

1 (“Complaint”). For the reasons that follow, Defendants’ Motion is GRANTED with leave
2 to amend.²

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4 **BACKGROUND**

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6 Plaintiff is a 59-year-old African American male, who is a military veteran and a
7 retired peace officer. In July 2019 he went to the WSPD with a female friend to inquire
8 about a call and police response to his home that occurred approximately three days
9 prior. As Plaintiff was speaking with the front desk clerk in the lobby, an unidentified
10 Caucasian man in civilian clothes entered the area and began walking back and forth
11 nearby. The man interrupted Plaintiff’s conversation with the clerk and began yelling,
12 “Shut up!” He then threatened Plaintiff, “You don’t know who I am and what I’ll do to
13 you,” and proceeded to use a nearby phone to request police assistance.

14 Shortly thereafter, between eight and ten Caucasian officers, including
15 Defendants Ogden, Fortier, Mahaffey, and Schreiber, entered the lobby and detained
16 and handcuffed Plaintiff. According to Plaintiff, he informed the officers that he was a
17 retired peace officer and that he needed assistance because he’d been threatened by
18 the unidentified man in the lobby. He also advised the officers that he smelled the odor
19 of alcohol on Defendant Ogden.

20 In detaining Plaintiff, the officers employed pain compliance tactics, twisting
21 Plaintiff’s thumbs and shoulders. They then put him in a hot patrol car, leaving the
22 windows rolled up. Plaintiff was eventually informed that he was arrested for disorderly
23 conduct, drunk in public, and resisting arrest.

24 Plaintiff was transported to booking at approximately 3:00 p.m. but not given an
25 alcohol screening test until 10:00 p.m. The results showed no alcohol in his system.
26 Plaintiff was nonetheless placed in a “filthy cell that was filled with urine, feces, and

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² Because oral argument would not have been of material assistance, the Court ordered this
28 matter submitted on the briefs. ECF No. 5; see E.D. Cal. Local Rule 230(g).

1 blood.” Compl. ¶ 18. He was denied food, water, or medical treatment, and was
2 released several hours later.

3 All criminal charges against Plaintiff were eventually dismissed. The state court
4 determined that there was no probable cause to arrest Plaintiff or make physical contact
5 with him and eventually declared Plaintiff factually innocent. This action followed.
6 Defendants now seek to dismiss claims regarding Monell (Claims One and Two);
7 malicious prosecution (Claim Five); negligent hiring, training, and retention (Claim
8 Seven), and the Unruh Civil Rights Act (Claim Eight).

9
10 **STANDARD**

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12 On a motion to dismiss for failure to state a claim under Federal Rule of Civil
13 Procedure (“FRCP”) 12(b)(6), all allegations of material fact must be accepted as true
14 and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut.
15 Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and
16 plain statement of the claim showing that the pleader is entitled to relief’ in order to ‘give
17 the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”
18 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson,
19 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss
20 does not require detailed factual allegations. However, “a plaintiff’s obligation to provide
21 the grounds of his entitlement to relief requires more than labels and conclusions, and a
22 formulaic recitation of the elements of a cause of action will not do.” Id. (internal citations
23 and quotation marks omitted). A court is not required to accept as true a “legal
24 conclusion couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
25 (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right
26 to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan
27 Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating
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1 that the pleading must contain something more than “a statement of facts that merely
2 creates a suspicion [of] a legally cognizable right of action”).

3 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket
4 assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and
5 quotation marks omitted). Thus, “[w]ithout some factual allegation in the complaint, it is
6 hard to see how a claimant could satisfy the requirements of providing not only ‘fair
7 notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing
8 Wright & Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a
9 claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not
10 nudged their claims across the line from conceivable to plausible, their complaint must
11 be dismissed.” Id. However, “[a] well-pleaded complaint may proceed even if it strikes a
12 savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very
13 remote and unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236
14 (1974)).

15 A court granting a motion to dismiss a complaint must then decide whether to
16 grant leave to amend. Leave to amend should be “freely given” where there is no
17 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice
18 to the opposing party by virtue of allowance of the amendment, [or] futility of the
19 amendment” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v.
20 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to
21 be considered when deciding whether to grant leave to amend). Not all of these factors
22 merit equal weight. Rather, “the consideration of prejudice to the opposing party . . .
23 carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183,
24 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that
25 “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group,
26 Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006,
27 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.
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1 1989) (“Leave need not be granted where the amendment of the complaint . . .
2 constitutes an exercise in futility . . .”).

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4 **ANALYSIS**

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6 **A. The Complaint Fails to State a Claim for Monell Liability.**

7 Plaintiff’s attempt to hold the City and WSPD liable for his injuries under Monell v.
8 New York City Department of Social Services, 436 U.S. 658 (1978), is unavailing.
9 Municipalities and local officials cannot be vicariously liable for the conduct of their
10 employees under § 1983, but rather are only “responsible for their own illegal acts.”
11 Connick v. Thompson, 563 U.S. 51, 60 (2011) (citing Monell, 436 U.S. at 665-83). In
12 other words, a municipality may only be liable where it individually caused a
13 constitutional violation via “execution of government’s policy or custom, whether by its
14 lawmakers or by those whose edicts or acts may fairly be said to represent official
15 policy.” Monell, 436 U.S. at 694. The Supreme Court has made clear that plaintiffs may
16 not merely state that a municipal employee wronged them to achieve success on a
17 Monell claim: “Where a plaintiff claims that the municipality has not directly inflicted an
18 injury, but nonetheless has caused an employee to do so, rigorous standards of
19 culpability and causation must be applied to ensure that the municipality is not held liable
20 solely for the actions of its employee.” Bd. of Cty. Comm’rs of Bryan Cty., Okl. v. Brown,
21 520 U.S. 397, 405 (1997) (emphasis added). Similar demands apply to allegations of
22 inadequate training. See City of Canton, Ohio v. Harris, 489 U.S. 378, 389-91 (1989).
23 Following Twombly and Iqbal, the Ninth Circuit Court of Appeals held that Monell
24 plaintiffs must provide allegations that are not mere recitations of the elements of such a
25 claim, and such facts must plausibly suggest entitlement to relief. AE ex rel.
26 Hernandez v. Cty. of Tulare, 666 F.3d 631, 637 (9th Cir. 2012); see, e.g., Dougherty v.
27 City of Covina, 654 F.3d 892, 900-01 (9th Cir. 2011).

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1 Plaintiff's Complaint offers only conclusory allegations that City and WSPD
2 executed policies and customs that would support Monell liability. See, e.g., Compl.
3 ¶ 41. Such conclusory allegations are insufficient to state a claim. Accordingly, the first
4 two causes of action are DISMISSED with leave to amend.

5 **B. Plaintiff's Fifth Cause of Action for Malicious Prosecution Fails**
6 **Because Under the Facts as Pled Defendants are Entitled to**
7 **Immunity.**

8 "In California, the elements of malicious prosecution are (1) the initiation of
9 criminal prosecution, (2) malicious motivation, and (3) lack of probable cause."³ Usher v.
10 City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987); see also Awabdy, 368 F.3d at
11 1066. California Government Code § 821.6, under which Defendants claim immunity,
12 provides: "A public employee is not liable for injury caused by his instituting or
13 prosecuting any judicial or administrative proceeding within the scope of his
14 employment, even if he acts maliciously and without probable cause." This immunity
15 extends to police officers. See, e.g., Baughman v. State of California, 38 Cal. App. 4th
16 182, 192 (1995); see also Asgari v. City of Los Angeles, 15 Cal. 4th 744, 757, 937
17 (1997) ("Under California law, a police officer may be held liable for false arrest and false
18 imprisonment, but not for malicious prosecution."). The section "frees investigative
19 officers from the fear of retaliation for errors they commit in the line of duty." Baughman,
20 38 Cal. App. 4th at 193.

21 Plaintiff asserts that section 821.6 does not apply due to two exceptions. First,
22 Defendants intended to deprive Plaintiff of his constitutional right to equal protection.
23 Opp'n at 8 (citing Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987)); see
24 Larramendy v. Newton, 994 F. Supp. 1211, 1213-16 (E.D. Cal. 1998) (explaining the

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27 ³ It is undisputed that the acts of the named officers led to the initiation of a criminal prosecution
28 against Plaintiff. The fact that Plaintiff was not only cleared of charges — but declared factually innocent
— is strong evidence of a lack of probable cause. See Awabdy v. City of Adelanto, 368 F.3d 1062, 1068
(9th Cir. 2004). Plaintiff avers, in fact, that the state judge presiding over his case declared there was no
probable cause to arrest him. Compl. ¶ 19.

1 exception).⁴ Second, Plaintiff avers that Defendants exceeded their authority with the
2 use of excessive force. Opp'n at 9 (citing Blankenhorn v. City of Orange, 485 F.3d 463
3 (9th Cir. 2007)).⁵

4 Usher did indeed create such an exception when a claim was brought under
5 42 U.S.C. § 1983. See Usher, 828 F.2d at 561-62. As an initial matter, it is unclear if
6 Plaintiff is bringing his malicious prosecution claim under state or federal law. Either
7 way, Plaintiff's charge that officers sought to violate his constitutional right to equal
8 protection is entirely conclusory in alleging that the officers arrested Plaintiff due to his
9 race. See Compl. ¶ 63; Opp'n at 8. Accordingly, claim five of Plaintiff's Complaint is
10 DISMISSED with leave to amend.

11 **C. Plaintiff has not Identified a Statutory Basis for Liability to Support**
12 **his Seventh Cause of Action for Negligent Hiring, Training and**
Retention.

13 In support of this claim, Plaintiff alleges that Defendant City negligently hired,
14 supervised, and retained the named officers in the instant suit, "knowing that each
15 employee was unfit and incompetent to work as police officers." Compl. ¶¶ 73-74.
16 However, claims for direct tort liability against public entities must be based on a specific
17 statute. See Cal. Gov. Code § 815(a).⁶ Plaintiff fails to identify such a statute, and he
18 cannot. Cf. Johnson v. Shasta Cty., 83 F. Supp. 3d 918, 936 (E.D. Cal. 2015) ("With
19 respect to hiring and supervision practices, . . . there is no statutory basis under
20 California law for declaring an entity directly liable for negligence."). Therefore,
21 Defendants' Motion is GRANTED with leave to amend as to the seventh cause of action.

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24 ⁴ An initiation of charges in bad faith, evidence of racial animus, and the criminal proceeding
25 ending in the complainant's favor may all contribute to a cognizable claim for malicious prosecution under
§ 1983. See Usher, 828 F.2d at 562.

26 ⁵ Blankenhorn does not create the exception for malicious prosecution envisioned by Plaintiff, and
27 it is not considered further. See Blankenhorn, 485 F.3d at 488.

28 ⁶ Plaintiff's argument that liability should be extended to the City under Government Code § 815.2
is rejected because that statute provides for vicarious liability, which has no bearing on this direct claim.

1 **D. Plaintiff has Failed to Allege that Defendants are Subject to Liability**
2 **Under the Unruh Act.**

3 Plaintiff contends Defendants violated the Unruh Civil Rights Act by discriminating
4 against him based on his race. Compl. ¶¶ 77-81 (citing Cal. Civ. Code §§ 51 et seq.).
5 The Unruh Civil Rights Act provides protection from discrimination from “all business
6 establishments of every kind whatsoever” in the State of California. See Cal. Civ. Code
7 § 51. California’s Department of Fair Employment and Housing asserts that the term
8 “business establishments” may include governmental and public entities. Public Access
9 Discrimination and Civil Rights, Dep’t Fair Employment & Housing (Dec. 2017),
10 https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf.
11 Although Plaintiff does identify several cases where public schools or school districts
12 were determined to qualify as “business establishments,”⁷ he offers no cases — and this
13 Court is aware of none — where the Unruh Civil Rights Act was applied to police
14 departments. Indeed, numerous California state courts and some federal courts have
15 found against the application of the Unruh Act to cities. See Willie Rubin v. City of
16 Inglewood, No. CV 20-319-MWF-E, 2020 WL 5413026, at *4 (C.D. Cal. July 17, 2020)
17 (collecting cases).

18 This Court concludes that the Unruh Act does not apply here. A California
19 appellate court in Brennon B. v. Superior Ct. of Contra Costa Cty. found that school
20 districts were not business establishments for purposes of the Unruh Act. 57 Cal. App.
21 5th 367, 369-97 (2020) (including, inter alia, criticism of federal cases finding to the
22 contrary). Likewise, police departments are already subject to “stringent anti-
23 discrimination laws,” including a “panoply of antidiscrimination statutes.” See id. at 370.
24 Moreover, “nothing in the historical context from which the Unruh Act emerged suggests
25 the state’s earlier public accommodation statutes were enacted to reach ‘state action.’

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27 ⁷ See Whooley v. Tamalpais Union High Sch. Dist., 399 F. Supp. 3d 986, 997 (N.D. Cal. 2019)
28 (school districts); Yates v. E. Side Union High Sch. Dist., No. 18-CV-02966-JD, 2019 WL 721313, at *2-3
(N.D. Cal. Feb. 20, 2019) (public schools); Sullivan By & Through Sullivan v. Vallejo City Unified Sch.
Dist., 731 F. Supp. 947, 952 (E.D. Cal. 1990) (public schools).

1 And there is much authority to the contrary” Id. at 372; see id. at 379 (finding that
2 the legislative history does not suggest that the Act was intended to reach state
3 conduct). Finally, while the California Supreme Court has not directly addressed the
4 topic, a review of cases from the state high court indicates that the Unruh Act is
5 designed to solely reach private discriminatory conduct. See id. at 388. Accordingly,
6 Defendants’ Motion to Dismiss claim eight is GRANTED with leave to amend.

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8 **CONCLUSION**

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10 In consideration of the foregoing, Defendants’ Motion to Dismiss (ECF No. 4) is
11 **GRANTED** with leave to amend. Not later than twenty (20) days following the date this
12 Memorandum and Order is electronically filed, Plaintiff may, but is not required to, file an
13 amended complaint. If no amended complaint is timely filed, the causes of action
14 dismissed by virtue of this Order will be deemed dismissed with prejudice upon no
15 further notice to the parties.

16 IT IS SO ORDERED.

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18 Dated: September 7, 2021

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20 MORRISON C. ENGLAND, JR.
21 SENIOR UNITED STATES DISTRICT JUDGE
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