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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DEMETRIUS L. HARVEY,

1:08-CV-01399-OWW-DLB

Plaintiff,

MEMORANDUM DECISION AND ORDER
RE: CITY OF FRESNO AND COUNTY
OF FRESNO'S MOTIONS TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT (Docs. 33, 34.)

v.

CITY OF FRESNO, *et al.*,

Defendants.

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I. INTRODUCTION

Before the court are two motions to dismiss or, in the alternative, for a more definite statement. One motion is brought by Defendants City of Fresno, the Fresno Police Department, Chief Jerry Dyer, Officers Robert Gonzales, Jesus Cerda, Brent Willey, and Detectives Brian Valles and Brendan Rhames (the "City defendants"). The other motion is brought by Defendant County of Fresno (the "County defendant").¹

Defendants seek dismissal of Plaintiff's 42 U.S.C. § 1983 and related claims on grounds that the claims fail to allege necessary elements. Plaintiff, appearing pro se, contends that his first amended complaint satisfies requirements to plead necessary elements of his claims.

¹ Fresno County limits its challenge to the sufficiency of the complaint under Federal Rule 12(b)(6). (See Doc. 33, "Fresno County's Motion to Dismiss.")

1
2 **II. FACTUAL BACKGROUND.**

3 The following facts are derived from Plaintiff's first amended
4 complaint, ("FAC"), filed on June 3, 2009. (Doc. 31.)

5 Plaintiff, a 23 year-old African-American male, alleges that
6 on January 7, 2007, he went over to a friend's apartment to help
7 him move. (FAC ¶ 4, 22.) Around 8:00 p.m., Defendant Willey and
8 Officer Yeager received a dispatch of an alleged attack and robbery
9 of Matt Billet, a Comcast Cable employee who was attacked while
10 working on a friend's cable box. (FAC ¶ 23.) Billet called 911
11 and told the dispatcher that "D-Boy" was wearing an orange t-shirt
12 after asking someone in the background what "D-Boy" was wearing.
13 (FAC ¶ 23.) Defendant Willey interviewed Billet and noted that he
14 had a "slight" amount of redness on his right cheek that went away.
15 According to the report, Defendant Willey did not photograph Billet
16 because he was unable to see any injuries. (FAC ¶ 24.) Billet
17 refused all emergency medical services. (FAC ¶ 24.) Defendant
18 Willey and Officer Yeager went to the crime scene and did not find
19 any physical evidence. (FAC ¶ 25.)

20 At approximately 9:00 p.m., officers came to Rooter's
21 apartment. (FAC ¶ 26.) Plaintiff went outside and gave his name
22 and was eventually placed under arrest by order of Defendant Cerda.
23 (FAC ¶ 27.) He was handcuffed and searched by Defendant Willey and
24 placed in the patrol car. (FAC ¶ 27.) When Plaintiff arrived at
25 the police station, he was interrogated by Defendants Gonzales and
26 Valles. (FAC ¶ 27.) Plaintiff waived his rights and denied
27 committing a robbery. (FAC ¶ 28.) Billet told Defendant Willey
28 that he had a conflict with Plaintiff several weeks before the

1 robbery, but Plaintiff told both officers that he was not involved
2 "in any type of physical disturbance with a white male." (FAC ¶
3 29.) Plaintiff also requested to take a polygraph test, but the
4 request was denied. (FAC ¶ 30.) He told the officers that he
5 would go to jail and then go to trial to prove his innocence. (FAC
6 ¶ 28.)

7 On January 9, 2007, Defendant County of Fresno filed a Felony
8 Complaint against Plaintiff and four other individuals who were in
9 the apartment on January 7, 2007, including Rooter. (FAC ¶ 32.)
10 Plaintiff was charged with (1) robbery; (2) possession of a
11 controlled substance while armed with a firearm; and (3) possession
12 of marijuana for sale. (FAC ¶ 32.) Plaintiff entered a not guilty
13 plea at his arraignment. (FAC ¶ 34.) On March 13, 2007, Plaintiff
14 appeared at the preliminary hearing. (FAC ¶ 35.) Billet testified
15 and changed his story, explaining that he and a friend went to a
16 friend's house to buy marijuana. (FAC ¶ 35.) He did not mention
17 working for Comcast or working on his friend's cable box. (FAC ¶
18 35.) Prosecutor Esmeralda Garcia was present at the hearing and
19 heard the inconsistent testimony. (FAC ¶ 36.) Defendants Willey
20 and Cerda also testified. (FAC ¶ 37.) Plaintiff was held to
21 answer to the robbery charge, while the drug charges were dropped.
22 (FAC ¶ 38.)

23 During the five day trial, Defendants Willey, Cerda, Rhames
24 and Gonzales testified. (FAC ¶ 41.) Plaintiff testified on his
25 own behalf, having rejected another plea offer the day prior to
26 trial. (FAC ¶ 42.) On July 6, 2007, a jury found Plaintiff not
27 guilty on all charges (second degree robbery, grand theft person
28 and petty theft). (FAC ¶ 43.)

1 Plaintiff was incarcerated from January 7, 2007, to July 6,
2 2007. (FAC ¶ 20.) During this time, he alleges that he endured
3 humiliation, suffered emotional distress, lost his job, and was
4 separated from his pregnant girlfriend who eventually miscarried
5 before her delivery date. (FAC ¶ 21.)

6 Plaintiff alleges he was wrongfully accused, wrongfully
7 arrested, and wrongfully held in custody against his will for six
8 months. All five Officers are alleged to have falsely detained,
9 arrested, and imprisoned Plaintiff, and held him against his will
10 without probable cause. Plaintiff also alleges that the Officers
11 were motivated by racial prejudice because the victim is Caucasian,
12 while the Plaintiff is African American.

13 Chief of Police, Jerry Dyer, and the City of Fresno are sued
14 because they allegedly did not effectively train, supervise, and
15 supervise City police officers with regard to the proper
16 constitutional and statutory limits of the existence of their
17 authority. Plaintiff also accuses them of initiating and promoting
18 a meritless and malicious prosecution, which deprived Plaintiff of
19 his constitutional rights.

20 The County of Fresno is sued because "Plaintiff hopes by
21 bringing this lawsuit ... the County of Fresno will review their
22 patterns and practices, and customs pertaining to false arrests and
23 imprisonments, wrongful detentions and malicious prosecutions in a
24 way that this tragedy will not be repeated by violating
25 constitutional and civil rights of individuals." (FAC 13.)
26 Plaintiff also alleges that the District Attorney's office,
27 specifically Deputy District Attorney Esmeralda Garcia, knew or
28 should have know that the alleged victim, Billet, was not telling

1 the truth. (FAC 36.)

2
3 **III. PROCEDURAL BACKGROUND.**

4 The original complaint was filed on September 19, 2008. (Doc.
5 1, Original Complaint.) Fresno County moved to dismiss Plaintiff's
6 Original Complaint on March 17, 2009. (Doc. 17.) City Defendants
7 moved to dismiss the complaint on April 3, 2009. (Doc. 19.)

8 The hearing on Defendants' motions to dismiss, originally set
9 for May 18, 2009, was continued to June 15, 2009 due to the press
10 of court business. (Doc. 30.)

11 On June 6, 2009, Plaintiff filed his First Amended Complaint.
12 The First Amended Complaint alleges nine claims for relief:

13 1. First Claim for Relief (All Defendants) - Denial of
14 Constitutional Right Against Unreasonable Search and Seizure in
15 violation of the Fourth and Fourteenth Amendments pursuant to 28
16 U.S.C. § 1983;

17 2. Second Claim for Relief (All Defendants) - False Arrest and
18 Imprisonment;

19 3. Third Claim for Relief (all Defendants) - Malicious
20 Prosecution;

21 4. Fourth Claim for Relief (all Defendants) - Intentional
22 Infliction of Emotional Distress;

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

25 6. Sixth Claim for Relief (All Defendants) - Vicarious
26 Liability;

27 7. Seventh Claim for Relief (City Defendants) - Negligent
28 Hiring, Retention, Training, Supervision, and Discipline.

1 8. Eighth Claim for Relief (Officer Defendants) - Violation
2 of California Civil Code § 52.7; and

3 9. Ninth Claim for Relief (Officer Defendants) - Negligence.
4

5 The FAC prays for injunctive relief enjoining City Defendants
6 from authorizing, allowing, or ratifying the use of excessive force
7 by its police officers; for a "public apology" from all Defendants;
8 and for attorney's fees as provided by law.

9 County and City Defendants separately moved to dismiss
10 Plaintiff's FAC on June 17, 2009. (Docs. 33, 34.) City Defendants
11 contend that the above causes of action fail to allege necessary
12 elements or facts for Defendants' liability and that Chief Dyer,
13 Officers Cerda, Willey, and Brendan Rhames, and Detectives Gonzales
14 and Valles are redundantly named in their official capacities.
15 Alternatively, defendants seek a more definite statement in that
16 the allegations are vague and ambiguous.

17 Fresno County argues that the claims arising out of the
18 conduct of the DA's office should be dismissed as a matter of law
19 as a County is not a proper defendant in a prosecutorial misconduct
20 case. The County also moves to remove DA Elizabeth Egan from the
21 case because she was found to be "absolutely immune" pursuant to an
22 Order filed on December 5, 2008.

23 Plaintiff opposed the motions on August 27 and August 31,
24 2009. (Docs. 36, 38.) Plaintiff claims that his FAC is sufficient
25 to put "these officers on notice" and that the motions should be
26 denied because "discovery process has not been done." (Doc. 36,
27 4:1-4:4.)
28

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

13 The Ninth Circuit has summarized the governing standard, in
14 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint
15 to survive a motion to dismiss, the non-conclusory factual content,
16 and reasonable inferences from that content, must be plausibly
17 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
18 *U.S. Secret Service*, 572 F.3d 962, 2009 WL 2052985, at *6 (9th Cir.
19 July 16, 2009) (internal quotation marks omitted).

20 21 **IV. DISCUSSION**

22 **A. City Defendants**

23 1. 42 U.S.C. § 1983

24 Defendants City of Fresno, the Fresno Police Department, Chief
25 Jerry Dyer, Officers Robert Gonzales, Jesus Cerda, Brent Willey,
26 and Detectives Brian Valles and Brendan Rhames seek F.R.Civ.P.
27 12(b)(6) dismissal of plaintiffs' 42 U.S.C. § 1983 ("Section 1983")
28 on grounds that the claims fail to allege necessary elements.

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a. Official Capacity Suit

In a § 1983 case, 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). "There is no longer a need to bring official-capacity actions against local government officials, for under Monell, ..., local government units can be sued directly for damages and injunctive or declaratory relief." *Graham*, 473 U.S. at 167 n.14. Given that an official capacity claim is treated as a claim against the local governmental entity, when a plaintiff sues an officer of a local governmental entity in his official capacity and also sues the local entity itself, the official capacity claim is redundant of the claim against the entity and the official capacity claim can be dismissed. See *Center For Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008); *Megargee v. Wittman*, 550 F. Supp. 2d 1190, 1206 (E.D.Cal. 2008); *Luke v. Abbott*, 954 F. Supp. 202, 204 (C.D. Cal. 1997).

Plaintiff has sued Chief Dyer, Officers Robert Gonzales, Jesus Cerda, and Brent Willey, and Detectives Brian Valles and Brendan Rhames in their official capacity and the City itself. The official capacity claims against Dyer and Officers Gonzales, Cerda, Willey, Valles, and Rhames are redundant of the claims against the City; therefore, the motion is GRANTED on the claims against Dyer, Gonzales, Cerda, Willey, Valles, and Rhames in their official capacities.

Plaintiff's § 1983 claims against Chief Dyer, Officers Robert Gonzales, Jesus Cerda, and Brent Willey, and Detectives Brian

1 Valles and Brendan Rhames in their official capacities is DISMISSED
2 from the suit WITH PREJUDICE, it is redundant and spurious.

3
4 b. Municipal Departments Not Proper Defendants

5 Plaintiff brings suit not only against the City of Fresno but
6 also its municipal department, the City of Fresno Police
7 Department. Municipal departments, here the City of Fresno Police
8 Department, are not appropriate Defendants. Under Section 1983, a
9 "person" acting under color of law may be sued for violations of
10 the U.S. Constitution or federal laws. The term "persons" under §
11 1983 encompasses state and local officials sued in their individual
12 capacities, private individuals and entities which acted under
13 color of state law, and local governmental entities. *Vance v.*
14 *County of Santa Clara*, 928 F. Supp. 993, 995-96 (N.D. Cal. 1996).
15 But "persons" do not include municipal departments. *Id.* "Naming
16 a municipal department as a defendant is not an appropriate means
17 of pleading a § 1983 action against a municipality." *Stump v.*
18 *Gates*, 777 F. Supp. 808, 816 (D. Colo. 1991). The City of Fresno
19 is the proper defendant in a § 1983 suit, not the City of Fresno
20 Police Department, which is DISMISSED WITHOUT LEAVE TO AMEND.

21
22 c. Monell Liability

23 Plaintiff brings a § 1983 constitutional violation claim
24 against the City of Fresno under the Fourth and Fourteenth
25 Amendments. Local governments are "persons" subject to suit for
26 "constitutional tort[s]" under 42 U.S.C. § 1983. *Haugen v.*
27 *Brosseau*, 339 F.3d 857, 874 (9th Cir. 2003) (citing *Monell v. Dep't*
28 *of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978)) "[O]ur holding ...

1 that local governments can be sued under § 1983 necessarily decides
2 that local government officials sued in their official capacities
3 are 'persons' under § 1983 in those cases in which, as here, a
4 local government would be suable in its own name". *Monell*, 436
5 U.S. at 691 n.55. "Local governing bodies, therefore, can be sued
6 directly under § 1983 for monetary, declaratory, or injunctive
7 relief where, as here, the action that is alleged to be
8 unconstitutional, implements or executes a policy statement,
9 ordinance, regulation, or decision officially adopted and
10 promulgated by that body's officers ... [or for] deprivations
11 visited pursuant to governmental 'custom' even though such a custom
12 has not received formal approval through the body's official
13 decision making channels." *Id.* at 690-91.

14 Although a local government can be held liable for its
15 official policies or customs, it will not be held liable for an
16 employee's actions outside of the scope of these policies or
17 customs. "[T]he language of § 1983, read against the background of
18 the same legislative history, compels the conclusion that Congress
19 did not intend municipalities to be held liable unless action
20 pursuant to official municipal policy of some nature caused a
21 constitutional tort. In particular, ... a municipality cannot be
22 held liable solely because it employs a tortfeasor. A municipality
23 cannot be held liable under § 1983 on a respondeat superior
24 theory." *Id.* at 691. The statute's "language plainly imposes
25 liability on a government that, under color of some official
26 policy, 'causes' an employee to violate another's constitutional
27 rights." *Id.* at 692.

28 To prevail on a § 1983 claim against a local government under

1 Monell, a plaintiff must satisfy a three-part test: (1) The
2 official(s) must have violated the plaintiff's constitutional
3 rights; (2) The violation must be a part of policy or custom and
4 may not be an isolated incident; and (3) A nexus must link the
5 specific policy or custom to the plaintiff's injury. See *Monell*,
6 436 U.S. at 690-92. There are three ways to show a policy or custom
7 of a municipality:

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

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

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

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

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

25 Prior to *Iqbal*, "a claim of municipal liability under section
26 1983 [was] sufficient to withstand a motion to dismiss even if the
27 claim [was] based on nothing more than a bare allegation that the
28 individual officers' conduct conformed to official policy, custom,
or practice." *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.
2007). However, *Iqbal* has made clear that conclusory, "threadbare"
allegations that merely recite the elements of a cause of action

1 will not withstand a motion to dismiss. See *Iqbal*, 129 S.Ct. at
2 1949-50. Even under a *Whitaker* standard, Plaintiff's FAC is
3 insufficient. Plaintiff's FAC fails to even cite a custom or
4 policy of the City or any other indicia of *Monell* liability, other
5 than a conclusory incantation that the City "knew" of an illegal
6 policy.

7 Plaintiff has not sufficiently alleged that, in depriving him
8 of his constitutional rights, a City employee was acting pursuant
9 to an official policy, custom or practice of the City of Fresno.
10 There is a brief reference to an "illegal policy," but no
11 explanation as to what comprises the "illegal policy, pattern,
12 practice, custom" referred to in the FAC:

13 Despite Defendant CITY'S knowledge of this illegal
14 policy, pattern, practice and custom, in that their
15 supervisory and policy-making officers need to take
16 effective steps to terminate such policies, patterns,
17 practices, and customs; to effectively disciplined or
18 otherwise properly supervised the individual officers
19 who engage in the policy, pattern, practice and
20 custom.

21 (FAC, ¶ 45.)

22 As best understood, paragraph 45 of the FAC refers to the
23 City's "knowledge" of an illegal "policy, pattern, practice,
24 custom" concerning the District Attorney's decision to file
25 criminal charges against him. Plaintiff's factual description ends
26 there. If Plaintiff seeks to allege a claim against the City,
27 Plaintiff must identify what "policy" or "custom" he is challenging
28 and how that policy or custom deprived him of his constitutional

1 rights.² See *Galen v. County of Los Angeles*, 477 F.3d 652, 667
2 (9th Cir. 2007) ("Generally, a municipality is liable under Monell
3 only if a municipal policy or custom was the 'moving force' behind
4 the constitutional violation."). At this time, it is unclear what
5 "policy, pattern, practice, custom" Plaintiff refers to and how the
6 City's purported "knowledge" of these policies deprived him of his
7 constitutional rights.

8 The FAC also alleges that Plaintiff was held "against his will
9 without probable cause and without lawful process, and continued to
10 incarcerate Plaintiff without probable cause and without lawful
11 process." To the extent Plaintiff relies on these allegations to
12 support his *Monell* claim, he concedes that during his March 13,
13 2007 preliminary hearing, a Fresno Superior Court Judge found
14 probable cause to exist as to hold him for trial on burglary
15 charges against him. A specific finding of probable cause appears
16 to run contrary to Plaintiff's assertions that he was held "without
17 probable cause." It is unclear how a specific probable cause
18 finding by a neutral magistrate supports Plaintiff's *Monell* claims
19 against the City and, in fact, the finding appears to bar his claim
20 under the fourth amendment.³

21
22 ² There must be "a direct causal link between a municipal
23 policy or custom and the alleged constitutional deprivation."
24 *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Furthermore,
25 it is not enough to "merely [to] alleg[e] that the existing ...
program ... represents a policy for which the city is
responsible." *Id.* at 389.

26 ³ It appears from the record that there was a probable cause
27 hearing that determined Plaintiff's arrest was supported by
28 probable clause. Plaintiff's Fourth Amendment claim would then
be barred by collateral estoppel. *Allen v. McCurry*, 449 U.S. 90,
95-96 (1980); see also *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th

1 The allegations in the FAC do not identify the challenged
2 policy/custom, explain how the policy/custom is deficient, explain
3 how the policy/custom caused the plaintiff harm. City Defendants'
4 motion to dismiss is GRANTED. Plaintiff has already amended his
5 complaint once. Leave to amend is GRANTED for one final
6 opportunity. No further leave will be given.

7
8 d. Chief Dyer, Officers Gonzales, Cerda, and Willey,
9 and Detectives Valles and Rhames

10 Plaintiff sues Defendants Chief Dyer, Officers Gonzales,
11 Cerda, and Willey, and Detectives Valles and Rhames in their
12 individual capacities for liability under § 1983. To establish
13 liability under § 1983, Plaintiff must allege that the individual
14 defendants deprived plaintiff of a right secured by the United
15 States Constitution or a federal law.

16 "Section 1983 provides for liability against any person acting
17 under color of law who deprives another 'of any rights, privileges,
18 or immunities secured by the Constitution and laws' of the United
19 States." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887
20 (9th Cir. 2003) (quoting 42 U.S.C. § 1983). "The rights guaranteed
21 by section 1983 are 'liberally and beneficently construed.'" *Id.*

22
23 _____
24 Cir. 1990) (warrantless misdemeanor arrest supported by probable
25 cause satisfies requirements of Fourth Amendment). Similarly,
26 Plaintiff's third cause of action for malicious prosecution
27 arising out of the January 7 arrest would be barred because
28 plaintiff cannot rejudicate an essential element of that tort,
i.e., lack of probable cause. See *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 871 (1989) (probable cause element of tort of malicious prosecution)

1 (quoting *Dennis v. Higgins*, 498 U.S. 439, 443 (1991)). Pursuant to
2 § 1983, plaintiffs may bring a civil action for deprivation of
3 rights under the following circumstances:

4 Every person who, under color of any statute,
5 ordinance, regulation, custom, or usage, of any State
6 or Territory or the District of Columbia, subjects, or
7 causes to be subjected, any citizen of the United
8 States or other person within the jurisdiction thereof
9 to the deprivation of any rights, privileges, or
10 immunities secured by the Constitution and laws, shall
11 be liable to the party injured in an action at law,
12 suit in equity, or other proper proceeding for
13 redress, except that in any action brought against a
14 judicial officer for an act or omission taken in such
15 officer's judicial capacity, injunctive relief shall
16 not be granted unless a declaratory decree was
17 violated or declaratory relief was unavailable. For
18 the purposes of this section, any Act of Congress
19 applicable exclusively to the District of Columbia
20 shall be considered to be a statute of the District of
21 Columbia.

22 To establish liability under § 1983, a plaintiff must show (1)
23 that he was deprived of a right secured by the United States
24 Constitution or a federal law and (2) that the deprivation was
25 effected "under color of state law." *Broom v. Bogan*, 320 F.3d
26 1023, 1028 (9th Cir. 2003).

27 The City defendants argue that Plaintiff fails to allege
28 sufficient facts to support a claim that City defendants personally
participated in the alleged deprivation of a federal constitutional
right. In opposition, Plaintiff cites that his allegations are
sufficient to state a claim and that "discovery process has not
been done to know each individual participation in this case ...
[o]nce discovery begins, plaintiff can amend his complaint." (Doc.
36, 4:15-4:19.)

Plaintiff has alleged one claim under § 1983. The claim
incorporates all of the previous "factual" allegations, and alleges

1 that "[t]he defendants deprived the Plaintiff of his right to be
2 free from unreasonable searches and seizures, as set forth and
3 assured by the Fourth and Fourteenth Amendments of the United
4 States Constitution." Plaintiff then simply recites a list of his
5 injuries such as "c. Severe emotional distress, d. Public
6 degradation, e. Loss of income." Plaintiff also repeats, word for
7 word, certain paragraphs. (See Doc 1., ¶50(c) and ¶50(d).) The
8 FAC does not identify which defendants are named in the § 1983
9 claim or what constitutional deprivations (i.e., "facts") support
10 his claims.

11 Where plaintiff has identified a federal constitutional right,
12 such as the Fourth and Fourteenth Amendments, plaintiff must allege
13 who violated those rights, and how. For example, under the § 1983
14 claim, the complaint alleges "defendants deprived of his right to
15 be free from unreasonable searches and seizures" and "defendants
16 deprived Plaintiff of his right to be free from prosecution."
17 Plaintiff must, without providing elaborate detail, allege *who*
18 denied him of these rights, and *how*.

19 *Iqbal* has made clear that conclusory, "threadbare" allegations
20 that merely recite the elements of a cause of action will not
21 withstand a motion to dismiss. See *Iqbal*, 129 S.Ct. at 1949-50.
22 If Plaintiff seeks to pursue this action, he must amend the § 1983
23 claim to identify the Defendants who violated his constitutional
24 rights and how those rights were allegedly violated. No further
25 leave will be given after this opportunity to amend.

26 Finally, to the extent Plaintiff seeks to hold Chief Dyer
27 liable for acts of his officers/detectives, Plaintiff is cautioned
28 that "[a] supervisor is only liable for constitutional violations

1 of his subordinates if the supervisor participated in or directed
2 the violations, or knew of the violations and failed to act to
3 prevent them. There is no respondeat superior liability under
4 section 1983." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
5 1989). Plaintiff is cautioned that a failure to research
6 applicable law and facts may result in sanctions.

7 City Defendants motion to dismiss is GRANTED WITH LEAVE TO
8 AMEND.⁴

9
10 2. State Law Claims

11 a. California Tort Claims Act

12 City Defendants argue that Plaintiff's state law claims are
13 barred by his failure to comply with the presentment requirements
14 of the California Tort Claims Act. In particular, the City argues
15 that Plaintiff failed to file this lawsuit within six months after
16 the notice of the rejection of the claims, as required by Section
17 946.6 of the California Government Code. The California Tort
18 Claims Act provides, in pertinent part, that "no suit for money or
19 damages may be brought against a public entity on a cause of action
20 [against a public entity or employee] until a written claim
21 therefor has been presented to the public entity and has been acted
22 upon by the board, or has been deemed to have been rejected by the
23 board" Cal. Gov't Code § 945.4. If a claim is rejected, the
24 public entity must provide written notice, and if such notice is
25

26 ⁴ In light of the numerous Defendants in this case and the
27 nature of the arrest/detention alleged, it is possible that the
28 first cause of action was so vague that fair notice of the claims
against the defendants is not provided.

1 provided in accordance with the statute, a plaintiff wishing to
2 file a lawsuit must do so "not later than six months after the date
3 such notice is personally delivered or deposited in the mail." *Id.*
4 § 945.6(a)(1).

5 Here, it is uncontested that Plaintiff's claims against the
6 City of Fresno and the County of Fresno were denied, and that the
7 notices of rejection were mailed to 360 South Helm Avenue, Fresno,
8 California (the address provided in Plaintiff's government claims)
9 on March 19, 2008 by the City of Fresno (Doc. 23, Ex. 3), and on
10 March 25, 2008 by the Fresno County Board of Supervisors, (Doc. 23,
11 Ex. 4). It is also uncontested that Plaintiff filed this lawsuit
12 on September 19, 2008.

13 City Defendants argue that "pursuant to Government Code 946.6,
14 before filing this civil action, plaintiff was required to first
15 petition the appropriate court for an order relieving him from the
16 provisions of the Government Code ... Defendants believe that no
17 such petition has ever been filed." City Defendants essentially
18 contend that the U.S. District Court of California is not the
19 "appropriate court" for purposes of § 946.6.

20 After a review of the relevant case law, the district courts
21 in California are split on the issue of whether federal district
22 courts have "jurisdiction" under § 946.6. See *Rahimi v. Nat'l R.R.*
23 *Passenger Corp. (Amtrak)*, No. C 08-4712-MEJ, 2009 WL 1883756 (N.D.
24 Cal. June 30, 2009) (summarizing the district court cases on point
25 and holding that "the reasoning set forth in *Perez* to be the better
26 approach ... [i]t would not further the remedial purpose of the
27 statute to deny the petition, require Plaintiffs to re-file their
28 petitions in Superior Court, file their tort causes of action in

1 state court upon the granting of the petitions, and then to have
2 the claims removed to the Court again and joined with the current
3 case."); *Cf. Hernandez v. McClanahan*, 996 F.Supp. 975, 979 (N.D.
4 Cal. 1998) (stating that "federal courts do not have jurisdiction
5 over section 946.6 petitions"). While the number of decisions
6 align with City Defendant's position regarding jurisdiction under
7 § 946.6., there is no clear pronouncement from the Ninth Circuit on
8 the issue.⁵

9 Here, for purposes of the City's motion to dismiss,
10 Plaintiff's allegations are sufficient to deny the motion. The
11 denial is without prejudice regarding City's ability to raise a
12 similar motion on a motion for summary judgment.

13
14 b. *False Arrest/Imprisonment (Count II), Malicious*
15 *Prosecution (Count III), IIED (Count IV),*
16 *California Civil Code section 52.1 (Count V),*
17 *Vicarious Liability (Count VI), and Negligence*
18 *(Counts VII, IX).*

19 Plaintiff alleges causes of action against City Defendants for
20 false arrest and imprisonment (Count II), malicious prosecution
21 (Count III), intentional infliction of emotional distress (Count
22 IV), and violation of California Civil Code section 52.1 (Count V).
23 He also alleges a cause of action for "Vicarious Liability" against

24
25 ⁵ There is also the parties' conflicting positions regarding
26 whether or not Plaintiff's claims are considered "personal
27 injury" claims under the California Tort Claims Act. Plaintiff
28 argues that his claims are "civil wrong" claims and are not
governed by the six-month deadline. City Defendants contend his
action is essential a "personal injury" action, which is required
to be filed within six months.

1 Defendants City of Fresno and County of Fresno pursuant to
2 California Government Code section 815.2 (Count VI). He also
3 alleges two "negligent" causes of action against Defendants City of
4 Fresno and County of Fresno pursuant to California Government Code
5 section 815.2

6 As described in Part (IV) (A) (1) (d), *supra*, the complaint must
7 be dismissed for failure to state a claim. Here, the complaint
8 must be dismissed because it fails to put the individual defendants
9 on notice of the claims asserted against them.⁶ Under Federal Rule
10 of Civil Procedure 8, a complaint must contain "a short and plain
11 statement of the claim showing that the pleader is entitled to
12 relief." Fed. R. Civ. P. 8(a)(2). A pleading may not simply
13 allege a wrong has been committed and demand relief. *Id.* While
14 Rule 8 does not demand detailed factual allegations, "it demands
15 more than an unadorned, the-defendant-unlawfully-harmed-me
16 accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949. "Threadbare
17 recitals of the elements of a cause of action, supported by mere
18 conclusory statements, do not suffice." *Id.*

19 Put another way, a complaint must contain sufficient factual
20 matter, accepted as true, to "state a claim to relief that is
21 plausible on its face." *Iqbal*, 129 S.Ct. 1937, 1949 (quoting *Bell*
22 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570.). A claim is
23 plausible "when the plaintiff pleads factual content that allows
24 the court to draw the reasonable inference that the defendant is

25
26 ⁶ For instance, Plaintiff supports his "false imprisonment"
27 cause of action by stating "Plaintiff had not committed any
28 crimes, and there was no reason upon defendant police officers
could have reasonably believed the plaintiff had committed any
crimes." (Compl. ¶ 59.)

1 liable for the misconduct alleged." *Id.* "Determining whether a
2 complaint states a plausible claim for relief [is] ... a
3 context-specific task that requires the reviewing court to draw on
4 its judicial experience and common sense." *Id.* at 1950.
5 Plaintiff's state law causes of action, in total, fail to meet the
6 rigors of *Iqbal*.

7 In his opposition brief Plaintiff submits that his FAC is
8 "sufficient to sue Defendant named officers ... Plaintiff has put
9 these officers on notice that they are being sued." Plaintiff also
10 states that he "needs discovery, which includes police documents
11 and trial records ... Plaintiff will amend his complaint
12 accordingly, pending discovery." However, in *Iqbal*, the Supreme
13 Court rejected a similar argument, finding that "a motion to
14 dismiss a complaint for insufficient pleadings does not turn on the
15 controls placed upon the discovery process." *Id.* at 1953.

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

20 The City Defendants' motion to dismiss is GRANTED WITH LEAVE
21 TO AMEND.

22
23 **B. Fresno County**

24 Fresno County moves to dismiss Plaintiff's FAC for failure to
25 state a claim. Specifically, Fresno County argues that it is not
26 subject to *Monell* liability in that its District Attorney acts as
27 an arm of the State of California, not the County, to prosecute and
28 investigate crimes. The County also argues that Plaintiff "does

1 not allege any other official County policy or custom that caused
2 his alleged constitutional deprivation." As to Plaintiff's state
3 law causes of action, the County asserts that is immune under
4 California Government Code sections 815.2(b) and 821.6.

5
6 1. District Attorney Elizabeth Egan

7 The County first argues that Fresno County District Attorney
8 Elizabeth Egan should be dismissed from this action because she is
9 entitled to absolute immunity. Defendant Egan was previously
10 dismissed from this action on immunity grounds, however, Plaintiff
11 repeated his allegations against Ms. Egan in his FAC.

12 The December 5, 2008 order determined that Plaintiff was
13 entitled to absolute immunity because she was sued in her capacity
14 as District Attorney:

15 Defendant Egan is entitled to absolute immunity.
16 Prosecutors are absolutely immune from civil suits for
17 damages under section 1983 which challenge activities
18 related to the initiation and presentation of criminal
19 prosecutions. *Imbler v. Pachtman*, 424 U.S. 409
20 (1976). Determining whether a prosecutor's actions
21 are immunized requires a functional analysis. The
22 classification of the challenged acts, not the
23 motivation underlying them, determines whether
24 absolute immunity applies. *Ashelman v. Pope*, 793 F.2d
25 1072 (9th Cir. 1986). The prosecutor's quasi-judicial
26 functions, rather than administrative or investigative
27 functions, are absolutely immune. Thus, even charges
28 of malicious prosecution, falsification of evidence,
coercion of perjured testimony and concealment of
exculpatory evidence will be dismissed on grounds of
prosecutorial immunity. See *Stevens v. Rifkin*, 608 F.
Supp. 710, 728 (N.D.Cal.1984).

(Doc. 7, 4:8-4:21.)

27 Here, Defendant Egan is entitled to absolute immunity.
28 Plaintiff does not make any specific allegations, in either the

1 original or FAC, that Defendant Egan was involved in any capacity
2 other than her chief prosecutor's role. In his opposition,
3 Plaintiff does not even address the December 5, 2007 order
4 dismissing Defendant Egan. The December 5, 2007 Order is
5 controlling. Defendant Egan is not a proper defendant for the
6 section 1983 cause of action. She is absolutely immune. The
7 charge against her is DISMISSED WITHOUT LEAVE TO AMEND.

8
9 2. Constitutional Allegations Against Fresno County

10 There are allegations in the FAC from which it may be inferred
11 that Plaintiff is seeking to hold the County of Fresno liable for
12 alleged constitutional violations by Fresno County District
13 Attorneys.

14 To hold a local government liable for an official's conduct,
15 a plaintiff must first establish that the official 1) had final
16 policymaking authority "concerning the action alleged to have
17 caused the particular constitutional or statutory violation at
18 issue" and 2) was the policymaker for the local governing body for
19 the purposes of the particular act. *McMillian v. Monroe County,*
20 *Alabama*, 520 U.S. 781, 785 (1997). State law defines the
21 official's "actual function ... in a particular area" for section
22 1983 purposes and this function must be evaluated to determine
23 whether he or she acts for the state or county. *Id.* at 786. In
24 *Pitts v. County of Kern*, 17 Cal.4th 340 (1998), the California
25 Supreme Court concluded that a district attorney acts on behalf of
26 the state rather than the county in preparing to prosecute crimes
27 and in training and developing policies for prosecutorial staff.

28 The Ninth Circuit has also concluded that "under California

1 law a county district attorney acts as a state official when
2 deciding whether to prosecute an individual. *Weiner v. San Diego*
3 *County*, 210 F.3d 1025, 1030 (9th Cir. 2000). Therefore, to the
4 extent that the FAC attempts to impose Section 1983 liability on
5 the County of Fresno for decisions of the prosecutors, the FAC does
6 not state a claim against the County upon which relief can be
7 granted.

8 Ninth Circuit authority also suggests that only acts falling
9 outside a prosecutor's absolute immunity can give rise to
10 governmental entity liability under Monell. See *Ceballos v.*
11 *Garcetti*, 361 F.3d 1168, 1183 (9th Cir. 2004) (using absolute
12 immunity cases to guide analysis of whether a district attorney is
13 acting in a prosecutorial capacity and therefore on behalf of the
14 State); see also *Botello v. Gammick*, 413 F.3d at 979 (Dismissal of
15 *Monell* claim against County was error when District Attorney acted
16 as policymaker for the County when he performed administrative
17 functions outside the scope of absolute prosecutorial immunity.).
18 There are such allegations in the FAC. These claims are DISMISSED
19 WITH PREJUDICE AND WITHOUT LEAVE TO AMEND.

20 Additionally, Plaintiff alleges that Fresno County is
21 responsible for policies, procedures, customs, and practices
22 "implemented through its various agencies, agents, departments, and
23 employees," and requests that the County review its policies.
24 (Doc. 23, ¶¶ 6, 13.) Plaintiff has not identified any written
25 policies, regulations or ordinances to support his allegations, and
26 has not established that Deputy DA Esmeralda Garcia, who is not a
27 party to this lawsuit, had final policy-making authority on the
28 issues that Plaintiff identifies.

1 Here, as discussed in Part IV(A)(1)(c), *supra*, Plaintiff does
2 not identify an official County policy or custom followed by either
3 the Fresno City Police Department, Fresno County District Attorneys
4 (who are not named in this action), or any other employee of the
5 County of Fresno. Plaintiff's *Monell* claim is also fatal in the
6 absence of an underlying constitutional deprivation or injury.
7 *See, e.g., Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950,
8 957 (9th Cir.2008) ("Because there is no constitutional violation,
9 there can be no municipal liability.") At this time, it is unclear
10 how Plaintiff's allegations against Fresno County relate to any
11 alleged unlawful conduct, whether by the Fresno City Police
12 Department or any other municipal department employee. It is also
13 unclear how Fresno County imposed on Plaintiff's constitutional
14 rights.

15 These claims are DISMISSED WITHOUT PREJUDICE. Plaintiff is
16 given one additional opportunity to amend his complaint.

17
18 3. Remaining State Law Allegations Against Fresno County

19 The same conclusion applies to the extent that the FAC seeks
20 to impose state law tort liability for malicious prosecution
21 against Fresno County. Here, although Plaintiff does not
22 specifically name the individual prosecutors as defendants, he
23 mentions them - specifically, Deputy DA Esmeralda Garcia - in his
24 complaint. Because Deputy DA Garcia is immune from liability
25 pursuant to California Government Code § 821.6,⁷ the County and the

26 _____
27 ⁷ Section 821.6 states: "A public employee is not liable for
28 injury caused by his instituting or prosecuting any judicial or
administrative proceeding within the scope of his employment,

1 District Attorney are also immune. California Government Code §
2 Section 815.2(b) provides:

3 (b) Except as otherwise provided by statute, a public
4 entity is not liable for an injury resulting from an
5 act or omission of an employee of the public entity
6 where the employee is immune from liability.

7 Because individual district attorneys are immune from
8 liability, immunity applies to the public entity as well. See
9 *Poppell v. City of San Diego*, 149 F.3d 951, 970 (9th Cir. 1998)
10 ("The City of San Diego cannot be held liable for such acts [of
11 negligence] where its employees are immune from liability.").

12 The California Supreme Court has held that § 821.6 "grants
13 immunity to any 'public employee' for damages arising from
14 malicious prosecution." See *Asgari v. City of Los Angeles*, 15 Cal.
15 4th 744, 756 (1997). Courts have repeatedly held that § 821.6
16 immunity is not limited to claims for malicious prosecution,
17 "although that is a principal use of the statute." See *Kemmerer*,
18 200 Cal. App. 3d at 1436.

19 With respect to Plaintiff's remaining state law claims, County
20 Defendant has not cited any case holding such claims to be subject
21 to § 821.6. However, the FAC does not raise the prospect of state
22 law liability against the County to the "plausible" level.
23 *Twombly*, 550 U.S. at 570. Absent such allegations, the County's
24 motion to dismiss is GRANTED WITH LEAVE TO AMEND.⁸

25 _____
26 even if he acts maliciously and without probable cause."

27 ⁸ Plaintiff's third cause of action for malicious
28 prosecution against the County is DISMISSED WITHOUT LEAVE TO
AMEND.

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C. Attorney's Fees

Defendants move to strike Plaintiff's request for attorney's fees from his FAC. Defendants argue that "Plaintiff is representing himself in this action and thus, he should not be allowed to proceed with the impression he can potentially recover attorney's fees." Plaintiff counters that "his request is based on seeking counsel ... this request will be in place when an attorney takes over the case."

Plaintiff's argument is not well-taken. Although Section 1988 provides for "reasonable attorney's fees" in any action to enforce § 1983, pro se civil litigants are not entitled to attorney's fees.⁹ See *Kay v. Ehrler*, 499 U.S. 432, 435-38 (1991); see also *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 816 (9th Cir. 1985). Should the plaintiff retain an attorney for further litigation related to his complaint, he may amend his complaint at that time. Plaintiff cites no case law in support of his "potential for counsel" argument.

Defendants' motion to strike is GRANTED as to Plaintiff's request for attorney's fees.

D. Motion For A More Definite Statement

City Defendants move for a more definite statement under Fed. R. Civ. Proc. 12(e). The relevant question here is whether the

⁹ In the Ninth Circuit, pro se litigants are not entitled to attorney's fees without express statutory authorization. *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 815-16 (9th Cir.1985) Plaintiff has not identified such statutory support.

1 complaint gives City Defendants sufficient notice of the claims.
2 "A court will deny a motion for a more definite statement" where
3 the complaint is specific enough to apprise the defendant of the
4 substance of the claim being asserted." *Neveau v. City of Fresno*,
5 392 F.Supp.2d 1159, 1169 (E.D.Cal. 2005). A motion for a more
6 definite statement is proper only where the complaint is "so vague
7 or ambiguous that the opposing party cannot respond, even with a
8 simple denial, in good faith or without prejudice to himself. *Id.*

9 A Rule 12(e) motion for a more definite statement must be
10 considered in light of the liberal pleading standards set forth in
11 Fed.R.Civ.P. 8(a)(2). *See, e.g., Bureerong v. Uvawas*, 922 F.Supp.
12 1450, 1461 (C.D.Cal. 1996) (citing *Sagan v. Apple Computer, Inc.*,
13 874 F.Supp. 1072, 1077 (C.D. Cal. 1994) ("Motions for a more
14 definite statement are viewed with disfavor and are rarely granted
15 because of the minimal pleading requirements of the Federal
16 Rules.")). A motion for a more definite statement is proper only
17 where the complaint is "so vague or ambiguous that the opposing
18 party cannot respond, even with a simple denial, in good faith or
19 without prejudice to himself." *Cellars v. Pacific Coast Packaging,*
20 *Inc.*, 189 F.R.D. 575, 578 (N.D.Cal. 1999) (internal quotations and
21 citation omitted). Whether to grant a Rule 12(e) motion for a more
22 definite statement lies within the discretion of the district
23 court. *See, e.g., San Bernardino Public Employees Ass'n v. Stout*,
24 946 F.Supp. 790, 804 (C.D.Cal. 1996).

25 Here, any issues concerning sufficiently pled causes of action
26 have been addressed in the 12(b)(6) analysis above. City
27 Defendants motion for more definite statement is DENIED.

1 **V. CONCLUSION**

2 For the foregoing reasons:

3 1. Plaintiff's § 1983 claims against Chief Dyer, Officers
4 Robert Gonzales, Jesus Cerda, and Brent Willey, and Detectives
5 Brian Valles and Brendan Rhames in their official capacities is
6 DISMISSED from the suit WITH PREJUDICE.

7 2. The City of Fresno is the proper defendant in a § 1983
8 suit, not the City of Fresno Police Department, which is DISMISSED
9 WITHOUT LEAVE TO AMEND.

10 3. Plaintiff's Monell claim against the City of Fresno is
11 DISMISSED WITH LEAVE TO AMEND.

12 4. Plaintiff's § 1983 claim against Defendants Chief Dyer,
13 Officers Gonzales, Cerda, and Willey, and Detectives Valles and
14 Rhames in their individual capacities is DISMISSED WITH LEAVE TO
15 AMEND.

16 5. Plaintiff's related state law causes of action against City
17 Defendants are DISMISSED WITH LEAVE TO AMEND.

18 6. Defendant Fresno County District Attorney Elizabeth Egan
19 is not a proper defendant for Plaintiff's § 1983 cause of action.
20 She is absolutely immune. The charge against her is DISMISSED
21 WITHOUT LEAVE TO AMEND.

22 7. Plaintiff's allegations against the County of Fresno for
23 alleged constitutional violations by Fresno County District
24 Attorneys are DISMISSED WITH PREJUDICE AND WITHOUT LEAVE TO AMEND.

25 8. Plaintiff's Monell claim against the County of Fresno is
26 DISMISSED WITH LEAVE TO AMEND.

27 9. Plaintiff's related state law causes of action against
28 County Defendants are DISMISSED WITH LEAVE TO AMEND.

1 10. Plaintiff's request for attorney's fees is DISMISSED.

2
3 Any amended complaint shall be filed within twenty (20) days
4 following electronic service of this order.

5 IT IS SO ORDERED.

6 **Dated: September 25, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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