strike.

IT IS SO ORDERED.

DATED: NOVEMBER 15, 2024

HON. CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE