

1 II

2 Plaintiff operated a private adult club named Club Flirt
3 on "Folsom Avenue" in San Francisco, California. Cmpl't ¶ 7.
4 According to the complaint defendants conducted an undercover
5 investigation of plaintiff's landlord. Cmpl't ¶ 8. The ABC filed an
6 accusation against plaintiff's landlord, operator of the adjacent
7 Cat Club, on April 2, 2009. Defs' Req for Judicial Notice (Doc #21)
8 Ex B.

9 On August 16, 2008, plaintiff hosted an event at the
10 "Folsom Avenue" location, and at approximately 10:00 pm defendants
11 entered the club and detained plaintiff. Id ¶¶ 9-10. Defendants
12 allegedly patted down plaintiff for weapons and asked plaintiff for
13 use of a room to interview witnesses and suspects. Id ¶ 10.
14 Plaintiff alleges that defendants detained him for a "considerable
15 period of time" and told him that he would be allowed to leave if he
16 spoke but would be arrested if he refused. Id ¶ 11. Plaintiff
17 alleges that he was not informed of his Miranda rights. Id. After
18 defendants told plaintiff that he was not the subject of the
19 investigation and after questioning, plaintiff was allowed to leave
20 and told that he could take his property if he so desired. Id ¶ 12.
21 Defendants allegedly told plaintiff that the event might be allowed
22 to continue, so plaintiff left his property on the premises except
23 for his money and car keys. Id ¶ 12.

24 Plaintiff alleges that he owned a licensed firearm and
25 left it on the premises. Defendants allegedly discovered the
26 firearm in plain sight and determined that it was registered to
27 plaintiff. Id ¶ 13. Defendants allegedly located plaintiff on the
28 street and asked him to accompany them to answer a few more

1 questions; plaintiff did so. Id ¶ 14. Once inside the club
2 defendants allegedly ordered plaintiff to place his hands on his
3 head and patted him down. Id ¶ 15. Plaintiff was allegedly grabbed
4 by the thumbs and escorted upstairs where he was place in handcuffs.
5 Id.

6 Defendants allegedly conducted another search and accused
7 plaintiff of carrying a concealed weapon which plaintiff denied. Id
8 ¶ 16. Defendants then allegedly placed plaintiff under arrest and
9 seized his property including his cash and firearm. Id ¶ 17.
10 Plaintiff was taken to the San Francisco jail where he was booked,
11 and his bail was set at \$75,000. Id ¶ 18. Plaintiff was released
12 upon payment of a bail bond at about 1:00 pm on August 17, 2008. Id
13 ¶ 19. Plaintiff alleges that his firearm and \$2,000 in cash were
14 not returned to him and remain in defendants' possession. Id ¶ 19.
15 Plaintiff alleges that when he appeared in court on August 21, 2008
16 he was informed by the clerk that no charges were being tendered and
17 that he was free to go. Id ¶ 20.

18 In his first claim for relief, plaintiff alleges that
19 defendants deprived him of the rights to be free from unreasonable
20 searches and seizures; deprivation of life, liberty or property
21 without due process of law; excessive force; cruel and unusual
22 punishment and pre-judgment punishment; and arrest without probable
23 cause. Plaintiff also seeks claims for state law violations: false
24 imprisonment; intentional infliction of emotional distress;
25 negligence; assault and battery; false arrest in violation of
26 California Civil Code § 52.1; and conversion and trespass to
27 personal property.

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1 construed in favor of the responding party. General Conference Corp
2 of Seventh-Day Adventists v Seventh-Day Adventist Congregational
3 Church, 887 F2d 228, 230 (9th Cir 1989).
4

5 A

6 Defendants contend that plaintiff's complaint is premised
7 upon the allegation that he was arrested for carrying a concealed
8 weapon without probable cause but that the allegations are not
9 sufficient to state a viable false arrest claim under the Fourth
10 Amendment or state law. Defendants acknowledge that "plaintiff
11 correctly asserts that he was not carrying the firearm at the
12 instant of his arrest." Doc #20 at 9. Defendants suggest that
13 plaintiff carried the handgun concealed in the ankle holster until
14 "ditching it before being patted-down." Id. Pursuant to Federal
15 Rule of Evidence 201 the court takes judicial notice of the arrest
16 report dated August 18, 2008 in which the arresting officer,
17 defendant Sal Martinez, reports that he found a loaded handgun lying
18 on the floor in an ankle holster. Doc #21-1 at 2. The arresting
19 officer's report supports the undisputed allegation that plaintiff
20 was not carrying the weapon at the time of arrest. This factual
21 allegation is sufficient to support the plausibility of plaintiff's
22 claim that defendants had no probable cause for arrest. "A claim
23 has facial plausibility when the plaintiff pleads factual content
24 that allows the court to draw the reasonable inference that the
25 defendant is liable for the misconduct alleged." Ashcroft v Iqbal,
26 129 S Ct 1937, 1949 (2009).

27 A determination whether there was probable cause at the
28 time of the arrest is based upon the information the officer had at

1 the time of making the arrest, a determination that should be made
2 at a later stage of the litigation with the benefit of evidentiary
3 support. See John v City of El Monte, 515 F3d 936, 941 (9th Cir
4 2008) ("The existence of probable cause necessarily turns upon the
5 particular facts of the individual case."). At the pleading stage,
6 accepting all allegations of material fact as true, the court finds
7 that plaintiff has sufficiently alleged a plausible claim for false
8 arrest.

9
10 B

11 Defendants contend that even if plaintiff could allege a
12 viable claim against ABC agent Sal Martinez, plaintiff has not
13 sufficiently alleged constitutional violations by the other named
14 agents: Levy Barnes, Casey Tinloy, Justin Gebb, Monica Molthen,
15 Guadalupe Ochoa, Robert Anderson, Jesus Gutierrez, Michelle Ott and
16 Cynthia Verbis. Plaintiff contends that the allegations
17 demonstrating that these agents were "integral participants" is
18 alleged "not in explicit terms [but] certainly is implied." Doc #26
19 at 5. Causes of action are not alleged by implication. The claims
20 against the named defendants, other than Agent Martinez, are
21 dismissed with leave to amend the complaint to include factual
22 allegations that meet the pleading standard set forth in Iqbal. See
23 Moss v US Secret Service, 572 F3d 962, 970 (9th Cir 2009).

24
25 C

26 Defendants seek dismissal of the state law claims other
27 than false arrest on the ground that California Government Code
28 section 821.6 bars those claims: intentional infliction of emotional

1 distress; negligence; assault and battery; and conversion and
2 trespass to personal property based on the seizure of plaintiff's
3 firearm and personal property during the ABC agents' search.
4 Defendants concede that Government Code section 820.4 does not
5 provide immunity from liability for false arrest or false
6 imprisonment. Doc #20 at 12 n3.

7 Defendants cite County of Los Angeles v Superior Court
8 (West), 181 Cal App 4th 218 (2009) to support their argument that
9 the investigating agents are immune under Government Code section
10 821.6, which provides

11 A public employee is not liable for injury caused by his
12 instituting or prosecuting any judicial or administrative
13 proceeding within the scope of his employment, even if he
acts maliciously and without probable cause.

14 In West, the court of appeal held that prosecutorial immunity
15 pursuant to section 821.6 protects not only against the act of
16 filing a criminal complaint but also against "[a]cts taken during an
17 investigation prior to the institution of a judicial proceeding
18 * * * because investigations are an essential step toward the
19 institution of formal proceedings." 181 Cal App 4th at 229.
20 Prosecutorial immunity under section 821.6 "extends to immunize
21 against claims by those suffering the injury who are not the target
22 of the prosecution." Id.

23 In the published portion of its opinion in West, the court
24 of appeal held that the trial court erred in denying summary
25 adjudication for the District Attorney and the County and held that
26 prosecutorial immunity under section 821.6 shielded the defendants
27 from liability for the civil rights claim under Civil Code section
28 52.1 and the claim of involuntary bailment. The court noted that

1 the complaint did not name as a party anyone who actually obtained
2 the search warrant or conducted the search and seizure. 181 Cal App
3 4th at 227. Defendants' reliance on the limited holding of West is
4 misplaced here, where plaintiff pursues claims against the arresting
5 agents for conduct that allegedly occurred during plaintiff's
6 arrest.

7 Plaintiff concedes that section 821.6 provides immunity
8 from liability for conduct during an investigation or for publicity
9 regarding an investigation and arrest. Doc #26 at 7. Plaintiff
10 contends however that section 821.6 does not protect defendants
11 against immunity from liability for conduct that occurred at and
12 around the time of plaintiff's arrest, citing Blankenhorn v City of
13 Orange, 485 F3d 463, 488 (9th Cir 2007). In Blankenhorn, the court
14 of appeals held that "section 821.6, as it applies to police
15 conduct, is limited to actions taken in the course or as a
16 consequence of an investigation." The court noted that the
17 principal function of section 821.6 is to provide relief from
18 malicious prosecution and distinguished tortious conduct that
19 occurred during an arrest rather than investigation of crimes. *Id*
20 at 487-88. The court held that "[b]ecause Blankenhorn's assault and
21 battery, negligence, and intentional infliction of emotional
22 distress claims are based on acts that allegedly happened during his
23 arrest, not pursuant to an investigation into his guilt, section
24 821.6 does not confer immunity from those claims upon Defendants."
25 *Id* at 488. The state court of appeal made a similar distinction in
26 West, noting that the allegations of malicious prosecution is
27 exactly that which section 821.6 was designed to immunize, but

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1 recognizing that it did not immunize against liability for unlawful
2 conduct during an arrest:

3 We held in [Gillan v City of San Marino, 147 Cal App 4th
4 1033, 1050 (2007)] that where Government Code section
5 821.6 provides no immunity from liability for false arrest
6 or false imprisonment, it was not available to immunize a
7 public employee for alleged violations of Civil Code
8 section 52.1 where that cause of action in Gillan was
9 "based on an arrest without probable cause * * * ."

10 181 Cal App 4th at 231-32. Taking plaintiff's allegations as true,
11 defendants' motion to dismiss the state law claims is denied.

12 IV

13 For the foregoing reasons, defendants' motion to dismiss
14 is granted with leave to amend as to the claims against defendants
15 Levy Barnes, Casey Tinloy, Justin Gebb, Monica Molthen, Guadalupe
16 Ochoa, Robert Anderson, Jesus Gutierrez, Michelle Ott and Cynthia
17 Verbis. Defendants' motion is DENIED on all other grounds.

18 If plaintiff chooses to amend, he must file an amended
19 complaint by June 18, 2010. In the absence of filing an amended
20 complaint, the action will proceed on the present complaint.
21 Defendants shall have until July 19, 2010 by which to answer.

22 IT IS SO ORDERED.

23 

24 VAUGHN R WALKER
25 United States District Chief Judge