

United States District Court
For the Northern District of California

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

GLEN MARCH,
Plaintiff,

v.

TWIN CITIES POLICE AUTHORITY, et. al.,
Defendants.

No. C 14-00512 SI

ORDER

**- GRANTING DEFENDANTS’ MOTIONS
TO DISMISS WITH LEAVE TO AMEND**

**- GRANTING SPECIAL MOTION BY
DEFENDANTS WOODRUFF AND
RIMES TO STRIKE AND FOR
ATTORNEY’S FEES**

Presently before the Court are the following three motions: (1) a motion by defendants Central Marin Police Authority successor to the Twin Cities Police Authority,¹ James Shirk, David Woo, Jenna McVeigh, and Hamid Khalili (“the Police defendants”) to dismiss plaintiff’s first amended complaint;² (2) a motion by defendants City of Larkspur, Leonard Rifkind, Dan Schwarz, Robert Sinnott, and Cynthia Huisman (“the City defendants”) to dismiss plaintiff’s first amended complaint; and (3) a motion by defendants Sky Woodruff and Anita Rimes to dismiss plaintiff’s first amended complaint, to strike claims 7 and 8 from the first amended complaint under California’s Anti-Slapp Law, and for attorney’s fees. Docket Nos. 21, 22, 25. On July 10, 2014, the Court took the matter under submission. Docket No. 51. For the reasons set forth below, the Court GRANTS defendants’ motions to dismiss

¹ The Central Marin Police Authority is the successor police entity to the Twin Cities Police Authority, which no longer exists. Docket No. 21 at 1 n.1; Docket No. 18, First Amended Complaint (“FAC”) ¶¶ 2-3.

² On May 15, 2014, defendants Central Marin Police Authority, Shirk, Woo, and McVeigh filed the present motion to dismiss. Docket No. 21. On June 9, 2014, defendant Khalili filed a notice of joinder in the previously filed motion to dismiss. Docket No. 44.

1 WITH LEAVE TO AMEND, and the Court GRANTS defendants Woodruff and Sky’s special motion
2 to strike and motion for attorney’s fees.

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4 **BACKGROUND**

5 The following allegations are taken from the First Amended Complaint. Plaintiff is a former
6 resident of the City of Larkspur. Docket No. 18, FAC ¶ 1. In April 2007, plaintiff purchased a fixer-
7 upper house at 143 Madrone Avenue, Larkspur, CA 94939. *Id.* ¶ 36. Plaintiff’s home was near Arroyo
8 Holon Creek. *Id.* ¶ 37.

9 Plaintiff submitted a proposed project to the City of Larkspur that required a flood plain
10 determination. *Id.* ¶¶ 38-42. In 2009 and 2010, an Assistant Planner for the City of Larkspur made
11 flood plain determinations on plaintiff’s proposal. *Id.* ¶ 42. Plaintiff disagreed with these
12 determinations and obtained a letter of map amendment (“LOMA”) from the Federal Emergency
13 Management Agency (“FEMA”), which determined the base flood elevation (“FEMA BFE”) of the
14 creek in the vicinity of the property. *Id.* ¶ 45-48. On February 9, 2012, the Flood Plain Administrator
15 for the City of Larkspur accepted the FEMA BFE, but later in February 2012, the Interim Planning
16 Director refused to recognize the FEMA BFE. *Id.* ¶¶ 50. Plaintiff alleges that from March 2012 to
17 August 2012, he attempted to resolve the situation through several communications with then Mayor
18 and City Councilman Leonard Rifkind, City Manager Dan Schwarz, and other city officials. *Id.* ¶¶ 52-
19 67. On August 7, 2012, the City’s Flood Plain Administrator again accepted the FEMA BFE, and a
20 Planning Commission hearing date was set for August 28, 2012. *Id.* ¶¶ 62, 64.

21 On August 11, 2012 at approximately 11:30 p.m., plaintiff had a conversation with Sean McLeod
22 at a local dive bar. FAC ¶ 68. Plaintiff alleges that he was being sarcastic and facetious and that he did
23 not make any criminal threats during the conversation, but plaintiff does not allege what he actually said
24 to Mr. McLeod during this conversation. *Id.* ¶¶ 18, 70-71. Plaintiff alleges that he never mentioned the
25 name Daryl Philips or the name Leonard Rifkind. *Id.* ¶¶ 100, 120.

26 The following morning, Mr. McLeod spoke to Deputy City Manager Robert Sinnott and told him
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1 that plaintiff made threatening statements about three people.³ FAC ¶¶ 76-77. Plaintiff alleges that
2 during the conversation, Mr. McLeod did not identify Building Official Daryl Philips or Mayor Rifkind.
3 *Id.* ¶¶ 103, 122. At 11:02 a.m. that same day, Mr. Sinnott sent an email to Captain Shirk of the Central
4 Marin Police Authority summarizing his conversation with Mr. McLeod about the alleged threats. *Id.*
5 ¶ 79. In the email, Mr. Sinnott stated that plaintiff told Mr. McLeod that he was going to kill Mayor
6 Rifkind and Building Official Daryl Philips. *Id.* ¶ 82; Docket No. 12, Request for Judicial Notice
7 (“RJN”) Ex. 1 at 8.⁴ Mr. Sinnott also stated in the email that during his conversation with Mr. McLeod,
8 plaintiff stated that “he ‘chased the mayor out to the freeway a few days ago with the intent to do harm
9 but couldn’t catch up to him.’” Docket No. 12, RJN Ex. 1 at 8. Plaintiff alleges that Mr. Sinnott knew
10 that the claims in the email were false because Mr. McLeod did not identify Building Official Daryl
11 Philips or Mayor Rifkind. *Id.* ¶ 80. Captain Shirk informed Mayor Rifkind’s wife and Mr. Philips about
12 the alleged threats and forwarded the email to Detective Woo. *Id.* ¶¶ 84-87.

13 At approximately 3:30 p.m. on August 12, 2012, detective Woo began interviewing Mr.
14 McLeod. FAC ¶ 95. During the interview, Mr. McLeod told detective Woo that Mr. Philips was not
15 mentioned during his conversation with plaintiff. *Id.* ¶ 106. Mr. McLeod told detective Woo that,
16 instead, a foreign sounding name was mentioned. *Id.* ¶ 108. Detective Woo suggested that the name
17 might have been Hamid Shamsapour because he was the only person detective Woo knew that worked
18 for the city with a foreign sounding name. *Id.* ¶¶ 109-110. It appears that plaintiff’s alleged statements
19 regarding Mayor Rifkind were discussed during the interview, but plaintiff’s allegations are unclear.
20 *See id.* ¶¶ 127-28 (“During the interview, Defendant Detective Woo continued that the ‘Mayor.’
21 Defendant Detective Woo did not attempt to identify another name.”). Plaintiff alleges that the
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24 ³ Plaintiff does not allege the identities of these three people.

25 ⁴ Mr. Sinnott’s email was attached to the petition for workplace violence restraining orders that
26 was filed by defendant Rimes with the Marin County Superior Court. Docket No. 12, RJN Ex. 1.
27 Accordingly, pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of the email
28 because it is a matter of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir.
2001). However, the Court notes that it only takes judicial notice of the contents of the email. The
Court does not judicial notice of email for the truth of the matters asserted therein. *See In re Bare
Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D. Cal. 2010).

1 interview ended after he was taken into custody.⁵ *Id.* ¶ 95.

2 On August 12, 2012 at a little after 4:00 p.m., plaintiff was arrested by the San Mateo Police
3 Department at the request of Detective Woo.⁶ FAC ¶ 19-20. Plaintiff alleges that Officer McVeigh and
4 Sergeant Khalili assisted in the arrest. *Id.* ¶¶ 92-93. Plaintiff posted bail and was released from jail after
5 midnight on August 13, 2012. *Id.* ¶ 99. On September 21, 2012, the Marin County District Attorney
6 filed two felony counts against plaintiff for making criminal threats in violation of California Penal
7 Code § 76 before the Superior Court of California, Marin County. FAC ¶ 22. Count 1 was for making
8 criminal threats against Mayor Rifkind, and Count 2 was for making criminal threats against Mr.
9 Sinnott. *Id.* ¶¶ 23-24. On October 9, 2012, the Superior Court sustained plaintiff's demurrer and
10 dismissed Count 2. *Id.* ¶ 25. On July 18, 2013, after plaintiff participated in and completed a diversion
11 program, the Superior Court dismissed Count 1. *Id.* ¶¶ 26-32.

12 On February 3, 2014, plaintiff, proceeding pro se, filed a complaint against defendants Twin
13 Cities Police Authority, Central Marin Police Authority, City of Larkspur, Leonard Rifkind, Larry Woo,
14 Dan Schwarz, Todd Cusimano, James Shirk, David Woo, Vera Hicks, Jenna McViegh, Monte Deignan,
15 Robert Sinnott, Cynthia Guisman, Niel Toft, Anne Moore, Sky Woodruff, and Dennis Reinhart. Docket
16 No. 1, Compl. On April 10 and 14, 2014, the defendants filed motions to dismiss and motions to strike
17 plaintiff's complaint. Docket Nos. 9-11. On May 1, 2014, plaintiff filed a first amended complaint
18 ("FAC"), mooted the defendants' motions. Docket No.18. The FAC names as defendants Twin Cities
19 Police Authority, Central Marin Police Authority, City of Larkspur, Leonard Rifkind, Dan Schwarz,
20 James Shirk, David Woo, Hamid Khalili, Jenna McVeigh, Robert Sinnott, Cynthia Huisman, Sky

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22 ⁵ Plaintiff alleges that prior to interview, detective Woo was informed that Mr. McLeod would
23 not confirm that Len Rifkind was mentioned during his conversation with plaintiff. FAC ¶¶ 88, 126.

24 ⁶ On the same day as his arrest, August 12, 2012, Detective Woo and Officer McVeigh obtained
25 three emergency restraining orders protecting Mayor Rifkind, Mr. Sinnott, and Mr. Shamsapour, which
26 expired on August 17, 2012. FAC ¶ 21. On August 17, 2012, defendant Anita Rimes on behalf of the
27 City of Larkspur filed a petition in Marin County Superior Court for a work place violence restraining
28 order naming Mayor Rifkind, Mr. Sinnott, and Mr. Shamsapour as protected persons. *Id.* ¶ 33, at 28.
On October 5, 2012, the petition was amended to remove Mr. Shamsapour as a protected person. *Id.*
¶ 34. Also on October 5, 2012, the Marin County Superior Court, after a hearing, granted the petition,
which named Mayor Rifkind and Mr. Sinnott as protected persons. *Id.* ¶ 35. The restraining order will
expire on October 5, 2015. *Id.*

1 Woodruff, and Anita Rimes. *Id.*

2 By the present motions, all of the defendants move to dismiss the FAC pursuant to Federal Rule
3 of Civil Procedure 12(b)(6) for failure to state a claim. Docket Nos. 21, 22, 25. In addition, defendants
4 Woodruff and Rimes move under California’s Anti-Slapp law to strike claims seven and eight from the
5 FAC and for attorney’s fees. Docket No. 25.

6
7 **LEGAL STANDARD**

8 To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a
9 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
10 “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer
11 possibility that a Defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).
12 While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts
13 sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 544, 555. “A
14 pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of
15 action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint
16 suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting
17 *Twombly*, 550 U.S. at 557). “While legal conclusions can provide the framework of a complaint, they
18 must be supported by factual allegations.” *Id.*

19 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the
20 complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d
21 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true “allegations that are
22 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*
23 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, “the tenet that a court must accept as true all of
24 the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.
25 In considering a motion to dismiss, the court may take judicial notice of matters of public record outside
26 the pleadings. *See MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). If the Court
27 dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has
28 “repeatedly held that a district court should grant leave to amend even if no request to amend the

1 pleading was made, unless it determines that the pleading could not possibly be cured by the allegation
2 of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation
3 marks omitted).

4 5 DISCUSSION

6 I. Plaintiff’s Second and Fourth Causes of Action Pursuant to 42 U.S.C § 1983

7 Plaintiff’s second and fourth causes of action are brought pursuant to 42 U.S.C. § 1983 and
8 allege violations of plaintiff’s civil rights. FAC at 20-24. The Police defendants and the City
9 defendants both move to dismiss these two causes of action. Docket No. 21 at 10-14; Docket No. 22
10 at 12-14. In response, plaintiff states that he does not object to the Court striking his second and fourth
11 causes of action. Docket No. 24 at 9-11; Docket No. 29 at 5. Accordingly, the Court dismisses with
12 prejudice Plaintiff’s second and fourth causes of action.

13 14 II. Plaintiff’s Cause of Action for Unlawful Arrest

15 As his first cause of action, plaintiff alleges a claim against defendants Woo, Khalili, McVeigh,
16 and Sinnott pursuant to 42 U.S.C. § 1983 for unlawful arrest in violation of plaintiff’s Fourth
17 Amendment rights. FAC ¶¶ 152-165.

18 19 A. Legal Standards for 42 U.S.C. § 1983

20 To state a claim under 42 U.S.C. § 1983, Plaintiff must allege that “(1) the defendants acting
21 under color of state law (2) deprived plaintiff[] of rights secured by the Constitution or federal statutes.”
22 *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). “Liability under section 1983 arises only
23 upon a showing of personal participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th
24 Cir. 1989); *accord Iqbal*, 556 U.S. at 677.

25 26 B. Legal Standards for Unlawful Arrest

27 “A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment,
28 provided the arrest was without probable cause or other justification.” *Dubner v. City & County of San*

1 *Francisco*, 266 F.3d 959, 965 (9th Cir. 2001); accord *Harper v. City of L.A.*, 533 F.3d 1010, 1022 (9th
2 Cir. 2008) (“An arrest without probable cause violates the Fourth Amendment and gives rise to a claim
3 for damages under § 1983.”). To maintain an action for false arrest, the plaintiff “must plead facts that
4 would show [defendant] ordered or otherwise procured the arrests and the arrests were without probable
5 cause.” *Lacey v. Maricopa County*, 693 F.3d 896, 918 (9th Cir. 2012).

6 “Probable cause exists when, under the totality of the circumstances known to the arresting
7 officers (or within the knowledge of the other officers at the scene), a prudent person would believe that
8 the suspect had committed a crime.” *Dubner*, 266 F.3d at 966; accord *United States v. Lopez*, 482 F.3d
9 1067, 1072 (9th Cir. 2007) (“Probable cause to arrest exists when officers have knowledge or reasonably
10 trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has
11 been or is being committed by the person being arrested.”). “While conclusive evidence of guilt is of
12 course not necessary under this standard to establish probable cause, [m]ere suspicion, common rumor,
13 or even strong reason to suspect are not enough.” *Lopez*, 482 F.3d at 1072. “While an officer may not
14 ignore exculpatory evidence that would negate a finding of probable cause, [o]nce probable cause is
15 established, an officer is under no duty to investigate further or to look for additional evidence which
16 may exculpate the accused.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1147 (9th Cir. 2012)
17 (quotation marks omitted).

18 “Probable cause is an objective standard. The arresting officers’ subjective intention . . . is
19 immaterial in judging whether their actions were reasonable for Fourth Amendment purposes.” *Lopez*,
20 482 F.3d at 1072. Therefore, an arrest is lawful if the officer “had probable cause to arrest [the suspect]
21 for *any* offense.” *Tsao*, 698 F.3d at 1147 (emphasis in original). Further, “[u]nder the collective
22 knowledge doctrine, in determining whether probable cause exists for arrest, courts look to ‘the
23 collective knowledge of all the officers involved in the criminal investigation.’” *Harper v. City of L.A.*,
24 533 F.3d 1010, 1022 (9th Cir. 2008).

25
26 **C. Plaintiff’s Unlawful Arrest Claim Against Defendants Woo, Khalili and McVeigh**

27 Defendants Woo, Khalili and McVeigh argue that this claim should be dismissed because
28 plaintiff’s arrest for violation of California Penal Code § 76 was supported by probable cause. Docket

1 No. 21 at 6. California Penal Code § 76 provides:

2 (a) Every person who knowingly and willingly threatens the life of, or threatens serious
3 bodily harm to, any elected public official, county public defender, county clerk, exempt
4 appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison
5 Terms, or the staff, immediate family, or immediate family of the staff of any elected
6 public official, county public defender, county clerk, exempt appointee of the Governor,
7 judge, or Deputy Commissioner of the Board of Prison Terms, with the specific intent
8 that the statement is to be taken as a threat, and the apparent ability to carry out that
9 threat by any means, is guilty of a public offense

10 (c) For purposes of this section, the following definitions shall apply:

11 (1) “Apparent ability to carry out that threat” includes the ability to fulfill the threat at
12 some future date when the person making the threat is an incarcerated prisoner with a
13 stated release date.

14 (2) “Serious bodily harm” includes serious physical injury or serious traumatic condition.

15 . . .

16 (5) “Threat” means a verbal or written threat or a threat implied by a pattern of conduct
17 or a combination of verbal or written statements and conduct made with the intent and
18 the apparent ability to carry out the threat so as to cause the person who is the target of
19 the threat to reasonably fear for his or her safety or the safety of his or her immediate
20 family.

21 “[T]he essence of a violation of section 76 is the making of a statement with the intent that it be taken
22 as a threat, along with the apparent ability to carry out the threat, resulting in actual reasonable fear on
23 the part of the victim.” *People v. Barrios*, 163 Cal. App. 4th 270, 277 (2008).

24 In the FAC, plaintiff has failed to allege sufficient facts showing that his arrest for violation of
25 California Penal Code § 76 was without probable cause. Whether there was probable cause depends
26 on the totality of the circumstances known to the arresting officers at the time of the arrest and if, under
27 those known circumstances, a prudent person would believe that plaintiff knowingly and willingly
28 threatened to kill an elected public official or the staff of an elected public official. *See Dubner*, 266
F.3d at 966.

Plaintiff alleges that detective Woo was provided with Mr. Sinnott’s email summarizing his
earlier conversation with Mr. McLeod. FAC ¶ 87. In the email, Mr. Sinnott states that plaintiff told Mr.
McLeod that he was going to kill Mayor Len Rifkind. *Id.* ¶ 82; Docket No. 12, RJN Ex. 1 at 8. Mr.
Sinnott also stated in the email that during his conversation with Mr. McLeod, plaintiff stated that “he
‘chased the mayor out to the freeway a few days ago with the intent to do harm but couldn’t catch up

1 to him.” Docket No. 12, RJN Ex. 1 at 8. Plaintiff alleges that Mr. Sinnott’s claims were false. *Id.* ¶
2 83. But, even accepting this as true, plaintiff does not allege any facts showing that detective Woo
3 should have known that the claims in the email were false prior to plaintiff’s arrest.⁷

4 Plaintiff also alleges that prior to his interview with Mr. McLeod, detective Woo was informed
5 that Mr. McLeod would not confirm that Len Rifkind was mentioned in his conversation with plaintiff.
6 FAC ¶¶ 88, 126. However, plaintiff does not allege whether during the interview and prior to plaintiff’s
7 arrest⁸ Mr. McLeod later identified Mayor Rifkind as the victim of plaintiff’s threats. Indeed, plaintiff
8 does not allege what Mr. McLeod said during the interview, and plaintiff’s allegations about the
9 interview are mostly incoherent. *See id.* ¶¶ 127-28 (“During the interview, *Defendant Detective Woo*
10 continued that the ‘Mayor.’ Defendant Detective Woo did not attempt to identify another name.”).
11 Moreover, in his opposition to the motion, plaintiff appears to state that Mayor Rifkind was identified
12 as the victim by Mr. McLeod during his interview with detective Woo. *See* Docket No. 24 at 5
13 (“*Defendant Detective WOO* continued to suggest that ‘the Mayor’ was mentioned (FAC ¶¶ 126-27)
14 resulting in the misidentification of the Mayor Len Rifkind by the witness.”). Thus, it appears from
15 plaintiff’s allegations that at the time of his arrest, detective Woo potentially had both the email from
16 Mr. Sinnott stating that plaintiff threatened to kill Mayor Rifkind and Mr. McLeod’s statement during
17 the interview identifying Mayor Rifkind as the victim of plaintiff’s threats. Accordingly, taking these
18 allegations as true, plaintiff has failed to plead sufficient facts to raise his right to relief above the
19 speculative level. *See Twombly*, 550 U.S. at 555. Specifically, plaintiff has failed to allege sufficient
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21 ⁷ In addition, it is unclear from plaintiff’s allegations whether Mr. Sinnott’s statements in the
22 email were actually false. In the FAC, plaintiff alleges that Mr. McLeod told Mr. Sinnott that plaintiff
23 made threatening statements about three people. FAC ¶ 77. But, plaintiff does not allege the identities
24 of these three people, or allege that none of them were potentially the mayor or some other elected
25 public official or the staff of an elected public official. The Court recognizes that plaintiff alleges in the
26 FAC that Mr. McLeod did not identify Mayor Len Rifkind and that Mr. McLeod would not confirm that
27 plaintiff mentioned Len Rifkind. FAC ¶¶ 88, 122, 126. However, the fact that Mr. McLeod did not
28 identify the victim specifically as Mayor Len Rifkind does not preclude Mr. McLeod from referring to
Mr. Rifkind in some other manner such as by referring to him by his title as City Council Member or
Police Council Member. *Cf.* FAC ¶¶ 6, 46, 52, 55-56 (referring to Leonard Rifkind as Defendant Police
Council Member / City Council Member Rifkind).

⁸ In the FAC, plaintiff alleges that detective Woo’s interview with Mr. McLeod began at
approximately 3:30 p.m. and that plaintiff was arrested shortly after 4:00 p.m. FAC ¶¶ 94-95.
Therefore, Mr. McLeod was interviewed for approximately 30 minutes prior to plaintiff’s arrest.

1 facts showing that the officers lacked probable cause for his arrest. Accordingly, the Court dismisses
2 without prejudice plaintiff's claim for unlawful arrest against defendants Woo, Khalili, and McVeigh.

3
4 **D. Plaintiff's Unlawful Arrest Claim Against Defendant Sinnott**

5 Defendant Sinnott argues that plaintiff's claim for unlawful arrest against him should be
6 dismissed because plaintiff has failed to allege that defendant Sinnott's acts were committed under color
7 of state law and because plaintiff has failed to allege facts showing that defendant Sinnott's actions
8 resulted in plaintiff's allegedly unlawful arrest. Docket No. 22 at 11-16.

9 "There is no 'rigid formula' for determining whether a state or local law official is acting under
10 color of state law." *Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006). State employment is
11 generally sufficient to render the defendant a state actor, but whether a defendant is acting under color
12 of state law turns on the nature and circumstances of the defendant's conduct and the relationship of that
13 conduct to the performance of his official duties. *Id.*; *see also United States v. Classic*, 313 U.S. 299,
14 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the
15 wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."). To
16 establish that the defendant was "acting under the color of state law," a plaintiff must show that: (1)
17 defendant's conduct was performed while acting, purporting to act, or pretending to act in the
18 performance of official duties; (2) defendant's conduct must have had the purpose and effect of
19 influencing the behavior of others; and (3) the challenged conduct must have been related in some
20 meaningful way either to defendant's governmental status or to the performance of his duties.
21 *Anderson*, 451 F.3d at 1068-69.

22 In support of his claim for false arrest against defendant Sinnott, plaintiff alleges that Mr. Sinnott
23 made false allegations in his email to Captain Shirk regarding his conversation with Mr. McLeod. FAC
24 at 19. Plaintiff alleges that Mr. Sinnott was acting in his individual capacity and in his official capacity
25 as the Deputy City Manager of the City of Larkspur. FAC ¶ 12. But, plaintiff does not allege facts
26 showing that when Mr. Sinnott sent the email to Captain Shirk he acting or purporting to act in the
27 performance of his official duties as a Deputy City Manager. In addition, plaintiff does not allege any
28 facts showing that reporting suspected criminal activity to the police was related in any way to Mr.

1 Sinnott’s government status or to the performance of his official duties as a Deputy City Manager.
2 “[M]erely complaining to the police does not convert a private party into a state actor.” *Collins v.*
3 *Womancare*, 878 F.2d 1145, 1155 (9th Cir. 1989); *accord Dietrich v. John Ascuaga’s Nugget*, 548 F.3d
4 892, 901 (9th Cir. 2008). This is true even if the private party is an off-duty state or city employee. *See,*
5 *e.g., Rojsza v. City of Ferndale*, No. C12-1149 MJP, 2012 U.S. Dist. LEXIS 170598, at *5-8 (W.D.
6 Wash. Nov. 29, 2012) (finding allegations that an off-duty police officer defendant reported suspected
7 criminal activity to the police insufficient to establish that the defendant was acting under color of state
8 law); *Brown v. Thalacker*, No. 6:11-cv-06120-HO, 2012 U.S. Dist. LEXIS 30306, at *9-10 (D. Or. Mar.
9 6, 2012) (finding allegations that a municipal employee reported suspected criminal activity to the police
10 insufficient to establish that the defendant was acting under color of state law). Therefore, plaintiff has
11 failed to allege sufficient facts showing that defendant Sinnott was acting under color of state law when
12 he sent the email to Captain Shirk.

13 Plaintiff alleges that defendants Wood, Khalili, McVeigh, and Sinnott acted as part of a common
14 plan to unlawfully arrest him. FAC at 18. A § 1983 claim may lie against a private party who is a
15 willful participant in joint action with the State or its agents. *Dietrich*, 548 F.3d at 899-900. “A plaintiff
16 may demonstrate joint action by proving the existence of a conspiracy or by showing that the private
17 party was ‘a willful participant in joint action with the State or its agents.’” *Franklin v. Fox*, 312 F.3d
18 423, 445 (9th Cir. 2002). However, “a substantial degree of cooperation” is required before liability will
19 be imposed on private parties for acting jointly with state actors. *Id.* “To establish liability for a
20 conspiracy in a § 1983 case, a plaintiff must ‘demonstrate the existence of an agreement or meeting of
21 the minds’ to violate constitutional rights.” *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir.
22 2010); *accord Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 929 (9th Cir. 2004) (“To state a claim
23 for conspiracy to violate constitutional rights, ‘the plaintiff must state specific facts to support the
24 existence of the claimed conspiracy.’”). “Such an agreement need not be overt, and may be inferred
25 on the basis of circumstantial evidence such as the actions of the defendants.” *Crowe*, 608 F.3d at 440.
26 But, “[a] mere allegation of conspiracy without factual specificity is insufficient.” *Karim-Panahi v. L.A.*
27 *Police Dep’t*, 839 F.2d 621, 626 (9th Cir. 1988). Here, plaintiff has failed to allege any facts showing
28 there was an overt or implicit agreement between defendant Sinnott and the defendant police officers

1 to violate plaintiff’s constitutional rights. The only contact alleged between defendant Sinnott and the
2 defendant police officers is Sinnott’s sending of the email to Captain Shirk. But, “merely complaining
3 to the police does not convert a private party into a state actor.” *Collins*, 878 F.2d at 1155; *accord*
4 *Dietrich*, 548 F.3d at 901. Accordingly, plaintiff has failed to allege sufficient facts showing that
5 defendant Sinnott was acting under color of state law with respect to plaintiff’s claim for unlawful
6 arrest, and, therefore, the Court dismisses without prejudice plaintiff’s claim for unlawful arrest against
7 defendant Sinnott.

8
9 **III. Plaintiff’s Cause of Action for Retaliation**

10 In the FAC, plaintiff alleges a cause of action against defendants Woo, Schwarz, Rifkind,
11 Sinnott, and Huisman pursuant to 42 U.S.C. § 1983 for retaliation in violation of his first amendment
12 rights. FAC at 27-28. Specifically, plaintiff alleges that these defendants caused him to be unlawfully
13 arrested and prosecuted in retaliation for plaintiff engaging in free speech related to his proposed project
14 with the City of Larkspur, including requesting public records from the City of Larkspur, filing Appeals
15 to the City Council to compel staff to adhere to the City laws, filing an Appeal to the City Planning
16 Director’s decision, and informing members of the City Council that its staff did not comply with City
17 laws. *Id.* Defendants argue that this claim should be dismissed because plaintiff has failed to allege that
18 defendants Woo and Sinnott’s actions were motivated by plaintiff’s communications with the City
19 regarding his proposed project. Docket No. 21 at 16-17; Docket No. 45 at 8. In addition, the City
20 defendants argue that plaintiff has failed to allege any facts showing that the defendants entered into a
21 conspiracy to violate plaintiff’s constitutional rights. Docket No. 22 at 18.

22 “Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit
23 exercise of the protected right[;] . . . the First Amendment prohibits government officials from
24 subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.” *Lacey*
25 *v. Maricopa County*, 693 F.3d 896, 916 (9th Cir. 2012) (en banc) (quotation marks omitted). In order
26 to demonstrate a First Amendment violation, a plaintiff must allege facts showing that (1) the
27 defendant’s conduct would chill a person of ordinary firmness from future First Amendment activity,
28 and (2) that the defendant’s desire to chill plaintiff’s speech was a but-for cause of his allegedly

1 unlawful conduct. *Id.* at 917; *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013).

2 Here, plaintiff has failed to satisfy the second element of his retaliation claim. “To satisfy the
3 second requirement, the [allegations] must be sufficient to establish that the officers’ desire to chill
4 [plaintiff’s] speech was a but-for cause of their conduct. In other words, would [plaintiff] have been
5 booked and jailed, rather than cited and arrested, but for the officers’ desire to punish [plaintiff] for his
6 speech?” *Ford*, 706 F.3d at 1194; *see also Mendocino Env’tl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283,
7 1300 (9th Cir. 1999) (explaining that “[i]ntent to inhibit speech” is an element of a claim for retaliation).
8 In the FAC, plaintiff has failed to allege sufficient facts showing that the defendants had a desire or
9 intent to chill plaintiff’s speech. To support his claim for retaliation, plaintiff relies on actions taken by
10 defendant Sinnott and Woo. Plaintiff alleges that defendant Sinnott retaliated against him by sending
11 an email with false allegations to Captain Shirk and by withholding information regarding staff
12 misconduct, and plaintiff alleges that defendant Woo retaliated against plaintiff by arresting him. FAC
13 at 27. However, plaintiff does not allege that defendants Sinnott and Woo were aware of any of
14 plaintiff’s relevant free speech activity. There are no allegations in the FAC showing that defendants
15 Sinnott and Woo were aware of plaintiff’s communications with the City regarding his proposed project.
16 In addition, as explained above, plaintiff has failed to allege sufficient facts showing that his arrest was
17 without probable cause. Therefore, plaintiff has failed to properly state a claim for retaliation. *See*
18 *Dietrich*, 548 F.3d at 901 (rejecting plaintiff’s retaliation claim as a matter of law where there was no
19 evidence that the officers were aware of the plaintiff’s free speech activity and the officers had probable
20 cause for their actions).

21 Based on the allegations in the FAC, the only defendants who knew about plaintiff’s free speech
22 activities were defendants Rifkind, Schwarz, and Huisman. *See* FAC ¶¶ 46, 52, 55-56, 58, 60-63, 65,
23 67. Plaintiff alleges that defendants Rifkind, Schwarz, Huisman, Sinnott, and Woo acted as part of a
24 common plan to retaliate against plaintiff in violation of his First Amendment rights. FAC at 27. “To
25 establish liability for a conspiracy in a § 1983 case, a plaintiff must ‘demonstrate the existence of an
26 agreement or meeting of the minds’ to violate constitutional rights.” *Crowe*, 608 F.3d at 440; *accord*
27 *Olsen*, 363 F.3d at 929 (“To state a claim for conspiracy to violate constitutional rights, ‘the plaintiff
28 must state specific facts to support the existence of the claimed conspiracy.’”). “Such an agreement

1 need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the
2 defendants.” *Crowe*, 608 F.3d at 440. But, “[a] mere allegation of conspiracy without factual
3 specificity is insufficient.” *Karim-Panahi*, 839 F.2d at 626. Here, plaintiff has failed to allege any facts
4 showing there was an overt or implicit agreement between any of these defendants to violate plaintiff’s
5 constitutional rights. Indeed, plaintiff does not allege any facts showing that defendants Rifkind,
6 Schwarz, or Huisman ever had a discussion with defendants Sinnott or Woo regarding plaintiff or his
7 proposed project. Therefore, plaintiff has failed to adequately allege that these defendants conspired
8 to retaliate against him in violation of his constitutional rights. *See Olsen*, 363 F.3d at 929-30 (affirming
9 the dismissal of plaintiff’s conspiracy claim where the complaint was “devoid of any discussion of an
10 agreement amongst the [defendants] to violate her constitutional rights”). Accordingly, the Court
11 dismisses without prejudice plaintiff’s cause of action of action for retaliation.

12
13 **IV. Plaintiff’s Cause of Action for Supervisor Liability**

14 As his third cause of action, plaintiff alleges a § 1983 claim against defendant Shirk for
15 supervisory liability based on the alleged violations of plaintiff’s First and Fourth Amendment rights.⁹
16 FAC at 21-22. “There is no respondeat superior liability under section 1983.” *Taylor*, 880 F.2d at 1045.
17 “A supervisor is liable under § 1983 for a subordinate’s constitutional violations ‘if the supervisor
18 participated in or directed the violations, or knew of the violations and failed to act to prevent them.’”
19 *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013).

20 For a supervisor to be liable for his subordinate’s constitutional violations, the plaintiff must
21 properly plead that the supervisor’s subordinates violated his constitutional rights. *See Starr v. Baca*,
22 652 F.3d 1202, 1207 (9th Cir. 2011) (“The law clearly allows actions against supervisors under section
23 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of
24 law of a federally secured right.” (emphasis added)) *see, e.g., Corales v. Bennett*, 567 F.3d 554, 570 (9th
25 Cir. 2009) (“[B]ecause Plaintiffs have failed to establish any triable issue of fact as to any of their
26

27 ⁹ In the FAC as part of this claim, plaintiff also alleged that his Fourteenth Amendment rights
28 were violated. FAC at 21. However, in his opposition, plaintiff states that he does not object to the
Court striking the Fourteenth Amendment allegations from this claim. Docket No. 24 at 9.

1 constitutional claims, a supervisory claim against Kinley is not sustainable.”). As explained above,
2 plaintiff has failed to adequately allege a violation of First or Fourth Amendment rights. Accordingly,
3 the Court dismisses without prejudice plaintiff’s third cause of action for supervisory liability against
4 defendant Shirk.

5
6 **V. Plaintiff’s Cause of Action for *Monell*¹⁰ Liability**

7 As his fifth cause of action, plaintiff alleges a § 1983 claim against defendants Central Marin
8 Police Authority and the City of Larkspur for municipal liability based on the alleged violations of
9 plaintiff’s First and Fourth Amendment rights.¹¹ FAC at 25-26. “Section 1983 suits against local
10 governments alleging constitutional rights violations by government officials cannot rely solely on
11 respondeat superior liability.” *AE v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). “In order to
12 establish liability for governmental entities under *Monell*, a plaintiff must prove ‘(1) that [the plaintiff]
13 possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3)
14 that this policy amounts to deliberate indifference to the plaintiff’s constitutional right; and, (4) that the
15 policy is the moving force behind the constitutional violation.’” *Dougherty v. City of Covina*, 654 F.3d
16 892, 900 (9th Cir. 2011).

17 Here, plaintiff’s allegations fail to satisfy the first element from the above test. As explained
18 above, plaintiff has failed to adequately allege a violation of his First or Fourth Amendment rights.
19 Therefore, plaintiff has failed to allege that he possessed a constitutional right of which he was deprived.
20 Accordingly, the Court dismisses without prejudice plaintiff’s fifth cause of action for *Monell* liability
21 against defendants Central Marin Police Authority and the City of Larkspur.

22
23
24
25
26 _____
¹⁰ *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978).

27 ¹¹ In the FAC as part of this claim, plaintiff also alleged that his Fourteenth Amendment rights
28 were violated. FAC at 25-26. However, in his opposition, plaintiff states that he does not object to the
Court striking the Fourteenth Amendment allegations from this claim. Docket No. 24 at 10-11.

1 **VI. Plaintiff's Causes of Action for Abuse of Process and Intentional Infliction of Emotional**
2 **Distress**

3 As his seventh and eighth causes of action, plaintiff alleges state law claims against defendants
4 Sky Woodruff and Anita Rimes for abuse of process and intentional infliction of emotional distress.
5 FAC at 28-30. Plaintiff alleges that defendant Rimes filed and prosecuted a Workplace Violence
6 Restraining Order against plaintiff at the request of the City of Larkspur. *Id.* at 28. Plaintiff alleges that
7 the petition contained false statements, that the defendants offered perjured testimony at the hearing on
8 the petition, and that the filing and prosecution of the restraining order was done for ulterior motives.
9 *Id.* at 28-29. Defendants Woodruff and Rimes move to dismiss these two claims for failure to state a
10 claim. Docket No. 25. In addition, defendants Woodruff and Rimes move pursuant to California's
11 Anti-SLAPP¹² statute to strike these two claims and for \$8,106.00 in attorney's fees. *Id.*

12 California Code of Civil Procedure § 425.16(b)(1) provides: "[a] cause of action against a
13 person arising from any act of that person in furtherance of the person's right of petition or free speech
14 . . . in connection with a public issue shall be subject to a special motion to strike, unless the court
15 determines that the plaintiff has established that there is a probability that the plaintiff will prevail on
16 the claim." "California's anti-SLAPP statute, enacted in 1992, provides 'for the early dismissal of
17 unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of
18 speech and petition for the redress of grievances.'" *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*,
19 742 F.3d 414, 421 (9th Cir. 2014). "[D]efendants sued in federal courts can bring anti-SLAPP motions
20 to strike state law claims and are entitled to attorneys' fees and costs when they prevail." *Verizon Del.,*
21 *Inc. v. Covad Communs. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004).

22 In determining whether a cause of action must be stricken under the broadly construed
23 anti-SLAPP statute, courts engage in a two-step inquiry. *CNN*, 742 F.3d at 422. First, the court must
24 determine whether the defendant has made a prima facie showing that the plaintiff's action arises from
25 conduct in furtherance of the exercise of defendant's constitutional right of petition or free speech in
26 connection with an issue of public interest. *Id.* If the defendant satisfies this threshold showing, the

27 _____
28 ¹²"SLAPP is an acronym for 'strategic lawsuit against public participation.'" *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 815 n.1 (2011).

1 burden then shifts to the plaintiff at the second step to establish, by competent evidence, a probability
2 that it will prevail on its claims. *Id.*

3
4 **A. Right of Petition or Free Speech**

5 At the first step of the anti-SLAPP analysis, the court must determine whether plaintiff’s state
6 law claims are based on conduct in furtherance of defendants’ right of petition or free speech in
7 connection with a matter of public interest. *CNN*, 742 F.3d at 422. California Code of Civil Procedure
8 § 425.16(e) provides that the term “‘act in furtherance of a person’s right of petition or free speech under
9 the United States or California Constitution in connection with a public issue’ includes: (1) any written
10 or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other
11 official proceeding authorized by law, [and] (2) any written or oral statement or writing made in
12 connection with an issue under consideration or review by a legislative, executive, or judicial body, or
13 any other official proceeding authorized by law” California courts “have interpreted this piece of
14 the defendant’s threshold showing rather loosely.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th
15 Cir. 2010).

16 A claim for relief filed in court is “indisputably a statement or writing made before a judicial
17 proceeding,” and is, therefore, subject to the anti-SLAPP statute. *Navellier v. Sletten*, 29 Cal. 4th 82,
18 90 (2002); accord *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006) (“‘Any act’ includes
19 communicative conduct such as the filing, funding, and prosecution of a civil action.”).
20 “[C]ommunications preparatory to or in anticipation of the bringing of an action or other official
21 proceeding” are also subject to the anti-SLAPP statute. *Briggs v. Eden Council for Hope &*
22 *Opportunity*, 19 Cal. 4th 1106, 1115 (1999). “This includes qualifying acts committed by attorneys in
23 representing clients in litigation.” *Rusheen*, 37 Cal. 4th at 1056; see also *Briggs*, 19 Cal. 4th at 1116
24 (“[T]he [anti-SLAPP] statute does not require that a defendant moving to strike under section 425.16
25 demonstrate that its protected statements or writings were made *on its own behalf*” (emphasis in
26 original)). Further, “a defendant moving to strike a cause of action arising from a statement made
27 before, or in connection with an issue under consideration by, a legally authorized official proceeding
28 need *not* separately demonstrate that the statement concerned an issue of public significance.” *Briggs*,

1 19 Cal. 4th at 1123 (emphasis in original).

2 Plaintiff's two state law claims are based on defendant Woodruff and Rimes's preparation,
3 initiation and prosecution of a workplace violence restraining order against plaintiff filed before the
4 Marin County Superior Court. FAC at 28-30. Therefore, defendants Woodruff and Rimes have met
5 their burden of showing that plaintiff's two state law claims are based on conduct in furtherance of
6 defendants' right of petition or free speech in connection with a matter of public interest. *See Rusheen*,
7 37 Cal. 4th at 1056; *Navellier*, 29 Cal. 4th at 90.

8
9 **B. Probability of Success on the Merits**

10 "To satisfy its burden under the second step, [the plaintiff] must demonstrate that its claims have
11 'only a minimum level of legal sufficiency and triability.'" *CNN*, 742 F.3d at 425. To satisfy this
12 standard, "the plaintiff must 'demonstrate that the complaint is both legally sufficient and supported by
13 a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by
14 the plaintiff is credited.'" *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002); *see also*
15 *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) ("[T]he claim should be dismissed if
16 the plaintiff presents an insufficient legal basis for it, or if, on the basis of the facts shown by the
17 plaintiff, 'no reasonable jury could find for the plaintiff.'"). In determining whether plaintiff has
18 satisfied this burden, "[t]he court is to consider 'the pleadings, and supporting and opposing affidavits
19 stating the facts upon which the liability or defense is based.'" *Mindys Cosmetics, Inc. v. Dakar*, 611
20 F.3d 590, 598 (9th Cir. 2010).

21 Defendants Woodruff and Rimes argue that plaintiff's claims for abuse of process and intentional
22 infliction of emotion distress have no probability of success because both claims are barred by
23 California's litigation privilege, California Civil Code § 47. Docket No. 25 at 9-11. The California
24 Supreme Court has noted that the California litigation privilege is relevant to the second step of the
25 anti-SLAPP analysis as "it may present a substantive defense a plaintiff must overcome to demonstrate
26 a probability of prevailing." *Flatley v. Mauro*, 39 Cal. 4th 299, 323 (2006). The California litigation
27 privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by
28 litigants or other participants authorized by law; (2) to achieve the objects of the litigation; and (4) that

1 have some connection or logical relation to the action.” *Silberg v. Anderson*, 50 Cal. 3d 205, 212
2 (1990); *see also* Cal. Civ. Code § 47(b). The purposes of the litigation privilege “are to afford litigants
3 and witnesses free access to the courts without fear of being harassed subsequently by derivative tort
4 actions, to encourage open channels of communication and zealous advocacy, to promote complete and
5 truthful testimony, to give finality to judgments, and to avoid unending litigation.” *Rusheen*, 37 Cal.
6 4th at 1063. “[I]n furtherance of the public policy purposes it is designed to serve, the privilege
7 prescribed by section 47(2) has been given broad application.” *Id.*; *see also* *Action Apartment Assn.,*
8 *Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1241 (2007) (“[W]e have given the litigation privilege
9 a broad interpretation.”).

10 The California litigation privilege is “an ‘absolute’ privilege, and it bars all tort causes of action
11 except a claim for malicious prosecution.” *Hagberg v. Cal. Fed. Bank*, 32 Cal. 4th 350, 360 (2004); *see*
12 *also* *Rusheen*, 37 Cal. 4th at 1058 (holding that the litigation privilege applies to claims for abuse of
13 process); *Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985) (holding that the litigation privilege applies to
14 claims for intentional infliction of emotional distress). The privilege is applicable to any
15 communication, whether or not it amounts to a publication. *Silberg*, 50 Cal. 3d at 212. Moreover, the
16 privilege “encompasses not only testimony in court and statements made in pleadings, but also
17 statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to
18 investigate the feasibility of filing a lawsuit.” *Hagberg*, 32 Cal. 4th at 361; *see also* *Rusheen*, 37 Cal.
19 4th at 1057 (“[The litigation privilege] is not limited to statements made during a trial or other
20 proceedings, but may extend to steps taken prior thereto, or afterwards.”).

21 Plaintiff’s two state law claims are based on defendant Woodruff and Rimes’s preparation,
22 initiation and prosecution of a work place violence restraining order against plaintiff filed before the
23 Marin County Superior Court. FAC at 28-30. Plaintiff alleges that the two defendants conspired to
24 submit a petition that contained false allegations and false statements and to withhold certain
25 declarations from the petition. *Id.* at 28-29. Plaintiff also alleges that the defendants knew that
26 defendants Sinnott and Rifkind would give false and misleading testimony at the hearing on the petition.
27 *Id.* at 29. In addition, plaintiff alleges that defendant Woodruff did not inform defendant Rimes about
28 the false and misleading statements in the declarations prior to the hearing. *Id.* Here, plaintiff’s claims

1 challenge communications made by the defendants during their litigation before the Marin County
2 Superior Court in regards to their petition for a restraining order that had a logical relation to the action.
3 Therefore, plaintiff’s state law claims against defendants Woodruff and Rimes are barred by the
4 litigation privilege. *See Rusheen*, 37 Cal. 4th at 1058 (“The privilege has been applied specifically in
5 the context of abuse of process claims alleging the filing of false or perjurious testimony or
6 declarations.”); *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993) (holding that “communications with ‘some
7 relation’ to judicial proceedings” are absolutely immune from tort liability by the litigation privilege).

8 Indeed, in his opposition, plaintiff acknowledges that the litigation privilege likely applies to his
9 claims against defendant Rimes. Docket No. 46 at 2. But, plaintiff argues that the litigations privilege
10 does not apply to defendant Woodruff’s actions because he merely performed the managerial function
11 of assigning an associate attorney, Rimes, to handle a legal matter. *Id.* However, plaintiff’s contention
12 does not match the allegations that are contained in the first amended complaint. In the FAC, plaintiff
13 does not challenge Woodruff’s decision to assign the matter to Rimes. Rather, plaintiff alleges that
14 Woodruff conspired with Rimes to submit a petition that contained false allegations and false
15 statements. FAC at 28-29. In addition, plaintiff alleges that defendant Woodruff did not inform
16 defendant Rimes about the false and misleading statements in the declarations prior to the hearing. *Id.*
17 Therefore, the gravamen of plaintiff’s claims against Woodruff challenge statements or non-statements,
18 i.e., communications, he made in connection with the preparation and prosecution of the restraining
19 order before the Marin County Superior Court. *See Rusheen*, 37 Cal. 4th at 1058 (“The distinction
20 between communicative and noncommunicative conduct hinges on the gravamen of the action.”).
21 Accordingly, plaintiff’s state law claims against Woodruff are barred by the litigation privilege. *See*
22 *Rubin*, 4 Cal. 4th at 1193.

23 In sum, because plaintiff’s claims for abuse of process and intentional infliction of emotional
24 distress are barred by the California litigation privilege, plaintiff has failed to show a probability that
25 he will prevail on these claims. *See Flatley*, 39 Cal. 4th at 323. Accordingly, the Court grants defendant
26 Woodruff and Rimes’s special motion to strike and their motion to dismiss, and the Court dismisses with
27 prejudice plaintiff’s claims for abuse of process and intentional infliction of emotional distress.
28

1 **C. Attorney’s Fees**

2 The “prevailing defendant on a special motion to strike shall be entitled to recover his or her
3 attorney’s fees and costs.” Cal. Civ. Proc. Code § 425.16(c)(1). “[A]ny SLAPP defendant who brings
4 a successful motion to strike is entitled to mandatory attorney fees.” *Ketchum v. Moses*, 24 Cal.4th
5 1122, 1131 (2001). “The dual purpose of this mandatory attorney fee award is to discourage meritless
6 lawsuits and to provide financial relief to the victim of a SLAPP lawsuit ‘by imposing the litigation
7 costs on the party seeking to chill the valid exercise of the constitutional rights of freedom of speech and
8 petition for the redress of grievances.’” *City of Los Angeles v. Animal Def. League*, 135 Cal. App. 4th
9 606, 627 n.19 (2006). “The defendant may recover fees and costs only for the motion to strike, not the
10 entire litigation.” *Christian Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1320 (2008).

11 An award of attorney’s fees and costs pursuant to section 425.16(c)(1) must be reasonable.
12 *Minichino v. First Cal. Realty*, No. C-11-5185 EMC, 2012 U.S. Dist. LEXIS 177524, at *7 (N.D. Cal.
13 Dec. 14, 2012) (citing *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 362 (1995) (“We readily conclude
14 section 425.16 similarly authorizes an award of *reasonable* attorney fees to the prevailing party.”)
15 (emphasis in original)). “[A] court assessing attorney fees begins with a touchstone or lodestar figure,
16 based on the ‘careful compilation of the time spent and reasonable hourly compensation of each attorney
17 . . . involved in the presentation of the case.’” *Ketchum*, 24 Cal. 4th at 1131-32; *see also Morales v. City*
18 *of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (“The ‘lodestar’ is calculated by multiplying the number
19 of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate.”). “As
20 the moving party, the prevailing defendant seeking fees and costs bear[s] the burden of establishing
21 entitlement to an award and documenting the appropriate hours expended and hourly rates. To that end,
22 the court may require [a] defendant[] to produce records sufficient to provide a proper basis for
23 determining how much time was spent on particular claims.” *Alnor*, 165 Cal. App. 4th at 1320
24 (quotations and citations omitted). A court has broad discretion in determining the reasonable amount
25 of attorney’s fees and costs to award. *See Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App.
26 4th 777, 785 (1996).

27 Because defendants Woodruff and Rimes have prevailed on their special motion to strike, they
28 are entitled to a mandatory award of reasonable attorney’s fees. *See Ketchum*, 24 Cal. 4th at 1131.

1 However, at this time, the Court cannot calculate a reasonable award of attorney's fees. In the motion,
2 defendants Woodruff and Rimes request \$8,106 in attorney's fees. Docket No. 25 at 12. But, in an
3 attached declaration, defendants' counsel explains that this requested amount includes an estimate of
4 the time he thought he would spend in preparing the reply brief and in appearing at the hearing on this
5 motion. Docket No. 26, Campbell Decl. ¶ 5. The Court notes that there was no hearing on this motion,
6 and that the reply brief that was filed was approximately three and a half pages. See Docket No. 47.
7 Therefore, defendants must update their request for attorney's fees to properly reflect the amount of
8 hours that were actually expended on the motion. In addition, the Court notes that the attached
9 declaration does not include records sufficient to provide a proper basis for determining how much time
10 was spent on the particular claims. Accordingly, the Court GRANTS defendants Woodruff and Rimes'
11 motion for attorney's fees, but ORDERS defendants Woodruff and Rimes to file an updated request for
12 attorney's fees that includes records sufficient to provide a proper basis for determining how much time
13 was spent on particular claims within **fourteen (14) days** from the date this order is filed.

14 15 CONCLUSION

16 For the foregoing reasons, the Court GRANTS defendants' motions to dismiss plaintiff's first
17 amended complaint and GRANTS plaintiff leave to amend. Specifically, the Court grants plaintiff leave
18 to amend with respect to his first (unlawful arrest), third (supervisor liability), fifth (*Monell* liability),
19 and sixth (retaliation) causes of action. The Court DISMISSES WITH PREJUDICE plaintiff's second,
20 fourth, seventh, and eight causes of action. Should plaintiff choose to file a second amended complaint,
21 it shall be consistent with the terms of this order and must be filed on or before **August 25, 2014**.

22 In addition, the Court GRANTS defendants Woodruff and Rimes's special motion to strike and
23 motion for attorney's fees. The Court ORDERS defendants Woodruff and Rimes to file an updated
24 request for attorney's fees that includes records sufficient to provide a proper basis for determining how
25 much time was spent on particular claims within **fourteen (14) days** from the date this order is filed.

26 **IT IS SO ORDERED.**

27 Dated: July 25, 2014

28 

SUSAN ILLSTON
United States District Judge