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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8 DEMETRIUS L. HARVEY,

1:08-CV-01399-OWW-DLB

9
10 Plaintiff,

MEMORANDUM DECISION AND ORDER
RE: CITY OF FRESNO AND COUNTY
OF FRESNO'S MOTIONS TO DISMISS
PLAINTIFF'S SECOND AMENDED
COMPLAINT (Docs. 49, 53.)

11 v.

12
13 CITY OF FRESNO, *et al.*,

14 Defendants.
15

16 I. INTRODUCTION

17 This case arises out of Plaintiff's arrest and prosecution for
18 burglary in 2007. Plaintiff was acquitted of this crime after a
19 jury trial. He now charges that the Defendant Officers violated
20 his constitutional rights and maliciously prosecuted him.
21 Plaintiff, proceeding pro per, also brings claims against the City
22 of Fresno for inadequate training and supervision.

23 Before the court are two motions to dismiss filed pursuant to
24 Rule 12(b)(6) of the Federal Rules of Civil Procedure. One motion
25 is brought by Defendants City of Fresno, Officers Robert Gonzales,
26 Jesus Cerda, Brent Willey, and Detective Brian Valles (the "City
27 defendants"). The other motion is brought by Defendant County of
28 Fresno (the "County defendant").

1 II. FACTUAL BACKGROUND

2 The following facts are derived from Plaintiff's second
3 amended complaint, ("SAC"), filed on December 9, 2009. (Doc. 48.)

4 Plaintiff, a 23 year-old African-American male, alleges that
5 on January 7, 2007, he went over to a friend's apartment, Jason
6 Rooter, to help him move. (Id. ¶'s 4, 18.) Around 8:00 p.m.,
7 Defendant Willey and Officer Yeager received a dispatch re the
8 alleged attack and robbery of Matt Billet, a Comcast Cable employee
9 who was attacked while working on a friend's cable box. (Id. ¶
10 19.) Billet called 911 and told the dispatcher that the suspect,
11 whom he identified as "D-Boy," was wearing an orange t-shirt. (Id.
12 ¶ 20.) Defendant Willey interviewed Billet, a white male, who was
13 allegedly struck in the face several times with a closed fist.
14 (Id. ¶ 21.) Defendant Willey noted that Billet had a "slight"
15 amount of redness on his right cheek that, but did not photograph
16 Billet because he was unable to see any injuries. (Id.) Billet
17 refused all emergency medical services. (Id. ¶ 22.) Defendant
18 Willey and Officer Yeager went to the crime scene and did not find
19 any physical evidence. (Id. ¶ 23.)

20 At approximately 9:00 p.m., Fresno City police officers
21 arrived at Jason Rooter's apartment. (Id. ¶ 24.) Plaintiff went
22 outside and gave his name and identification. (Id. ¶ 24.)
23 Plaintiff was interviewed and eventually placed under arrest by
24 Defendant Cerda. (Id. ¶ 25.) He was handcuffed, searched, and
25 placed in the patrol car by Defendant Willey. (Id. ¶ 26.)
26 According to Plaintiff, he was not given a reason for his arrest.
27 (Id.)

28 When Plaintiff arrived at the police station, he was

1 interrogated by Defendants Gonzales and Valles. (Id. ¶ 27.)
2 Plaintiff waived his Miranda rights and denied committing a
3 robbery. (Id. ¶ 28.) Billet told Defendant Willey that he had a
4 conflict with Plaintiff several weeks before the robbery, but
5 Plaintiff told both officers that he was not involved "in any type
6 of physical disturbance with a white male." (Id. ¶ 29.)
7 Plaintiff also requested to take a polygraph test, but the request
8 was denied. (Id. ¶ 30.) He told the officers that he would go to
9 jail and then go to trial to prove his innocence. (Id. ¶ 28.)

10 On January 7, 2007, Brooke Doval, a City of Fresno employee,
11 obtained swabs from handgun's grip, trigger and magazine. (Id. ¶
12 32.) The results of Ms. Doval's tests were negative. (Id.) On
13 January 8, 2007, Fresno City Detective Rudy Montoya interviewed
14 Plaintiff regarding the alleged gun used in the robbery. (Id. ¶
15 33.) Plaintiff denied any knowledge of the gun and restated that
16 he was only at the apartment complex to help Mr. Rooter. (Id.)
17 According to Plaintiff, Detective Montoya told Plaintiff that "if
18 I come back see to you in jail, it will be bad news, because you
19 lied to me." (Id. ¶ 34.)

20 On January 9, 2007, Defendant County of Fresno filed a Felony
21 Complaint against Plaintiff and four other individuals who were in
22 the apartment on January 7, 2007, including Rooter. (Id. ¶ 36.)
23 Plaintiff was charged with (1) robbery; (2) possession of a
24 controlled substance while armed with a firearm; and (3) possession
25 of marijuana for sale. (Id.) Plaintiff entered a not guilty plea
26 at his arraignment. (Id. ¶ 38.) On March 13, 2007, Plaintiff
27 appeared at his preliminary hearing. (Id. ¶ 39.) According to
28 Plaintiff, Billet changed his story, testifying that he and a

1 friend went to a friend's house to buy marijuana. (Id. ¶ 39.) He
2 did not mention working for Comcast or working on his friend's
3 cable box. (Id.) Fresno County Prosecutor Esmeralda Garcia was
4 present at the hearing and heard the inconsistent testimony. (Id.
5 ¶ 40.) Defendants Willey and Cerda also testified. (Id. ¶ 41.)
6 Plaintiff was held to answer to the robbery charge, while the drug
7 charges were dropped. (Id. ¶ 42.)

8 During the five day trial, Defendants Willey, Cerda, Rhames
9 and Gonzales testified. (Id. ¶ 46.) Plaintiff testified on his
10 own behalf, having rejected another plea offer the day prior to
11 trial. (Id. ¶ 47.) On July 6, 2007, a jury found Plaintiff not
12 guilty on all charges (second degree robbery, grand theft person
13 and petty theft). (Id. ¶ 48.)

14 Plaintiff was incarcerated from January 7, 2007, to July 6,
15 2007. (Id. ¶ 51.) During this time, he alleges that he endured
16 humiliation, suffered emotional distress, lost his job, and was
17 separated from his pregnant girlfriend who eventually miscarried
18 before her delivery date. (FAC ¶ 21.)

19 Plaintiff alleges he was wrongfully accused, wrongfully
20 arrested, and wrongfully held in custody against his will for six
21 months. The officers are alleged to have falsely detained,
22 arrested, and imprisoned Plaintiff, and held him against his will
23 without probable cause. Plaintiff also alleges that the Officers
24 were motivated by racial prejudice because the victim is Caucasian,
25 while the Plaintiff is African American.

26 The City of Fresno is sued because they allegedly did not
27 effectively train and supervise City police officers with regard to
28 the proper constitutional and statutory limits of the existence of

1 their authority. Plaintiff also accuses the City of initiating and
2 promoting a meritless and malicious prosecution, which deprived
3 Plaintiff of his constitutional rights.

4
5 **III. PROCEDURAL BACKGROUND**

6 On September 19, 2008, Plaintiff filed this § 1983 action
7 against the County of Fresno, City of Fresno, the Fresno Police
8 Department, Chief Jerry Dyer, Officers Robert Gonzales, Jesus
9 Cerda, Brent Willey, and Detectives Brian Valles and Brendan
10 Rhames. (Doc. 1, "Original Complaint".) Fresno County moved to
11 dismiss Plaintiff's original complaint on March 17, 2009. (Doc.
12 17.) City Defendants moved to dismiss the original complaint on
13 April 3, 2009. (Doc. 19.) The hearing on Defendants' motions to
14 dismiss, originally set for May 18, 2009, was continued to June 15,
15 2009 due to the press of court business. (Doc. 30.) On June 3,
16 2009, Plaintiff filed his first amended complaint ("FAC"), mooted
17 the then-pending motions to dismiss. (Doc. 31.)

18 County and City Defendants separately moved to dismiss
19 Plaintiff's FAC on June 15, 2009. (Docs. 33, 34.) Oral argument
20 on the motions to dismiss was held on September 14, 2009. The
21 court issued a written decision on September 28, 2009, dismissing
22 Plaintiff's FAC without prejudice. (Doc. 41.) Plaintiff was given
23 twenty days from the issuance of the order to amend his complaint.¹
24 (Id.)

25
26 ¹ On November 2, 2009, Plaintiff filed a "Request for
27 Extension of Time," seeking thirty additional days to file an
28 amended complaint. (Doc. 46.) The motion was granted on November
10, 2009. (Doc. 47.) Plaintiff was required to file a second
amended complaint by December 9, 2009. (Id.)

1 Plaintiff filed his second amended complaint, ("SAC"), on
2 December 9, 2009. (Doc. 48.) The SAC's caption lists the City of
3 Fresno, Robert Gonzales, Jesus Cerda, Brent Willey, and Brian
4 Valles as Defendants. The SAC alleges eight claims for relief:

5 1. First Claim for Relief (All City Defendants) - Denial of
6 Constitutional Right Against Unreasonable Search and Seizure in
7 violation of the Fourth and Fourteenth Amendments pursuant to 28
8 U.S.C. § 1983;

9 2. Second Claim for Relief (Officer Defendants) - False
10 Arrest and Imprisonment;

11 3. Third Claim for Relief (Officer Defendants) - Malicious
12 Prosecution;

13 4. Fourth Claim for Relief (Officer Defendants) -
14 Intentional Infliction of Emotional Distress;

15 5. Fifth Claim for Relief (Officer Defendants) - Violation
16 of California Civil Code § 52.1;

17 6. Sixth Claim for Relief (All City Defendants) - Vicarious
18 Liability;

19 7. Seventh Claim for Relief (Officer Defendants) - Violation
20 of California Civil Code § 51.7; and

21 8. Eighth Claim for Relief (Officer Defendants) -
22 Negligence.

23
24 The SAC prays for injunctive relief enjoining City Defendants
25 from authorizing, allowing, or ratifying the use of excessive force
26 by its police officers; for a "public apology" from all Defendants;

1 and for attorney's fees as provided by law.²

2 County and City Defendants separately moved to dismiss
3 Plaintiff's SAC on December 11, 2009. (Docs. 49, 53.) Plaintiff
4 opposed the motions on February 22, 2010. (Doc. 55.)

5
6 IV. LEGAL STANDARD

7 Under Federal Rule of Civil Procedure 12(b)(6), a motion to
8 dismiss can be made and granted when the complaint fails "to state
9 a claim upon which relief can be granted." Dismissal under Rule
10 12(b)(6) is appropriate where the complaint lacks a cognizable
11 legal theory or sufficient facts to support a cognizable legal
12 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
13 (9th Cir. 1990).

14 To sufficiently state a claim to relief and survive a 12(b)(6)
15 motion, a complaint "does not need detailed factual allegations"
16 but the "[f]actual allegations must be enough to raise a right to
17 relief above the speculative level." *Bell Atl. Corp. v. Twombly*,
18 550 U.S. 544, 555 (2007). Mere "labels and conclusions" or a
19 "formulaic recitation of the elements of a cause of action will not
20 do." *Id.* Rather, there must be "enough facts to state a claim to
21 relief that is plausible on its face." *Id.* at 570. In other
22 words, "[t]o survive a motion to dismiss, a complaint must contain
23 sufficient factual matter, accepted as true, to state a claim to
24 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.

25
26 _____
27 ² Plaintiff's request for attorneys' fees was stricken from
28 the FAC pursuant to the September 28, 2009 Order. (Doc. 41.) Pro
se civil litigants are not entitled to attorney's fees. See *Kay v.*
Ehrler, 499 U.S. 432, 435-38 (1991).

1 ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
2 quotation marks omitted). "The plausibility standard is not akin
3 to a probability requirement, but it asks for more than a sheer
4 possibility that a defendant has acted unlawfully. Where a
5 complaint pleads facts that are merely consistent with a
6 defendant's liability, it stops short of the line between
7 possibility and plausibility of entitlement to relief." *Id.*
8 (internal citation and quotation marks omitted).

9 In deciding whether to grant a motion to dismiss, the court
10 must accept as true all "well-pleaded factual allegations." *Iqbal*,
11 129 S.Ct. at 1950. A court is not, however, "required to accept as
12 true allegations that are merely conclusory, unwarranted deductions
13 of fact, or unreasonable inferences." *Sprewell v. Golden State*
14 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g., Doe I v.*
15 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at *3 (9th
16 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart
17 exercised control over their day-to-day employment is a conclusion,
18 not a factual allegation stated with any specificity. We need not
19 accept Plaintiffs' unwarranted conclusion in reviewing a motion to
20 dismiss.").

21 The Ninth Circuit has summarized the governing standard, in
22 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint
23 to survive a motion to dismiss, the non-conclusory factual content,
24 and reasonable inferences from that content, must be plausibly
25 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
26 *U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (internal
27 quotation marks omitted).

1 V. DISCUSSION

2 A. Fresno County

3 On June 15, 2009, Fresno County moved to dismiss Plaintiff's
4 FAC, arguing that the allegations against it were insufficient
5 under Rule 12(b). In particular, via the September 28, 2009
6 written order, it was determined that Fresno County District
7 Attorney Elizabeth Egan was not a proper defendant for Plaintiff's
8 § 1983 claim; the court also found that he could not sustain a
9 constitutional claim against Fresno County for alleged
10 constitutional violations by its District Attorneys. (Doc. 41 at
11 22:23-26:16.) These claims/parties were dismissed without leave to
12 amend. Plaintiff, however, was given one additional opportunity to
13 perfect his *Monell* claim against the County of Fresno. (Id.)

14 Fresno County now moves to dismiss Plaintiff's SAC for three
15 reasons. First, the County argues that it should be dismissed
16 because the SAC does not name the County as a Defendant. Second,
17 the SAC does not contain any substantive allegations against the
18 County or its employees. Third, the proof of service attached to
19 the complaint demonstrates that Plaintiff did not intend to serve
20 the SAC on the County.

21 Courts have held that an amended complaint that drops a
22 defendant named in the original complaint effectively dismisses
23 that defendant from the action. See *Hafiz v. Indymac Fed. Bank*, C-
24 09-02300-SI, 2009 WL 2982830 (N.D. Cal. Sep. 14, 2009) ("[W]here
25 the plaintiff does not rename a particular defendant in an amended
26 complaint, no judgment may issue against that defendant.") (quoting
27 *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d
28 1542 (9th Cir. 1990)); see also *King v. Atiyeh*, 814 F.2d 565, 567

1 (9th Cir. 1987) ("All causes of action alleged in an original
2 complaint which are not alleged in an amended complaint are
3 waived.").

4 *Rasidescu v. Midland Credit Mgmt., Inc.*, 435 F. Supp. 2d 1090
5 (S.D. Cal. 2006), held:

6 Once filed, the amended complaint supersedes the
7 original: it must stand or fall on its own;
8 jurisdictional and other allegations essential to the
9 claim must be realleged; and the original complaint is
10 rendered irrelevant unless the amended complaint
11 incorporates by reference portions of the prior
12 pleading. An amended complaint that drops a defendant
13 named in the original complaint effectively dismisses
14 that defendant from the action.

15 *Id.* at 1101 (citations omitted).

16 Plaintiff's SAC neither names the County of Fresno as a
17 defendant in its caption, nor contains any substantive allegations
18 against the County or its employees. The allegations against the
19 County have been superceded by the SAC or were dismissed by prior
20 court order. Plaintiff has not perfected his *Monell* claim against
21 the County despite being given one last opportunity to amend his
22 complaint. The County's request for an order dismissing it from
23 this action is GRANTED WITH PREJUDICE.

24 **B. City of Fresno Defendants**

25 **1. 42 U.S.C. § 1983 (Claim I)**

26 Defendants City of Fresno, Officers Robert Gonzales, Jesus
27 Cerda, Brent Willey, and Detective Brian Valles seek 12(b)(6)
28 dismissal of Plaintiff's 42 U.S.C. § 1983 on grounds that the
claims fail to allege necessary elements or are barred by the
doctrine of collateral estoppel.

1 a. Monell Liability

2 Plaintiff brings a § 1983 constitutional violation claim
3 against the City of Fresno under the Fourth and Fourteenth
4 Amendments. Local governments are "persons" subject to suit for
5 "constitutional tort[s]" under 42 U.S.C. § 1983. *Haugen v.*
6 *Brosseau*, 339 F.3d 857, 874 (9th Cir. 2003) (citing *Monell v. Dep't*
7 *of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978)) "[O]ur holding ...
8 that local governments can be sued under § 1983 necessarily decides
9 that local government officials sued in their official capacities
10 are 'persons' under § 1983 in those cases in which, as here, a
11 local government would be suable in its own name". *Monell*, 436
12 U.S. at 691 n.55. "Local governing bodies, therefore, can be sued
13 directly under § 1983 for monetary, declaratory, or injunctive
14 relief where, as here, the action that is alleged to be
15 unconstitutional, implements or executes a policy statement,
16 ordinance, regulation, or decision officially adopted and
17 promulgated by that body's officers ... [or for] deprivations
18 visited pursuant to governmental 'custom' even though such a custom
19 has not received formal approval through the body's official
20 decision making channels." *Id.* at 690-91.

21 Although a local government can be held liable for its
22 official policies or customs, it will not be held liable for an
23 employee's actions outside of the scope of these policies or
24 customs. "[T]he language of § 1983, read against the background of
25 the same legislative history, compels the conclusion that Congress
26 did not intend municipalities to be held liable unless action
27 pursuant to official municipal policy of some nature caused a
28 constitutional tort. In particular, ... a municipality cannot be

1 held liable solely because it employs a tortfeasor. A municipality
2 cannot be held liable under § 1983 on a respondeat superior
3 theory." *Id.* at 691. The statute's "language plainly imposes
4 liability on a government that, under color of some official
5 policy, 'causes' an employee to violate another's constitutional
6 rights." *Id.* at 692.

7 To prevail on a § 1983 claim against a local government under
8 *Monell*, a plaintiff must satisfy a three-part test: (1) The
9 official(s) must have violated the plaintiff's constitutional
10 rights; (2) The violation must be a part of a policy or custom and
11 may not be an isolated incident; and (3) A nexus must link the
12 specific policy or custom to the plaintiff's injury. See *Monell*,
13 436 U.S. at 690-92. There are three ways to show a policy or
14 custom of a municipality:

15 (1) By showing a longstanding practice or custom which
16 constitutes the standard operating procedure of the
local government entity;

17 (2) By showing that the decision-making official was,
18 as a matter of state law, a final policymaking
19 authority whose edicts or acts may fairly be said to
represent official policy in the area of decision or

20 (3) By showing that an official with final
21 policymaking authority either delegated that authority
to, or ratified the decision of, a subordinate.

22 *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005).

23 A municipal policy may be inferred from widespread practices
24 or evidence of repeated constitutional violations for which the
25 errant municipal officers were not discharged or reprimanded. *Id.*
26 Municipalities can be held liable "if its deliberate policy caused
27 the constitutional violation alleged." *Blackenhorn*, 485 F.3d at
28 484.

1 The City argues that Plaintiff's *Monell* claim fails because he
2 "again fail[s] to plead that the alleged constitutional violations
3 were pursuant to a 'custom or policy' of the Fresno Police
4 Department." (Doc. 53-2, 5:1-5:2.) This issue, i.e., pleading a
5 *Monell* claim under the *Iqbal* standard, was discussed in detail at
6 the September 14, 2009 oral argument and in the September 28, 2009
7 Order. The September 28, 2009 Order provides:

8 Prior to *Iqbal*, "a claim of municipal liability under
9 section 1983 [was] sufficient to withstand a motion to
10 dismiss even if the claim [was] based on nothing more
11 than a bare allegation that the individual officers'
12 conduct conformed to official policy, custom, or
13 practice." However, *Iqbal* has made clear that
14 conclusory, "threadbare" allegations that merely
15 recite the elements of a cause of action will not
16 withstand a motion to dismiss. Even under a *Whitaker*
17 standard, Plaintiff's FAC is insufficient.
18 Plaintiff's FAC fails to even cite a custom or policy
19 of the City or any other indicia of *Monell* liability,
20 other than a conclusory incantation that the City
21 "knew" of an illegal policy.

22 Plaintiff has not sufficiently alleged that, in
23 depriving him of his constitutional rights, a City
24 employee was acting pursuant to an official policy,
25 custom or practice of the City of Fresno. There is a
26 brief reference to an "illegal policy," but no
27 explanation as to what comprises the "illegal policy,
28 pattern, practice, custom" referred to in the FAC
29 [...]

30 As best understood, paragraph 45 of the FAC refers to
31 the City's "knowledge" of an illegal "policy, pattern,
32 practice, custom" concerning the District Attorney's
33 decision to file criminal charges against him.
34 Plaintiff's factual description ends there. If
35 Plaintiff seeks to allege a claim against the City,
36 Plaintiff must identify what "policy" or "custom" he
37 is challenging and how that policy or custom deprived
38 him of his constitutional rights. At this time, it is
39 unclear what "policy, pattern, practice, custom"
40 Plaintiff refers to and how the City's purported
41 "knowledge" of these policies deprived him of his
42 constitutional rights [...]

43 The allegations in the FAC do not identify the
44 challenged policy/custom, explain how the
45 policy/custom is deficient, explain how the

1 policy/custom caused the plaintiff harm. City
2 Defendants' motion to dismiss is GRANTED. Plaintiff
3 has already amended his complaint once. Leave to
4 amend is GRANTED for one final opportunity. No
5 further leave will be given.

6 (Doc. 41 at 12:22-15:6.) (citations omitted).

7 Plaintiff has not cured his pleading deficiencies. Here,
8 Plaintiff alleges that Defendants City of Fresno and its officers
9 "violated his civil rights" and "wrongfully held [him] in custody
10 against his will for six months, and emotionally distressed [him]."
11 (SAC ¶ 14.) Plaintiff further alleges that "Defendants deprived
12 the Plaintiff of his right to be free from unreasonable search and
13 seizures," and "Defendants knew or should have known of the
14 Plaintiff's rights, and knew and should have known that their
15 wrongful and illegal conduct violated Plaintiff's rights." (Id.
16 ¶'s 57, 60.) The SAC, however, fails to allege or identify an
17 official custom or policy of the City of Fresno that caused the
18 alleged constitutional violations. This is fatal to Plaintiff's
19 Monell claim against the City. See, e.g., *Blankenhorn*, 485 F.3d at
20 484; see also *Funez ex rel. Funez v. Guzman*, --- F.Supp.2d ----,
21 2009 WL 5064982 (D. Or. Dec. 15, 2009) (dismissing Plaintiff's
22 Monell claim on grounds that the complaint failed to identify a
23 specific policy or custom); *Wilson v. City of Fresno*, CV-09-0887-
24 LJO-SMS, 2009 WL 3233879 (E.D. Cal. Oct. 2, 2009) (Plaintiff's §
25 1983 discrimination claim "is conclusory and fails to establish the
26 City's Monell liability [....] [t]he complaint identifies no policy
27 with particularity to connect the City's execution of such policy
28 to [Plaintiff's] alleged [] deprivation.").

Plaintiff has not sufficiently alleged that, in depriving him

1 of his constitutional rights, a City employee was acting pursuant
2 to an official policy, custom or practice of the City of Fresno.³
3 Plaintiff's allegations do not support a claim against the City of
4 Fresno under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).
5 The motion is GRANTED. No further leave will be given.

6
7 b. Collateral Estoppel

8 Plaintiff asserts a § 1983 claim against Defendants Gonzales,
9 Cerda, Willey, and Valles on grounds that Plaintiff was arrested
10 and prosecuted without probable cause.⁴ To the extent it can be
11 understood, the substance of Plaintiff's complaint is that Mr.
12 Billet, the alleged victim, gave inconsistent statements to the
13 police and changed his testimony during the preliminary hearing.
14 According to Plaintiff, Prosecutor Esmeralda Garcia, who is not a
15 party to this action, knew Billet's statements were inconsistent
16 and failed to act, leading to the probable cause finding, his pre-
17 trial incarceration, and his trial.

18 Defendants argue that Plaintiff should be estopped from
19

20 ³ Plaintiff's *Monell* claim fails because he has neither pled
21 any facts suggesting that the City of Fresno had an
22 unconstitutional policy or custom nor indicated how the City of
23 Fresno violated his constitutional rights. See *City of Canton v.*
24 *Harris*, 489 U.S. 378, 385 (1989) (There must be "a direct causal
link between a municipal policy or custom and the alleged
constitutional deprivation.").

25 ⁴ Plaintiff sues Defendants Gonzales, Cerda, Willey, and
26 Valles in their individual capacities for liability under § 1983.
27 Plaintiff alleges that his arrest was unlawful and that "Defendants
28 deprived [him] of his right to be free from unreasonable searches
and seizures." (SAC ¶ 57.) Defendants move to dismiss the claim
on grounds that it is barred under the doctrine of collateral
estoppel.

1 challenging the propriety of his arrest under *McCutchen v. City of*
2 *Montclair*, 73 Cal. App. 4th 1138 (1999) and *Heath v. Cast*, 813 F.2d
3 254 (9th Cir. 1987).⁵ Defendants contend that because the
4 sufficiency of probable cause for his arrest was necessarily
5 determined in the preliminary hearing held on March 13, 2007, after
6 which Plaintiff was held over for trial, Plaintiff may not
7 re-litigate the question of probable cause through this case.

8 The doctrine of collateral estoppel, or issue preclusion,
9 prevents re-litigation of legal and/or factual issues necessarily
10 considered and determined in a prior legal proceeding between the
11 same parties, or their privies. See, e.g., *Allen v. McCurry*, 449
12 U.S. 90, 94 (1980); *McGowan v. City of San Diego*, 208 Cal. App. 3d
13 890, 895 (1989). The collateral estoppel doctrine applies with
14 equal force to claims brought under § 1983. See *Allen*, 449 U.S. at
15 105. Whether collateral estoppel applies in a given case is
16 primarily a legal question. *Ayers v. City of Richmond*, 895 F.2d
17 1267, 1270 (9th Cir. 1990). State law governs the application of
18 collateral estoppel to issues that were decided in a prior state
19 court proceeding. See *id.*; *Allen*, 449 U.S. at 96 (state law
20 applicable for prior state judgments).

21 Under California law, collateral estoppel is applied where:
22 (1) the issue sought to be precluded is identical to that which was
23 decided in a prior proceeding; (2) that issue was actually

25 ⁵ The defense of collateral estoppel may be considered on a
26 motion to dismiss if the court can take judicial notice of all
27 relevant facts. See *Day v. Moscow*, 955 F.2d 807, 811 (2nd Cir.
28 1992); see also *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th
Cir. 1986) (district court may examine preclusive effect of prior
judgment sua sponte).

1 litigated and necessarily decided in that proceeding; (3) there was
2 a final judgment on the merits; and (4) that party against whom
3 collateral estoppel is asserted was a party or in privity with a
4 party to the prior proceeding. See *McCutchen*, 73 Cal. App. 4th at
5 1145; *Heath*, 813 F.2d at 258. In California, a prior criminal
6 proceeding may have collateral estoppel implications for a
7 subsequent civil suit. See, e.g., *McGowan v. City of San Diego*,
8 208 Cal. App. 3d 890, 895 (1989); *McCutchen*, 73 Cal. App. 4th at
9 1144; *Heath*, 813 F.2d at 258.

10 A probable cause determination at a preliminary hearing is
11 considered a final judgment on the merits because the defendant can
12 immediately appeal the determination. See *Haupt v. Dillard*, 17
13 F.3d 285, 288-89 (9th Cir. 1994); *McCutchen*, 73 Cal. App. 4th at
14 1145-46. In California, an accused can immediately appeal the
15 determination by filing a motion to set aside the preliminary
16 hearing under California Penal Code § 995 and then obtain review of
17 the decision on this motion by filing a writ of prohibition under
18 California Penal Code § 999a. See *McCutchen*, 73 Cal. App. 4th at
19 1146. Consequently, a preliminary hearing that determines probable
20 cause to arrest may bar subsequent claims under § 1983 based on
21 this issue, but not in all circumstances. See, e.g., *Awabdy v.*
22 *City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (“[A] [civil]
23 plaintiff [in a § 1983 action] can rebut a prima facie finding of
24 probable cause [] by showing that the criminal prosecution was
25 induced by fraud, corruption, perjury, fabricated evidence, or
26 other wrongful conduct undertaken in bad faith.”).

27 Plaintiff maintains that collateral estoppel does not apply to
28 his § 1983 claim because the “trial judge erred in deciding that

1 Plaintiff should be held to answer for the charges of robbery."

2 (Doc. 55 at 4:19-20.) On Plaintiff's account, Billet's false and
3 inconsistent testimony was considered by the judge at the hearing
4 and led to the adverse and incorrect probable cause ruling.

5 Plaintiff also blames "Prosecutor Esmeralda Garcia" for not
6 intervening, but does not allege that the officers perjured
7 themselves or caused Billet to change his testimony. The SAC
8 provides in relevant part:

9 39. On March 13, 2007 the Plaintiff and other charged
10 individuals appeared at the preliminary hearing to
11 see if there is enough evidence to hold the
12 plaintiff and go to trial. Billet testified at the
13 hearing and considerably changed his story on what
14 occurred that evening of January 7, 2007. During
15 his testimony, Billet made no mention that he
16 worked for Comcast Cable and that he was working on
17 his friend's cable box on the day of the alleged
18 incident. Billet['s] new story was, that he and
19 his friend went to someone's house to score a bag
20 of marijuana.

21 40. Prosecutor Esmeralda Garcia from Defendant County
22 District Attorney Office was present at the
23 hearing. Ms. Garcia knew or reasonabl[y] should
24 have known that the alleged victim, Billet, story
25 was contradictive [sic] and inconsistent from his
26 original statements on January 7, 2007.

27 41. Defendants Willey and Cerda testified at the
28 hearing before Judge Hoff.

42. Plaintiff was held to answer Count-1 [robbery] and
the drug charges were dropped. Plaintiff was plead
to the mid-term of Count-1, to dismiss as to the
gun enhancement.

(SAC ¶'s 39-42.)

Defendants advance two reasons why the doctrine of collateral
estoppel bars Plaintiff's § 1983 claim: (1) Plaintiff "admitted"
to answering to the robbery charge in both his second amended
complaint and opposition; and (2) the transcript of the March 13,

1 2007 preliminary hearing demonstrates that probable cause existed
2 to try Plaintiff on the robbery charge. The March 13, 2007
3 transcript, portions of which are attached to Plaintiff's SAC and
4 opposition, provides:⁶

5 Court: All right. As to the charge in Count 1 of the
6 complaint, felony offense of robbery under
7 Penal Code Section 211 charged against
8 Defendant Number 1, Demetrius Harvey only, the
9 court finds that there is sufficient evidence
10 to establish that the crime of robbery has
11 occurred and there's also sufficient,
12 reasonable and probable cause that the
13 defendant Harvey is guilty thereof. I order
14 he be held to answer that charge.

15 The court is also satisfied that there's
16 sufficient evidence to establish the personal
17 use of a firearm within the meaning of Penal
18 Code Section 12022.53(b) as to defendant
19 Harvey in Count 1, and therefore, he's held to
20 answer as alleged in Count 1.

21 (Doc. 55, Exh. 1, March 13, 2007 Preliminary Hearing, 56:13-57:2.)

22 This finding precludes Plaintiff's § 1983 claim alleging the
23 Defendants violated his Fourth and Fourteenth Amendment rights when
24 they arrested him. Although the specific finding states only that
25 there was probable cause to hold Plaintiff for trial and does not
26 specifically address whether there was probable cause to arrest,
27 under California law, "a finding of sufficiency of the evidence to
28

22 ⁶ The Court takes judicial notice of the March 13, 2007
23 preliminary hearing transcript. See *Backe v. Novatel Wireless,*
24 *Inc.*, 607 F. Supp. 2d 1145 (S.D. Cal. 2009) ("In evaluating a
25 motion to dismiss, a court may consider evidence on which the
26 complaint 'necessarily relies' as long as: (1) the complaint refers
27 to the document; (2) the document is central to the plaintiff's
28 claim; and (3) no party questions the authenticity of the copy
attached to the 12(b)(6) motion."). In addition, the Court may
consider matters of public record. *Lee v. City of Los Angeles*, 250
F.3d 668, 688 (9th Cir. 2001)

1 require the defendant to stand trial is a finding of probable cause
2 to arrest the defendant." See *McCutchen*, 73 Cal. App. 4th at 1145
3 (citing *Haupt*, 17 F.3d at 289). The issues necessarily determined
4 at Plaintiff's preliminary hearing are the same issues that
5 underscore his civil-rights claim. Under *McCutchen* and well-
6 established Ninth Circuit precedent, the March 13, 2007 probable
7 cause finding forecloses Plaintiff's § 1983 claim against
8 Defendants Gonzales, Cerda, Willey, and Valles.

9 That is not the end of the inquiry, however. Courts have
10 identified factual circumstances that limit or eliminate collateral
11 estoppel effects of a prior criminal preliminary hearing. In *Haupt*
12 *v. Dillard*, 17 F.3d 285, the Ninth Circuit found two such
13 situations: (1) where facts were presented to the judicial officer
14 presiding over the preliminary hearing which were additional to (or
15 different from) those available to the officers at the time they
16 made an arrest; and (2) where tactical considerations prevented a
17 litigant/prior criminal defendant from vigorously pursuing the
18 issue of probable cause during the prior criminal
19 prosecution/preliminary hearing. See *id.* at 289. The *McCutchen*
20 decision identified a third factual "exception" to the *Haupt*
21 doctrine: (3) where a plaintiff alleges that the arresting officer
22 lied or fabricated evidence presented at the preliminary hearing.
23 *McCutchen*, 73 Cal. App. 4th at 1147. In the absence of one of
24 these three exceptions, however, California plaintiffs may not
25 "re-litigate" the "issue" of probable cause.

26 Here, Plaintiff's SAC contains no allegations regarding
27 untruthfulness or fraud on the part of the arresting
28 officers/detectives. In particular, Plaintiff has neither pled nor

1 indicated that the Defendant officers/detectives perjured
2 themselves or fabricated evidence. The gravamen of Plaintiff's SAC
3 focuses on Billet's "changed story," and the prosecutor's alleged
4 failure to intervene. This case is readily distinguishable from
5 those applying the *Haupt* and *McCutcheon* exceptions. Compare
6 *Hernandez v. City of Los Angeles*, CV-04-09262-FMC, 2005 WL 5714358
7 (C.D. Cal. Jan. 6, 2005) (dismissing Plaintiff's § 1983 claim, on
8 collateral estoppel grounds, after finding that his allegations did
9 not implicate *Haupt* or *McCutchen* exceptions) with *Guerrero v. City*
10 *and County of San Francisco*, C-00-1247-THE, 2003 WL 22749099 at *5
11 (N.D. Cal. Nov. 18, 2003) (denying Defendants' collateral estoppel
12 argument because "plaintiff alleges that [the officer] falsely
13 testified at the preliminary hearing and falsely stated in his
14 affidavit supporting the arrest warrant that [the victim] had told
15 him that plaintiff had vaginally penetrated [the victim] [on a
16 number of occasions].").

17 As pled, collateral estoppel bars Plaintiff from relitigating
18 the issue of probable cause to arrest, and the motion to dismiss is
19 granted on Plaintiff's § 1983 claims against Defendants Gonzales,
20 Cerda, Willey, and Valles. Plaintiff has neither pled nor
21 indicated that the "exceptional" circumstances discussed in *Haupt*
22 or *McCutcheon* exist in this case. The motion is GRANTED WITH
23 PREJUDICE.⁷

24
25 ⁷ Although it is generally preferable to decide a collateral
26 estoppel defense on a motion for summary judgment rather than on a
27 motion to dismiss, see *Morley v. Walker*, 175 F.3d 756, 761 (9th
28 Cir. 1999), under the circumstances of this case, dismissing
Plaintiff's claims on a motion to dismiss is warranted. See *Day v.*
Moscow, 955 F.2d 807, 811 (2d Cir. 1992). In addition, the

1 c. Equal Protection Claim

2 Plaintiff alleges a claim for violation of his right to equal
3 protection, contending that the actions of Defendant officers were
4 driven by race discrimination. The SAC's equal protection
5 allegations are comprised of one paragraph:

6 91. Plaintiff is informed and believes and alleges
7 that the conduct of the officers and does 1-
8 10, was motivated by racial prejudice against
9 Plaintiff because Billet [the victim] is
10 white. Plaintiff is and was readily
11 recognizable African-American.

12 (SAC ¶ 91.)

13 Defendants move to dismiss Plaintiff's equal protection claim
14 on grounds that the allegations do not adequately state an
15 unconstitutional animus or motive. A party alleging an equal
16 protection violation must indicate that there are at least "two
17 classifications of persons who are treated differently under the
18 law." *Christian Gospel Church v. San Francisco*, 896 F.2d 1231,
19 1226 (9th Cir. 1990). A plaintiff must also allege discriminatory
20 animus. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948-49
21 (9th Cir. 2003). Plaintiff has not done either.

22 Plaintiff's second amended complaint has not appropriately

23 holdings of *Moreno v. Baca*, CV-00-07149-ABC-CWX, 2001 WL 1204113
24 (C.D. Cal. July 9, 2001) and *White v. City of Fresno*, CV-F-05-1558-
25 OWW, 2007 WL 3341470 at *21 (E.D. Cal. Nov. 9, 2007) are
26 distinguishable. Those cases presented an incomplete testimonial
27 record, thus the question of the potential collateral estoppel
28 effect could not be resolved without resorting to facts outside of
the operative pleadings. This case is differs for two reasons: (1)
as pled, Plaintiff's allegations against the Defendant officers do
not implicate the *Haupt* or *McCutcheon* exceptions; and (2) the
probable cause finding is not in dispute. This case is analogous
to *Hernandez v. City of Los Angeles*, *supra*.

1 identified with particularity the conduct undertaken by Defendants
2 that rises to "intentional discrimination." Nor has he
3 sufficiently described how "two classifications of persons were
4 treated differently under the law." The SAC merely alleges that
5 Plaintiff's equal protection rights were violated because the
6 victim was caucasian and he is African-American. No other facts
7 are alleged. This is insufficient under *Iqbal*. Defendants' motion
8 to dismiss the equal protection claim is GRANTED.

9
10 2. State Law Claims

11 Plaintiff alleges causes of action against Defendants
12 Gonzales, Cerda, Willey, and Valles for false arrest/imprisonment
13 (Count II), malicious prosecution (Count III), intentional
14 infliction of emotional distress (Count IV), negligence (Count
15 VIII) and violations of California Civil Code §§ 52.1 (Count V) and
16 51.7 (Count VII). He also alleges a cause of action for "Vicarious
17 Liability" against the City of Fresno and County of Fresno.

18
19 a. False Arrest/Imprisonment (Count II) and
20 Malicious Prosecution (Count III)

21 Plaintiff alleges causes of action against Defendants
22 Gonzales, Cerda, Willey, and Valles for false arrest and
23 imprisonment (Count II) and malicious prosecution (Count III).
24 Defendants contend that Plaintiff's claims for false
25 arrest/imprisonment and malicious prosecution are precluded under
26 the doctrine of collateral estoppel. Defendants are correct.

27 Collateral estoppel bars Plaintiff's claims for false
28 arrest/imprisonment and malicious prosecution because the issue of

1 probable cause has already been determined in state court. See,
2 e.g., *Rutledge v. County of Sonoma*, C-07-4274-CW, 2009 WL 3075596,
3 (N.D. Cal. Sep. 22, 2009). Under the analysis discussed above, the
4 preliminary hearing provided a final determination that there was
5 probable cause to prosecute. As an essential element of each claim
6 is want of probable cause, the March 13, 2007 finding bars
7 Plaintiff from relitigating this issue in connection with his false
8 arrest/imprisonment and malicious prosecution claims. See *Estate*
9 *of Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1030 (9th
10 Cir. 2008) (stating the elements of a claim for malicious
11 prosecution in California); see also *Flowers v. County of Fresno*,
12 CV-F-09-0051-LJO-GSA, 2009 WL 1034574 at *8 (E.D. Cal. April 16,
13 2009) (discussing the necessity of probable cause in the context of
14 a false arrest/imprisonment claim). Plaintiff provided no argument
15 or evidence disputing City Defendants' argument on this point.

16 The determination of probable cause at the March 13, 2007
17 hearing operates as a complete defense to these tort claims. The
18 motion is GRANTED. Plaintiff's second and third causes of action
19 are DISMISSED WITH PREJUDICE.

20
21 b. IIED (Count IV)

22 Defendants move to dismiss Plaintiff's IIED claim on grounds
23 that "the only conduct identified by Plaintiff as allegedly
24 'outrageous' is the arrest, and subsequent detention." To
25 establish a prima facie case of intentional infliction of emotional
26 distress, Plaintiff must show extreme and outrageous conduct by
27 Defendant, the intention to cause or reckless disregard of the
28 probability of causing emotional distress, actual severe emotional

1 suffering by Plaintiff, and actual and proximate causation of the
2 emotional distress. *Potter v. Firestone* 6. Cal. 4th 965, 1001
3 (1999); *Delfino v. Agilent Technology, Inc.*, 145 Cal. App. 4th
4 790, 808 (2006). For conduct to be extreme and outrageous, it must
5 be "so extreme as to exceed all bounds of that usually tolerated in
6 a civilized community." *Potter*, 6 Cal. 4th at 1001; *Delfino*, 145
7 Cal. App. 4th at 809.

8 In his opposition, Plaintiff submits that "paragraphs 79
9 through 82 of the SAC properly establish a claim for IIED." (Doc.
10 55 at 5:16-5:18.) The relevant portion of the SAC provides:

11 79. Plaintiff re-alleges and incorporates herein
12 paragraphs 1 through 78 above, as though fully set
forth in this Claim for relief.

13 80. As alleged above, defendants, and each of them,
14 acted willfully, knowingly, maliciously, in bad
15 faith and with the intention to cause Plaintiff
humiliation, mental anguish, and severe emotional
16 distress; and defendants acted with the knowledge
that such injuries would occur.

17 81. As a direct, proximate, and legal result of the
18 above illegal and wrongful acts defendants, and
each of the defendants, Plaintiff suffered injury,
19 damages, and losses, including, but not limited to
the following, in the amount that will be proven at
trial;

- 20 a. Loss of liberty
- 21 b. Loss of comfort and emotional support for his
girlfriend during pregnancy
- 22 c. Severe emotional distress
- d. Public degradation, e. Loss of income.
- e. Loss of income

23 82. The above described conduct by named officers and
24 Does 1 through 25, and each of them, were willful,
oppressive, intentional and malicious; punitive and
25 exemplary damages and therefore [sic] to make an
example of and punish named defendants officers and
26 Does 1 through 25.

27 (SAC ¶'s 79-82.)

28 Defendants correctly note that the conclusory allegations set

1 forth in the SAC are insufficient to state a claim for IIED. Here,
2 Plaintiff again fails to cure the pleading deficiencies attendant
3 to his IIED claim. This point was discussed in detail in the
4 September 28, 2009 Order:

5 [T]he complaint must be dismissed because it fails to
6 put the individual defendants on notice of the claims
7 asserted against them. Under Federal Rule of Civil
8 Procedure 8, a complaint must contain "a short and
9 plain statement of the claim showing that the pleader
10 is entitled to relief." A pleading may not simply
11 allege a wrong has been committed and demand relief.
12 While Rule 8 does not demand detailed factual
13 allegations, "it demands more than an unadorned,
14 the-defendant-unlawfully-harmed-me accusation."
15 "Threadbare recitals of the elements of a cause of
16 action, supported by mere conclusory statements, do
17 not suffice."

18 Put another way, a complaint must contain sufficient
19 factual matter, accepted as true, to "state a claim to
20 relief that is plausible on its face." A claim is
21 plausible "when the plaintiff pleads factual content
22 that allows the court to draw the reasonable inference
23 that the defendant is liable for the misconduct
24 alleged." "Determining whether a complaint states a
25 plausible claim for relief [is] ... a context-specific
26 task that requires the reviewing court to draw on its
27 judicial experience and common sense." Plaintiff's
28 state law causes of action, in total, fail to meet the
rigors of *Iqbal*.

In his opposition brief Plaintiff submits that his FAC
is "sufficient to sue Defendant named officers ...
Plaintiff has put these officers on notice that they
are being sued." Plaintiff also states that he "needs
discovery, which includes police documents and trial
records ... Plaintiff will amend his complaint
accordingly, pending discovery." However, in *Iqbal*,
the Supreme Court rejected a similar argument, finding
that "a motion to dismiss a complaint for insufficient
pleadings does not turn on the controls placed upon
the discovery process."

Whatever state law claims Plaintiff intends to allege
against any defendant in connection with the events of
January 7, 2007 through June 6, 2007, he must state
facts that support the elements of each cause of
action, as to each defendant.

(Doc. 41 at 20:19-22:21.) (citations omitted).

1 At this time Plaintiff has had over one year and one-half to
2 conduct discovery. He has not discovered any facts that support
3 his conclusory allegations.

4 The motion is GRANTED. Plaintiff's fourth cause of action for
5 IIED is DISMISSED WITH PREJUDICE.

6
7 c. Cal. Civil Code § 52.1 (Claim V)

8 Plaintiff includes a cause of action invoking California Civil
9 Code § 52.1, premised on violations of his rights under the Fourth
10 and Fourteenth Amendments. Section 52.1 establishes a private
11 right of action for an "individual whose exercise of enjoyment of
12 rights secured by the Constitution or laws of the United States, or
13 of rights secured by the Constitution or laws of [California], has
14 been interfered with" by "threats, intimidation, or coercion, or
15 attempts to interfere by threats, intimidation, or coercion." Cal.
16 Civ. Code § 52.1(a).

17 Defendants argue that plaintiff has failed to allege
18 sufficient facts to be entitled to relief under § 52.1. As
19 defendants correctly point out, § 52.1 provides remedies for
20 violations of constitutional or statutory rights where the
21 violation is accompanied by threats, intimidation, or coercion.
22 *See Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996);
23 *Austin B. v. Escondido Union School Dist.*, 149 Cal. App. 4th 860
24 (2007). Here, while Plaintiff alleges that Defendants "acted
25 unlawfully" and were "malicious," Plaintiff does not allege that
26 any defendant threatened him, intimidated him, or coerced him.
27 Plaintiff does not state a claim under § 52.1.

28 Moreover, Plaintiff's § 52.1 claims does not rely on a proper

1 constitutional or statutory claim, as his § 1983 claim was barred
2 by the doctrine of collateral estoppel. He does not advance a
3 separate theory to advance a § 52.1 claim. The motion is GRANTED
4 and no further leave will be given.

5
6 d. Vicarious Liability (Claim VI)

7 The sixth cause of action is alleged against the City of
8 Fresno and Defendants Gonzales, Cerda, Willey, and Valles. After
9 incorporating all preceding allegations, the sixth cause of action
10 alleges:

11 88. Defendants City, pursuant to Gov. Code Section
12 815.2(a), are vicariously liable to plaintiff for
13 their injuries and damages suffered as alleged,
14 incurred as a proximate result of the previous
15 mentioned [sic] of intentional, negligent, and
16 wrongful conduct of the named defendant officers
17 and DOES 1-25, as stated in the Second through
18 Fifth Causes of Action.

19 89. As a proximate result of named Defendants' conduct,
20 plaintiff suffered injuries and damages.

21 (SAC ¶'s 88-89.)

22 Defendants move to dismiss Plaintiff's sixth claim because
23 "vicarious liability is not a cause of action in and of itself
24 [...] there must be an underlying tort or statutory violation by an
25 employee in the course and scope of his employment before vicarious
26 liability can attach. Defendants are correct. Because Plaintiff's
27 claims are either barred by the doctrine of collateral estoppel or
28 are legally insufficiently, there is no basis to impose vicarious
liability. Given the absence of any legal authority supporting the
cause of action, the vicarious liability claim is DISMISSED WITH
PREJUDICE.

1 e. Cal. Civil Code § 51.7 (Claim VII)

2 Plaintiff's seventh cause of action is for violation of the
3 Unruh Civil Rights Act, California Civil Code Section 51.7. It is
4 asserted only against Defendants Gonzales, Cerda, Willey, and
5 Valles.

6 California Civil Code § 51.7 grants the "right to be free from
7 any violence, or intimidation by threat of violence, committed"
8 against "persons or property" because of a characteristic listed or
9 defined in California's Unruh Civil Rights Act, California Civil
10 Code § 51. Defendants move to dismiss Plaintiff's claim for
11 violation of § 51 because no facts are alleged that come within the
12 scope of the statute.

13 Here, as discussed in § V(B)(1)(c), *supra*, Plaintiff has not
14 sufficiently pled a racial discrimination claim. Plaintiff has
15 also failed to allege that any defendant committed violence against
16 him or threatened violence against him. Plaintiff's claim under §
17 51.7 is DISMISSED WITH PREJUDICE.

18
19 f. Negligence (Claim VIII)

20 Plaintiff's SAC alleges that defendants were negligent in
21 causing "unnecessary harm and distress to persons through their use
22 of force and making arrests." (SAC ¶ 95.) Defendants argue that
23 the negligence claim should be dismissed because probable cause for
24 the arrest was established at the March 13, 2007 hearing and
25 Defendants owed no legal duty to Plaintiff in relation to their
26 investigation.

27 "The elements of a cause of action for negligence are (1) a
28 legal duty to use reasonable care, (2) breach of that duty, and (3)

1 proximate [or legal] cause between the breach and (4) the
2 plaintiff's injury." *Mendoza v. City of Los Angeles*, 66
3 Cal.App.4th 1333, 1339 (1998) (citation omitted). "The existence
4 of a legal duty to use reasonable care in a particular factual
5 situation is a question of law for the court to decide." *Vasquez*
6 *v. Residential Investments, Inc.*, 118 Cal. App. 4th 269, 278 (2004)
7 (citation omitted).

8 To the extent that Plaintiff argues that he has a cause of
9 action for negligence against Defendants Gonzales, Cerda, Willey,
10 and Valles for arresting him in January of 2007, this claim is
11 dismissed. The January 2007 arrest, which provides the basis for
12 his claim, was supported by probable cause, negating his claim. To
13 the extent that Plaintiff makes a negligence claim against the City
14 of Fresno for the circumstances surrounding his January 2007
15 arrest, it also dismissed. Plaintiff fails to cite any California
16 authority permitting such a cause of action. Plaintiff also fails
17 to specifically allege the existence of a duty and the breach of
18 that duty.

19 Plaintiff's negligence claim primarily fails because the state
20 court found that probable cause existed to hold Plaintiff over for
21 trial on the burglary charge. Consequently, neither the City of
22 Fresno nor its officers breached any duty it owed Plaintiff, if one
23 was owed. The negligence claim against the City of Fresno and its
24 officers is DISMISSED WITH PREJUDICE.

25 26 3. Attempt At Amendment

27 Plaintiff's claims are largely barred by the doctrine of
28 collateral estoppel. His remaining claims are not cognizable as a

1 matter of law. Plaintiff was given several opportunities to amend
2 his complaint, but failed to provide sufficient factual
3 allegations. Defendants' motion is GRANTED WITH PREJUDICE.
4

5 VI. CONCLUSION

6 For the foregoing reasons:

7 1. Plaintiff's *Monell* claim against the County is DISMISSED
8 WITH PREJUDICE. The County's request for an order dismissing it
9 from this action is GRANTED.

10 2. Plaintiff's § 1983 claim against the City of Fresno,
11 Robert Gonzales, Jesus Cerda, Brent Willey, and Brian Valles is
12 barred under the doctrine of collateral estoppel. The claim is
13 DISMISSED WITH PREJUDICE.

14 3. Plaintiff's *Monell* claim against the City of Fresno is
15 DISMISSED WITH PREJUDICE.

16 4. Plaintiff fails to sufficiently allege an equal
17 protection claim against Defendants. Plaintiff's equal protection
18 claim is DISMISSED WITH PREJUDICE.

19 5. The determination of probable cause at the March 13, 2007
20 hearing operates as a complete defense to Plaintiff's false
21 arrest/imprisonment and malicious prosecution claims. These causes
22 of action are DISMISSED WITH PREJUDICE.

23 6. Plaintiff's fourth cause of action for IIED is DISMISSED
24 WITH PREJUDICE.

25 7. Plaintiff's fifth cause of action for a violation of
26 California Civil Code §§ 52.1 is DISMISSED WITH PREJUDICE.

27 8. Plaintiff's sixth cause of action for vicarious liability
28 is DISMISSED WITH PREJUDICE.

1 9. Plaintiff's seventh cause of action for a violation of
2 California Civil Code §§ 51.7 is DISMISSED WITH PREJUDICE.

3 10. Plaintiff's eighth cause of action for negligence is
4 DISMISSED WITH PREJUDICE.

5 Defendants shall submit a form of order consistent with, and
6 within five (5) days following electronic service of, this
7 memorandum decision.

8
9 IT IS SO ORDERED.

10 Dated: March 8, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE