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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JAVIER COTA,
Plaintiff,

v.
CITY OF SAN DIEGO, et al.,
Defendants.

Case No. 12-cv-998 BAS (WMC)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

[ECF Nos. 54-1, 65]

Before the Court is Defendants’ Motion for Summary Judgment. ECF 54-1. For the reasons set forth below, the Court **DENIES IN PART** and **GRANTS IN PART** Defendants’ Motion for Summary Judgment.

I. FACTUAL BACKGROUND¹

On June 4, 2011, Plaintiff Javier Cota (“Cota”) and his nephew, Jamie Cota (“Jamie”), went to a bar in San Diego’s Gaslamp District, where Cota drank about five alcoholic drinks. Pl.’s Opp’n Defs.’ Mot. Summ. J. 1:9–11, ECF 65. After the bar closed at 2:00 a.m., Cota and Jamie met two unidentified women and joined them in a pedicab. *Id.* at 1:21–25. The women directed the pedicab back to their

¹ These facts are either uncontested or construed in the light most favorable to Plaintiff.

1 car. *Id.* Cota and his nephew waited in the pedicab for the women to go to their car,
2 believing that after they went to the car the women would return. *Id.* at 26–28, 2:1.
3 Cota then saw two men in dark clothing talking to the women and overheard one of
4 the women say, “I’m not interested. Leave me alone.” *Id.* at 2:10–13. Cota
5 believed the men were “hitting on” the women. *Id.* at 2:20. From ten to fifteen feet
6 away, Cota called out to the men, “why are you acting like dipshits to the women.”
7 *Id.* at 2:27.

8 From that distance away, Cota believed the men were Target security
9 guards. *Id.* at 2:28; Defs.’ Mot. Summ. J. 2:15–18, ECF 54–1 (citing Pl.’s Dep.). In
10 fact, the men were San Diego Police Officers, Defendants Justin Mattly and Ariel
11 Savage (collectively referred to as “Officers”). Pl.’s Opp’n 2:28; Defs.’ Mot. 2:15–
12 16 (citing Pl.’s dep.). Cota claims that the Officers’ police car was thirty feet away
13 with its blue and red lights off and that he did not hear the Officers ask the women
14 if they intended to drive. Pl.’s Opp’n 4:5–6, 2:8.

15 After Cota called to the Officers, Officer Mattly told Cota to get out of the
16 pedicab, arresting him for public intoxication pursuant to California Penal Code §
17 647(f). *Id.* at 3:9; Defs.’ Mot. 3:6–7. The Officers arrested Cota because he yelled
18 at them, appeared intoxicated, and they believed he might become violent or
19 interfere with their investigation of the women. Pl.’s Opp’n 9:1–13. Cota admits he
20 felt intoxicated and drunk at the time of the arrest. Defs.’ Mot. 4:10 (citing to Pl.’s
21 Dep.). However, Officer Savage did not ask Cota how much he drank that night
22 until after he was arrested and did not ask him if he intended to drive. Pl.’s Opp’n
23 3:12–17. Officer Mattly admitted he arrested Cota before he smelled alcohol or
24 knew of the possibility that Cota would drive a car. *Id.* at 9:8–10.

25 After the Officers arrested Cota, they placed him in the police car without
26 double-locking his handcuffs, a measure that could have prevented them from
27 tightening around his wrists. *Id.* at 4:7–16. On the way to the Volunteers for
28 America Detox Center (“Detox”), the Officers drove erratically, turned the radio

1 up, and could not hear Cota when he complained that the handcuffs were painful.
2 *Id.* at 4:12–13. Cota attempted to reduce the pain by lying down in the police car,
3 which gave the appearance that he had “passed out.” *Id.* at 4:11–12.

4 After arriving at Detox, Cota informed the Officers that the handcuffs were
5 painful. Consequently, the Officers loosened and double-locked Cota’s handcuffs.
6 *Id.* at 4:15–16. The Officers told Cota that they would not charge him with public
7 intoxication if he checked into Detox. Cota refused, stating he wanted to speak to
8 the Officers’ supervisor. *Id.* at 4:16–18. The Officers took Cota back to police
9 headquarters so Cota could speak to Defendant Sergeant Christopher Sarot to
10 complain about the circumstances of his arrest. *Id.* at 4:19–21. Because Sergeant
11 Sarot did not tell Cota the reason for his arrest, Cota requested to speak with the
12 Lieutenant. *Id.* at 4:25–27. While speaking with Defendant Lieutenant Daniel
13 Christman, Cota requested that Christman conduct an internal investigation
14 regarding his arrest. *Id.* at 5:6–9. Lieutenant Christman denied the request and
15 directed Cota to fill out a Citizens Complaint Form (“CCF”). *Id.*; Defs.’ Mot. 5:27–
16 28. Both Sergeant Sarot and Lieutenant Christman reported that Cota portrayed
17 signs of intoxication, which included: bloodshot eyes, lack of eye-contact, inability
18 to give lucid answers, and the smell of alcohol. Defs.’ Mot. 4:19–25, 5:17–25.

19 After Cota filled out the CCF, the Officers took him back to Detox where he
20 checked himself in. Pl.’s Opp’n 5:10, 6:22–26. According to an employee at
21 Detox, Cota did not stumble, was able to pay the service fee, and was cooperative
22 when he checked in. *Id.* at 6:21–28, 7:3.

23 To follow up on the June 4th incident, Cota spoke with Defendant Chief
24 William Lansdowne’s assistant, Defendant Officer Boyd Long, and traveled to San
25 Diego to speak with Chief Lansdowne regarding his CCF. *Id.* at 7:16–18. Both
26 Chief Lansdowne and Officer Long would not discuss the investigation with Cota
27 because Cota had filed a lawsuit against the San Diego Police Department. *Id.* at
28 8:2–20.

1 Pursuant to the CCF, Defendant Sergeant Righthouse conducted an internal
2 affairs investigation. Defs.’ Mot. 6:2–3. He interviewed Cota, Jamie Cota, Officer
3 Mattly, Officer Savage, and approximately fifty pedicab drivers. *Id.* at 7:15–16.
4 Sergeant Righthouse also obtained closed-circuit footage from a pub that captured
5 Cota and the Officers on the street. *Id.* at 7:13–14. The Citizens Review Board
6 reviewed Sergeant Righthouse’s findings and agreed the arrest was lawful and
7 justified. *Id.* at 7:20–23.

8 Defendants now move for summary judgment on all causes of action alleged
9 by Plaintiff. Plaintiff has agreed to dismiss the civil conspiracy and negligent
10 employment claims. Pl.’s Opp’n 22:1–5, 26:2–3.

11 **II. LEGAL STANDARD**

12 Summary judgment is appropriate on “all or any part” of a claim if there is
13 an absence of a genuine issue of material fact and the moving party is entitled to
14 judgment as a matter of law. Fed.R.Civ.P. 56; *see also Celotex Corp. v. Catrett*,
15 477 U.S. 317, 322 (1986) (“*Celotex*”). A fact is material when, under the
16 governing substantive law, the fact could affect the outcome of the case. *See*
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Freeman v.*
18 *Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is
19 genuine if “the evidence is such that a reasonable jury could return a verdict for the
20 nonmoving party.” *Anderson*, 477 U.S. at 248. One of the principal purposes of
21 Rule 56 is to dispose of factually unsupported claims or defenses. *See Celotex*, 477
22 U.S. at 323–24.

23 The moving party bears the initial burden of establishing the absence of a
24 genuine issue of material fact. *See Celotex*, 477 U.S. at 323. “The burden then
25 shifts to the nonmoving party to establish, beyond the pleadings, that there is a
26 genuine issue for trial.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th
27 Cir. 2006) (citing *Celotex*, 477 U.S. at 324).

28 “When the party moving for summary judgment would bear the burden of

1 proof at trial, it must come forward with evidence which would entitle it to a
2 directed verdict if the evidence went uncontroverted at trial. In such a case, the
3 moving party has the initial burden of establishing the absence of a genuine issue
4 of fact on each issue material to its case.” *C.A.R. Transportation Brokerage Co.,*
5 *Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoted by
6 *Miller*, 454 F.3d at 987).

7 “In contrast, when the non-moving party bears the burden of proving the
8 claim or defense, the moving party can meet its burden by pointing out the absence
9 of evidence from the non-moving party. The moving party need not disprove the
10 other party's case.” *Miller*, 454 F.3d at 987 (citing *Celotex*, 477 U.S. at 325).
11 “Thus, ‘[s]ummary judgment for a defendant is appropriate when the plaintiff fails
12 to make a showing sufficient to establish the existence of an element essential
13 to[his] case, and on which [he] will bear the burden of proof at trial.’ ” *Miller*, 454
14 F.3d at 987 (quoting *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795,
15 805–06 (1999) (internal quotations omitted)).

16 A genuine issue at trial cannot be based on disputes over “irrelevant or
17 unnecessary facts[.]” See *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*,
18 809 F.2d 626, 630 (9th Cir. 1987). Similarly, “[t]he mere existence of a scintilla of
19 evidence in support of the nonmoving party's position is not sufficient.” *Triton*
20 *Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing
21 *Anderson*, 477 U.S. at 252).² The party opposing summary judgment must “by [his
22 or her] own affidavits, or by the ‘depositions, answers to interrogatories, and
23 admissions on file,’ designate ‘specific facts showing that there is a genuine issue
24 for trial.’ ” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P 56(e)). That party
25 cannot “rest upon the mere allegations or denials of [his or her] pleadings.”

26
27 ² See also *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (if
28 the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment
by merely demonstrating “that there is some metaphysical doubt as to the material facts”).

1 Fed.R.Civ.P. 56(e).

2 The Court is not obligated “to scour the records in search of a genuine issue
3 of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing
4 *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). “[T]he district
5 court may limit its review to the documents submitted for the purposes of summary
6 judgment and those parts of the record specifically referenced therein.” *Carmen v.*
7 *San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

8 When making its determination, the Court must view all inferences drawn
9 from the underlying facts in the light most favorable to the nonmoving party. *See*
10 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
11 “Credibility determinations, the weighing of evidence, and the drawing of
12 legitimate inferences from the facts are jury functions, not those of a judge, [when]
13 he [or she] is ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at
14 255.

15 **III. DISCUSSION**

16 **1. The Court Grants Summary Judgment for Plaintiff’s *Monell* Claim** 17 **(Claim 2)**

18 Plaintiff claims Chief Lansdowne violated his civil rights by failing to
19 investigate his Citizens Complaint, the basis of Plaintiff’s *Monell* claim. Plaintiff
20 only offers self-serving assertions to support his claims that the San Diego Police
21 Department (“Department”) did not carry out an investigation and that Chief
22 Lansdowne did not personally investigate the complaint.

23 *Monell* provides for municipal liability if a government employee violates a
24 person’s constitutional rights under 42 U.S.C § 1983 pursuant to a department
25 policy or regulation. *See Monell v. Department of Social Services*, 436 U.S. 685,
26 691 (1978). Government supervisors can violate a person’s civil rights if the
27 supervisors fail to train, supervise, or control their subordinates. *See Larez v. City of*
28 *Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (quoting *Clay v. Conlee*, 815 F.2d

1 1164, 1170 (8th Cir.1987). Plaintiff claims Chief Lansdowne violated his rights by
2 failing to comply with California Penal Code § 832.5(a)(1), which requires law
3 enforcement agencies to have a policy or procedure to investigate a citizen's
4 complaint of the agency's personnel. *See* Cal. Penal Code § 832.5(a)(1).

5 Here, Plaintiff offers no evidence showing Chief Lansdowne did not comply
6 with § 832.5(a)(1) or disputing Defendants' evidence that Officer Righthouse
7 conducted an investigation pursuant to Plaintiff's Citizen Complaint. Plaintiff argues
8 that Chief Lansdowne did not conduct an investigation, which therefore violates the
9 penal code. However, § 832.5(a)(1) requires the Department have a procedure in
10 place. Plaintiff fails to argue that the Department does not have a procedure to
11 conduct investigations pursuant to citizens' complaints; rather, he only argues that
12 Chief Lansdowne failed to investigate his complaint.

13 In this instance, the Department did follow a procedure when it investigated
14 Plaintiff's complaint. Defendants offer undisputed evidence that Officer Righthouse
15 conducted an investigation to Chief Lansdowne's satisfaction. Further, the Citizen
16 Review Board Team reviewed and agreed with Officer Righthouse's findings.
17 Because Chief Lansdowne followed a department policy, the Court finds Chief
18 Lansdowne did not violate § 832.5(a)(1) or Plaintiff's rights.

19 Accordingly, Defendants' motion is **GRANTED IN PART**. The Court
20 **DISMISSES** Plaintiff's *Monell* claim against the City of San Diego and Chief
21 Lansdowne **WITH PREJUDICE**.

22 **2. The Court Grants Summary Judgment for Violation of Civil**
23 **Rights under 42 U.S.C. § 1985(3) (Claim 3)**

24 Plaintiff claims Officers Mattly and Savage conspired to violate his First,
25 Fourth, Fifth, Sixth, and Fourteenth Amendment rights when the Officers arrested
26 him. Additionally, Plaintiff asserts that Defendants Righthouse, Sarot, Christman,
27 Long, and Lansdowne had knowledge of the conspiracy. However, Plaintiff fails to
28 explain how his First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights have

1 been infringed under 42 U.S.C § 1985(3) in his Opposition.

2 A § 1985(3) claim provides for a private citizen to sue public actors in their
3 personal capacity for money damages if the public actors conspired to prevent the
4 citizen from exercising a right or privilege. *See* 42 U.S.C. § 1985. To establish a §
5 1985(3) claim, a plaintiff must show:

6 (1) that the purpose of the conspiracy was to deprive the plaintiff of
7 equal protection, equal privileges and immunities...; (2) that the
8 defendants intended to discriminate against the plaintiff; (3) that the
9 defendants acted under color of state law and authority; (4) that the
10 acts done in furtherance of the conspiracy resulted in an injury to the
plaintiff's person or property or prevented him from exercising a right
or privilege of a United States citizen.

11 *Sykes v. State of Cal.*, 497 F.2d 197, 200 (9th Cir. 1974). The plaintiff must allege
12 and prove that racial or class animus motivated the defendants. *See Sever v. Alaska*
13 *Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992) (citing *United Brotherhood of*
14 *Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 828–29 (1983)).

15 Here, Plaintiff fails to allege any facts demonstrating that race or class-based
16 animus motivated Defendants' actions. In fact, he fails to mention racial or class
17 animus in his brief. Since Plaintiff did not provide evidence to support an essential
18 element of the claim, Defendants' motion is **GRANTED IN PART**. The Court
19 **DISMISSES** the § 1985(3) claim against all Defendants **WITH PREJUDICE**.

20 **3. The Court Grants Summary Judgment on Plaintiff's Civil**
21 **Conspiracy and Negligent Employment Claims (Claims 6 and 10)**

22 Plaintiff agrees to dismiss the civil conspiracy and negligent employment
23 claims. Accordingly, Defendants' motion is **GRANTED IN PART**. The Court
24 **DISMISSES** Plaintiff's claims for civil conspiracy and negligent employment
25 against all Defendants **WITH PREJUDICE**.

26 **4. The Court Grants Summary Judgment for Plaintiff's Tort in**
27 **Essence Claim (Claim 7)**

28 Plaintiff cites to several California Penal Code violations to support a Tort in

1 Essence claim against Defendants. However, there is no evidence to support any of
2 the alleged penal code violations. Again, Plaintiff offers only self-serving
3 statements to support this claim.

4 The Tort in Essence Doctrine provides an injured person with the right to
5 sue for “breach of nonconsensual duty” pursuant to a statute even though that
6 statute does not afford a civil remedy. *See Rezek v. City of Tustin*, No. SACV 11–
7 01601 2012 WL 5829928, at *7–8 (C.D. Cal. Nov. 15, 2012). A criminal statute
8 can create a nonconsensual duty owed to another; however, “private rights of
9 action under criminal statutes have rarely been implied.” *Id.* For a statute to create
10 a private right to sue, the legislature must have intended it to do so. *See e.g.*,
11 *Farmers Ins. Exchange v. Superior Court*, 137 Cal App. 4th 842, 849 (2006);
12 *Willis v. City of Los Angeles*, 57 Fed Appx. 283, 289 (9th Cir. 2002).

13 Here, Plaintiff fails to cite authority showing that the legislature intended the
14 fifteen criminal statutes he invokes to provide a private right to sue. Additionally,
15 there are no facts to support the finding that any of Defendants violated the Penal
16 Code sections. Accordingly, Defendants’ motion is **GRANTED IN PART**. The
17 Court **DISMISSES** the Tort in Essence claim against all Defendants **WITH**
18 **PREJUDICE**.

19 **5. The Court Grants Summary Judgment for Intentional Infliction**
20 **of Emotional Distress (Claim 8)**

21 Plaintiff claims Defendants caused him to suffer severe emotional distress.
22 Specifically, in Plaintiff’s Opposition, he argues Officers Mattly and Savage’s
23 behavior was sufficiently outrageous and extreme to give rise to an intentional
24 infliction of emotional distress (“IIED”) claim. However, Plaintiff’s facts do not
25 support his claim.

26 A *prima facie* claim for IIED requires the following three elements: “(1)
27 extreme and outrageous conduct by the defendant with the intention of causing, or
28 reckless disregard of the probability of causing, emotional distress; (2) the

1 plaintiff's suffering severe or extreme emotional distress; and (3) actual and
2 proximate causation of the emotional distress by the defendant's outrageous
3 conduct.” *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982) (quoting
4 *Cervantez v. J. C. Penny Co.*, 24 Cal. 3d 579, 593 (1979)).

5 Plaintiff’s claim does not satisfy the first or second elements. For the first
6 element, Plaintiff fails to allege any specific acts by the Officers he claims are
7 outrageous or that the Officers intentionally or recklessly caused him emotional
8 distress. For the second element, Plaintiff does not point to any evidence that he
9 actually suffered severe emotional distress. Mere allegations in the complaint are
10 not enough to create a genuine issue of material fact, evidence for emotional
11 distress needs to be provided. *Moreland v. Las Vegas Metro. Police Dep’t*, 159
12 F.3d 365, 374 (9th Cir. 1998), as amended (Nov. 24, 1998)(finding that Plaintiff’s
13 reliance on the complaint’s allegations rather than presenting evidence to support
14 the elements of an IIED claim was “insufficient to carry the plaintiff’s burden on
15 summary judgment.”). In the complaint, Plaintiff alleges physical pain, fear,
16 anxiety, and mental anguish. In contrast, Plaintiff provides no evidence supporting
17 these claims in his Opposition. Because there is no evidence to support the
18 Complaint’s allegations that he suffered severe or extreme emotional distress,
19 Defendants’ motion is **GRANTED IN PART**. The Court **DISMISSES** the eighth
20 cause of action against all Defendants **WITH PREJUDICE**.

21 **6. The Court Grants Summary Judgment for Plaintiff’s Negligence**
22 **Claim (Claim 9)**

23 Plaintiff alleges that Defendants negligently caused him to suffer emotional
24 and mental distress. A negligent infliction of emotional distress claim requires proof
25 of duty, breach, causation, and damages. *Marlene F. v. Affiliated Psychiatric Med.*
26 *Clinic, Inc.*, 48 Cal. 3d 583, 588 (1989). Plaintiff does not provide any facts to show
27 the elements of this tort. In Plaintiff’s Opposition, Plaintiff argues that only Chief
28 Lansdowne acted negligently for failing to conduct a proper investigation. This

1 argument does not support the Complaint’s allegation of emotional or mental
2 distress. Additionally, there is undisputed evidence the Department investigated
3 Plaintiff’s Citizen Complaint. Therefore Plaintiff cannot support his claim that
4 Defendants negligently caused him to suffer emotional or mental distress.

5 Accordingly, Defendants’ motion is **GRANTED IN PART**. The Court
6 **DISMISSES** the ninth cause of action against all Defendants **WITH PREJUDICE**.

7 **7. The Court Grants Summary Judgment on Plaintiff’s Violation of**
8 **Civil Rights under California Civil Code Sections 52.1 and 51.7**
9 **Claims (Claim 11)**

10 Plaintiff also fails to sufficiently establish material elements for a violation
11 of civil rights under California Civil Code (“CCC”) §§ 52.1 and 51.7 claim.

12 First, CCC § 52.1 affords a person with a private right of action against
13 another who interferes with that person’s constitutional rights, requiring the same
14 material elements as a 42 U.S.C. § 1983 claim. Cal. Civ. Code § 52.1; *Jones v.*
15 *Kmart Corp.*, 17 Cal. 4th 329, 334 (1998). However, a CCC § 52.1 claim
16 additionally requires the plaintiff to show the defendant interfered using improper
17 means, such as threats, intimidation, or coercion. *Shoyoye v. Cnty. of Los Angeles*,
18 203 Cal. App. 4th 947, 955 (2012), reh’g denied (Mar. 13, 2012), review denied
19 (May 9, 2012). Coercion inherent in wrongful detention is not a sufficient
20 “improper means.” *Id.* Here, Plaintiff failed to respond to Defendants’ argument
21 that Defendants never used coercion, intimidation, or threats against Plaintiff.
22 Therefore Plaintiff fails to meet his burden to establish a genuine issue for trial that
23 Defendants used improper means to interfere with his rights.

24 Second, CCC § 51.7 provides a person with a private right of action for
25 damages “for violence, or intimidation by threat of violence.” Cal. Civ. Code §
26 51.7. This cause of action requires the plaintiff to allege that a “protected
27 characteristic” of the plaintiff motivated the defendant’s actions. Here, Plaintiff
28 provides no evidence to establish that he has a protected characteristic or that a

1 protected characteristic motivated Defendants. Therefore Plaintiff did not satisfy
2 his burden to establish these essential elements of this claim.

3 Accordingly, Defendants' motion is **GRANTED IN PART**. The Court
4 **DISMISSES** Plaintiff's claims under CCC §§ 52.1 and 51.7 against all Defendants
5 **WITH PREJUDICE**.

6 **8. The Court Denies Summary Judgment for Violation of Civil**
7 **Rights 42 U.S.C. § 1983 and False Arrest (Claims 1 and 5)**

8 For the violation of his civil rights pursuant to 42 U.S.C § 1983 and false
9 arrest claims, there is a genuine dispute of the material facts. Plaintiff asserts the
10 false arrest claim against the Officers and the City of San Diego ("City) and asserts
11 the § 1983 claim against all Defendants except the City. If the facts are taken in the
12 light most favorable to Plaintiff, they may support a false arrest claim and liability
13 under § 1983 for an arrest without probable cause, using excessive force, and
14 retaliatory arrest.

15 Both the false arrest claim and arrest without probable cause rest heavily on
16 the factual determination of whether or not the Officers had probable cause to
17 arrest Plaintiff. To find probable cause for a warrantless arrest, a prudent person
18 must believe, given all of the facts and circumstance, the defendant committed a
19 crime. *See e.g., U.S. v. Potter*, 895 F.2d 1231, 1234 (9th Cir. 1990); *Barry v.*
20 *Fowler*, 902 F.2d 770,773 (9th Cir. 1990). Plaintiff's and Defendants' stories of the
21 arrest differ enough to create a genuine issue of material fact as to whether the
22 Officers had probable cause to authorize the arrest. The Court cannot make a
23 credibility determination to reconcile the conflicting narratives at the summary
24 judgment stage. *See Anderson*, 477 U.S. at 255.

25 For excessive force, this Circuit holds that when an arrestee complains of
26 tight handcuffs and is physically harmed by the tight handcuffs, the officers used
27 excessive force. *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir.1993). Here, in
28 light of the facts most favorable to Plaintiff, a reasonable jury could find the

1 Officers used excessive force when they did not double-lock the handcuffs and
2 Plaintiff tried to notify the Officers that the handcuffs were tight.

3 Similarly, Plaintiff's retaliatory arrest claim survives because there is a
4 genuine issue of material fact as to whether the Officers arrested Plaintiff in
5 retaliation for lawful activity. The facts present here, if taken in the light most
6 favorable to Plaintiff, could hypothetically support a claim for retaliatory arrest.

7 All of the surviving claims require Plaintiff to show that the Officers acted
8 unreasonably, therefore violating his constitutional rights. Because an officer is not
9 protected by qualified immunity when violating a person's constitutional rights,
10 this Court will not decide the issue of qualified immunity at the summary judgment
11 stage. *See Hope v. Pelzer*, 536 U.S. 730, 736 (2002). However, this determination
12 relies on the facts taken in the light most favorable to Plaintiff, and reasonable
13 finders of fact could find the Officers entitled to qualified immunity at trial.

14 Plaintiff's § 1983 claim under the First and Fourth Amendment involve the
15 Officers' conduct in the field. Even taking the evidence in the light most favorable
16 to Plaintiff, there are no facts to support similar liability against the other
17 Defendants. Accordingly, the § 1983 claim survives exclusively against the
18 Officers.

19 Because the false arrest claim against the Officers survives, the City may
20 also be liable under the doctrine of *respondeat superior* if the Officers were acting
21 within the scope and course of their employment when they arrested Plaintiff. *See*
22 *Phillips v. City of Fairfield*, 406 F. Supp. 2d 1101, 1119 (E.D. Cal. 2005).

23 Accordingly, Defendants' motion is **DENIED IN PART** on claim five
24 against the Officers and the City and claim one against the Officers, and
25 **GRANTED IN PART** as to claim one against all Defendants other than the
26 Officers. The Court **DISMISSES** Plaintiff's claim one against all Defendants other
27 than the Officers **WITH PREJUDICE**.

28

1 **9. The Court Denies Summary Judgment on Plaintiff’s Assault and**
2 **Battery Claim (Claim 4)**

3 Plaintiff alleges the Officers and the City committed assault and battery
4 when the Officers improperly handcuffed him. There is a genuine issue of material
5 fact as to whether the handcuffs were double-locked and whether Plaintiff notified
6 the Officers about the tight handcuffs.

7 A plaintiff establishes a *prima facie* case for battery if an officer used
8 unreasonable force to make an arrest. *Saman v. Robbins*, 173 F.3d 1150, 1157 n. 6
9 (9th Cir. 1999). Assault and battery relies on the same standards as a § 1983 claim
10 based on excessive force. *Nelson v. City of Davis*, 709 F. Supp. 2d 978, 992 (E.D.
11 Cal. 2010) aff’d, 685 F.3d 867 (9th Cir. 2012). As with the excessive force claim,
12 the facts most favorable to Plaintiff could support a finding of unreasonable force.
13 Additionally, the City may be held liable under the doctrine of *respondeat superior*
14 if the Officers were acting within the scope and course of their employment when
15 they allegedly committed assault and battery. *See Phillips v. City of Fairfield*, 406
16 F. Supp. 2d 1101, 1119 (E.D. Cal. 2005).

17 Accordingly, Defendants’ motion is **DENIED IN PART**.

18 **IV. CONCLUSION & ORDER**

19 For the foregoing reasons, the Court **DENIES IN PART** and **GRANTS IN**
20 **PART** Defendants’ Motion for Summary Judgment. The Court **DISMISSES**
21 Plaintiff’s claims two, three, six, seven, eight, nine, ten, and eleven against all
22 Defendants **WITH PREJUDICE**. Plaintiff’s claim one survives against
23 Defendants Mattly and Savage, and claims four and five survive against Officers
24 Mattly and Savage and the City. All claims are **DISMISSED** against all other
25 Defendants **WITH PREJUDICE**.

26 **IT IS SO ORDERED.**

27 Dated: October 29, 2014

28 
Hon. Cynthia Bashant
United States District Judge