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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

VIRGIL POPESCU,  
  
Plaintiff,  
  
v.  
  
CITY OF SAN DIEGO, *et al.*,  
  
Defendants.

Case No. 15-cv-01657-BAS(JLB)  
**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS**  
**[ECF No. 5]**

**I. INTRODUCTION**

The Plaintiff, Virgil Popescu, filed his Complaint, pursuant to 42 U.S.C. § 1983, ostensibly for false arrest, emotional distress, retaliation, illegal seizure, malicious prosecution, fabrication of evidence, false witnesses, false imprisonment, theft of property, and “refusal to arrest criminal who injured Plaintiff” against the City of San Diego; the San Diego Police Department; San Diego Police Chief William Lansdowne; Mayor Jerry Sanders; Acting Mayor Todd Gloria; City Attorney Mike Aguirre; City Attorney Jan Goldsmith; San Diego Police Officers Hunter, Lynch, Biggler, Dodd, Keefe, and Fish; San Diego Police Sergeants Saenz,

1 Durina, Benavides, Casillas, Barnes, Nislett, Hastings, and Novac; San Diego Police  
2 Detectives Vile and Hudgins; and Parking Enforcement Officer Robert Pagan.  
3 (Complaint, ECF No. 1.)

4 Defendants filed a Motion to Dismiss the Complaint. (ECF No. 5.) Plaintiff  
5 opposed, and Defendants responded to this Opposition. (ECF Nos. 6, 7.) The Court  
6 finds this motion suitable for determination on the papers submitted and without oral  
7 argument. *See* Civ. L.R. 7.1(d)(1). For the reasons stated below, this Court  
8 **GRANTS IN PART AND DENIES IN PART** Defendants’ Motion to Dismiss the  
9 Complaint.

## 10 11 **II. STATEMENT OF FACTS**

### 12 **A. Background**

13 Virgil Popescu’s problems began in 2006, when he received parking tickets  
14 from Parking Enforcement Officer Pagan. In a federal lawsuit, filed in 2006, Popescu  
15 claimed that he was targeted by Pagan because of religious bumper stickers. (*See*  
16 *Popescu v. City of San Diego*, No. 3:06-cv-01577-WMC (S.D. Cal.)) In that lawsuit,  
17 Popescu alleged that Officer Pagan targeted him because the officer was, in fact, a  
18 “pagan” whose last name indicated he did not believe in God. (Complaint, *Popescu*  
19 *v. City of San Diego*, No. 3:06-cv-01577-WMC (S.D. Cal. Aug. 8, 2006), ECF No.  
20 1.)<sup>1</sup>

21 Following a bench trial, the Court ruled, “Plaintiff failed to meet his burden of  
22 proving that Officer Pagan violated his constitutional rights by issuing one or more  
23 parking violations in a discriminatory manner based on Plaintiff’s political or  
24 religious beliefs.” (Judgment in a Civil Case, *Popescu v. City of San Diego*, No.  
25 3:06-cv-01577-WMC (S.D. Cal. Dec. 8, 2011), ECF No. 115.)

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27 <sup>1</sup> Although “[j]udicial notice of court records is routinely accepted,” the Court will only take  
28 judicial notice of the fact that these documents with these allegations were filed in earlier cases, not  
for the truth of the matter asserted therein. *See Rowland v. Paris Las Vegas*, No. 13-cv-2630-GPC-  
DHB, 2014 WL 769393, at \*3 (S.D. Cal. Feb. 25, 2014).

1 In 2007, Popescu was arrested and convicted by a jury of stalking Parking  
2 Enforcement Officer Pagan, a conviction Popescu claims has since been overturned  
3 by the Appellate Court. (Complaint ¶ 14, ECF No. 1.) In 2010, Popescu filed a  
4 lawsuit against the City of San Diego; the San Diego Police Department; Mayor  
5 Sanders; Police Chief Lansdowne; City Attorney Aguirre; Detectives Vile and  
6 Hudgins; Sergeants Salenz, Durina, Benavides, Hastings, Nislett, and Novak; Police  
7 Officer Hunter; Parking Enforcement Officer Pagan, his wife, and daughter; and  
8 Postal Inspector Antonio Villareal. (*Popescu v. City of San Diego*, No. 3:10-cv-  
9 00220-BEN-AJB (S.D. Cal.)) In that lawsuit, Popescu claimed two 2007 arrests,  
10 including the one for stalking Pagan, were in retaliation for the complaints he filed  
11 against Pagan. (Complaint, *Popescu v. City of San Diego*, No. 3:10-cv-00220-BEN-  
12 AJB (S.D. Cal. Jan. 28, 2010), ECF No. 1.) Additionally, Popescu alleged he  
13 complained to Mayor Sanders, Police Chief Lansdowne, and City Attorney Aguirre,  
14 but they did nothing. (*Id.*) Finally, Popescu alleged that Detectives Vile and Hudgins  
15 stole \$10,000 cash from him when they executed the search warrant incident to the  
16 arrest in 2007. (*Id.*) The Court dismissed the 2010 complaint for failure to state a  
17 claim. (Order, *Popescu v. City of San Diego*, No. 3:10-cv-00220-BEN-AJB (S.D.  
18 Cal. Feb. 19, 2010), ECF No. 3.)

19  
20 **B. The Complaint in this Case**

21 On July 24, 2015, Popescu filed this lawsuit. (Complaint, ECF No. 1.) In this  
22 lawsuit, Popescu alleges six counts for violation of his civil rights. Counts One and  
23 Two allege false arrest, false imprisonment, retaliation, theft, and fabrication of  
24 evidence all based on the same two 2007 arrests, one allegedly occurring on June 6,  
25 2007, and one on September 17, 2007. Interestingly, the amount of money stolen  
26 during the search warrant seems to have increased in the ensuing years, and Popescu  
27 now alleges that during execution of the search warrant Detective Hudgins stole  
28 \$15,000 in cash from his house. (Complaint ¶ 50.)

1 In Count Three, Popescu alleges that on July 26, 2014, he was pushed and  
2 assaulted by Roslyn Fleming and her step-father John Kennedy. (Complaint ¶¶ 18,  
3 56.) When he reported this assault to the police, he claims, Officers Lynch and  
4 Biggler refused to arrest either Kennedy or Fleming. (Complaint ¶ 58.)

5 In Count Four, Popescu claims that on September 10, 2013, he was again  
6 illegally arrested, this time by Officers Keefe and Fish, who also illegally searched  
7 his residence. (Complaint ¶¶ 65, 66.) According to the Complaint, Popescu was  
8 subject to a permanent restraining order obtained by Fleming and Kennedy, but he  
9 claims he did not violate the restraining order, and thus the Officers arrested him  
10 without probable cause. (Complaint ¶¶ 19, 64.) When Plaintiff demanded to speak  
11 to a supervisor, Sergeant Barnes spoke to him and participated in the illegal arrest  
12 and search. (Complaint ¶ 66.)

13 In Count Five, Popescu alleges that a friend of his was illegally detained on  
14 February 14, 2015, when officers asked him about Virgil Popescu. (Complaint ¶¶  
15 76). And in Count Six, Popescu alleges he was illegally stopped and falsely accused  
16 of making an illegal right turn on December 30, 2014. (Complaint ¶¶ 21, 78.) During  
17 this stop, Popescu claims two police officers came on both sides of his car and stared  
18 at him “with their hands near the guns, ready to draw and shoot.” (Complaint ¶ 78.)  
19 Instead, however, the officers just gave him a ticket. (Complaint ¶ 78.)  
20

### 21 **III. LEGAL STANDARD**

22 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
23 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.  
24 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court  
25 must accept all factual allegations pleaded in the complaint as true and must construe  
26 them and draw all reasonable inferences from them in favor of the nonmoving party.  
27 *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). To avoid a  
28 Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations,

1 rather, it must plead “enough facts to state a claim to relief that is plausible on its  
2 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial  
3 plausibility when the plaintiff pleads factual content that allows the court to draw the  
4 reasonable inference that the defendant is liable for the misconduct alleged.”  
5 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).  
6 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s  
7 liability, it stops short of the line between possibility and plausibility of ‘entitlement  
8 to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

9 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
10 relief’ requires more than labels and conclusions, and a formulaic recitation of the  
11 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting  
12 *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (alteration in original). A court need  
13 not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference  
14 the court must pay to the plaintiff’s allegations, it is not proper for the court to assume  
15 that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants  
16 have violated the...laws in ways that have not been alleged.” *Associated Gen.  
17 Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526  
18 (1983).

19 As a general rule, a court freely grants leave to amend a complaint which has  
20 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied  
21 when “the court determines that the allegation of other facts consistent with the  
22 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co.  
23 v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

#### 24 25 **IV. LEGAL ANALYSIS**

26 As a preliminary matter, Plaintiff makes no factual allegations against Acting  
27 Mayor Todd Gloria, City Attorney Jan Goldsmith, Police Officer Dodd, or Police  
28 Sergeants Benavides and Casillas. Therefore, the Complaint against Defendants

1 Gloria, Goldsmith, Dodd, Benavides, and Casillas is **DISMISSED WITHOUT**  
2 **PREJUDICE** for failure to state a cause of action.

3 Furthermore, since the City of San Diego did not set up its Police Department  
4 as a separate legal entity, the Plaintiff may not sue the San Diego Police Department.  
5 *See McKee v. L.A. Interagency Metro. Police Apprehension Crime Task Force*, 134  
6 Cal. App. 4th 354, 359 (2005) (holding that in the absence of an agreement to create  
7 a legally separate entity, plaintiff may not sue a municipal department, including a  
8 police department). Hence, Defendant San Diego Police Department is  
9 **DISMISSED WITH PREJUDICE**.

10  
11 **A. Counts One and Two**

12 Plaintiff's first and second causes of action for events that occurred on June 6  
13 and September 17, 2007, are time barred. *See Maldonado v. Harris*, 370 F.3d 945,  
14 954 (9th Cir. 2004) ("In determining the proper statute of limitations for actions  
15 brought under 42 U.S.C. §1983, we look to the statute of limitations for personal  
16 injury actions in the forum state."); Cal. Civ. Proc. § 335.1 (requiring an action for  
17 personal injury in California to be brought within two years). Plaintiff filed this  
18 Complaint on July 24, 2015, almost eight years after the events occurred in Counts  
19 One and Two. (ECF No. 1.) Therefore, the first and second causes of action are  
20 **DISMISSED WITH PREJUDICE**. Since the only allegations against Defendants  
21 Pagan, Hunter, Durina, Vile, Hudgins, Nislett, Hastings, Novac, Sanders,  
22 Lansdowne, and Aguirre are in these time-barred causes of action, the Complaint is  
23 **DISMISSED** against these Defendants.<sup>2</sup>

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27 <sup>2</sup> Additionally, it appears these causes of action were already litigated in *Popescu v. City of San*  
28 *Diego*, No. 3:06-cv-01577-WMC (S.D. Cal.), and *Popescu v. City of San Diego*, No. 3:10-cv-  
00220-BEN-AJB (S.D. Cal.). However, since the causes of action are filed past the statute of  
limitations, the Court need not explore the issues of res judicata or collateral estoppel further.

1           **B.     Count Three**

2           In Count Three, Popescu alleges that Officers Lynch and Biggler refused to  
3 protect him by arresting John Kennedy who had just assaulted him. (Complaint ¶¶  
4 57–59.) Popescu claims, as a result “Defendants” subjected Popescu “to more abuse  
5 and mistreatment by John Kennedy and his family.” (Complaint ¶ 60.)

6           The California Tort Claims Act, California Government Code Sections 810 et  
7 seq., provides immunity for public employees in various situations. California  
8 Government Code Section 846 provides, “Neither a public entity nor a public  
9 employee is liable for injury caused by the failure to make an arrest or by the failure  
10 to retain an arrested person in custody.” Similar immunities are provided for a public  
11 employee causing injury: (1) “resulting from his act or omission where the act or  
12 omission was the result of the exercise of the discretion vested in him, whether or not  
13 such discretion be abused,” Cal. Gov’t Code § 820.2; “by failing to enforce any law,”  
14 *id.* § 818.2; and “by his . . . failure to enforce an enactment,” *id.* § 821.

15           To the extent Popescu simply alleges inaction on the part of the officers, their  
16 actions are immunized by these California Government Code sections. *See, e.g.,*  
17 *Michenfelder v. City of Torrance*, 28 Cal. App. 3d 202, 207 (1972) (holding an  
18 officer’s decision to make an arrest is vested in his discretion and thus is not  
19 actionable); *Lum v. Cnty. of San Joaquin*, 756 F. Supp. 2d 1243, 1256 (E.D. Cal.  
20 2010) (“The purpose of the statute is to prevent police from over-using their arrest  
21 power merely to avoid civil liability that results from failure to arrest and detain.”).  
22 Hence, Popescu’s third cause of action for “refusal to arrest criminal” is  
23 **DISMISSED.**

24  
25           **C.     Count Four**

26           In Count Four Popescu alleges that Officers Fish and Keefe and Sergeant  
27 Barnes illegally arrested him and searched his residence without a warrant or  
28 probable cause. (Complaint ¶¶ 19, 64.) Although Defendants argue the face of the

1 Complaint shows the Officers’ conduct was reasonable and thus they are entitled to  
2 qualified immunity, this is an issue better suited for summary judgment. The Court  
3 must accept all factual allegations pleaded in the complaint as true and must construe  
4 them and draw all reasonable inferences from them in favor of the nonmoving party.  
5 *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d at 337–38.

6 Although Popescu admits being subject to a permanent restraining order, he  
7 alleges that he had a friend, Marvin Smith, serve an appeal of the restraining order,  
8 and this was the only contact he had with the victim Ms. Fleming. (Complaint ¶¶ 19,  
9 64.) Popescu alleges the officers looked at various documents, interviewed various  
10 witnesses, including Marvin Smith, and nonetheless arrested him without probable  
11 cause for a violation of the restraining order. (*Id.*) He claims the City elected not to  
12 prosecute him for the alleged violation. (*Id.*) Finally, he alleges the three Officers  
13 illegally searched his residence without a warrant. (*Id.*) Although the facts may  
14 support defense counsel’s arguments at a summary judgment motion, at this point in  
15 the proceedings, Popescu has alleged sufficient facts to state a cause of action for  
16 illegal arrest and search. Hence, the Motion to Dismiss Count Four is **DENIED**.

#### 17 18 **D. Count Five**

19 In Count Five, Popescu alleges his civil rights were violated, when a friend of  
20 his was stopped and questioned about him. (Complaint ¶ 76.) At a minimum, in  
21 order to establish standing to sue, Plaintiff must allege an injury against him that is  
22 “concrete or particularized” and not “conjectural or hypothetical.” *Lujan v.*  
23 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiff also must allege a causal  
24 connection between the injury and the conduct complained of. *Id.*

25 Count Five has insufficient allegations of standing. Popescu fails to allege  
26 how the stop of his friend was a “concrete or particularized” injury to him. Popescu  
27 has even failed to allege that his friend was unwillingly or unlawfully detained. At  
28 this point, the Complaint merely alleges that a friend of his was questioned about



1 him, and this caused him “severe mental stress.” Even construing all allegations in  
2 his favor, the allegations are insufficient and therefore will be **DISMISSED**.

3  
4 **E. Count Six**

5 In Count Six, Popescu alleges that he was stopped for making an illegal right  
6 turn. (Complaint ¶ 78.) Although he makes a passing reference to officers with their  
7 hands on their guns, ultimately, he concedes he was not arrested and was merely  
8 ticketed for the offense. (*Id.*)

9 In order to allege a constitutional violation under section 1983, Plaintiff must  
10 allege that officers deprived him of a constitutional right. 42 U.S.C. § 1983; *Ketchum*  
11 *v. Alameda Co.*, 811 F.2d 1243, 1245 (9th Cir. 1987). Plaintiff seems to allege that  
12 the officers’ conduct in some way violated his constitutional rights because he was  
13 afraid they might shoot him. However, the facts he alleges: (i) that the officers “had  
14 their hands near to the guns and they were ready to draw their guns and shoot  
15 Plaintiff,” and (ii) “that they stood there until the female officer returned, about five  
16 minutes later, and gave the Plaintiff his papers, and ticket for an illegal turn,”  
17 (Complaint ¶ 79), do not allege any constitutional violation. There is no  
18 constitutional right not to receive a traffic ticket. Although Plaintiff “expected to be  
19 shot” and is “firmly convinced” that he might have been shot “execution style,” (*id.*),  
20 he does not allege that any of his worries came to pass.

21 Because Count Six fails to allege a violation of 42 U.S.C. § 1983, this Count  
22 is also **DISMISSED**.

23  
24 **V. CONCLUSION**


25 Defendants’ Motion to Dismiss (ECF No. 5) is **GRANTED IN PART AND**  
26 **DENIED IN PART**. With respect to Counts One, Two, Three, Five, and Six, the  
27 Motion to Dismiss is **GRANTED**. Counts One and Two are **DISMISSED WITH**  
28 **PREJUDICE**, as are Defendants Pagan, Hunter, Durina, Vile, Hudgins, Nislett,

1 Hastings, Novac, Sanders, Lansdowne, and Aguirre because they are outside the  
2 statute of limitations. Similarly, Counts Three and Five are also **DISMISSED**  
3 **WITH PREJUDICE**, along with Defendants Lynch and Biggler, for failure to state  
4 a cause of action. The Court finds “allegation of other facts consistent with the  
5 challenged pleading could not possibly cure the deficiency” in these causes of action.  
6 *Schreiber*, 806 F.2d at 1401. Likewise, Defendant San Diego Police Department is  
7 **DISMISSED WITH PREJUDICE**.

8 Count Six is **DISMISSED WITHOUT PREJUDICE**. If Plaintiff chooses to  
9 amend this cause of action only, he must do so no later than **May 17, 2016**. Similarly,  
10 Defendants Gloria, Goldsmith, Todd, Saenz, Benavidez, and Casillas are  
11 **DISMISSED WITHOUT PREJUDICE** from the Complaint. Finally, with respect  
12 to Count Four and the allegations against Fish, Keefe, Barnes, and the City of San  
13 Diego, the Motion to Dismiss is **DENIED**.

14 **IT IS SO ORDERED.**

15  
16 **DATED: April 26, 2016**

  
**Hon. Cynthia Bashant**  
**United States District Judge**