

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LANE BAULDRY,
Plaintiff,
v.
COUNTY OF CONTRA COSTA, et al.,
Defendants.

No. C 12-03943 CRB
**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

Plaintiff Lane Bauldry (“Plaintiff”) brings this action under 42 U.S.C. § 1983 and California tort law, based on his arrest during a “Dirty DUI.” Defendants Sergeant Andrew Wells (“Sgt. Wells”) and the City of Piedmont (collectively, “Defendants”) filed this Motion to Dismiss (“MTD”) (dkt. 60), moving to dismiss all claims in Plaintiff’s Second Amended Complaint (“SAC”) (dkt. 39).

I. BACKGROUND¹

Before October 2010, Defendants Christopher Butler and Stephen Tanabe agreed to work together to effectuate a “Dirty DUI” scheme. SAC ¶ 16. Butler is a private investigator and Tanabe is a deputy in the Contra Costa Sheriff’s Office. *Id.* ¶¶ 7, 8. Butler and Tanabe planned to set up unsuspecting husbands by plying them with alcohol and then having them arrested when they drove under the influence. *Id.* ¶¶ 16, 34. Their wives would

¹ The Court takes its account of the facts from the allegations in Plaintiff’s SAC.

1 then use the arrests against them in court proceedings. Id. Plaintiff was one of the husbands
2 set up by Butler and Tanabe. See id.

3 In late 2010, Plaintiff's former wife, Mona Daggett, filed for divorce from Plaintiff in
4 Alameda County Superior Court. Id. ¶ 17. Daggett met with Butler in October 2010 in order
5 to hire Butler to effectuate the Dirty DUI involving Plaintiff. Id. ¶ 19. Daggett paid Butler
6 \$600 at that meeting. Id. ¶ 23.

7 Butler's initial attempt at the Dirty DUI occurred on October 21, 2010 and was
8 unsuccessful. Id. ¶¶ 26-41. Butler learned that Plaintiff would be at an Oakland, California
9 bar named Crogan's that night. Id. ¶ 26. Butler did not know any Oakland police officers
10 who would agree to arrest Plaintiff, so he asked Sgt. Wells of the Piedmont Police
11 Department to assist with the plan. Id. Butler hoped to entice Plaintiff to drink at Crogan's,
12 leave the establishment, and drive through Piedmont, where Sgt. Wells would then arrest
13 Plaintiff. Id. ¶¶ 28, 33.

14 Butler, Tanabe, and others approached Sgt. Wells about the Dirty DUI plan before
15 October 21. Id. ¶ 33. Sgt. Wells had previously helped Butler coordinate unrelated events in
16 Piedmont. Id. ¶ 31. He knew that Butler was untrustworthy and unreliable. Id. ¶ 32. Sgt.
17 Wells agreed to be a part of the plan, telling Butler that he would be on duty and would be
18 willing to arrest Plaintiff for drunk driving. Id. ¶ 33. On October 21, 2010, Butler, Tanabe,
19 and two women went to Crogan's to effectuate the Dirty DUI, planning to have the two
20 women convince Plaintiff to drink excessively and then have Plaintiff drive them elsewhere.
21 Id. ¶ 36. However, for reasons unknown to Plaintiff, the October 21 Dirty DUI attempt
22 ended prematurely. Id. ¶ 36. Sgt. Wells learned that the Dirty DUI scheme ended
23 unsuccessfully. Id. ¶ 39. He continued to keep the scheme a secret and did not take any
24 steps to stop the Dirty DUI. Id.

25 Daggett met with Butler again on October 26, 2010 and learned that the first attempt
26 at arresting Plaintiff was unsuccessful. Id. ¶ 42. Daggett paid Butler another \$600 so that
27 Butler could again try to have Plaintiff arrested. Id. On November 2, 2010, Plaintiff went to
28 Meenars, a bar located in Danville, California. Id. ¶ 43. Butler, Tanabe, and the two women

1 who had been present at Crogan’s were also at Meenars. Id. ¶ 44. Defendant Tom
2 Henderson, a Deputy in the Contra Costa Sheriff’s Department, had previously agreed to
3 make the arrest for the second attempt. Id. ¶¶ 9, 48. Henderson knew that the call about the
4 DUI would not go through dispatch and that the purpose was inappropriate and illegal. Id. ¶
5 49. He waited outside Meenars for Plaintiff to return to his car, at which point he pulled
6 Plaintiff over and arrested Plaintiff for driving under the influence in violation of California
7 Vehicle Code Sections 23152(a) and (b). Id. ¶ 52.

8 The arrest was reported to Alameda County Superior Court and used to restrict
9 Plaintiff’s time with his daughter. Id. ¶ 55. The District Attorney’s office either never
10 brought or dismissed the criminal charges. Id. ¶ 57.

11 Plaintiff filed suit on July 26, 2012. See Original Compl. (dkt. 1). Sgt. Wells and
12 Piedmont filed a Motion to Dismiss on October 8, 2012, which Judge Illston granted with
13 leave to amend. See MTD (dkt. 15); Order (dkt. 28). Plaintiffs then filed a First Amended
14 Complaint (“FAC”) on December 6, 2012, see FAC (dkt. 33), and an SAC pursuant to the
15 joint stipulation of all parties on January 4, 2013.² The SAC contains nine Federal and State
16 claims: (1) Bad Faith Arrest in violation of 42 U.S.C. § 1983 against Sgt. Wells and
17 Piedmont; (2) Bad Faith Arrest in violation of 42 U.S.C. § 1983 against Butler and Tanabe;
18 (3) Conspiracy to Commit Bad Faith Arrest in violation of 42 U.S.C. § 1983 against Daggett,
19 Butler, Tanabe, Henderson, Sgt. Wells, Contra Costa County, and Piedmont; (4) Egregious
20 Official Conduct Intended to Injure Unjustified by Any Governmental Interest in violation of
21 42 U.S.C. § 1983 against Sgt. Wells, Piedmont, Tanabe, and Henderson; (5a)³ Conspiracy to
22 Commit Egregious Official Conduct Intended to Injure Unjustified by Any Governmental
23 Interest in violation of 42 U.S.C. § 1983 against Daggett, Butler, Tanabe, Henderson, and
24 Sgt. Wells; (5b) False Arrest and Imprisonment against Daggett, Butler, Tanabe, Henderson,

26 ² Plaintiff calls both the First and Second Amended Complaints “Amended Complaint.” The
27 Court will call the amended complaint filed on December 6, 2012 the First Amended Complaint and the
complaint filed on January 4, 2013 the Second Amended Complaint.

28 ³ Plaintiff misnumbered his claims, calling two different claims “Fifth Claim for Relief.” The
Court refers to these claims as the “fifth(a)” and “fifth(b)” claims.

1 Sgt. Wells, Contra Costa County, and Piedmont; (6) Abuse of Process against Butler,
2 Tanabe, Henderson, Sgt. Wells, Contra Costa County, and Piedmont; (7) Intentional
3 Infliction of Emotional Distress against Daggatt, Butler, Tanabe, Henderson, Sgt. Wells,
4 Contra Costa County, and Piedmont; and (8) Negligence against Daggett, Butler, Tanabe,
5 Henderson Sgt. Wells, Contra Costa County, and Piedmont. See SAC.

6 Defendants Sgt. Wells and Piedmont again move to dismiss all claims against them
7 under Federal Rule of Civil Procedure 12(b)(6). See MTD.⁴

8 **II. LEGAL STANDARD**

9 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims
10 alleged in a complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
11 Under Federal Rule of Civil Procedure 8(2), a complaint must contain a “short and plain
12 statement of the claim showing that the pleader is entitled to relief.” “Detailed factual
13 allegations” are not required, but the Rule does call for sufficient factual matter, accepted as
14 true, to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662,
15 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)).
16 According to the Supreme Court, “a claim has facial plausibility when the plaintiff pleads
17 factual content that allows the court to draw the reasonable inference that the defendant is
18 liable for the misconduct alleged.” Id. at 678. In determining facial plausibility, whether a
19 complaint states a plausible claim is a “context-specific task that requires the reviewing court
20 to draw on its judicial experience and common sense.” Id.

21 **III. DISCUSSION**

22 Defendants move to dismiss on the following grounds: (A) Plaintiff does not allege a
23 conspiracy involving Sgt. Wells, and even if he did, Sgt. Wells was not a part of the second
24 conspiracy that resulted in Plaintiff’s arrest; (B) state law immunities bar Plaintiff’s state
25 claims against Sgt. Wells and Piedmont; (C) Plaintiff did not adequately plead the Federal
26 “direct action” claims against Defendants and the Monell doctrine bars all Federal claims
27

28 _____
⁴ Only Sgt. Wells and Piedmont brought this MTD.

1 against Defendants; and (D) Plaintiff did not allege facts sufficient to support a claim for
2 punitive damages.⁵

3 **A. Conspiracy**

4 The previous order issued by Judge Illston granted Sgt. Wells’s last motion to dismiss
5 because Plaintiff failed to allege any agreement by Sgt. Wells to participate in the conspiracy
6 or action by Sgt. Wells in furtherance of the conspiracy.⁶ Order (dkt. 38) at 4. Defendants
7 again argue that Plaintiff fails to state a claim for conspiracy. First, they argue that Sgt.
8 Wells did not agree to participate or actually participate in a conspiracy. Second, they argue
9 that Plaintiff alleges two separate conspiracy schemes, instead of one ongoing conspiracy.
10 Because Plaintiff alleges Sgt. Wells’s participation in one conspiracy, the MTD is denied
11 with respect to the third, fifth(a), fifth(b), sixth, and seventh claims.

12 **1. Plaintiff Alleges that Sgt. Wells Agreed to Participate in the**
13 **Conspiracy for the Common Purpose of Arresting Plaintiff in Order**
14 **for the Arrest to Be Used Against Plaintiff in Family Court**
15 **Proceedings**

16 To plead a civil conspiracy under § 1983, Plaintiff must show “an agreement or
17 ‘meeting of the minds’ to violate constitutional rights.” Franklin v. Fox, 312 F.3d 423, 441
18 (9th Cir. 2002) (quoting United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539,
19 1540-41(9th Cir. 1989)). A complaint must be pled with sufficient particularity to show a
20 meeting of the minds. Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Burns v. Cnty.
21 of King, 883 F.2d 819, 821 (9th Cir. 1989). Each participant does not need to know each
22 detail of the conspiracy but all must share a common objective. United Steelworkers, 865
23 F.2d at 1541; Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983) (no common objective shown
24 when bank turned over individual’s bank records to FBI without knowing that FBI’s goal

25
26 ⁵ Defendants also argued initially that Plaintiff amended his first, third, and fourth claims beyond
27 the permissible scope of amendment. MTD at 4. However, Defendants subsequently conceded that this
28 argument was in error. Reply at 3.

⁶ The complaint alleged that Sgt. Wells “expressly or tacitly agreed to the plan, failed to stop,
impede, or report Butler’s activities being taken against members of the public and thus failed to stop
the Dirty DUI scheme.” Original Compl. ¶ 25.

1 was to end individual’s political speech). Circumstantial evidence may show participation in
2 a conspiracy. Gilbrook v. City of Westminster, 177 F.3d 839, 856-57 (9th Cir. 1999).

3 California law is similar. See Applied Equip. Corp. v. Litton Saudia Arabia Ltd., 7
4 Cal. 4th 503, 510-11 (1994) (a conspiracy “imposes liability on persons who, although not
5 actually committing a tort themselves, share with the immediate tortfeasors a common plan
6 or design in its perpetration”). A plaintiff must prove three things: “(1) the formation and
7 operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3)
8 damages arising from the wrongful conduct.” Kidron v. Movie Acquisition Corp., 40 Cal.
9 App. 4th 1571, 1581 (1995). “Tacit consent as well as express approval will suffice to hold a
10 person liable as a coconspirator.” Wyatt v. Union Mortg. Co., 24 Cal. 3d 773, 785 (1979).

11 Plaintiff sufficiently alleges Sgt. Wells’s involvement in the conspiracy. Plaintiff
12 alleges that Butler and Tanabe agreed to a scheme that entailed encouraging husbands
13 undergoing divorce proceedings to drink alcohol and then drive, at which point a uniformed
14 officer would arrest the husband for driving under the influence. SAC ¶ 16. Plaintiff defines
15 this as a “Dirty DUI scheme.” Id. Plaintiff then alleges that Butler and Tanabe approached
16 Sgt. Wells and informed him of the Dirty DUI scheme. Id. ¶ 33. Sgt. Wells agreed to the
17 plan, by saying he would be on duty the night of October 12, 2010 and able to carry out the
18 arrest of Plaintiff. Id. As alleged by Plaintiff, Sgt. Wells did not agree to simply arrest
19 Plaintiff on the night in question, or to arrest him if there was probable cause for doing so;
20 rather, Plaintiff alleges that Sgt. Wells agreed to participate in the “Dirty DUI scheme,”
21 therefore assuming the purpose of arresting Plaintiff so that the arrest could be used in family
22 court proceedings. See id. ¶¶ 16, 33.

23 Moreover, the SAC also pleads the agreement between Sgt. Wells and the other
24 Defendants through circumstantial evidence. Plaintiff alleges that Butler needed an officer to
25 arrest Plaintiff and that he approached Sgt. Wells because he did not have a contact within
26 the Oakland Police Department, the jurisdiction where Plaintiff was drinking on the night of
27 the first attempt. SAC ¶¶ 28, 30. Butler and Tanabe were able to move forward with the first
28

1 Dirty DUI attempt in reliance on Sgt. Wells’s participation, as their potential success was
2 contingent on the participation of an arresting officer. See id. ¶ 26.

3 **2. Plaintiff Alleges a Single Conspiracy**

4 Defendants urge this Court to find that there were two separate conspiracies alleged:
5 first, an unsuccessful conspiracy to arrest Plaintiff on the night of October 21, 2010 at
6 Crogan’s, and second, a successful conspiracy to arrest Plaintiff on the night of November 2,
7 2010. MTD at 11. Defendants do not cite a single case in favor of their argument. Drawing
8 all reasonable inferences in favor of the Plaintiff, see Iqbal, 556 U.S. at 678, this Court
9 DENIES the MTD with respect to the conspiracy claims because Plaintiff adequately pled
10 that the arrest of Plaintiff was the product of a single conspiracy.

11 A defendant’s “liability [for a conspiracy] continues until the objectives of the
12 conspiracy are completed, or the defendant withdraws from the conspiracy.” In re TFT-LCD
13 (Flat Panel) Antitrust Litig., 820 F. Supp. 2d 1055, 1059 (N.D. Cal. Sept. 26, 2011)
14 (collecting cases); see also United States v. Recio, 371 F.3d 1093, 1096 (9th Cir. 2004) (a
15 “conspiracy continues until there is affirmative evidence of abandonment, withdrawal,
16 disavowal, or defeat of the object of the conspiracy”); People v. Leach, 15 Cal. 3d 419, 431
17 (1975). “To withdraw from a conspiracy a defendant must either disavow the unlawful goal
18 of the conspiracy, affirmatively act to defeat the purpose of the conspiracy or take ‘definite,
19 decisive, and positive’ steps to show that the [defendant’s] disassociation from the
20 conspiracy is sufficient.” United States v. Lothian, 976 F.2d 1257, 1261 (9th Cir. 1992).

21 When determining whether there is a single conspiracy or multiple conspiracies, “the
22 question is what is the nature of the agreement.” United State v. Varelli, 407 F.2d 735, 742
23 (7th Cir. 1969). “Various people knowingly joining together in furtherance of a common
24 design or purpose constitute a single conspiracy.” Id. In contrast, separate agreements
25 between individuals and a common conspirator to achieve distinct ends indicates multiple
26 conspiracies. See id. The standard is similar under California law. People v. Jasso, 142
27 Cal. App. 4th 1213, (2006) (defendant’s attempted importation of drugs on three occasions,
28

1 using three women, did not convert single conspiracy into multiple conspiracies when
2 attempts had the same modus operandi and occurred in close temporal proximity).

3 Taking the allegations in the light most favorable to the Plaintiff, the SAC alleges one
4 overarching Dirty DUI scheme, rather than two separate conspiracies. Throughout both
5 arrest attempts, the Dirty DUI plan and the objective of the parties remained the same: to set
6 up Plaintiff for a DUI and to use that DUI against him in family court proceedings. SAC ¶¶
7 20, 23, 42. Each attempt involved the same parties: Butler, Tanabe, Daggett, the two women,
8 and Plaintiff. *Id.* ¶ 36, 44. Only the identities of the officers involved changed. Sgt. Wells
9 made no effort to withdraw from the conspiracy at any point, *id.* ¶¶ 40, 41, and the objectives
10 of the conspiracy were obtained when Plaintiff was arrested on November 2 and the arrest
11 was used against him. When Sgt. Wells agreed to arrest Plaintiff during the unsuccessful
12 first attempt, he agreed to participate in the “Dirty DUI scheme,” *see* SAC ¶ 33, which ended
13 upon complete of the conspiracy’s objective.

14 Defendants argue that Daggett’s second payment of \$600 and Sgt. Wells’s lack of
15 knowledge of and participation in the second attempt preclude his involvement in the
16 conspiracy. MTD at 11. However, conspirators can be liable without participating in every
17 detail of the conspiracy. *See Beltz Travel Svc., Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d
18 1360, 1366-67 (9th Cir. 1980); *United States v. Aron*, 463 F.2d 779, 780 (9th Cir. 1972).
19 Additionally, Daggett discovered that the Crogan’s attempt was unsuccessful at her meeting
20 with Butler on October 26. SAC ¶ 42. She could have terminated the conspiracy at that
21 point but instead made a second payment to Butler of \$600 to continue his efforts to arrest
22 Plaintiff. *Id.* That she paid Butler the same price for the second attempt as she did for the
23 first also suggests that his work on the second attempt was nearly identical to his previous
24 work.

25 Additionally, the facts do not support Defendants’ contention – in briefing and at oral
26 argument – that the conspiracy ended when the first attempt to arrest Plaintiff failed.
27 Plaintiff alleges that “something caused the co-conspirators at Crogan’s to abort the plan”
28 and that Sgt. Wells “learned of and was advised that the scheme he had agreed to assist in at

1 Crogan’s had been aborted.” Id. ¶¶ 37, 38. However, taking the facts in the light most
2 favorable to Plaintiff, Plaintiff did not allege that the conspiracy ended at this point or that
3 Sgt. Wells withdrew from the overall conspiracy. Instead and as discussed above, Plaintiff
4 alleges that this was merely a failed attempt to carry out the overall objective of the
5 conspiracy, of which Sgt. Wells was still a part. See id. ¶ 16, 33.

6 This Court denies the MTD with respect to the state and federal conspiracy claims
7 against Sgt. Wells and Piedmont.

8 **B. Application of State Law Immunities**

9 Before addressing whether state law immunities apply to Sgt. Wells and Piedmont,
10 this Court must first address whether Sgt. Wells owed a duty to Plaintiff. See Williams v.
11 California, 34 Cal. 3d 18, 23 (1983) (the “question of duty is . . . a threshold issue, beyond
12 which remain the immunity barriers.”). This is because the court must first determine that a
13 plaintiff would be liable before state law immunities would apply. Davidson v. City of
14 Westminster, 32 Cal. 3d 197, 201-02 (1982). Judge Illston’s previous order did not address
15 state law immunities because Plaintiff’s Original Complaint did not allege that Sgt. Wells
16 owed Plaintiff a duty. Order at 5. However, Judge Illston suggested that a special
17 relationship (and, therefore, a duty) might be created between Plaintiff and Sgt. Wells if the
18 conspiracy was adequately pled. Id.

19 **1. Sgt. Wells Had a Duty to the Plaintiff**

20 Based on the sufficiently pled conspiracy involving Sgt. Wells, this Court holds that
21 Plaintiff alleged that Sgt. Wells owed Plaintiff a duty to warn him of the Dirty DUI set up.

22 Generally, one does not owe a duty to control the conduct of another or to warn those
23 endangered by another’s conduct. Von Batsch v. Am. Dist. Telegraph Co., 175 Cal. App. 3d
24 1111, 1121 (1985); Davidson, 32 Cal. 3d at 203. However, a special relationship, giving rise
25 to a duty of protection or assistance, might be created by an officer’s words or conduct. See
26 M.B. v. City of San Diego, 233 Cal. App. 3d 699, 704-05 (1991). “Liability may be imposed
27 if an officer voluntarily assumes a duty to provide a particular level of protection, and then
28 fails to do so [citations omitted], or if an officer undertakes affirmative acts that increase the

1 risk of harm to the plaintiff.” Zelig v. Cnty. of Los Angeles, 27 Cal. 4th 1112, 1129 (2002);
2 Wallace v. City of Los Angeles, 12 Cal. App. 4th 1385, 1396 (1993) (“when the
3 government’s actions create a foreseeable peril to a specific foreseeable victim, a duty to
4 warn arises when the danger is not readily discoverable by the endangered person”); Johnson
5 v. California, 69 Cal. 2d 782 (1968) (duty to warn found when the California Youth
6 Authority placed a minor with foster parents without warning them that he had homicidal
7 tendencies). At least one court has recognized that a duty may arise based on a conspiracy
8 that places the victim in harm’s way. See Hernandez v. City of Napa, 781 F. Supp. 2d 975,
9 1005 (N.D. Cal. 2011).

10 As suggested in Judge Illston’s previous order, the Dirty DUI conspiracy placed
11 Plaintiff in a position of harm, thus creating a special relationship between Sgt. Wells and
12 Plaintiff. Order at 6. The DUI conspiracy involving Sgt. Wells culminated in Plaintiff’s
13 arrest for drunk driving, and the subsequent use of that arrest against him in family court.
14 SAC ¶ 55. As Sgt. Wells was a member of the conspiracy that planned and effectuated
15 Plaintiff’s arrest, he contributed to Plaintiff’s risk of harm, which resulted in a duty to warn
16 Plaintiff of the set up. Additionally, Defendants do not contest that Sgt. Wells’s involvement
17 in a conspiracy would create a duty to Plaintiff. See MTD at 17.

18 As a duty existed, the Court looks to whether the state law immunities apply. See
19 Williams, 34 Cal. 3d at 22.

20 2. State Law Immunities Do Not Apply to Plaintiff’s State Claims

21 A public entity is not liable for injury caused by an employee if the employee is
22 immune from liability. Cal. Gov’t Code § 815.2. When considering the state immunities, the
23 Court may consider their application to the claims for abuse of process, negligence, and
24 intentional infliction of emotional distress. See Richards v. Dept. of Alcoholic Beverages
25 Control, 139 Cal. App. 4th 304, 311 (2006) (applying section 820.2 immunity to an abuse of
26 process claim); Mann v. California, 70 Cal. App. 3d 773, 778-79 (1977) (analyzing state
27 immunities as applied to negligence claim); Alicia T. v. Cnty. of Los Angeles, 222 Cal. App.
28 3d 869, 882-83 (1990) (applying immunities to intentional infliction of emotional distress

1 claim). Immunity is not available to an officer for false imprisonment or false arrest claims.
2 Cal. Gov't. Code § 820.4.

3 **a. California Government Code section 820.2**

4 Defendants argue that public employees, such as Sgt. Wells, are immunized under
5 section 820.2 for injuries resulting from discretionary acts or injuries. Immunity is meant to
6 protect basic policy decisions of public officials. Johnson v. California, 69 Cal. 2d at 793.
7 Immunity ends after the basic policy decision has been made. Johnson v. Cnty. of Los
8 Angeles, 143 Cal. App. 3d 298, 313 (1983).

9 A determination of whether section 820.2 applies also requires a determination of
10 whether the officer's actions were discretionary or ministerial. McCorkle v. City of Los
11 Angeles, 70 Cal. 2d 252, 260 (1969). The California Supreme Court employs a narrowed
12 definition of "discretionary," recognizing that every act by an officer involves some level of
13 discretion. See Johnson v. California, 69 Cal. 2d at 788-89, 794 n.8 ("to be entitled to
14 immunity the state must make a showing that such a policy decision, consciously balancing
15 risks and advantages, took place"); McCorkle, 70 Cal. 2d at 261 (discretionary acts require
16 "personal deliberation, decision and judgment") (internal citations omitted). Even if an
17 officer's act is discretionary, he will not receive immunity "if the injury to another results,
18 not from the employee's exercise of 'discretion vested in him' to undertake the act, but from
19 his negligence in performing it after having made the discretionary decision to do so."
20 McCorkle, 70 Cal. 2d at 261 (internal citations omitted). Multiple cases have found that
21 immunity does not apply to discretionary acts of government officials that give rise to a duty
22 to warn the public of impending danger. See, e.g., Johnson v. California, 69 Cal. 2d at 796;
23 Johnson v. Cnty. of Los Angeles, 143 Cal. App. 3d at 313 (sheriffs not immunized in
24 wrongful death action for failure to warn wife that husband, who posed known danger to
25 himself, was released from custody).

26 The facts alleged by Plaintiff do not provide any reason to immunize Sgt. Wells from
27 liability under section 820.2. As alleged by Plaintiff, Sgt. Wells was part of a conspiracy to
28 arrest Plaintiff for driving under the influence. This conspiracy created foreseeable harm to

1 Plaintiff. See supra Part III.B.1. There is no allegation that Sgt. Wells weighed the decision
2 to enter into the conspiracy and determined that public policy justified his action. Even if he
3 did and his decision to enter into the conspiracy was discretionary, the duty to warn Plaintiff
4 of the harm was not. See Johnson v. California, 143 Cal. 2d at 796; Johnson v. Cnty. of Los
5 Angeles, 143 Cal. App. 3d at 313. In light of Plaintiff’s allegations and the policy rationale
6 behind statutory immunity, section 820.2 does not immunize Sgt. Wells from liability.

7 **b. California Government Code section 845**

8 Similarly, section 845 provides immunity for the failure of a public entity or public
9 employee to provide police protection. Section 845 “was designed to prevent political
10 decisions of policy-making officials of government from being second-guessed by judges
11 and juries in personal injury litigation.” Mann v. California, 70 Cal. App. 3d 773, 778 (1977)
12 “[E]ssentially budgetary decisions of these officials were not to be subject to judicial review
13 in tort litigation.” Id. at 778-79; see also Zelig, 27 Cal. 4th at 1142 (section 845 immunity “is
14 meant to protect the budgetary and political decisions which are involved in hiring and
15 deploying a police force”). For example, immunity applied when police failed to provide
16 sufficient security at fairgrounds even though gang violence was a known risk. Turner v.
17 California, 232 Cal. App. 3d 883, 894-85 (1991).

18 Here, Sgt. Wells is not immunized for the reasons discussed above. Plaintiff’s claims
19 are not that Sgt. Wells failed to provide police protection; rather, the allegations are that Sgt.
20 Wells entered into a conspiracy and helped to create the harm that befell Plaintiff. Sgt.
21 Wells’s action was not based on budgetary limitations or a political decision. Instead, his
22 failure to act was based on his participation in the conspiracy.

23 **c. California Government Code sections 818.2, 821, and 846**

24 Defendant also argues that California Government Code sections 818.2, 821, and 846
25 immunize Sgt. Wells. Section 821 states that “[a] public employee is not liable for an injury
26 caused by his adoption of or failure to adopt an enactment or by his failure to enforce an
27 enactment.” Section 818.2 applies this same immunity to public entities for failure to enforce
28

1 a law. Section 846 immunizes public entities and employees for “injury caused by the failure
2 to make an arrest or by the failure to retain an arrested person in custody.”

3 Defendants cite Michenfelder v. City of Torrence, 28 Cal. App. 3d 202 (1972), in
4 support of applying sections 818.2, 821, and 846. In Michenfelder, Plaintiff alleged that
5 officers were negligent because they were aware of trespassers who raided Plaintiff’s store
6 but failed to take police action. Id. at 205. In determining that the immunity statutes applied,
7 that court specifically noted that the plaintiffs alleged only “wrongful inaction” against the
8 officers, and not any “actual participation or express encouragement.” Id. Unlike
9 Michenfelder, Sgt. Wells helped create the harm through his conspiracy with the other
10 defendants, and he had a duty to warn Plaintiff of the risk of harm. He did not simply fail to
11 arrest other defendants or fail to enforce a law. Thus, sections 821, 818.2, and 846 do not
12 immunize Sgt. Wells or Piedmont.

13 California Government Code section 820.2, 845, 818.2, 821, and 846 do not apply to
14 the facts alleged. As such, neither Sgt. Wells nor Piedmont are immunized from state
15 liability.

16 **C. Federal Claims**

17 Defendants also move to dismiss Plaintiff’s federal direct conduct claims against Sgt.
18 Wells and Piedmont, arguing that they lack a factual basis.⁷ MTD at 15. Plaintiff failed to
19 address any of these arguments in his papers. See Opp’n. This failure can amount to a
20 concession. See, e.g., In re Online DVD Rental Antitrust Litig., No. 09-2029 PJH, 2011 WL
21 5883772, at *12 (N.D. Cal. Nov. 23, 2011) (absent unusual circumstances, failure to respond
22 to argument on merits “viewed as grounds for waiver or concession of the argument”).
23 However, this Court grants the MTD these claim on their merits.

24 //

25
26
27 ⁷ Defendants also move to dismiss the state law claims because Sgt. Wells was not involved in
28 the second attempt to have Plaintiff arrested. MTD at 16. However, Plaintiff predicates the liability of
Sgt. Wells and Piedmont on Sgt. Wells’ involvement in the conspiracy. In California, “a conspiracy
cannot be alleged as a tort separate from the underlying wrong it is organized to achieve.” Applied
Equip. Corp., 7 Cal. 4th at 510-11. Thus, Plaintiff’s state law claims are properly pled in this regard.

1 **1. Plaintiff Does Not Adequately Plead Bad Faith Arrest Against Sgt. Wells or Piedmont**

2 Plaintiff alleges that Defendants engaged in a “bad faith arrest” when Sgt. Wells and
3 the Piedmont Police Department “creat[ed] a danger for plaintiff that he otherwise would not
4 have been subjected to, and ultimately resulted in plaintiff’s arrest which was unnecessary.”
5 SAC ¶ 65. However, Sgt. Wells did not execute Plaintiff’s arrest and there is not any basis
6 for a bad faith arrest claim against an officer who did not arrest or detain an individual.

7 “Section 1983 imposes civil liability on an individual who ‘under color [of state law] .
8 . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation
9 of any rights, privileges or immunities secured by the Constitution and laws.’” Franklin v.
10 Fox, 312 F.3d 423, 444 (9th Cir. 2002) (quoting 42 U.S.C. § 1983). Claims for “bad faith
11 arrest” in violation of the Fourth Amendment are not frequently addressed by courts, but
12 courts have generally found that an arrest made with a warrant or with probable cause defeats
13 a claim for bad faith arrest under § 1983. See Baker v. McCollen, 443 U.S. 137, 143-45
14 (1979) (holding that a plaintiff, arrested with a valid warrant, could not bring § 1983 claim);
15 Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (stating that an arrest made in bad
16 faith may give rise to a § 1983 claim as an “illegal, unconstitutional arrest”) (citing Guenther
17 v. Holmgreen, 738 F.2d 879, 883 (7th Cir. 1984)); Guenther, 738 F.2d at 883 (determining
18 that a plaintiff arrested without a warrant or probable cause may have a § 1983 claim). Cases
19 generally address liability against the officers who either arrested or confined individuals.
20 See Baker, 443 U.S. at 143-45; Guenther, 738 F.2d at 883.

21 Here, Plaintiff does not allege facts that show that Sgt. Wells engaged in a bad faith
22 arrest. In fact, Plaintiff alleges that Deputy Henderson, not Sgt. Wells, effectuated Plaintiff’s
23 arrest on November 2, 2010. SAC ¶ 52. There are not any facts to suggest that Sgt. Wells
24 arrested Plaintiff and not any case law that would allow a bad faith arrest claim based on the
25 creation of harm to Plaintiff. Plaintiff’s first claim for bad faith arrest is dismissed without
26 leave to amend.

27 //

1 **2. Plaintiff Does Not Adequately Plead Egregious Official Conduct**
2 **Intended to Injure Unjustified by Any Government Interest Against**
3 **Sgt. Wells or Piedmont**

4 Defendants move to dismiss Plaintiff’s fourth claim for Egregious Official Conduct
5 Intended to Injure Unjustified by Any Government Interest for failure to state a claim for
6 relief. MTD at 15. This Court grants the MTD as to this claim because Plaintiff alleges
7 action by Tanabe and Henderson, not Defendants.

8 The fourth claim is predicated on entrapment carried out by Tanabe and Henderson.
9 See SAC ¶ 70. Even if Plaintiff pled sufficient facts, entrapment alone does not constitute a
10 substantive due process claim. See United States v. Russell, 411 U.S. 423, 430 (1973)
11 (holding that a criminal defendant’s constitutional rights were not violated because officers
12 entrapped him); Stokes v. Gann, 498 F.3d 483, 484-85 (5th Cir. 2007) (extending Russell to
13 § 1983 causes of action based on entrapment and citing other circuit courts that have done
14 the same). Thus, in order for Plaintiff to have a substantive due process claim according to
15 § 1983, he must allege government action that rises to the level of “shock[ing] the
16 conscious.” See Rochin v. California, 342 U.S. 165, 172-73 (1952); Cnty. of Sacramento v.
17 Lewis, 523 U.S. 833, 849 (1998) (“conduct intended to injure in some way unjustifiable by
18 any government interest is the sort of official action most likely to rise to the conscience-
19 shocking level”); Cooper v. Dupnik, 924 F.2d 1520, 1530 n.20 (9th Cir. 1991) (discussing
20 Rochin standard); United States v. O’Connor, 737 F.2d 814, 817 (9th Cir. 1984) (conduct
21 must be so shocking as to “violate the universal sense of justice”). Courts have held that
22 obtaining evidence by involuntary stomach pumping meets the “shocks the conscience”
23 standard, Rochin, 342 U.S. at 172-74, as does government agents “engineer[ing] and
24 direct[ing] a criminal enterprise from start to finish,” United States v. So, 755 F.2d 1350,
25 1353 (9th Cir. 1985).

26 In his fourth claim, Plaintiff alleges that “the actions and behavior of Deputy Tanabe
27 and Deputy Henderson in entrapping Plaintiff via a Dirty DUI arrest constituted an abuse of
28 power.” SAC ¶ 70. Plaintiff alleges only that Tanabe and Henderson arrested Plaintiff, and
does not allege any action by Sgt. Wells, including participation in the conspiracy, as the

1 basis for this § 1983 claim for egregious conduct. See id. ¶ 16. As there are no allegations as
2 to Sgt. Wells or Piedmont, the claim is dismissed without leave to amend.

3 **3. Monell Bars Federal Claims Against Piedmont and Sgt. Wells in his**
4 **Official Capacity**

5 This Court dismisses Plaintiff’s fourth claim against Piedmont and the third and
6 fifth(a) claims against Piedmont and Sgt. Wells in his official capacity because they are
7 inadequately pled in light of the Supreme Court’s decision in Monell v. Dept. of Social Svcs.,
8 436 U.S. 658 (1978).

9 Local governments cannot be held liable for the actions of their employees on the
10 theory of respondeat superior. Id. at 691, 694. However, local governments cannot escape
11 liability when the government’s policy or custom causes the injury. Id. at 694. “For the
12 government to be held liable on the basis of custom, there must be a pattern of ‘persistent and
13 widespread discriminatory practices of state officials’ which became ‘so permanent and well
14 settled as to [have] the force of law.’” Doe v. Alameda Unified Sch. Dist., No. C 04-02672
15 CRB, 2006 WL 734348, at *5 (N.D. Cal. Mar. 20, 2006) (citing Monell, 436 U.S. at 691).
16 This same rationale applies to suits against officers in their official capacity. Kentucky v.
17 Graham, 473 U.S. 159, 168 (1985) (“in an official-capacity suit the entity’s ‘policy or
18 custom’ must have played a part in the violation of federal law”) (internal citations omitted).

19 Plaintiff alleges the first, third, and fourth⁸ claims against Piedmont and Sgt. Wells, in
20 his official capacity, SAC ¶¶ 10, 65, 69, 70,⁹ yet Plaintiff failed to plead any policy or custom
21 of the City that created the injury to Plaintiff. In fact, Plaintiff does not challenge that
22 Monell bars his claims against Sgt. Wells in an official capacity and Piedmont. See Opp’n.
23 Further, Plaintiff does not allege that a Dirty DUI scheme occurred multiple times in
24 Piedmont or that multiple Piedmont officers were involved. See SAC. There was no city

25 ⁸ This Court dismisses the first and fourth claims in their entirety against Sgt. Wells and
26 Piedmont for being insufficiently pled. See supra Parts III.C.1 and 2. Thus, this Court need only
27 consider the Monell doctrine in relation to the third and fifth(a) claims, to the extent that Plaintiff alleges
28 them against Piedmont and Sgt. Wells, in his official capacity

⁹ Plaintiff alleges the fifth claim, Conspiracy to Commit Egregious Official Conduct Intended
to Injury Unjustified by Any Government Interest against Sgt. Wells, although it is unclear if Plaintiff
also intends this to be alleged against Sgt. Wells in his official capacity. Id. ¶ 71.

1 policy that officers help assist Butler in the set up; Sgt. Wells was the only Piedmont officer
2 assisting with the Dirty DUI. See id. Further, Plaintiff does not allege that any other officer
3 even knew about the Dirty DUI scheme. Id. As such, this Court dismisses the fourth claim
4 against Piedmont and the third and fifth(a) claims against Sgt. Wells in his official capacity.

5 **D. Punitive Damages**

6 Finally, Defendants move to dismiss Plaintiff's claim for punitive damages, citing
7 both federal and state law. In his Opposition, Plaintiff clarifies that the claim for punitive
8 damages is brought pursuant to California Civil Code section 3294 only. Opp'n at 19.

9 Section 3294 provides damages for when a Plaintiff proves, by clear and convincing
10 evidence, "that the defendant has been guilty of oppression, fraud, or malice." Malice has
11 two possible definitions: (1) "conduct which is intended by the defendant to cause injury to
12 the plaintiff"; or (2) "despicable conduct which is carried on by the defendant with a willful
13 and conscious disregard of the rights or safety of others." Cal. Civ. Code § 3294(c)(1).
14 Oppression is defined as "despicable conduct that subjects a person to cruel and unjust
15 hardship in conscious disregard of that person's rights." Id. § 3294(c)(2).

16 Assuming the truth of the facts alleged in Plaintiff's SAC, this Court denies
17 Defendants' MTD as to punitive damages. When Daggett hired Butler, she intended to have
18 Plaintiff arrested for driving under the influence so that she could use the arrest against him
19 in divorce proceedings, therefore causing harm. SAC ¶¶ 19-20. Sgt. Wells agreed to
20 participate in the "Dirty DUI scheme," which Plaintiff alleges included the common goal to
21 have him arrested and to use that arrest against him in family court proceedings. Id. ¶¶ 16,
22 33, 34. As previously discussed, entering into the conspiracy caused harm to the Plaintiff.
23 See supra Part III.A. As causing injury can be the basis for punitive damages under section
24 3294(c)(1), Plaintiff adequately pled a claim for punitive damages.

25 **IV. CONCLUSION**

26 The Court DENIES the MTD as to the third, fifth(a), fifth(b), sixth, and seventh
27 claims as to Sgt. Wells's participation in the conspiracy. The Court also DENIES the MTD
28 as to the applicability of state immunities. The Court GRANTS the MTD without leave to

1 amend as to the first and fourth claims against Sgt. Wells and Piedmont for Bad Faith Arrest
2 and Egregious Official Conduct Intended to Injure Unjustified by Any Governmental
3 Interest. The Court also GRANTS the MTD as to the fourth and fifth(a) claims against Sgt.
4 Wells in his official capacity and Piedmont. The Court DENIES the MTD as to punitive
5 damages.

6 **IT IS SO ORDERED.**

7
8 Dated: April 23, 2013

9 
10 _____
11 CHARLES R. BREYER
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28