No. B244759

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PATRICIA McALLISTER,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, JOHN E. DEASY, Superintendent of the Los Angeles Unified School District, and DOES 1 THROUGH 100, Inclusive

Defendants and Respondents.

Appeal from the Superior Court, Los Angeles County
The Hon. Rita Miller, Judge (Case No. BC484767)

APPELLANT'S OPENING BRIEF

Julie A. Esposito, SBN 177722
424 Linwood Avenue, Unit B
Monrovia, CA 91016
Tel: (626) 358-9216
E-mail: julieesq2@gmail.com

Participating Attorney for
THE RUTHERFORD INSTITUTE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court rule 8.208(e)(3), the undersigned Counsel for Appellant does hereby certify that she knows of no entity that has an ownership interest of 10% or more in the Appellant or of any other person or entity that has a financial or other interest in the outcome of these proceedings.

Julie A. Esposito

TABLE OF CONTENTS

COPIES OF RULE 8.1115 OPINIONS

Adams v. Kraft (N.D. Cal. July 29, 2011) 2011 WL 3240598.

Cuviello v. Cal Expo (E.D. Cal. Sept. 19, 2012) 2012 WL 4208201.

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

NATURE OF THE ACTION

The instant case is one seeking relief for wrongful discharge of a public employee. The Plaintiff-Appellant, Patricia McAllister (hereafter "McAllister"), was employed as a substitute teacher by Defendant-Respondent Los Angeles Unified School District (hereafter "LAUSD") until McAllister was discharged, allegedly on the orders and at the direction of Defendant-Respondent John E. Deasy (hereafter "Deasy"), Superintendent of LAUSD.[1] In her First Amended Complaint, McAllister asserted causes of action for (1) wrongful termination, (2) deprivation of rights under Cal. Const. Art. I, § 2(a), (3) deprivation of rights under U.S. Const. amend. 1, (4) breach of implied contract, (5) breach of covenant of good faith and fair dealing, and (6) negligent infliction of emotional distress (CT at 3)[2]. McAllister requested a judgment awarding her general, special and punitive damages, an injunction requiring the Defendants reemploy her, reasonable attorneys' fees and costs, and other appropriate relief (CT at 17-18).

LAUSD and Deasy filed a demurrer to each cause of action (CT at 29), to which McAllister responded (CT at 43). On October 3,

[1] McAllister also included as defendants unknown John Does 1-100.
[2] "CT" references are to pages of the Clerk's Transcript.

2012, the Superior Court entered a judgment sustaining the Defendants' demurrer without leave to amend as to each of McAllister's causes of action and ordering that McAllister take nothing on her First Amended Complaint against the Defendants (CT at 86). McAllister timely filed a Notice of Appeal from this judgment (CT at 89).

STATEMENT OF APPEALABILITY

The Superior Court's October 3, 2012 judgment is appealable because it disposes of each and every claim and cause of action raised by McAllister and is a final judgment appealable under Cal. Civ. Proc. Code § 904.1(a)(1).

STATEMENT OF FACTS

The relevant facts are set forth in McAllister's First Amended Complaint (CT at 3). Beginning in April 2006, McAllister was employed as and served as a well-regarded and often-requested substitute mathematics teacher in schools within the LAUSD. Under this employment, McAllister was called on by LAUSD as needed by LAUSD to fill positions of regular LAUSD teachers who were absent

from service. This employment was confirmed and continued on May 4, 2011, when McAllister executed a form in which LAUSD made an offer of employment to McAllister for the school year beginning in September 2011 and ending in June 2012 as an on-call substitute teacher (CT at 5, 20).

During the course of her employment as a substitute teacher for LAUSD, McAllister was never the subject of any significant disciplinary action and was a highly sought-after substitute teacher. As of approximately October 12, 2011, McAllister was requested and scheduled to begin a substitute assignment at Ramon C. Cortines School of Visual and Performing Arts on November 4, 2011, and was specifically requested for this substitute position by the administration at the school because of positive past experiences with McAllister (CT at 5-6).

On Wednesday, October 12, 2011, McAllister attended a public rally at Los Angeles City Hall. The rally was a part of the movement known as "Occupy Los Angeles," a grass-roots effort to protest the power exercised by corporations and the wealthiest one-percent of the population, and to seek to stop the deleterious effects of the influence of wealth and corporate power on the political systems and

environment of the United States. McAllister attended the rally because of her opposition to cuts in funding for public education (CT at 6).

During this rally, McAllister was approached by a news reporter for Reason.TV who asked for an interview, which he then recorded. McAllister was asked by the reporter for her name and affiliation. McAllister identified herself and stated she was there "representing herself," although she did disclose that she works for the LAUSD. When explaining why she was at the rally, McAllister stated that "I think that the Zionist Jews who are running these big banks and our Federal Reserve, which are not run by the federal government, they need to be run out of this country." (CT at 6).

A video of the interview of McAllister by Reason.TV was posted at the Reason.TV website. Although McAllister's interview included statements by her in addition to those quoted above, the video posted and available at Reason.TV website was edited to include only the statements quoted above. The same edited video was also uploaded to**,** and available at**,** YouTube.com and was widely viewed (CT at 6).

Beginning the morning of Friday October 14, 2011, McAllister began receiving telephone calls from unidentified persons berating and condemning her for the statements which were repeated on the videos available on the internet. During the ensuing weekend, McAllister viewed the video over the internet and saw comments posted with the video statements urging persons to call LAUSD and demand that McAllister be fired and providing the telephone number for LAUSD (CT at 7).

On Tuesday, October 18, 2011, McAllister called the LAUSD "SubFinder" automated phone system to check on her scheduled teaching assignment for November 4, 2011, for the substitute assignment at Ramon C. Cortines School of Visual and Performing Arts that was to begin the following November. However, when she attempted to log in, the system rejected her request. The automated Subfinder system message said that her status was inactive, and that she should call her supervisor (CT at 7).

McAllister then called the Certificated Substitute Unit of LAUSD to inquire as to why her status was inactive. McAllister spoke with Marjorie Josaphat who told McAllister to call Dr. Ira Berman, LAUSD's Director of Employee Relations. McAllister

called Dr. Berman's office and Dr. Berman told her to come to his office right away (CT at 7).

McAllister arrived at LAUSD's central offices at 1:00 p.m. on October 18, 2011**,** proceeded to Dr. Berman's office and was ushered inside. Present in the LAUSD office when McAllister entered were Dr. Berman and John Brasfield, Deputy Director of Human Relations for LAUSD. Dr. Berman then informed McAllister that her employment with LAUSD was terminated. McAllister asked Dr. Berman why she was being terminated, but Dr. Berman did not give a reason and told McAllister that she should see Defendant Deasy to inquire further. McAllister then left Dr. Berman's office (CT at 7).

Before she could speak to Deasy personally about the reason she was terminated, McAllister saw news reports of a statement that had been released to the press and media by Deasy as Superintendent of LAUSD. Defendant Deasy's statement read as follows:

> As Superintendent of the Los Angeles Unified School District (LAUSD), I want to emphasize that we condemn the remarks made recently by Patricia McAllister.
>
> Her comments, made during non-work time at a recent protest rally, were her private opinions and were not made in the context of District services. At LAUSD, we recognize that the law is very protective of the freedom of speech rights of public employees when they are speaking as private citizens during non-working time.

> I further emphasize to our students, who watch us and look to us for guidance, to be role models and to represent the ideals by which LAUSD lives, that we will never stand for behavior that is disrespectful, intolerant or discriminatory.
>
> As a day-to-day substitute teacher, Ms. McAllister was an at-will employee. As of today, she is no longer an employee of the LAUSD.

(CT at 8).

On October 20, 2011, McAllister received by certified mail a letter dated October 18, 2011 from LAUSD under the signature of Vivian K. Ekchian. The letter read that "you are to be separated from employment with the Los Angeles Unified School District effective the date of this letter." (CT at 8, 23). On December 2, 2011, pursuant to the requirements of the California Tort Claims Act, McAllister filed a claims form (provided to her by defendant LAUSD) outlining her claim against LAUSD for damages she suffered as a result of her wrongful and unlawful termination. In the claims form, McAllister asserted that she had been fired as a result of an interview she gave at an "Occupy Los Angeles" rally that was posted on the internet. McAllister further asserted that the termination was the result of the statements made in the interview and that the termination was in violation of her First Amendment right to freedom of speech (CT at 8-9, 25-26). McAllister thereafter received a letter dated December 13,

2011 from the Division of Risk Management and Insurance Services of LAUSD under the signature of Robert Deegan, Liability Claims Manager. The letter read "[y]our claim presented to the Board Secretariat on December 6, 2011 is rejected," and advised McAllister that, subject to certain exceptions, she had six (6) months to file a court action on the rejected claim (CT at 9, 28).

McAllister alleged that the sole and exclusive cause for the termination of her employment with LAUSD on October 18, 2011, was the content of the statements made by McAllister at the Occupy Los Angeles Rally described in ¶ 11 of the First Amended Complaint (CT at 9-10). The First Amended Complaint further alleged that Deasy made the decision to terminate McAllister's employment (CT at 10).

Defendants Deasy and LAUSD filed a demurrer asserting that each of the six causes of action in the First Amended Complaint did not set forth actionable claims (CT at 31-32). McAllister filed a response asserting that each of the causes of action set forth in the First Amended Complaint set forth viable claims (CT at 43). In addition, as to the Third Cause of Action under 42 U.S.C. § 1983 for deprivation of McAllister's First Amendment rights, McAllister

requested leave to amend to make it clear that Deasy was being sued on that claim in his individual capacity (CT at 57).

On October 3, 2012, the Superior Court entered judgment sustaining the Defendants' demurrer as to each of the six causes of action without leave to amend and ordering that McAllister take nothing on her First Amended Complaint (CT at 86). In a tentative ruling filed on September 10, 2012, the Superior Court provided some explanation for its eventual ruling (CT at 82). With respect to the claims for wrongful termination and negligent infliction of emotional distress (the First and Sixth Causes of Action, respectively), the Court, citing a Legislative Comment to Cal. Gov. Code § 815, wrote that these claims were common law claims which cannot be brought against a public entity like LAUSD (CT at 82). As to Deasy, the Court wrote that individuals are not liable for wrongful discharge, so he could not be responsible for the claims in the First and Sixth Causes of Action (CT at 83).

As to the Second Cause of Action, a claim for relief under Cal. Const. Article I, § 2(a), the free speech provision of the California Constitution, the Superior Court held that the demurrer should be

sustained because no private right of action exists under this constitutional provision (CT at 83).

On the Third Cause of Action for relief under 42 U.S.C. § 1983, the Superior Court first pointed out that McAllister did not dispute that LAUSD is not subject to a claim under this statute because it is an arm of the state and may not be sued under § 1983 because of the protection afforded by the Eleventh Amendment. However, McAllister did dispute that Deasy was similarly protected and argued that Deasy may be sued in his individual capacity. But the Superior Court wrote that "[t]his argument appears inconsistent with the factual allegations of the complaint, which strongly indicate that Deasy is being sued in his official capacity." To support this point, the Superior Court noted that the First Amended Complaint alleges that Deasy acted within the course and scope of his employment and duties as Superintendent (CT at 83). Although the trial court was inclined to allow McAllister to make an offer of proof showing that Deasy was acting in his individual capacity, it went on to write that it "cannot see how the complaint might be amended to state a viable claim against Deasy in light of the foregoing[.]" (CT at 84).

Ultimately, the Superior Court sustained the demurrer as to McAllister's claim under 42 U.S.C. § 1983 (CT at 86).

With respect to the Fourth and Fifth Causes of Action for breach of contract and breach of the covenant of good faith and fair dealing, the Superior Court wrote that the Defendants were correct in arguing that public employment is not held by contract, but by statute. It also referred to Cal. Educ. Code § 44953 which provides that a school district may dismiss a substitute teacher at any time at the pleasure of the board (CT at 84).

After the judgment in accordance with this tentative ruling was entered on October 3, 2012 (CT at 85-86), McAllister timely filed her notice of appeal on October 23, 2012 (CT at 89).

ARGUMENT

I. THE FIRST AMENDED COMPLAINT SETS FORTH A VIABLE CLAIM UNDER 42 U.S.C. § 1983 AGAINST DEASY IN HIS PERSONAL/INDIVIDUAL CAPACITY AND THE SUPERIOR COURT ERRED IN GRANTING THE DEMURRER AS TO THE THIRD CAUSE OF ACTION

The Superior Court granted in all respects the demurrer filed by LAUSD and Deasy without leave to amend. The standard of review for such an order and judgment was set forth by this Court as follows:

> "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].) Irrespective of the labels attached by the pleader to any alleged cause of action, we examine the factual allegations of the complaint, "to determine whether they state a cause of action on *any* available legal theory." (*Ellenberger v. Espinosa* (1994) 30 Cal. App.4th 943, 947 [36 Cal. Rptr. 2d 360], italics added; accord, *Saunders v. Cariss* (1990) 224 Cal. App.3d 905, 908 [274 Cal. Rptr. 186].) If they do, then the trial court's order of dismissal must be reversed. (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal. App.3d 1439, 1444 [266 Cal. Rptr. 601].) If they do not, then the order will be affirmed.

Adelman v. Associated Intern. Ins. Co. (2001) 90 Cal.App.4th 352, 359 -360.

The Third Cause of Action set forth in the First Amended Complaint asserts a claim against Deasy under 42 U.S.C. § 1983 (CT at 13).[3] That federal law provides that "[e]very person who, under

[3] Significantly, the First Amended Complaint does not assert a claim against LAUSD under 42 U.S.C. § 1983. The allegations of the Third Cause of Action, and in particular the allegations of ¶ 55 that "Defendant Deasy is liable to the Plaintiff" (CT at 13) make clear that McAllister understood that LAUSD was not

color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" *Id.* By virtue of the Supremacy Clause of U.S. Const. Art. VI, a state court is obligated to enforce claims under 42 U.S.C. § 1983 and to apply the law and standards applicable to such claims as set forth in the decisions of federal courts. *Howlett by and through Howlett v. Rose* (1990) 496 U.S. 356, 369-70; *Martinez v. State of California* (1980) 444 U.S. 277, 283 n. 7; *Donaldson v. National Marine, Inc.* (2005) 35 Cal. 4th 503, 510-11.

There are two essential elements to a claim under 42 U.S.C. § 1983: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1402. The First Amended Complaint sufficiently alleges both of these elements in support of the § 1983 cause of action. The

---

subject to suit under 42 U.S.C. § 1983 and that the claim under the federal statute had to be limited to Deasy individually.

complaint alleges that in all respects set forth in the complaint, and specifically with respect to terminating McAllister, Deasy acted under color of the law of the State of California (CT at 4, 13). Moreover, it is alleged that the discharge and termination of McAllister was in retaliation for statements made by McAllister that were protected by U.S. Const. amend. I, and so "[t]he discharge and termination of [McAllister] by Defendant Deasy deprived [McAllister] of her rights under the First Amendment to the United States Constitution." (CT at 13).

However, the Superior Court erroneously sustained the demurrer to this claim because it failed to appreciate that Deasy is being sued in his "individual" or "personal" capacity and is not protected by the same Eleventh Amendment immunity that protects LAUSD. California school districts, like LAUSD, are considered "arms of the state", protected by Eleventh Amendment immunity, and not a "person" suable under § 1983. *Kirchman v. Lake Elsinore Unified School District* (2000) 83 Cal. App. 4th 1098, 1103-04 (citing *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58). Employees and other agents of California school districts who cause a deprivation of another's federal rights are not entitled to claim this

same immunity from suit, even if they do so in the course and scope of their duties. The Superior Court improperly clothed Deasy with LAUSD's immunity and improperly sustained the demurrer to the Third Cause of Action.

Under 42 U.S.C. § 1983, a natural person may be sued either in his "individual"/"personal" capacity or in his "official" capacity. "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'. . . As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham* (1985) 473 U.S. 159, 165-166 (citations omitted). *Accord Pitts v. County of Kern* (1998) 17 Cal. 4th 340, 350. Because "official" capacity suits are no different than a suit against the entity, an official-capacity action is barred by the Eleventh Amendment or *Will* if the named defendant is an officer of an entity that is deemed an "arm of the state." *Pena v. Gardner* (9th Cir. 1992) 976 F.2d 469, 472.

However, an individual/personal-capacity suit is *not* barred by the Eleventh Amendment or *Will*. *Pena*, 976 F.2d at 472. "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, '[o]n the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.'" *Hafer v. Melo* (1991) 502 U.S. 21, 25 (quoting *Graham*, 473 U.S. at 166; emphasis in original). Defendant Deasy, as an individual, is clearly a "person" for purposes of 42 U.S.C. § 1983 and is subject to a claim under that section for constitutional deprivations he caused under color of state law.

It is the distinction between personal capacity and official capacity claims that the Superior Court wholly failed to appreciate and this failure resulted in its erroneous decision to grant the demurrer as to the claim under 42 U.S.C. § 1983 against Deasy. In its preliminary decision, the Superior Court acknowledged that McAllister made a distinction between "personal capacity" and "official capacity" claims and that she asserted that Deasy was being sued in his individual/personal capacity, but the court wrote that this argument

was inconsistent with the allegation that Deasy acted within the course and scope of his employment and duties as Superintendent (CT at 83). Thus, it appears that the Superior Court ruled that McAllister's § 1983 claim could *only* be an "official capacity" claim because it alleged that Deasy was acting within the scope of his duties as LAUSD Superintendent.

But the idea that a claim against a public officer/employee is *only* an "official capacity" claim has been specifically rejected by the United States Supreme Court in *Hafer v. Melo*, *supra*. There, a state official argued that because the alleged acts supporting the § 1983 claim were taken as part of her official duties, the claim against her was necessarily an "official capacity" suit. The Supreme Court refused to accept this reasoning:

> Hafer seeks to overcome the distinction between official- and personal-capacity suits by arguing that § 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff. Under *Will*, she asserts, state officials may not be held liable in their personal capacity for actions they take in their official capacity. Although one Court of Appeals has endorsed this view, see *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 942-943 (6th Cir. 1990), we find it both unpersuasive as an interpretation of § 1983 and foreclosed by our prior decisions.

> Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape,* 365 U.S. 167, 172 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. The requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general. We cannot accept the novel proposition that this same official authority insulates Hafer from suit.

Hafer, 502 U.S. at 27-28. The Supreme Court went on to hold that "state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts." *Hafer*, 502 U.S. at 31.

The principle established by *Hafer* that a public official may be sued in his or her personal capacity notwithstanding that the acts were part of the official's duties was also recognized in *Brunius v. Parrish* (2005) 132 Cal.App.4th 838. There the court noted that *Hafer*, 502 U.S. at 26-27, "eliminate[d][an] ambiguity" in *Will* and held the phrase "'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Brunius*, 132

Cal. App. 4th at 851 n.6. The idea that "any action for damages against a state employee for actions taken in the course of his or her employment is necessarily an official capacity suit . . . contradicts the Supreme Court's holding in *Hafer*." *Barry v. Ratelle* (S.D. Cal. 1997) 985 F. Supp. 1235, 1240.

It is precisely this idea that underlay the Superior Court's erroneous decision to dismiss McAllister's § 1983 claim against Deasy. The First Amended Complaint sufficiently alleged that Deasy acted under color of state law and that doing so he caused a deprivation of McAllister's First Amendment rights. This is enough to establish personal liability on a § 1983 claim. *Hafer*, 502 U.S. at 25. That Deasy was acting within the scope of his duties does not require the claim be deemed an "official capacity" claim to which LAUSD's Eleventh Amendment immunity applies. Indeed, if that were the case, state officials would be absolutely immunized from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities. School district officials acting within the scope of their authority could, for example, discharge all Democrats without fear of liability because their "official" acts would endow them with the immunity that has been

extended to school district. This result was specifically rejected in *Hafer*, 502 U.S. at 28, and must be rejected here by reversing the Superior Court's decision and judgment on McAllister's § 1983 claim.

The decision and judgment may not be sustained on the basis of some defect in the pleading. A demurrer should be denied if the allegations of the complaint, reasonably considered, state a cause of action under *any* legal theory. *Adelman*, 90 Cal.App.4th at 359 -360. The legal theory that Deasy is sued in his personal/individual capacity is patently stated by the First Amended Complaint, particularly because the Third Cause of Action *does not* allege liability on the part of LAUSD, but asserts that "Defendant Deasy" is liable for the constitutional deprivation (CT at 13). An official capacity claim would have necessarily involved LAUSD because such claims are no different than a suit against the entity which employs the official. *Pitts*, 17 Cal. 4th at 350. The omission of LAUSD from the Third Cause of Action demonstrates that Deasy was sued in his personal capacity on the § 1983 claim.

Moreover, a court will "presume[] that officials necessarily are sued in their personal capacities where those officials are named in a complaint, even if the complaint does not explicitly mention the

capacity in which they are sued." *Romano v. Bible* (9th Cir. 1999)169 F.3d 1182, 1186. Where, as here, a § 1983 complaint seeks damages against a named person, the complaint indicates that the named person is sued in his personal/individual capacity, even if the office of the named person also is identified. *Price v. Akaka* (9th Cir. 1990) 928 F.2d 824, 828, *cert. denied* (1991) 502 U.S. 967.

And in any event, to the extent it is not clear what capacity Defendant Deasy is sued in, McAllister should have been allowed the opportunity to amend the complaint to make it crystal clear that Deasy is being sued in the Third Cause of Action in his individual/personal capacity. A demurrer may be sustained without leave to amend only if there is no reasonable possibility that the defect can be cured by an amendment. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318. The purported defect here could certainly have been cured by simply adding an express allegation that Deasy is sued in his personal/individual capacity. The Superior Court's decision and judgment sustaining the demurrer was clearly error and requires the judgment be reversed.

II. MCALLISTER HAS A PRIVATE CAUSE OF ACTION FOR RELIEF UNDER THE GUARANTEE TO FREEDOM OF SPEECH CONTAINED IN ARTICLE I, § 2(A) OF THE CALIFORNIA CONSTITUTION

Cal. Const. Art. I, § 2(a) provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Despite the important values and policies served by this provision of the state constitution, the Superior Court granted the Defendants' demurrer to McAllister's claim under this guarantee as set forth in the Second Cause of Action (CT at 12). In its tentative ruling, the Superior Court summarily wrote that the freedom of speech provisions of the California Constitution do not give rise to a private cause of action (CT at 83).

However, the broad claim that there is no private cause of action under Art. I, § 2, which was made by the Defendants and apparently accepted by the Superior Court, does not withstand analysis. The primary case cited in support of this proposition is *Degrassi v. Cook* (2002), 29 Cal.4th 333, which, while denying a private cause of action for ***damages*** under Art. I, § 2 under the facts before it, held that "this does not mean that the free speech clause, in general, never will support an action for money damages." *Id*. at 344.

Instead, each case must be considered on its own facts using the analysis and factors set forth in *Katzberg v. Regents of the University of California* (2002) 29 Cal. 4th 300, 324-29. *See Adams v. Kraft* (N.D. Cal. July 29, 2011) 2011 WL 3240598, at * 16 (recognizing that *Degrassi* did not categorically reject private causes of action for damages under Cal. Const. Art. I, § 2 and refusing to dismiss claims under that provision without an examination of the *Katzberg* factors as applied to the facts of the case) and *Cuviello v. Cal Expo* (E.D. Cal. Sept. 19, 2012) 2012 WL 4208201, at *10-*11 (same).

DeGrassi ruled that under *Katzberg*, a court must first look to the text of the constitutional provision at issue to see if an intention to create a private cause of action for damages may be found or inferred. Finding no such intent is evident in the terms of Art. I, § 2, the Court held that *Katzberg* requires engaging in the constitutional tort analysis employed in *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388. That analysis involves consideration of the following factors: (1) whether the plaintiff had meaningful alternative remedies; (2) the extent to which a constitutional tort action would change existing tort law; (3) the nature of the constitutional provision and the significance of the purpose it seeks to effect; (4) whether recognizing

a damages action would produce adverse policy consequences or practical problems of proof; and (5) whether there is reason to question the competence of courts to assess particular types of damages. *DeGrassi*, 29 Cal. 4th at 342-43 (citing *Katzberg*, 29 Cal. 4th at 326-29).

If the Superior Court here was correct in sustaining the demurrer as to each of the other causes of action set forth in the First Amended Complaint, then the first factor certainly favors recognition of a cause of action for damages under the state constitution in this case. If McAllister has no cause of action under tort or contract law and no cause of action under 42 U.S.C. § 1983, then there are no other adequate remedies available to her for recovering the income she has lost as a result of exercising her constitutional right to free speech. Indeed, this is not a situation where the Defendants claimed and the Superior Court ruled that the facts do not support the Plaintiff's causes of action; the ruling below was that McAllister's claims for recovery are *legally* barred. Thus, unless a cause of action for damages is recognized under the facts of this case for wrongful termination, there is no alternative state law remedy available to McAllister, and no remedy under *any* law against Defendant LAUSD.

This case is distinguishable from *DeGrassi* on this first *Katzberg* factor. *DeGrassi* found that the plaintiff, a city council member who alleged that the defendants had violated her rights under Art. I, § 2 by impeding her ability to participate on the city council, could have sought mandate or an injunction under particular statutory provisions in order to stop the conduct of which she complained. The referenced statutory provision would not have been available to McAllister to prevent the Defendants from discharging her and would not have compensated her for the wages and salary she lost as a result of her termination.

As to the second factor, recognition of a constitutional tort action in cases like the instant one would not change established tort law. Indeed, the constitutional tort cause of action in this case is consistent with the wrongful termination claim now recognized under California law. Even to the extent wrongful termination may not be maintained against a governmental entity due to governmental immunity, recognizing a constitutional tort for discharges in violation of the right to free speech simply makes governmental entities liable for the torts committed on their behalf, which is ultimately the intent of the Governmental Claims Act.

With respect to the third factor, there can be little doubt that the right to freedom of speech set forth in Art. I, § 2 (a) is an "important and fundamental interest." *DeGrassi*, 29 Cal. 4th at 343. Although *DeGrassi* found this factor to have little weight, that was because the first two factors did not militate in favor of constitutional tort recognition in that case. In this case, the first two factors do militate in favor of the Plaintiff's constitutional tort claim.

Finally, this is not a case, like *DeGrassi*, where there is reason to doubt whether courts could assess damages accurately. Cases involving employee discharge will call on courts or juries to determine economic harm, such as lost wages and the value of lost benefits, that is subject to definite proof and is easily calculable. Elements of non-economic harm, such as mental distress, are something courts and juries routinely assess based on the evidence presented in the case. The instant case, and others involving employee termination for exercising free speech rights, involves an objectively ascertainable measure of damages, and does not call for assessing damages for the kind of intangible losses and injuries at issue in *DeGrassi*, 29 Cal. 4th at 343-44.

Because application of the *Katzberg/DeGrassi* factors in the instant case militate in favor of recognition of a constitutional tort cause of action for damages, the demurrer to the Second Cause of Action should not have been sustained.

Furthermore, it must be stressed that McAllister's complaint not only seeks monetary relief, but requests "[i]njunctive relief requiring Defendant LAUSD reemploy [McAllister] at her former position with the same wages and benefits [McAllister] received before her termination." (CT at 17). The *Degrassi* ruling was limited to private causes of action for ***damages.*** 29 Cal. 4th at 335. The *Degrassi* court also ruled that "the free speech clause of article I, section 2(a) '*is* self-executing, and . . . even without any effectuating legislation, all branches of government are required to comply with its terms. Furthermore, it also is clear that, like many other constitutional provisions, this section supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction.'" *Id*. at 338 (emphasis in original, citation omitted). Thus, McAllister at the very least is entitled to maintain her claim under article I, § 2(a) for an injunction requiring she be rehired and the

demurrer clearly should not have been granted as to this aspect of her claim in the Second Cause of Action.

III. THE TORT CLAIMS FOR WRONGFUL DISCHARGE AND INFLICTION OF EMOTIONAL DISTRESS MAY BE BROUGHT UNDER THE GOVERNMENTAL CLAIMS ACT AND THE DEMURRER SHOULD NOT HAVE BEEN SUSTAINED AS TO THEM

In its tentative ruling on the First Cause of Action (for wrongful termination) and the Sixth Cause of Action (for negligent infliction of emotional distress), the Superior Court wrote that the decision in *Miklosy v. Regents of the University of California* (2008), 44 Cal.4th 876, required the Defendants' demurrer to these tort claims be sustained. The lower court referenced the ruling in *Miklosy* that the Governmental Claims Act, Cal. Gov. Code § 815 "abolishes all common law or judicially declared forms of liability for public entities[.]", *except for such liability as may be required by the state or federal constitution*, e.g., inverse condemnation[.] . . . Moreover, our own decisions confirm that section 815 abolishes common law tort liability for public entities." *Id.* at 899 (citations omitted, emphasis added). The Superior Court reasoned that because wrongful discharge and negligent infliction of emotional distress are common law claims,

they may not be brought against a public entity like LAUSD under § 815.

But if all common law claims are barred by § 815, then no tort claim may be brought against a public entity and the very purpose of the Government Claims Act is thwarted. This is clearly not the case and *Miklosy* does not bar McAllister's wrongful discharge and infliction of emotional distress for several reasons.

First, immediately after § 815 sets forth the general rule abolishing public entity liability, the Governmental Claims Act provides a general authorization to assert tort claims against governmental entities. Cal. Gov. Code § 815.2 provides that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Thus, the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person and the public entity is vicariously liable. *Barnhart v. Cabrillo Community College* (1999) 76 Cal.App.4th 818, 822. Liability need

not be specifically provided for by statute with respect to the tort; liability arises if the tort is otherwise recognized under the law.

The First and Sixth Causes of Action assert tort claims that are recognized by California law. With respect to the First Cause of Action for wrongful discharge, "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170. The wrongful discharge tort covers cases where the employee is discharged for exercising or refusing to waive a constitutional right or privilege, *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 454, which is precisely the allegation set forth in the First Amended Complaint (CT at 11).

Second, *Miklosy* is distinguishable with respect to the wrongful termination claim because the claim in the instant case is based upon a violation of McAllister's constitutional rights. As *Miklosy* noted, legislative comments to § 815 provide that the legislature intended to abolish all existing common law and judicially declared forms of liability "except for such liability as may be required by the state or federal constitution." 44 Cal. 4th at 899. *Miklosy* involved a claim for

wrongful termination based upon a violation of California's statutory whistleblower protection; the case does not abolish liability for discharges based upon the exercise of constitutional rights.

Other courts have held that constitutional torts are not barred by the Government Claims Act. For instance, in *Scott v. Solano County Health and Social Services Dept.* (E.D. Cal. 2006) 459 F.Supp.2d 959, 968, the Court specifically considered the GCA in a wrongful termination case against a public employer based upon a constitutional violation and held that it was no bar to relief.

The Superior Court's judgment sustaining the demurrer as to McAllister's tort claims adopts a view of the Government Claims Act that essentially eliminates the tort liability of governmental entities. This is plainly not the purpose or intent of the Act, which is to provide the basis and procedure for asserting tort claims against governmental entities. Wrongful termination and negligent infliction of emotional distress are established common law torts for which liability may be asserted against LAUSD under Cal. Gov. Code § 815.2. Therefore, the Superior Court erred in sustaining the demurrer as to the First and Sixth Causes of Action.

IV. PUNITIVE DAMAGES ARE PROPERLY RECOVERABLE BY MCALLISTER UNDER THE CLAIMS SET FORTH IN THE COMPLAINT

The Superior Court sustained the demurrer as to McAllister's claim for punitive damages, but only because it sustained the demurrer as to the substantive causes of action (CT at 84). Because the lower court erred in its substantive rulings, the ruling on the punitive damages claim also must be reversed. In particular, punitive damages may be awarded under 42 U.S.C. § 1983 against an individual who is found to have acted with reckless or callous indifference in depriving the plaintiff of her constitutional rights. *See, e.g., Smith v. Wade* (1983) 461 U.S. 30, 56, and *Larez v. City of Los Angeles* (9th Cir. 1991) 946 F.2d 630, 639.

Deasy's press release clearly indicated that he realized that Plaintiff's rights to free speech would be violated by his termination of her employment in response to her protected statements. This was indicated by his statement that "At LAUSD, we recognize that the law is very protective of the freedom of speech rights of public employees when they are speaking as private citizens during non-working time." (CT at 8) Given this knowing and intentional violation, punitive

damages may be appropriate. In any case, they are not barred as a matter of law, as the Superior Court ruled.

CONCLUSION

By sustaining the Defendants' demurrer without leave to amend, the Superior Court ruled that a public school employee has ***absolutely no recourse*** under the law if she is discharged for engaging in political speech during off-duty hours and on a matter that is not related to school business. Plainly, this cannot be the case, and just as plainly this Court must reverse the judgment below. Public school employees like Patricia McAllister are entitled to speak out on matters of public concern and to seek and obtain justice if they are punished because school administrators dislike what was said. All of this was denied McAllister under the ruling below, and justice, the rule of law and the principles of freedom of speech will be served only by reversing the judgment of the Superior Court and remanding the case for further proceedings in which McAllister may vindicate her fundamental right to freedom of speech.

February 1, 2013

Respectfully submitted,

Julie A. Esposito
Attorney for Appellant

Participating Attorney for
THE RUTHERFORD INSTITUTE

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court rule 8.204(c)(1), the undersigned Counsel for Appellant does hereby certify that the foregoing Appellant's Opening Brief contains 7,086 words, as shown by a computer program word count and excluding matters set forth in California Rules of Court rule 8.204(c)(3).

February 1, 2013

Julie A. Esposito

PROOF OF SERVICE AND DELIVERY

I am over 18 years of age and not a party to this action. I am a resident of the county where the mailing described herein took place. My business address is 424 Linwood Avenue, Unit B, Monrovia, CA 91016.

On February 1, 2013, I sent from Monrovia, CA, the following document:

APPELLANT'S OPENING BRIEF

I served the document by enclosing copies in envelopes and depositing the sealed envelopes with the United States Postal Service delivery by first-class mail, all charges prepaid, except that the copy served on the California Supreme Court was served electronically pursuant to Rule of Court 8.212(C)(2)(A). The envelopes were addressed as follows:

Alexander A. Molina
Offices of the General Counsel
Los Angeles Unified School District
333 South Beaudry Ave., 20th Floor
Los Angeles, CA 90017
(*Attorney for Respondents*
Los Angeles Unified School District and John E. Deasy)

Office of the Clerk
Superior Court of Los Angeles County
111 North Hill Street
Los Angeles, CA 90012

(*Delivered for the attention of Hon. Rita Miller, Judge*)

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783
(*Served electronically pursuant to Rule 8.212(C)(2)(A)*)

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit/declaration.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

February 1, 2013

Julie A. Esposito

Adams v. Kraft (N.D. Cal. July 29, 2011) 2011 WL 3240598

Not Reported in F.Supp.2d, 2011 WL 3240598 (N.D.Cal.)
(Cite as: 2011 WL 3240598 (N.D.Cal.))

H
Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.
Berry Lynn ADAMS, Plaintiff,
v.
Daniel L. KRAFT, Phillip Hauck, Kirk Lingenfelter, K.P. Best, J.I. Stone, Chip Bockman, R. Callison, Scott Sipes, Defendants.

No. 5:10–CV–00602–LHK.
July 29, 2011.

Kathleen Wells, Attorney at Law, Santa Cruz, CA, for Plaintiff.

Daniel B. Alweiss, Office of the Attorney General, San Francisco, CA, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND; AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

LUCY H. KOH, District Judge.

***1** Plaintiff Berry Lynn Adams filed his Second Amended Complaint (Dkt. No. 110–11, "SAC") on April 7, 2011. Defendants Daniel L. Kraft ("Kraft"), Phillip Hauck ("Hauck"), Kirk Lingenfelter ("Lingenfelter"), K.P. Best ("Best"), J.I. Stone ("Stone"), Chip Bockman ("Bockman"), R. Callison ("Callison"), and Scott Sipes ("Sipes") (collectively "Defendants") moved to dismiss Adams' SAC pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 116 ("Mot."); *see also* Dkt. No. 122 ("Reply"). Adams opposes. Dkt. No. 123 ("Opp'n"). Plaintiff has also filed a motion for leave to amend, which Defendants oppose. Pursuant to Civil Local Rule 7–1(b), the Court deems both motions suitable for disposition without oral argument. As explained below, the Court hereby GRANTS in part and DENIES in part Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint; and DENIES Plaintiff's motion for leave to file a Third Amended Complaint.

I. BACKGROUND

A. Procedural History and Court's March 8, 2011 Order

On March 8, 2011, this Court issued an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("FAC"). *See* Dkt. No. 96. The long procedural history leading up to the March 8, 2011 Order helps shed light on the Court's analysis of Defendants' present Motion. Plaintiff, at that time represented by Attorney M. Van Smith, filed his initial complaint on February 10, 2010, making broad allegations regarding alleged "violations of civil rights" against various State Park Rangers and the State of California. Plaintiff's initial complaint included seven claims: 1) "Violation of Civil Rights" (discussing an "unreasonable seizure"); 2) "Violation of Civil Rights" (discussing "excessive force"); 3) False Arrest; 4) Battery; 5) Violation of California Bane Act (discussing a "false arrest"); 6) "Violation of Civil Rights" (discussing an "unreasonable seizure"); and 7) Violation of California Bane Act (discussing an "interference with free speech"). Defendants answered on March 17, 2010.

On June 9, 2010, prior to the filing of any motion by the current Defendants, [FN1] Plaintiff's current counsel, Attorney Kate Wells, moved to be substituted as counsel because Plaintiff's former counsel, Attorney M. Van Smith, had serious health issues. The Honorable James Ware granted Plaintiff's motion to substitute counsel on July 19, 2010. *See* Dkt. No. 53. Defendants had already filed a motion for judgment on the pleadings as to the initial complaint on July 14, 2010, and then, on July 30, 2010, Defendants moved for sanctions.

FN1. On May 28, 2010, Former Defendant Greg Inloes moved to dismiss for failure to state a claim. That motion became moot, however, when the Court granted the parties' stipulation to dismiss Defendant Greg Inloes with prejudice. *See* Dkt. No. 64, September 23, 2010 Order Granting Stipulation to Dismiss Defendant Greg Inloes With Prejudice.

This action was reassigned to the undersigned on August 2, 2010. On November 30, 2010, the Court issued two Orders. In the first, the Court, over Defendants' strenuous opposition that they had already spent significant resources in bringing their motion for

judgment on the pleadings and that Plaintiff had unreasonably delayed in amending his complaint without good cause, granted Plaintiff's motion for leave to file an amended complaint and denied as moot Defendants' motion for judgment on the pleadings. *See* Dkt. No. 77, November 30, 2010 Order Granting Plaintiff's Motion for Leave to File Amended Complaint and Denying as Moot Defendants' Motion for Judgment on the Pleadings. That Order stated:

> ***2** The Court acknowledges Defendants' efforts in bringing their motions and is sympathetic to Defendants' position that Plaintiff could have amended his complaint earlier. Defendants, however, have not established that allowing leave to amend at this point amounts to substantial prejudice. The case is still at an early stage, as the parties have not engaged in any discovery, and discovery has not yet closed. Moreover, this is *Plaintiff's first attempt* at amending his complaint.

Id. at 6 (emphasis added). Defendants' Motion for Judgment on the Pleadings had extensively detailed the problems in Plaintiff's original Complaint. At that time, however, there was no case schedule and no discovery or trial deadlines. In the second order of November 30, 2010, the Court denied Defendants' motion for sanctions. *See* Dkt. No. 78, November 30, 2010 Order Denying Motion for Sanctions. Although the Court found Plaintiff's original Complaint to be "poorly organized" and "confusing," the Court determined that those deficiencies did not merit sanctions but instead "the potential deficiencies highlighted by Defendants are more appropriately raised in a motion to dismiss." *Id.* at 5.

On December 2, 2010, the Court held a case management conference and issued a Case Management Order providing, among other things, for a July 31, 2011 deadline for the close of all discovery; an August 11, 2011 deadline to file dispositive motions, with the hearing on any such motions to be heard on September 15, 2011; a November 2, 2011 pretrial conference; and a November 14, 2011 jury trial start date. *See* Dkt. No. 79. Plaintiff's counsel, Ms. Wells, was present at the December 2, 2010 case management conference and was given the opportunity to provide input on the case schedule adopted by the Court.

Plaintiff filed the FAC on December 6, 2010. *See* Dkt. No. 80. On December 23, 2010, Defendants filed a Motion to Dismiss, again laying out numerous challenges to Plaintiff's allegations. This motion resulted in the aforementioned March 8, 2011 Order. In that Order, the Court exhaustively catalogued Plaintiff's claims and analyzed all of Plaintiff's allegations and Defendants' challenges. The March 8, 2011 Order *again* gave Plaintiff leave to amend certain claims, and provided extensive guidance as to the deficiencies that must be remedied for those claims to stand. The Court ended with the following summary:

> **The Court dismisses the following claims with prejudice:**
>
> Plaintiff's claims against all Defendants for violation of Plaintiff's claimed Fourth Amendment right to be free from retaliatory prosecution;
>
> Plaintiff's claims against Hauck, Stone, Lingenfelter, Best, Bockman, and Sipes for violation of Plaintiff's Fourth Amendment right to be free from unreasonable searches;
>
> Plaintiff's Fourth Amendment unlawful arrest and excessive force claims for damages against Callison.
>
> **The Court dismisses the following claims with leave to amend:**
>
> ***3** Plaintiff's First Amendment claims against all Defendants;
>
> Plaintiff's Fourth Amendment search claims against Kraft and Callison;
>
> Plaintiff's Fourth Amendment unlawful arrest and excessive force claims against Lingenfelter and Best;
>
> Plaintiff's Fourth Amendment excessive force claims against Stone, Bockman, and Sipes;
>
> Plaintiff's Fourteenth Amendment claims against all Defendants;
>
> Plaintiff's claims for damages against all Defendants for violation of the California Constitution, Article 1, Sections 1, 2, 3, 7, 13, 25;

Plaintiff's claims for false arrest against Kraft, Hauck, Stone, Sipes, Bockman, Best, and Lingenfelter;

Plaintiff's Bane Act claims against all Defendants;

Plaintiff's claims for damages against Lingenfelter, Best, and Kraft for failure to train or supervise and for liability based on training or supervision.

The Court denies Defendants' motion to dismiss the following claims:

Plaintiff's Fourth Amendment unlawful arrest claims against Stone, Bockman, and Sipes.

See March 8, 2011 Order at 27–28.

On April 7, 2011, Plaintiff filed the operative SAC. On April 26, 2011, Defendants moved to dismiss the SAC, aside from certain claims against certain officers as explained below. *See* Dkt. No. 116. Plaintiff filed a timely Opposition on June 22, 2011, and Defendants filed a Reply on June 29, 2011. Dkt. Nos. 119, 122. On June 24, 2011, however, Plaintiff also filed a Motion for leave to file a now Third Amended Complaint. *See* Dkt. No. 121.

B. Factual Allegations in SAC

Plaintiff alleges that Defendants, all California State Park Rangers, violated his constitutional rights while acting in their individual capacity and under the color of state law. SAC ¶ 5. He alleges that his problems with California State Park Rangers began in 1985, when the Rangers replaced the Santa Cruz Sheriff's Office in patrolling Seacliff State Park Beach and Pier ("Seacliff"). *Id.* at ¶ 8. Plaintiff, a self-proclaimed "expert" surf fisher with 25 years of experience fishing at Seacliff, claims that he never had any problems with the Sheriff's Office. *Id.* at ¶ 7.

Plaintiff's first claimed interaction with the Defendants occurred on February 15, 2008. *Id.* at ¶ 10. Defendant Best issued a ticket to Plaintiff for unlawful possession of alcohol while he was parked in a public parking lot. *Id.* Plaintiff claims that in light of evidence that Plaintiff was in fact drinking ginger ale, Best rescinded the ticket two to three days later. *Id.* at ¶ 12. However, this allegation is inconsistent with Plaintiff's FAC, which alleged that the ticket was rescinded on March 3, 2008. FAC ¶ 6. While rescinding his citation, Best allegedly told Plaintiff that he had never before rescinded a ticket and that he would be watching Plaintiff in the future. SAC ¶ 12. According to Plaintiff, his encounter with Best, a supervisor over several of the other Defendants, caused Best, Kraft, Lingenfelter, Hauck, Stone, Bockman, Callison, and Sipes to cooperate in a planned effort to punish Plaintiff for "humiliating" Best. *Id.*

***4** Plaintiff also describes several other incidents that resulted from Defendants' plan to exact revenge on behalf of Best. First, on June 15, 2008, Kraft and Callison "walked into Monterey Bay" in their uniforms and "demanded to search ADAM's [sic] backpack." *Id.* at ¶ 13. During the search, Kraft allegedly told Plaintiff that, "My boss [Best] has not forgotten you." *Id.* Second, Plaintiff states "on numerous occasions KRAFT approached ADAMS and required ADAMS to produce his water bottle to KRAFT so that KRAFT could sniff the liquid contents (water) to confirm that it was not alcohol." *Id.* at ¶ 14.

Third, on July 8, 2008, Stone issued Plaintiff a parking citation for parking at Seacliff after it had closed. *Id.* at ¶ 15. Plaintiff does not contest the validity of the citation, but instead alleges that Stone issued the citation without the usual custom of announcing that the park had closed and without issuing a warning. *Id.* Plaintiff further alleges that Stone did not give citations to other parked vehicles and told Plaintiff that he was "one of the locals who were the worst offenders and needed to be taught a lesson." *Id.*

Plaintiff claims that he contacted, on unspecified dates, the Rangers' supervisor, Defendant Lingenfelter, to complain about this "harassment." *Id.* at ¶ 17. Plaintiff alleges that Lingenfelter did nothing to stop the other Defendants from harassing him. *Id.* Furthermore, he alleges Lingenfelter took retaliatory actions by requesting that the District Attorney obtain a court order prohibiting Plaintiff from being present on several beaches, including Seacliff. *Id.* Specifically, Plaintiff alleges Lingenfelter wrote a July 23, 2009 letter to the District Attorney, which claimed Plaintiff was lodging baseless complaints about State Park Peace Officers and consuming the officers' time, and that Plaintiff was causing disturbances, which Lingenfelter believed would continue to occur. *Id.*

Plaintiff alleges the disturbances were almost always in response to being erroneously accused, with subsequent public outcry at how the Rangers were treating him. *Id.* According to Plaintiff, the District Attorney sought a stay away order, but the Superior Court refused. *Id.*

Plaintiff's next alleged interaction with Defendants occurred after he gave an interview to a news channel on June 22, 2009 during a rally at Seacliff opposing proposed budget cuts to the State Parks System. *Id.* at ¶ 19. Plaintiff told the interviewer that the State of California could save a lot of money by returning beach patrolling responsibility to the Sheriff's Office. *Id.* Plaintiff, on information and belief, alleges that the broadcast was either viewed or reported to all the Park Rangers, which allegedly made them more resolved than ever to harass Plaintiff. *Id.*

Also on June 22, 2009, Plaintiff crossed paths with Greg Inloes. *Id.* at ¶ 20. In his initial complaint, Plaintiff alleged he was upset with Inloes because Inloes had shared information about Plaintiff's new fishing lure with the Western Outdoor News, without Plaintiff's permission. Compl. ¶¶ 8–10. The two argued, and Plaintiff threatened to sue Inloes if he did not refrain from certain conduct in relation to fishing journalism. SAC ¶ 20. In his SAC, Plaintiff alleges he did not threaten any physical violence towards Inloes at any time. *Id.* However, in his initial complaint, Plaintiff acknowledged that Mr. Inloes complained that Plaintiff threatened to put him in the intensive care unit if Mr. Inloes continued writing about Plaintiff. Compl. ¶ 9.

***5** Plaintiff believes Inloes subsequently complained to Kraft on June 24, 2009. SAC ¶ 21. Plaintiff alleges Inloes informed him that Kraft, Best, and Lingenfelter "demanded" Inloes provide the Rangers with a written statement against Plaintiff, which Inloes did. *Id.* Plaintiff states Judge Almquist, who presided over the jury trial, dismissed all charges because "if you read Inloes' letter, he wasn't afraid that anything was going to happen immediately or imminently. He waited 48 hours to even make a complaint about this to law enforcement." *Id.* According to Plaintiff, Inloes's nine-page statement was a rambling, incoherent, and ultimately exculpatory diatribe containing contradictory allegations about alleged threats. *Id.* Plaintiff, however, does not contest that he made potentially threatening statements to Inloes, but only notes his belief that his statements were not sufficiently "immediate" or "imminent" enough to constitute a criminal threat.

According to Plaintiff, on June 24, 2009, Defendants Kraft, Hauck, Stone, Sipes and Bockman, along with three other unnamed Rangers, arrived at the pier where Plaintiff was fishing. *Id.* at ¶ 22. Hauck then informed Plaintiff that they were arresting him. *Id.* Once informed that he was under arrest, Plaintiff alleges he attempted to put down his bag of potato chips. *Id.* at ¶ 23. Plaintiff alleges that as he did so, Kraft kicked Plaintiff's right hand and wrist. *Id.* Kraft allegedly then grabbed Plaintiff by the left arm and forced him into a pain compliance hold. *Id.* at ¶ 24. According to Plaintiff, none of the other Rangers intervened. *Id.* Hauck and Kraft then arrested Plaintiff for resisting arrest. *Id.* A Superior Court judge later dismissed the charges against Plaintiff for resisting arrest and for threatening Inloes. *Id.* at ¶ 26.

Plaintiff also alleges that Defendants Kraft, Hauck, Lingenfelter, and Best did not forward or disclose Inloes's nine-page complaint to the District Attorney who prosecuted Plaintiff. *Id.* at ¶ 25. The existence of Inloes's complaint was only revealed inadvertently during Plaintiff's September 2009 criminal trial for violating California Penal Code § 422 and § 148. *Id.* Plaintiff was acquitted on "both charges pursuant to a California Penal Code § 1118.1 motion that the prosecution's evidence failed to establish a *prima facie* case of guilt." *Id.* at ¶ 26. Plaintiff alleges the withholding of Inloes's statements from the District Attorney was in retaliation for the various actions Plaintiff took to redress grievances and for speaking out in public against the officers. *Id.* at ¶ 27.

The last alleged incident occurred on July 31, 2009 while Plaintiff was fishing at Seacliff. *Id.* at ¶ 28. Plaintiff yelled at another fisherman who was violating "the protocol and law of fishing" by crossing his line with the lines of Plaintiff and others on the pier. *Id.* Plaintiff alleges that after expressing his complaint to a Lifeguard, Defendants Kraft, Best, and Callison ejected Plaintiff from Seacliff for disturbing the peace. *Id.* No other fisherman was ejected and several witnesses, apparently friends of Plaintiff, told the Rangers of Plaintiff's innocence. *Id.*

***6** Plaintiff alleges he filed a California Government Code § 945.4 claim with the state on De-

cember 16, 2009 against all Defendants. The claim was denied on February 18, 2010.

Based on these allegations, Plaintiff makes four claims for relief. First, against all Defendants, Plaintiff seeks damages for violation of his rights under the First and Fourteenth Amendments of the United States Constitution and of Article 1, Sections 1, 2, 3, 7, 15, and 25 of the Constitution of the State of California. Second, against Defendants Kraft, Hauck, Best, and Lingenfelter, Plaintiff seeks damages for false arrest under the Fourth Amendment of the United States Constitution. Third, Plaintiff seeks damages for excessive force against Defendants Kraft, Hauck, Stone, Sipes and Bockman under the Fourth Amendments of the United States Constitution, and for failure to intervene against Defendants Stone, Sipes, and Bockman. Finally, Plaintiff seeks damages against Defendants Kraft and Callison for an unlawful search.

II. LEGAL STANDARDS

A. Standard for Motion to Dismiss

Dismissal under Fed.R.Civ.P. 12(b)(6) for failure to state a claim is "proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Services, Inc.*, 606 F.3d 658, 664 (9th Cir.2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001)). In considering whether the complaint is sufficient to state a claim, the court must accept as true all of the factual allegations contained in the complaint. *Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). However, the court need not accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir.2008). While a complaint need not allege detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

B. Standard for § 1983 Claims

Under Section 1983, the plaintiff must demonstrate that (1) the action occurred "under color of state law" and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. *See Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In the instant action, there is no dispute that the officers were acting under color of state law. The disputes in this case are whether Defendants violated Plaintiff's First, Fourth, and Fourteenth Amendment rights.

III. ANALYSIS

A. Plaintiff's Third Amended Complaint

***7** As a preliminary matter, the Court notes that Plaintiff filed a Third Amended Complaint ("TAC") two days after filing his Opposition to Defendants' Motion to dismiss the SAC, and before the Court had decided Defendants' motion. Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a party may amend its pleading once as a matter of course, either twenty-one days after serving it or within twenty-one days after service of a responsive pleading or a motion under 12(b), (e), or (f), whichever is earlier. Fed.R.Civ.P. 15(a)(1). Otherwise, a party may only amend its complaint with the opposing party's permission or with leave from the court. Fed.R.Civ.P. 15(a)(2). Here, as the time to amend the complaint as a matter of course has passed, Plaintiff may only amend his complaint with the opposing party's written consent or the Court's leave. As the Court has not given Plaintiff leave to file an amended complaint, this new complaint will be given no weight in this Order.[FN2] Moreover, were the Court to consider the TAC in the context of deciding Defendants' motion to dismiss the SAC, the Court would arguably be improperly converting the motion into one for summary judgment by considering a matter outside the pleadings before it. *See* Fed.R.Civ.P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

FN2. Under Federal Rule of Civil Procedure 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent." The Case Scheduling Order in this action provides a close of discovery of July 31, 2011 and a dispositive motion filing deadline

> of August 11, 2011. Presumably, Plaintiff's proposed TAC would necessitate a modification of the Case Scheduling Order. However, Plaintiff has not sought leave for such a modification. In any event, as explained in the text, the Court declines to consider Plaintiff's proposed TAC under Rule 15 in light of the substantial prejudice to Defendants, Plaintiff's unexplained and undue delay in seeking leave just before the close of discovery and other filing deadlines, and numerous prior amendments to the complaint over the past year and a half.

Rule 15(a) states that leave shall be freely given "when justice so requires." Fed.R.Civ.P. 15(a). In general, the Court considers five factors in assessing a motion for leave to amend: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir.2004). Not all of the factors merit equal weight; it is the consideration of prejudice to the opposing party that carries the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003); *see also Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989) ("Leave [to amend] need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay."). The Court has broad discretion over whether to grant leave to amend, where it has previously granted such leave.

A year and a half into this litigation, Plaintiff's SAC is the third attempt to state cognizable claims and is now fully briefed and ripe for decision. Plaintiff directs Defendants and this Court to "the more detailed account ... contained in plaintiff's [sic] TAC, attached as Exhibit A...." *See* Pl.'s Opp'n at 16. However, Plaintiff, represented by counsel throughout these proceedings, has already been given three chances to adequately plead allegations in support of his claims, with specific instructions from the Court as to the facts necessary to properly plead the claim. Each of these attempts at proper pleading was followed by a motion by Defendants, which represented substantial time and effort to parse the issues diligently. Defendants have already addressed three iterations of Plaintiff's complaint. Forcing them to respond to yet another version of Plaintiff's claims is substantially prejudicial and unwarranted in these circumstances, where Plaintiff provides absolutely no reason for not providing a "more detailed account" of his allegations sooner.

***8** Furthermore, the fact discovery deadline in this case is July 11, 2011, the dispositive motion filing deadline is August 11, 2011, and a trial by jury in this case is set for November 24, 2011. These deadlines were set, with input from Plaintiff's counsel, nearly eight months ago, at the Case Management Conference of December 2, 2010. *See* Dkt. No. 79. Yet another amended complaint would create undue delay, as the case schedule and trial deadlines would almost certainly have to be delayed even further. With due respect for the nature of Plaintiff's serious allegations, justice does not require granting Plaintiff yet another chance to amend his complaint this late in the litigation, especially where, as here, the amendment would only provide a "more detailed account" of the allegations and not add any additional allegations that Plaintiff became apprised of in the midst of litigation. Rather, the Court finds that the ends of justice will be served by proceeding with this litigation on the basis of Plaintiff's SAC and reaching a resolution of the claims therein.

Accordingly, the Court denies Plaintiff's motion for leave to file a TAC and does not rely upon the TAC in the analysis and conclusions below.

B. Analysis of Constitutional Claims in Plaintiff's SAC

Plaintiff's SAC consists of four claims: (1) Claim for Damages based on Violation of Constitutional Rights related to Free Speech against all Defendants; (2) Claim for Damages based on False Arrest against Defendants Kraft, Hauck, Best, and Lingenfelter; (3) Claim for Damages based on Excessive Force against Defendants Kraft, Hauck, Stone, Sipes and Bockman; and (4) Claim for Damages based on Unlawful Search against Defendants Kraft and Callison. Defendants respond that they are agreeable to answering Plaintiff's SAC to the extent it asserts a Fourth Amendment violation against Kraft and Hauck for false arrest (i.e., Claim 2), and a Fourth Amendment violation against Kraft only for excessive force. *See* Defs.' Mot. at 3. However, Defendants seek dismissal of the SAC in all other respects.

Much of the Court's analysis is guided by the Ninth Circuit's decision in *Beck v. City of Upland*, 527 F.3d 853 (9th Cir.2008). In *Beck*, the plaintiff, Mr. Beck, alleged that City of Upland police officers retaliated against him by engineering a false arrest due to his outspoken criticism of a city contract granted to one of his competitors. According to Mr. Beck's allegations, he was arrested for telling officers "you don't know who you're dealing with," which the officers later alleged (wrongly) was a threat of violence. The Ninth Circuit held that, in order to state a claim for false arrest under either a First Amendment-retaliation or Fourth Amendment rationale, "a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution [must] show the absence of probable cause." *Id.* at 865.

In *Beck*, the Ninth Circuit also went on to hold that "if a plaintiff can prove that the officials secured his arrest or prosecution without probable cause and were motivated by retaliation against the plaintiff's protected speech, the plaintiff's First Amendment suit can go forward" despite the rebuttable presumption that a prosecutor's filing of a criminal complaint constitutes "independent judgment" and breaks the chain of causation between arrest and prosecution. *Id.* at 863–64. Regarding Mr. Beck's First Amendment cause of action, the Ninth Circuit stated: "Arresting someone in retaliation for their exercise of free speech rights was violative of law clearly established at the time of Beck's arrest. By 1990, it was 'well established ... that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity.' " *Id.* at 871 (internal citation omitted). Because the plaintiff, Mr. Beck, sufficiently alleged the absence of probable cause and retaliatory motive, the Ninth Circuit reversed the district's court grant of summary judgment to defendants.

***9** Thus, here, as in *Beck*, a crucial issue for both the First Amendment retaliation and Fourth Amendment false arrest claims is the presence or absence of probable cause.

1. Determination of Probable Cause

Plaintiff alleges that he was arrested on June 24, 2009 as a result of trumped up charges by a Mr. Greg Inloes. Although not in the SAC, a prior version of Plaintiff's complaint noted that Plaintiff yelled at Inloes, apparently a writer, for putting Plaintiff's name in an article for the *Western Outdoor News*. *See* Compl. ¶¶ 8–9. Plaintiff acknowledged "threatening to put him [Inloes] in the intensive care unit if he [Inloes] continued to write for the Western Outdoor News about the pier at Seacliff State Park." *Id.* Plaintiff alleged that, even if truthful, his statement to Inloes was not an "immediate" threat of physical violence as required by California Penal Code § 422, and thus the State Park Rangers did not have probable cause to arrest him. Moreover, Plaintiff alleges that the lack of an "immediate" threat was the basis for the dismissal of his criminal suit in Santa Cruz County Superior Court.

As noted above, Defendants do not challenge Plaintiff's Fourth Amendment false arrest claim as to Defendants Kraft and Hauck. In order to succeed on this claim, Plaintiff must establish a lack of probable cause. By not challenging the Fourth Amendment false arrest claim as to the arresting officers, Kraft and Hauck, Defendants are necessarily acknowledging that Plaintiff has, at least for purposes of a motion to dismiss for failure to state a claim, sufficiently alleged the absence of probable cause. This concession by Defendants is crucial to the Court's analysis below.

2. First Amendment—Retaliation

Plaintiff claims that he has been retaliated against for exercising his right to free speech, free press, petition for redress of grievances, freedom of association, and has been deprived of his pursuit of happiness. SAC ¶ 3 1. Plaintiff alleges that the State Park Rangers retaliated against him for (1) his efforts to get his citation rescinded, (2) his complaints to Lingenfelter about the behavior of subordinate Rangers, and (3) the interview Plaintiff granted to a television journalist.

As discussed in the Court's March 8, 2011 Order:

> A claim under § 1983 for such retaliation has three elements: (1) the plaintiff engaged in activity that is constitutionally protected; '(2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.'

Dkt. No. 96, at 6 (citing *Blair v. Bethel Sch. Dist.*,

608 F.3d 540, 543 (9th Cir.2010)). In order to sufficiently allege his § 1983 claim against Defendants, Plaintiff must sufficiently allege each of the above elements.

a. Constitutionally Protected Activity

***10** Plaintiff asserts he was engaged in three protected activities: the right to petition for redress of grievances when asking Defendant Best to rescind his citation, free speech when complaining to Defendant Lingenfelter about other Defendants' actions, and free speech when being interviewed by the press.

Plaintiff alleges that the Park Rangers retaliated against him for speaking out against Defendant Best to rescind his citation of Plaintiff. SAC ¶ 12. Defendants concede that, were Plaintiff engaged in the act of filing a petition to have this citation vacated, this would "fall[ ] within Adams's First Amendment right to petition." Defs.' Mot. at 6. However, Defendants contend that Plaintiff was not engaged in filing a petition at the time Defendant Best rescinded the citation, and he therefore "did not engage in constitutionally protected activity." *Id.*

Defendants elevate form over substance. Regardless whether the Court construes Plaintiff's actions as petitioning for redress or as engaging in speech, his actions are protected under the First Amendment. " 'The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.' The freedom of individuals to oppose or challenge police action verbally ... is one important characteristic by which we distinguish ourselves from a police state." *Duran v. Douglas*, 904 F.2d 1372, 1377 (9th Cir.1990) (citing *Houston v. Hill*, 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987)); *see also Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989) (observing it was undisputed that the plaintiff had a protected interest in commenting on the actions of government officials). Were the Court to construe Plaintiff as engaging in speech, rather than in the act of filing a petition, this activity would still be a protected challenge to police action.

Plaintiff states that he contacted Defendant Best's supervisor, Defendant Lingenfelter, to "complain[ ] of the ongoing harassment" he received from Park Rangers. SAC ¶ 17. Plaintiff contends that a subsequent letter from Defendant Lingenfelter to the Santa Cruz County District Attorney was in retaliation for this complaint, and was also part of the ongoing program of harassment following his challenge of Defendant Best. *Id.* Plaintiff's SAC fails to specify the content or even the date of his complaints to Defendant Lingenfelter, making it difficult for the Court to assess whether this speech is of the type that would be protected by the First Amendment. *See id.* However, Defendants have conceded that Plaintiff's complaints were protected, and the Court will accept them as such on this basis. Defs.' Mot. at 6.

Finally, Plaintiff alleges that Defendants retaliated against him for his exercise of free speech in an interview. On June 22, 2009, Plaintiff was interviewed by KCBA–TV during a rally protesting budget cuts. SAC ¶ 19. In this broadcasted interview, Plaintiff suggested the State of California should return control of Seacliff beach to the Santa Cruz County Sheriff's Office. *Id.* The Court finds that Plaintiff engaged in a protected activity in expressing his opinions to the press.

***11** Accordingly, Plaintiff has fulfilled the first element of his claim that he was retaliated against for the exercise of his First Amendment rights, as he appears to have been exercising his rights to free speech and to petition for redress of grievances.

b. Adverse Action

Plaintiff must next prove that he was subjected to adverse action that would discourage the ordinary person from further engagement in the protected activity. Here, Plaintiff alleges that Defendants targeted him for harassment in the form of: illegal searches by Defendants Kraft and Callison on June 15, 2008 and other unknown dates (SAC ¶¶ 13–14); an unfair citation by Defendant Stone on July 8, 2008 (*Id.* at ¶ 15); a false arrest by Defendants Hauck and Kraft on June 24, 2009 (*Id.* at ¶ 24); a baseless injunction (e.g., "stay away" order) requested by Defendant Lingenfelter (*Id.* at ¶ 17); and withholding of Inloes's complaint (*Id.* at ¶¶ 25, 27). As Plaintiff fails to allege which Defendants withheld Inloes's complaint, he has failed to sufficiently plead a claim for this last alleged transgression against any Defendant.

Plaintiff asserts he was subjected to an ongoing campaign of harassment in response to his exercise of his First Amendment rights. Although these events are spread out in time, appear only loosely connected, and

involve different sets of actors, the Court recognizes that, if true, this pattern of behavior culminating in the June 24, 2009 false arrest, constitutes substantial adverse action that would discourage Plaintiff from challenging the behavior of Park Rangers in the future. *See Beck*, 527 F.3d at 868 (plaintiff's allegations that officers unlawfully arrested him in retaliation for criticism was sufficient to plead a First Amendment retaliation and Fourth Amendment false arrest claims). Plaintiff has therefore fulfilled the second element of this claim.

c. Substantial Causal Relationship

Finally, Plaintiff must prove a substantial causal relationship between his protected activity and the alleged retaliation of Defendants.

i. Defendants Kraft and Best

Plaintiff has alleged that on June 15, 2008, while conducting an illegal search, Defendant Kraft informed him, "My boss [Defendant Best] has not forgotten you." SAC ¶ 13. If true, this could indicate a causal relationship between Defendant Best's statement "that he would never forget Adams" at the time of rescinding the citation, and Defendant Kraft's search of Plaintiff. *Id.* at ¶ 12. Moreover, Plaintiff has alleged, and Defendants do not challenge as to Hauck and Kraft, that he was arrested without probable cause in retaliation for his speaking out against the State Park Rangers. Kraft's repeating Best's alleged threat establishes a causal relationship between Plaintiff's exercise of his right to petition for redress of grievances, and this allegedly retaliatory search. Plaintiff has pled sufficient facts for the Court to infer that Defendants Kraft and Best intended to retaliate against him for his exercise of his First Amendment rights. The Court therefore denies Defendants' Motion to Dismiss, as to Plaintiff's first claim against Defendants Best and Kraft.

ii. Defendant Lingenfelter

***12** Plaintiff claims that Defendant Lingenfelter retaliated against him by requesting an injunction preventing Plaintiff from going to various beaches around Santa Cruz, and in soliciting the criminal complaint against Plaintiff by Inloes. SAC ¶¶ 17, 21. These allegedly retaliatory actions took place on July 23 and June 24, 2009, respectively. *Id.*

In his discussion of Defendant Lingenfelter's letter, Plaintiff relies solely on the fact that this letter was written after several instances of Plaintiff exercising his First Amendment rights. *See id.* at ¶ 17. Based on this chronology, Plaintiff concludes that Defendant Lingenfelter's letter was retaliatory. While theoretically possible, Plaintiff has alleged no facts indicating that Defendant Lingenfelter intended to retaliate against Plaintiff for the exercise of his First Amendment rights. Plaintiff has not referenced any threatening statements made to him by Defendant Lingenfelter, any statements made to others by Defendant Lingenfelter that implied a desire to retaliate, or even that Defendant Lingenfelter knew of Plaintiff's exercising his First Amendment rights. The sparse and confusing facts Plaintiff does provide indicate that Defendant Lingenfelter was requesting an injunction in response to the disturbances Plaintiff had caused at Seacliff. *See id.* (where Plaintiff acknowledges creating at least three disturbances). On these allegations, Plaintiff has not established a causal connection between Plaintiff's actions and Defendant Lingenfelter's letter citing disturbances created by Plaintiff at Seacliff, disturbances which Plaintiff does not deny. [FN3]

> FN3. As Defendant Lingenfelter's letter is not a basis for Plaintiff's retaliation claim, Defendants' argument for *Noerr–Pennington* immunity is moot.

While Defendant Lingenfelter's letter does not appear retaliatory, the alleged pressure he and other Defendants placed on Inloes to pursue his criminal complaint against Plaintiff may be retaliatory. Plaintiff points out that his arrest occurred "just 2 days after" his interview on June 22, 2009, asking the Court to infer that the arrest and the criminal complaint leading to it were retaliatory. Opp'n. at 11. That Plaintiff's arrest *followed* this interview does not mean that these events were *because of* Plaintiff's interview. Further, the Court notes that Defendants had been approached by Inloes, on June 22, 2009, with a complaint that Plaintiff had threatened Inloes with bodily harm. SAC ¶ 21. While Plaintiff argues that Defendants " 'demanded' [Inloes] make a written statement," he does not allege that Defendants improperly sought out this criminal complaint. *Id.*

The Court agrees with Defendants that the Inloes complaint provides an equally plausible explanation for Plaintiff's June 24, 2009 arrest. However, there remain Plaintiff's allegations that Defendants, including Defendant Lingenfelter, pressured Inloes into

pursuing this criminal complaint. *Id.* On a motion to dismiss, the court is required to "read the complaint charitably, [and] to take all well-pleaded facts as true." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir.1994). While Plaintiff's allegations are subject to serious dispute by Defendants, the allegations regarding the pressure placed on Inloes are well-pleaded, and support the inference that Lingenfelter could have been retaliating against Plaintiff based on Plaintiff's constitutionally protected activity. The Court therefore denies Defendants' Motion as to Plaintiff's first claim against Defendant Lingenfelter.

iii. Defendant Hauck

***13** While Plaintiff does not specifically state a First Amendment claim against Defendant Hauck, the Court assumes Defendant Hauck was meant to be included in the allegation that all Defendants punished Plaintiff for the exercise of his First Amendment rights. *See* SAC ¶ 31.

Plaintiff alleges that Defendant Hauck was actively involved in his arrest. Specifically, Defendant Hauck informed Plaintiff he was under arrest, and then assisted Defendant Kraft in the completion of the arrest. *Id.* at ¶¶ 22–24. Plaintiff further alleges that Defendant Hauck used excessive force against him. *Id.* at ¶ 24. Plaintiff has thus sufficiently alleged that Defendant Hauck participated in what Plaintiff claims, and Defendants concede, was an arrest without probable cause.

The second issue to be resolved is whether Defendant Hauck intentionally took part in the alleged campaign of harassment against Plaintiff, in perpetuating this arrest. While Plaintiff's factual allegations are thin, the Court notes the particular cooperation which Plaintiff has alleged between Defendants Kraft and Hauck. Plaintiff alleges that the arrest was announced by Hauck; Hauck and Kraft performed the actual arrest; and Hauck and Kraft used excessive force. *Id.* at ¶¶ 22–24. Reading Plaintiff's allegations *very* charitably, and without deciding the veracity of those allegations, the Court takes as true for the purposes of this Motion that Hauck and Kraft worked together in retaliating against Plaintiff. Accordingly, the Court denies Defendants' Motion to dismiss Plaintiff's First Amendment claim against Hauck.[FN4]

> FN4. To overcome a defense motion for summary judgment, of course, Plaintiff will have to do far more to proceed with his retaliation claim against Defendant Hauck.

iv. Defendant Callison, Stone, Sipes, and Bockman

Plaintiff has failed to plead any facts that would connect Defendants Callison or Stone to his disagreement with Defendant Best. *See generally* SAC. Plaintiff instead provides conclusory statements that all Defendants acted to "implement [ ] the ongoing harassment campaign directed by Best." *Id.* at ¶ 16. Plaintiff provides no statements from the other Defendants that link them to Defendant Best's alleged vendetta.

Defendant Callison is present at only two of the incidents described by Plaintiff. On June 15, 2008, Defendant Callison apparently waded into Monterey Bay, along with Defendant Kraft, to search Plaintiff's backpack. *Id.* at ¶ 13. Plaintiff's specific allegations, however, are entirely against Kraft. It is allegedly Kraft who spoke to Plaintiff, and who informed him that Defendant Best "ha[d] not forgotten" him. *Id.* Similarly, on July 31, 2009, Defendant Callison was present when Plaintiff was ejected from Seacliff. *Id.* at ¶ 28. Plaintiff has failed to allege any specific actions taken or statements made by Defendant Callison that would imply he was involved in any retaliation against Plaintiff. *Id.* Plaintiff has also failed to allege any facts that would indicate Callison knew of the dispute between Plaintiff and Best or, assuming such existed, knew of any retaliation campaign against Plaintiff. As Plaintiff has failed to allege a causal relationship between his exercise of his First Amendment rights and any of Defendant Callison's actions, the Court dismisses Plaintiff's claims against Defendant Callison.

***14** Plaintiff's allegations against Defendant Stone pertain to the issuance of a parking citation, and Defendant Stone's presence at Plaintiff's arrest on June 24, 2009. *Id.* at ¶¶ 15, 22. Plaintiff contends that Defendant Stone issued a parking citation out of retaliation. *Id.* at ¶ 32. However, Plaintiff's description of the incident indicates that the citation was for being parked at Seacliff after closing, and that he was in fact parked at Seacliff after closing. *Id.* at ¶ 15. Plaintiff's true dispute is with Defendant's Stone's failure to provide warning that Seacliff was about to close: "the reason there was no announcement of beach closure ... was to entrap [Plaintiff] into inadvertently overstaying." *Id.* However, Plaintiff has not alleged that Defendant Stone had a duty to provide notice that Sea-

cliff was closing, and, as with Defendant Callison, has alleged no facts indicating that Defendant Stone knew of or intended to participate in a campaign of harassment against Plaintiff. Plaintiff thus has provided the Court with no reason to view the issuance of a valid parking citation to be retaliatory. Similarly, while Plaintiff states that Defendant Stone was present at the time of Plaintiff's arrest, he does not describe any action taken by Stone in furtherance of this arrest. *See generally* SAC ¶¶ 22–24. Defendant Stone's issuance of a valid citation and presence at an unfortunate event are insufficient for this Court to infer he participated in a campaign of harassment, or that these actions were substantially caused by Plaintiff's exercise of his First Amendment rights.

The only incident in which Plaintiff alleges Defendants Sipes and Bockman took part was Plaintiff's arrest on June 24, 2009. *Id.* at ¶ 22. As with Defendant Stone, Plaintiff places Defendants Sipes and Bockman at the scene but ascribes no overt actions to them. *See id.* Without some indication that Defendants Sipes and Bockman knew of and intended to join in systematic retaliation against Plaintiff, their mere presence is insufficient to imply it bears a substantial relationship to Plaintiff's exercise of his rights to free speech.

As Plaintiff provides no factual allegations tending to establish a causal relationship between his challenge of Defendant Best's authority and the actions of Defendants Callison, Stone, Sipes, and Bockman, the Court dismisses Plaintiff's first claim against those Defendants. In the March 8, 2011 Order deciding the prior Motion to Dismiss in this case, the Court specifically instructed Plaintiff that, if he chose to amend, "he must allege facts that allow the Court to reasonably infer that *each individual Defendant* acted to chill Plaintiff's speech *because of* Plaintiff's constitutionally protected activities." *See* March 8, 2011 Order at 8 (emphases added). Plaintiff was thus put on notice that he must establish that each of the Defendants acted "as a result" of Plaintiff's exercise of his First Amendment rights, and that he must establish a "substantial causal relationship" between those rights and the adverse actions taken by Defendants. *Blair*, 608 F.3d at 543. Plaintiff failed to establish the second two elements of a First Amendment claim against Defendants Callison, Stone, Sipes and Bockman in this now third attempt at stating a claim. The Court's dismissal of Plaintiff's First Amendment claims against these Defendants is thus granted without leave to amend.

d. Plaintiff's Freedom of Association Allegations

***15** Although not identified as a separate claim, Plaintiff's SAC makes the vague allegation that he was "punished for his implied First Amendment freedom of association" when he was ejected from Seacliff on July 31, 2009. SAC ¶¶ 31–33. It is not clear that Plaintiff intends to bring a separate freedom of association claim aside from his First Amendment retaliation claim. In any event, the Court dismisses any such freedom of association claim because Plaintiff's sparse factual allegations are insufficient to establish that he was exercising his First Amendment right to freedom of association at the time he was ejected from Seacliff.

The First Amendment freedom of association is generally construed as the "freedom to engage in association for the advancement of beliefs and ideas." *See Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 543, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963). The definition of association extends to "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The right thus "extends to groups organized to engage in speech that does not pertain directly to politics." *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

Plaintiff alleges that he was ejected from Seacliff while fishing from the end of the pier. SAC ¶ 28. Nowhere does Plaintiff allege that he was at Seacliff for the purpose of engaging in protected speech with his associates. Plaintiff does not even allege that he had chosen Seacliff as a fishing spot for the purpose of associating with like-minded fishermen.

To the extent Plaintiff argues he was deprived of his freedom of association in retaliation for his exercise of free speech (SAC ¶ 33), Plaintiff has not alleged he was exercising this freedom while at Seacliff. Plaintiff instead alleges that he was exercising his right to fish. *Id.* at ¶ 28. The Court cannot see how Defendants deprived Plaintiff of a right he was not exercising. To the extent Plaintiff intended to claim he was deprived of his freedom of association as an act of retaliation, this claim is dismissed.

As Plaintiff does not allege he was engaging in an

activity protected by the First Amendment, he has not fulfilled the first element required for this claim. Accordingly, the Court dismisses this claim without leave to amend.

e. Accompanying Citations to California Constitution

With his First Amendment claim, Plaintiff has cited to, but not made any specific allegations under, sections 1, 2, 3, 7, 15, and 25 of Article I of the California Constitution.

i. Section 1

Plaintiff states that he was "deprived of the pursuit of happiness under Article I, § 1 of the California Constitution." SAC ¶ 31. The Court agrees with Defendants that Plaintiff has insufficiently alleged an actual claim. Nowhere else in the SAC does Plaintiff indicate he has been deprived of happiness and, when it is introduced here, this deprivation is stated in only conclusory terms. Moreover, at least one other district court has ruled that § 1 does not entitle Plaintiff to a private right of action for damages. *See Garcia v. County of Fresno*, 2005 U.S. Dist. LEXIS 31624, 2005 WL 3143429 (E.D.Cal. Nov. 21, 2005) ("Plaintiffs, however, have failed to cite authority that this constitutional provision supports a private cause of action for damages [in the context of happiness]."). The Court therefore grants Defendants' Motion as to this claim.

ii. Sections 2 and 3

***16** Plaintiff contends that Defendants infringed on his right to free speech and to freedom of association under the California Constitution. SAC ¶¶ 31–33. Defendants contend that there is no private right of action for a violation of § 2, citing *Degrassi v. Cook*, 29 Cal.4th 333, 127 Cal.Rptr.2d 508, 58 P.3d 360 (Cal.2002). However, the Court's review of *Degrassi* reveals that its holding was limited to "the present case. This does not mean that the free speech clause, in general, never will support an action for money damages ... Rather, we conclude that the loss or damage of which plaintiff here complains—interference with her functioning and effectiveness as a legislator-does not support recognition of a constitutional tort for damages." *Id.* at 344, 127 Cal.Rptr.2d 508, 58 P.3d 360. As Plaintiff alleges infringement of free speech in the Federal and California contexts, the Court will not dismiss Plaintiff's claim under § 2 as it extends to freedom of speech. However, as discussed above, Plaintiff has failed to show that he has exercised his freedom of association; the Court dismisses this claim to the extent it refers to freedom of association.

Plaintiff also contends that Defendants infringed upon his right to petition for redress of grievances under § 3. This is substantially similar to the Federal claim which the Court has declined to dismiss; the Court will therefore not dismiss this claim at this time.

The Court notes that the fact that the California Supreme Court has not precluded the granting of damages for violations of §§ 2 and 3 does not necessarily mean that damages are available in this case. In similar situations, district courts have required arguments from the parties as to whether, applying the so-called "*Katzberg* factors" laid out by the California Supreme Court, damages should be available for such violations. *See Manser v. Sierra Foothills Pub. Util. Dist.*, 2008 U.S. Dist. LEXIS 98189, at *16–17, 2008 WL 5114619 (E.D.Cal. Dec. 4, 2008) (requiring the parties to brief the issue of damages); *MHC Financing Limited Partnership Two v. City of Santee*, 182 Cal.App.4th 1169, 1186, 107 Cal.Rptr.3d 87 (Cal.App.4th Dist.2010) (requiring the parties to brief the issue of damages); *see also Katzberg v. Regents of University of California*, 29 Cal.4th 300, 324–29, 127 Cal.Rptr.2d 482, 58 P.3d 339 (Cal.2002) (outlining factors). Further, the California Supreme Court has decided such issues based on the specific facts before it. *See Degrassi*, 29 Cal.4th at 344, 127 Cal.Rptr.2d 508, 58 P.3d 360 ("we decline to recognize a constitutional tort action for damages to remedy the asserted violation of article I, section 2(a), *alleged in the present case")* (emphasis added). Given the current paucity of authority cited by either party, the Court does not find it appropriate to decide whether damages are available at this time.

Should Defendants be found to have infringed upon Plaintiff's constitutional rights, the Court will not grant Plaintiff duplicated damages under both the United States and California Constitutions. However, should Defendants be found to have infringed upon Plaintiff's rights under §§ 2 and 3, but not to have violated Plaintiff's federal rights, the Court will require the parties to provide briefing, with citation to relevant authority, on the state law damages question.

iii. Section 7

***17** Plaintiff has cited, in a heading only, § 7 of the California Constitution regarding due process. Plaintiff provides no factual allegations as to the manner in which Defendants violated any such rights under § 7, nor does he refer to § 7 in the text of his claims. In any event, Defendants are correct that there is no private right of action for damages under § 7. *See* *Katzberg v. Regents of University of California*, 29 Cal.4th 300, 324, 127 Cal.Rptr.2d 482, 58 P.3d 339 (Cal.2002) ("We conclude that there is no indication in the language of article I, section 7(a), nor any evidence in the history of that section, from which we may find, within that provision, an implied right to seek damages for a violation of the due process liberty interest."); *see also* *Javor v. Taggart*, 98 Cal.App.4th 795, 807, 120 Cal.Rptr.2d 174 (2002) ("It is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution."). This claim is accordingly dismissed, with prejudice.

iv. Section 15

In his SAC, Plaintiff states that his First Claim for Damages is brought under § 15 (regarding rights of a criminal defendant) of Article I of the California Constitution. SAC at 12. However, as with other sections noted above, this allegation appears only in the heading introducing Plaintiff's first claim, and Plaintiff nowhere informs the Court of the law or facts on which this claim is based. *See generally* SAC ¶¶ 30–37. Moreover, the Court's previous Order specifically informed Plaintiff that he "may not add new causes of action ... without leave of Court or by stipulation of the parties." Dkt. No. 96 at 28. Plaintiff did not make a claim under § 15 in his previous complaint. *See generally* FAC. The Court did not grant leave to add this new cause of action, and Defendants do not appear to have stipulated to this addition. Plaintiff is therefore making a new claim in direct contravention of the Court's Order. This claim is dismissed without leave to amend.

v. Section 25

Finally, Plaintiff contends that he was deprived of his right to fish, as provided for in Article I § 25 of the California Constitution, when he was ejected from Seacliff. SAC ¶ 33. Plaintiff alleges that this ejection was done in retaliation for his earlier exercise of his First Amendment rights. *Id.* at ¶ 33. The Court has already acknowledged Plaintiff's petition to redress grievances, complaints to Lingenfelter, and interview with a journalist were all constitutionally protected activities.

Plaintiff alleges that, in retaliation for his exercise of his First Amendment rights, Defendants deprived him of freedom of association and the right to fish. *Id.* at ¶ 33. The Court notes that Plaintiff does not characterize the adverse action taken against him as ejection from Seacliff. Rather, Plaintiff specifically states that the adverse action taken against him is Defendants' deprivation of his right to fish. *Id.* As discussed above, Plaintiff was not exercising his freedom of association at the time he was ejected from Seacliff. However, as Plaintiff was fishing at this time, he arguably was exercising his right to fish. *Id.* at ¶ 28.

***18** As a preliminary matter, it is not clear that the "right to fish" provides an individual with a private right of action for damages. Article I, Section 25 of the California Constitution provides:

> *The people shall have the right to fish* upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without *reserving in the people the absolute right to fish thereupon;* and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

Cal. Const. Art. I, § 25 (emphases added). California courts have focused on the "public" aspect of this right in terms of public trust and protection of waterways. *See, e.g.*, *California v. San Luis Obispo Sportsman's Assn.*, 22 Cal.3d 440, 448, 149 Cal.Rptr. 482, 584 P.2d 1088 (Cal.1978) (describing the "public right" to recreational fishing). Plaintiff cites no authority, and this Court has found none, for the proposition that the right to fish provides him with an individual right of action for damages.

In addition, Plaintiff's allegations do not sufficiently establish a deprivation of this right. After acknowledging that he yelled at another fisherman multiple times for "crossing his line," Plaintiff alleges that

Defendants "came to ADAMS and ejected him from Seacliff for the day." *Id.* at ¶ 28, 149 Cal.Rptr. 482, 584 P.2d 1088. Seacliff itself remained open for fishing. Plaintiff does not allege that Defendants seized his fishing license, or even his fishing gear. Plaintiff does not allege that Defendants prohibited him from traveling to another beach and continuing his fishing there. Plaintiff does not allege that Defendants permanently barred him from fishing at Seacliff. Inclement weather, park repairs, or a public event would have the same effect on Plaintiff's right to fish, yet the Court notes Plaintiff "has been surf fishing at Seacliff ... for more than 25 years," and apparently throughout this litigation, without being deterred. *Id.* at ¶ 7, 149 Cal.Rptr. 482, 584 P.2d 1088. One individual's ejection from a single location does not strike the Court as the proper occasion to create a private right of action for damages for an individual right to fish, and certainly not as "adverse action by the defendant that would chill [Plaintiff] ... from continuing to engage in" his First Amendment rights. *Blair*, 608 F.3d at 543.

Plaintiff has not alleged sufficient facts to establish that his right to his day-long exclusion from fishing at Seacliff meets the second element for a First Amendment cause of action. Therefore, the Court grants Defendants' Motion as to this claim.

5. Fourteenth Amendment

Plaintiff's First Amendment claim is accompanied by a citation to the Fourteenth Amendment of the United States Constitution. Defendants argue that Plaintiff cannot bring a claim for violation of the due process clause of the Fourteenth Amendment for Defendants' alleged violation of the First Amendment. Defs.' Mot. at 12. The Court need not resolve this issue because Plaintiff states this section of the SAC "is simply a First Amendment claim that is applied to the states under the Fourteenth Amendment" and not a separate Fourteenth Amendment claim. Opp'n at 14. Accordingly, with Plaintiff's concession, the Court finds moot Defendants' Motion to dismiss any potential claim under the Fourteenth Amendment.

6. Fourth Amendment—False Arrest

***19** Plaintiff also alleges that Defendants Kraft, Hauck, Best, and Lingenfelter subjected him to false arrest on June 24, 2009 in violation of his Fourth Amendment rights.[FN5] This claim requires Plaintiff to demonstrate that "there was no probable cause to arrest him." *Norse v. City of Santa Cruz*, 629 F.3d 966, 978 (9th Cir.2010) (en banc) (internal quotation marks omitted). "Probable cause exists when the facts and circumstances within the officer's knowledge are sufficient to cause a reasonably prudent person to believe that a crime has been committed." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (9th Cir.2009). However, "[p]robable cause is obviously lacking when the arrest is motivated purely by a desire to retaliate against a person who verbally challenges the authority to effect a seizure or arrest." *See Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir.1994).

FN5. The false arrest allegations against Best and Lingenfelter are only made in their supervisory capacity. The Court discusses supervisory liability in a separate section below.

The SAC claim for damages for false arrest is only against Defendants Kraft and Hauck (e.g., the arresting officers on June 24, 2009), and then Best and Lingenfelter for supervisory liability. In Defendants' Reply, they state "Kraft and Hauck are agreeable to answering Adam's SAC, to the extent it asserts a Fourth Amendment violation against Kraft and Hauck for false arrest." Dkt. No. 122 at 1. With reference to false arrest, Plaintiff alleges that "Hauck and KRAFT are liable for the false arrest of ADAMS on June, 24, 2009 by reason of the fact that these two Defendants directly accomplished said arrest and did not have any probable cause to do so." SAC ¶¶ 22, 39. Plaintiff alleges an absence of probable cause based on the rationale that the officers should have known that the alleged threat he made to Inloes (i.e., to put Inloes into the ICU if he ever wrote about Plaintiff again) was not "immediate" enough to constitute a violation of California Penal Code § 422.[FN6] Defendants do not challenge the sufficiency of the Plaintiff's pleading as to his Fourth Amendment false arrest claims against Hauck and Kraft. Accordingly, the Court denies Defendants' Motion as to this claim.[FN7]

FN6. Section 422 provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying

> it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."
>
> FN7. Presumably, Defendants will attempt to establish that the arresting officers did have probable cause on a motion for summary judgment.

6. Fourth Amendment—Excessive Force

The next issue is whether Plaintiff has properly stated a Fourth Amendment claim for excessive force or unlawful arrest against Defendants Kraft, Hauck, Stone Sipes and Bockman. "A claim for unlawful arrest is cognizable under section 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or justification" *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 964 (2001) (citing *Larson v. Neimi*, 9 F.3d 1397, 1400 (9th Cir.1993)). Plaintiff claims the police officers arresting him on July 24, 2009, Kraft and Hauck, used excessive force in an unlawful arrest. The separate allegations of false arrest and failure to intervene as to Stone, Sipes, and Bockman are addressed below.

a. Arresting Officers on June 24, 2009: Kraft and Hauck

"Determining whether a police officer's use of force was reasonable or excessive therefore requires careful attention to the facts and circumstances of each particular case and a careful balancing of an individual's liberty with the government's interest in the application of force." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002) (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)) (quotation omitted). Therefore, the Court is to balance "the 'nature and quality of the intrusion' on a person's liberty with the 'countervailing governmental interests at stake' to determine whether the use of force was objectively reasonable under the circumstances." *Id.; see also Cunningham v. Gates*, 229 F.3d 1271 (9th Cir.2000) ("Under U.S. Const. amend. IV, police may use only such force as is objectively reasonable under the circumstances. Determining whether force used in making an arrest is excessive or reasonable requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.").

***20** The March 8, 2011 Order stated that "Defendants do not challenge the sufficiency of Plaintiff's pleadings as to his Fourth Amendment excessive force and unlawful arrest claims against Hauck and Kraft." Dkt. 96 at 12. The SAC now alleges "[u]pon HAUCK's announcement [that he was being placed under arrest] ADAMS leaned down to place a bag of potato chips on the ground. At this point and without any justification whatsoever, KRAFT kicked ADAMS in the right hand and wrist, injuring the same. KRAFT then subjected ADAMS to a pain compliance hold. HAUCK and KRAFT then accomplished the arrest of ADAMS and announced that it was a charge of resisting arrest." SAC ¶¶ 23, 24.

Defendants challenge the claims against Hauck in the SAC, arguing that Plaintiff "fails to validly allege Hauck had any physical involvement" and that Plaintiff's "internal allegations in his SAC are inconsistent. Defs.' Mot. at 16. On the one hand, he alleges it was Kraft, and then later realizes Hauck did not have physical contact with him so he changes his story, mid-stream, to substantiate an allegation against Hauck." *Id.; see also* Reply at 6 ("facts alleged in a complaint are deemed an admission and the facts from Adam's FAC and SAC clearly show Hauck did not have physical contact with Adams.").

Although the Court agrees that Plaintiff's allegations are not a model of clarity, Plaintiff's allegations in the SAC are still sufficient to state an excessive force claim against both Kraft and Hauck. Plaintiff alleges "KRAFT then subjected ADAMS to a pain compliance hold. HAUCK and KRAFT then accomplished the actual arrest of ADAMS." SAC ¶ 24. In the claims, he alleges "Defendant HAUCK is liable for the use of excessive force against ADAMS on June 24, 2009 by reason of his unnecessary and gratuitous employment of a pain compliance hold against ADAMS." *Id.* at ¶ 49. Read in the light most favorable to the Plaintiff, as the Court must do with respect to

Defendants' Motion to dismiss, Plaintiff does allege that Hauck was involved with the arrest and assisted with the allegedly unlawful pain compliance hold. Moreover, the FAC also included allegations describing Hauck's role in the arrest. Specifically, Plaintiff alleged "KRAFT then grabbed plaintiff by the left arm forcing his arm to his upper back in a pain compliance hold. All of the other rangers present failed to intervene to protect plaintiff from the excessive force of KRAFT and HAUCK." FAC ¶ 17.

As Defendants did not challenge the sufficiency of Plaintiff's FAC as to his Fourth Amendment excessive force and unlawful arrest claims against Hauck and Kraft, and as those allegations have not substantially changed in the SAC, the Court will not dismiss the excessive force claim against Kraft and Hauck. Accordingly, the Court denies Defendants' Motion to Dismiss as to the excessive force claim against Kraft and Hauck.

b. Failure to Intervene (Stone, Sipes, Bockman)

***21** The Court's previous Order found the Fourth Amendment claims against Stone, Sipes, and Bockman (three officers who were merely present at Plaintiff's arrest) to be insufficient because Plaintiff did not claim they had an opportunity to interfere with the events. *See* March 8, 2011 Order at 13–15. Police officers have a duty to intercede when fellow officers commit violations, but must have a realistic opportunity to intercede. *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir.2000) ("officers can be held liable for failing to intercede only if they had an opportunity to intercede"). Moreover, the inquiry is specific to the individual defendant. *See Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir.1996) (holding that an officer could not be liable just because of his membership in a group committing an unlawful and excessive search of a woman's home without a showing of individual participation in the unlawful conduct).

Plaintiff's insufficient allegations still only allege that "none of the other Rangers present attempted to intervene on behalf of ADAMS either to protect him from false arrest or from the excessive force used by HAUCK and KRAFT, despite the fact that they were in a position to and could have stopped the arrest and intervened to prevent the excessive use of force after KRAFT initially kicked ADAMS in the wrist for no apparent reason." SAC ¶ 24. Plaintiff claims the three officers "are liable for their failure to intervene when it was manifestly apparent to them that KRAFT and HAUCK were engaging in unnecessary and brutal force against ADAMS." *Id.* at ¶ 50. In a change from the FAC, Plaintiff does add that the three officers "were in a position to and could have stopped the arrest and intervened to prevent the excessive use of force after" the kick. *Id.* at ¶ 24.

Defendants acknowledge that they saw the event, but challenge both the basis for his "information and belief" that they could have interceded, and note that Adams failed to allege the officers had a "realistic opportunity to intercede." Defs.' Mot. at 15. Specifically Defendants argue Plaintiff failed to allege "sufficient time for the officers to intervene between the point they saw Kraft's kick and before the compliance hold, he would also have to allege that Stone, Sipes and Bockman actually saw this happening and were close enough to intervene and leave their positions, in the split second between Kraft's alleged kick and compliance hold." *Id.* at 15.

To state a claim against the three officers, Plaintiff must establish that they had a realistic opportunity to intervene. Plaintiff's conclusory allegation in the SAC that the officers had the opportunity to intervene is merely a formulaic recitation of the legal standard, and not a specific factual allegation. Nowhere does Plaintiff support his allegations against Stone, Sipes and Bockman with actual factual allegations regarding their opportunity to intervene or their exact role in Plaintiff's arrest.

***22** In sum, in his now third attempt at stating a claim, Plaintiff still only alleges that officers Stone, Sipes, and Bockman were merely present at his arrest. These allegations are insufficient to state a claim for failure to intervene. As this is the third attempt to allege these facts and Plaintiff is still unable to adequately state a claim for failure to intervene, the claim is dismissed without leave to amend.

7. Fourth Amendment—Unlawful Search

Plaintiff also alleges that "Defendants Kraft and Callison are liable for the unlawful search of ADAMS' backpack on June 15, 2008." *Id.* at ¶ 56. To establish an unlawful search, "Plaintiff must show that a search or seizure occurred and that the search or seizure was unreasonable." *Freece v. Clackamas Cnty.*, 442 F.Supp.2d 1080, 1086 (9th Cir.2006) (citing *Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S.Ct. 1378,

103 L.Ed.2d 628 (1989)). The Court's March 8, 2011 Order held that Plaintiff alleged a search occurred, but that "Plaintiff has not alleged supporting facts that the search was unreasonable or unconstitutional." Dkt. 96 at 11. The claim was dismissed with leave to amend against Defendant Kraft and Callison only. The SAC states, "[i]n support of this claim, Adams alleges "on or about June 15, 2008 KRAFT and CALLISON walked into Monterey Bay and demanded to search ADAM's [sic] backpack KRAFT advised ADAMS that they were looking for fish." SAC ¶ 13.

Despite express notice that he had to provide additional allegations that the search was somehow unreasonable or unlawful, Plaintiff still does not clearly allege that a search occurred and does not provide enough information to determine that the search was unlawful. Moreover, the California Supreme Court recently noted that "California authority has interpreted [Fish & G.Code, § 2012] as authorizing a stop of a vehicle occupied by an angler or hunter for such purposes, and the United States Supreme Court has held in a number of decisions that an administrative search or seizure may be conducted, consistent with the Fourth Amendment, in the absence of reasonable suspicion that violation of a statute or administrative regulation has occurred." *People v. Maikhio*, 51 Cal.4th 1074, 1080, 126 Cal.Rptr.3d 74, 253 P.3d 247 (Cal.2011) (holding officer's demand that the fisherman display all fish or game that he caught without probable cause did not violate a reasonable expectation of privacy because the state's interest in protecting and preserving the wildlife of this state outweighs the minimal impingement upon privacy engendered by such a stop and demand procedure.) Given that Plaintiff has provided only minimal and conclusory factual allegations, and that California law appears to allow such "administrative searches" of fish or game, even without reasonable suspicion, the Court grants Defendants' Motion to Dismiss the unlawful search claim as to officers Kraft and Callison without leave to amend.

8. Supervisory Liability

Throughout the SAC, Plaintiff made claims against Defendants Kraft, Best, and Lingenfelter for their alleged supervisory roles in the incidents in question. "Generally, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability under 42 U.S.C. § 1983." *Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir.2001) (citing *Hansen v. Black*, 885 F.2d 642, 645–46 (9th Cir.1989)). "Supervisors can be held liable for: (1) their own culpable action or inaction in the training, supervision, or control of subordinates; (2) their acquiescence in the constitutional deprivation of which a complaint is made; or (3) for conduct that showed a reckless or callous indifference to the rights of others." *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir.2000). " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *See Connick v. Thompson*, ––U.S. ––––, ––––, 131 S.Ct. 1350, 1360, 179 L.Ed.2d 417 (2011) (internal citation omitted).

***23** The March 8, 2011 Order dismissed the supervisory liability claims because Plaintiff did not clearly delineate which constitutional violations Defendants allegedly failed to properly supervise or train. Dkt. No. 96 at 16. Specifically, the Court dismissed Plaintiff's FAC claims for supervisory liability for the charge of false arrest because the Court was "sympathetic to the Defendants' interest in having their alleged constitutional violations clearly outlined in Plaintiff's complaint" so that Defendants could better assert their qualified immunity defenses. *See* March 8 2011 Order at 16. "Government officials who perform discretionary functions generally are entitled to qualified immunity from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134 (9th Cir.2003) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). However, Defendants have not raised qualified immunity as a defense to the claims in the SAC. Instead, Defendants challenge the sufficiency of the allegations themselves.

With regard to the First Amendment retaliation supervisory liability claim, Plaintiff makes the conclusory allegations that Best, Lingenfelter and Kraft had "supervisory duties and are liable for their own actions or inactions that violated ADAMS' constitutional rights for failure to train, supervise and control their subordinates." SAC ¶ 36. Also, Plaintiff alleges that Best and Lingenfelter failed to supervise Kraft and Hauck for their involvement with the false arrest. SAC ¶ 40. With the hodgepodge of allegations thrown into the SAC, it is not clear whether Plaintiff actually

intends to plead these supervisory liability allegations as separate claims. To the extent Plaintiff does intend to plead separate claims, aside from the conclusory allegations that these Defendants failed to train and/or supervise, the SAC still fails to delineate sufficient facts to state a claim for supervisory liability. *See Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (U.S.2009) (rejecting argument that supervisor's "mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution" because a supervisor is "only liable for his or her own misconduct").

With regard to Best and Lingenfelter's supervisory liability, Plaintiff does not specify whom Defendant Best supervised, or even to which constitutional violation either Best or Lingenfelter was deliberately indifferent. Plaintiff's vague allegation that Best "actively promoted" his arrest does not specify what, if anything, Best did to promote Plaintiff's arrest. Plaintiff's conclusory allegation that Lingenfelter was a supervisor at the time does not, in itself, establish supervisory liability. Plaintiff does not allege that Lingenfelter took any specific actions or inactions with regard to training the officers. There are no factual allegations as to the training of subordinate officers, let alone sufficient facts to establish a causal connection between Lingenfelter's actions and the alleged constitutional violations. Moreover, Plaintiff does not even allege that Best or Lingenfelter knew of subordinate officer's alleged constitutional violations or exhibited reckless disregard to those alleged constitutional violations. *See Iqbal*, 129 S.Ct. at 1949 (for an official charged with violations arising from supervisory responsibilities, requiring plaintiff to establish that supervisor had requisite mental state). Because Plaintiff has still not clearly outlined specific allegations in this now second amended pleading, the Court dismisses the supervisory liability claims against Defendants Best and Lingenfelter without leave to amend.

***24** With regard to Defendant Kraft, this is the first time Plaintiff alleges Kraft had any supervisory role and Plaintiff does not allege any facts to support this assertion. In fact, he alleges "the supervisor of KRAFT at this time was BEST." SAC ¶ 13. Accordingly, the claim of supervisory liability against Defendant Kraft is dismissed without leave to amend.[FN8]

FN8. Plaintiff's SAC does not allege supervisory liability for excessive force against any Defendant.

IV. CONCLUSION

For the reasons explained above, the Court DENIES Plaintiff's motion for leave to file a Third Amended Complaint. The Court GRANTS in part and DENIES in part Defendants' motion to dismiss the Second Amended Complaint as follows:

A. The Court **GRANTS** Defendants' Motion with respect to the following claims, and dismisses them without leave to amend:

1. Plaintiff's claims against Defendant Callison,

2. Plaintiff's claims against Defendant Stone,

3. Plaintiff's claims against Defendant Sipes,

4. Plaintiff's claims against Defendant Bockman

5. Plaintiff's claims for supervisory liability against Defendants Best, Kraft, and Lingenfelter,

6. Plaintiff's claims under the Fourteenth Amendment, as to all Defendants,

7. Plaintiff's claims under the Fourth Amendment, for the June 15, 2008 unlawful search, as to all Defendants,

8. Plaintiff's claims under the First Amendment, as they relate to the freedom of association, against all Defendants, and

9. Plaintiff's claims under Article I, Sections 1, 7, 15, and 25 of the California Constitution, against all Defendants.

B. The Court **DENIES** Defendants' Motion with respect to the following claims:

1. Plaintiff's claims against Defendant Kraft, under the First Amendment and for false arrest and excessive force under the Fourth Amendment,

2. Plaintiff's claims against Defendant Hauck, under

the First Amendment and for false arrest and excessive force under the Fourth Amendment,

3. Plaintiff's claim against Defendant Best, under the First Amendment,

4. Plaintiff's claim against Defendant Lingenfelter, under the First Amendment,

5. Plaintiff's claims under the Fourth Amendment, as they relate to false arrest, against Defendants Kraft, Hauck, Best, and Lingenfelter, and

6. Plaintiff's claims under Article I, Sections 2 and 3 of the California Constitution, against Defendants Kraft, Hauck, Best, and Lingenfelter.

IT IS SO ORDERED.

N.D.Cal.,2011.
Adams v. Kraft
Not Reported in F.Supp.2d, 2011 WL 3240598 (N.D.Cal.)

END OF DOCUMENT

Cuviello v. Cal Expo (E.D. Cal. Sept. 19, 2012) 2012 WL 4208201

Slip Copy, 2012 WL 4208201 (E.D.Cal.)
(Cite as: 2012 WL 4208201 (E.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
Joseph P. CUVIELLO, et al., Plaintiffs,
v.
CAL EXPO, et al., Defendants.

Civ. No. S–11–2456 KJM EFB.
Sept. 19, 2012.

Joseph P. Cuviello, Redwood City, CA, pro se.

Gilbert Whitney Leigh, Gonzalez & Leigh, LLP, Matthew Lowe Springman, Matthew L. Springman, Attorney at Law, Trent J. Thornley, Law Office of Trent J. Thornley, Matthew A. Siroka, Law Office of Matthew A. Siroka, San Francisco, CA, for Plaintiffs.

George A. Acero, Gordon Rees LLP, Sacramento, CA, for Defendants.

ORDER

K.J. MUELLER, District Judge.

***1** This case was on calendar on February 10, 2012 for argument on the individual defendants' motion to dismiss. Plaintiff Joseph Cuviello appeared pro se; Gilbert Leigh appeared for plaintiffs Deniz Bolbol and Shannon Campbell; David Beauvais appeared telephonically for plaintiff Mark Ennis; George Acero and David King appeared for defendants Cal Expo, Norbert Bartosik, Brian May, Robert Craft, Craig Walton, Robert Whittington, Larry Menard, Everest Robillard and John Tatarakis; and Matthew Liedle appeared for Rocky Mayes and orally joined the motion to dismiss. After considering the parties' argument, the court GRANTS in part and DENIES in part defendants' motion.

I. *Standards For A Motion To Dismiss*

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." A court may dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal ry." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).

Although a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), in order to survive a motion to dismiss this short and plain statement "must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" or " 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.' " *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss for failure to state a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. Ultimately, the inquiry focuses on the interplay between the factual allegations of the complaint and the dispositive issues of law in the action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

In making this context-specific evaluation, this court must construe the complaint in the light most favorable to the plaintiff and accept as true the factual allegations of the complaint. *Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). This rule does not apply to " 'a legal conclusion couched as a factual allegation,' " *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (quoted in *Twombly*, 550 U.S. at 555), nor to "allegations that contradict matters properly subject to judicial notice" or to material attached to or incorporated by reference into the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir.2001).

A court's consideration of documents attached to a complaint or incorporated by reference or as a matter of judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir.2003); *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th

Cir.1995); *compare* *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir.2002) (noting that even though court may look beyond pleadings on motion to dismiss, generally court is limited to face of the complaint on 12(b)(6) motion). In this case, defendants have provided a copy of Cal Expo's Free Speech Activities Guidelines in conjunction with their motion to dismiss. ECF No. 10–3 at 5–12. As plaintiffs challenge those guidelines both facially and as applied, their complaint depends on the contents of these guidelines and the court's consideration of them does not convert this into a motion for summary judgment. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.2005).

II. *Background*

***2** Plaintiffs Joseph Cuviello, Deniz Bolbol, Shannon Campbell and Mark Ennis are members of a group that seeks to educate the public about the abuse and mistreatment of circus animals. Complaint, ECF No. 2 ¶ 20.[FN1] As part of their educational activities, they hold signs and banners, offer informational leaflets and show video footage of the mistreatment of circus animals. ¶ 21.

> FN1. Further references in this section are to the complaint unless otherwise specified.

The Carson and Barnes Circus leased Parking Lot A on the grounds of Cal Expo for performances from May 20–22, 2011. ¶ 30.

On May 20, Cuviello and Bolbol faxed a letter to defendant Norbert Bartosik, Cal Expo's general manager, and defendant Robert Craft, Cal Expo's police chief, informing them of their intention to protest Carson and Barnes' use of animals. ¶ 34. While Cuviello, Campbell and Bolbol were en route to Sacramento, Bolbol received a call from defendant Brian May, the Deputy General Manager of Cal Expo, who said that they would not be allowed onto Cal Expo property to demonstrate because they had not applied for a permit seventy-two hours in advance, as required by Cal Expo's Free Speech Guidelines. ¶¶ 35–36. These guidelines provide, in relevant part, that activities are deemed to be "on-site" if they occur within Cal Expo's grounds and parking lots; that a "public forum" is an event wherein the facilities are available to members of the public for debate of social issues; that with the exception of the State Fair, no public forum events occur on Cal Expo's ground, but it is Cal Expo's policy to allow free speech activity when it is not inconsistent with Cal Expo's normal operations; that the parking areas become congested with vehicle traffic during events; that free expression zones are therefore necessary to balance the needs of those involved in free speech activities with the safety and needs of the patrons, who use narrow walkways to and from the parking areas; that groups wishing to engage in free speech activities should register with Cal Expo seventy-two hours before the event so as to allow Cal Expo to assign space for the free speech activities; that Cal Expo will not discriminate on the basis of ideas or beliefs in evaluating permit requests; that violations of any of the conditions shall be grounds for expulsion from Cal Expo's grounds, preceded, where possible, by an initial warning, though in the alternative, officers may issue a permit. ECF No. 10–3 at 7–10.

Plaintiff Ennis joined Cuviello, Bolbol and Campbell and the group proceeded to Cal Expo. ECF No. 2 ¶¶ 37. Defendant Mayes, a Cal Expo police officer, asked the plaintiffs if they were going to protest and asked for their permit. ¶ 39. When he learned they did not have one, Mayes told plaintiffs they could protest on the sidewalk but not come onto the grounds. ¶ 39. Cuviello, Bolbol and Campbell entered Cal Expo property and headed toward the circus tent in Parking Lot A while Ennis remained to talk to Mayes. *Id.* Mayes told Ennis that the group would be asked to leave and then cited for trespassing.

***3** Defendant Tatarakis, another Cal Expo police officer, told plaintiffs they were not allowed on Cal Expo property without a permit but they could demonstrate on the sidewalk. ¶ 41. He said he was not threatening plaintiffs with arrest, but they "had been warned." *Id.* Plaintiffs remained in Parking Lot A near the entrance to the circus without incident for about an hour and a half and Campbell and Ennis videotaped the animals. ¶ 42.

Around 7:40 p.m., plaintiffs gathered their materials and began to leave Parking Lot A when six police cars arrived. ¶¶ 45–46. Defendant Craft and defendant Walton, a Cal Expo police chief, asked Cuviello and Bolbol for identification. ¶ 47. Craft said the protestors had refused to leave earlier when asked to do so and so they were being detained for trespassing. ¶¶ 47–48. Defendant Mayes told Cuviello to put his camera down because he was being arrested for trespassing. ¶ 48. Walton knocked Ennis's camera to the ground, handcuffed him, and said he was arresting

Ennis for "602." ¶ 51. Officers took Campbell's camera and arrested him. ¶ 52. Two other officers grabbed Bolbol's arms, twisted them behind her back and pushed her to the ground. ¶ 49. Defendant Craft pointed to the plaintiffs and said "602." ¶ 53.

Cuviello asked that they be cited and released. ¶ 57. Mayes refused because he believed plaintiffs would continue in their activities. Cuviello countered that they were leaving because the circus had concluded for the evening. *Id.* Later Whittington, Mayes, Robillard and Menard questioned plaintiffs and filled out citations. ¶ 58. Mayes told Cuviello any personal property that would fit into an eight by eight inch bag would be booked into Sacramento County Jail with them and that they could pick up the rest during business hours. ¶ 59. Plaintiffs' demonstration materials, leaflets, and cameras were seized; Mayes told plaintiffs the materials would be booked into evidence. *Id.*

Plaintiffs were booked into Sacramento County Jail and when they were released early the next morning, they were given Notices To Appear, listing the charges as violations of California Penal Code §§ 602(o), 602.1(a) and 602.6. ¶¶ 64–65.

Plaintiffs returned to Cal Expo later on May 21 to resume protests, but did not have the signs, banners and leaflets seized by the Cal Expo officers. ¶¶ 66–67. Although plaintiffs remained on the sidewalk for their protest, defendant Craft told them they would be arrested for trespassing if they crossed onto Cal Expo property; he refused to show plaintiffs the property line. ¶¶ 69–71.

Plaintiffs protested on May 22, 2011 but were not approached by Cal Expo police officers. ¶ 74. Because their materials specific to the Carson and Barnes Circus had not been returned, their ability to disseminate their message was hampered. ¶ 75. Because they were relegated to the sidewalk, they were unable to reach a wide audience. *Id.*

***4** Although plaintiffs arrived at the Cal Expo business office around 3:45 p.m. on May 23, 2011, they were unable to retrieve their confiscated materials. ¶ 78. The next morning plaintiff Cuviello called, as he had been instructed to do, but no one from Cal Expo returned his telephone call that day or the next. ¶¶ 80–83. On May 26, 2011, Walton told Cuviello and Bolbol they could retrieve their confiscated banners and a plastic bag of signs the next morning or on the morning of May 28; he said he did not know anything about additional materials. ¶ 85. The Cal Expo police department did not return plaintiffs' materials until the charges against plaintiffs were dropped, on June 15, 2011. ¶ 88.

Plaintiffs allege that all defendants "planned, authorized, directed, ratified, and/or personally participated in" retaliation against plaintiffs for the exercise of their First Amendment rights; arrested plaintiffs for engaging in constitutionally protected activities; refused to allow plaintiffs access to public areas of the Cal Expo complex in order to exercise their First Amendment rights; singled out plaintiffs because of their viewpoints; refused to return plaintiffs' property; and used threats and intimidation against plaintiffs. ¶ 89.

The complaint contains eight claims. The first, by all plaintiffs against all defendants, is based on violations of the First Amendment right to free exercise of speech, Fourth Amendment right against unlawful seizure, false arrest, excessive force, and malicious prosecution; the Fourteenth Amendment right to due process and equal protection of laws, all alleged as part of a claim brought under Title 42 U.S.C. § 1983; it includes Bolbol's claim of excessive force against defendants Craft and Menard. The second, by all plaintiffs against all defendants, alleges a conspiracy to violate plaintiffs' First, Fourth and Fourteenth Amendment rights and is brought under 42 U.S.C. §§ 1983 and 1985. The third, brought by all plaintiffs against all defendants, alleges a violation of Article I, section 2(a) of the California Constitution. The fourth, brought by all plaintiffs against the State of California, is a facial and as applied challenge to California Penal Code § 853.6(i)(7), which gives officers the discretion to book, rather than cite and release, if the officer believes the offense would continue or resume if the arrestee is released.[FN2] The fifth, brought by all plaintiffs against Cal Expo, is a facial and as applied challenge to Cal Expo's "Free Speech Activities Guidelines." The sixth, by all plaintiffs against defendants Cal Expo Police Officers, is for intentional infliction of emotional distress. The seventh, by all plaintiffs against all defendants, is for false arrest and false imprisonment. The eighth, by all plaintiffs against all defendants, is for a violation of California Civil Code section 52.1 (Bane Act). They name as defendants Cal

Expo; Norbert Bartosik, General Manager of Cal Expo; Brian May, Deputy General Manager; Police Chief Robert Craft; Sergeant Craig Walton; and Officers Robert Whittington, Larry Menard, Everest Robillard and John Tatarakis.

> FN2. The State of California is not named in the caption nor is there is any indication that the State of California has been served. The single summons issued lists defendants Menard, Whittington, Bartosik, Cal Expo, Craft, May, Mayes, Robillard, and Walton. ECF No. 4

***5** The individual defendants mount a multi-pronged attack on the complaint. Each claim will be addressed separately below.

III. *The § 1983 Claim (First Claim)*

The individual defendants argue they are entitled to qualified immunity from plaintiffs' claim under the Civil Rights Act because they were enforcing Cal Expo's presumptively valid free speech guidelines. They also argue that the complaint does not state a claim against defendants Bartosik and May, as there are no allegations showing their connection to the arrest and detention of plaintiffs or against defendants Menard and Robillard, whose involvement began only after plaintiffs were detained.

Plaintiffs argue that the individual defendants who did not directly participate in the arrests are nonetheless liable as part of a conspiracy to deny plaintiffs their First and Fourteenth Amendment rights and defendants are not entitled to qualified immunity because they were not enforcing a law, but rather guidelines without the force of law. Defendants counter that the officers' reasonable basis for their actions-a belief that plaintiffs were trespassing because they had not obtained a permit for their activities-entitles them to qualified immunity.

A claim under 42 U.S.C. § 1983 has two elements: (1) A violation of a federal constitutional right, (2) committed by a person acting under state law. *Long v. County of Los Angeles*, 442 F.3d, 1178, 1185 (9th Cir.2006). Defendants do not dispute that the complaint adequately pleads these elements, but rather argue they were not involved or are entitled to qualified immunity.

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). When a defendant raises qualified immunity, "a ruling on that issue should be made early in the proceedings...." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). "[A] district court should decide the issue of qualified immunity as a matter of law when 'the material, historical facts are not in dispute, and the only disputes involve what inferences properly may be drawn from those historical facts.' " *Conner v. Heiman*, 672 F.3d 1126, 1131 (9th Cir.2012) (quoting *Peng v. Mei Chin Penghu*, 335 F.3d 970, 979–80 (9th Cir.2003)).

In determining whether a governmental officer is immune from suit based on the doctrine of qualified immunity, the court generally considers two questions. The district court may decide the order of addressing these questions and answer only the second, in accordance with fairness and efficiency and in light of the circumstances of a particular case. *Pearson*, 555 U.S. at 236. The first is, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). A negative answer ends the analysis, with qualified immunity protecting defendant from liability. *Id.* If a constitutional violation occurred, a court must further inquire "whether the right was clearly established." *Id.* "If the law did not put the [defendant] on notice that [his] conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id* . at 202. A right is clearly established when all reasonable officers would understand that their actions violate that right; precedent at the time of the alleged violation "must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, ——U.S. ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (internal citation, quotation omitted). The Supreme Court has emphasized that "the qualified immunity inquiry must be undertaken in light of the specific context of the case." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004).

***6** If the right is clearly established, an official is entitled to qualified immunity if he or she "acted reasonably" under that law, even if "another reasonable, or more reasonable interpretation of the events can be constructed...." *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

A. *Fourth Amendment And False Arrest*

Plaintiffs allege that their rights to be free of unreasonable seizure and arrest and from wrongful arrest, detention and imprisonment were violated when defendants arrested them for trespassing and confiscated their protest materials.

A plaintiff may bring a claim for wrongful arrest and seizure under the Fourth Amendment if the arrest was not justified by probable cause. *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir.2011). A warrantless arrest is reasonable when an officer has probable cause to believe an offense is being committed. *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). "Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the suspect had committed a crime." *Dubner v. City & County of San Francisco*, 266 F.3d 959, 964 (9th Cir.2001).

Defendants arrested plaintiffs for trespassing in violation of California Penal Code §§ 602(o), 602.1(a) and 602.6,[FN3] after ascertaining that they did not have a permit to protest on Cal Expo's grounds while the circus was making use of the facility. As plaintiffs allege, they were aware of the permit requirement, yet proceeded to Cal Expo without having secured permission to protest. ECF No. 2 ¶ 36. When plaintiffs entered the grounds defendant Mayes asked if they had a permit as required by the Free Speech Guidelines and told them they would be cited for trespass if they protested. *Id.* ¶¶ 39–40. Defendant Tartarkis warned plaintiffs they needed a permit to continue their protest on the grounds and said that whether they would be arrested "depended on what the chief wants." *Id.* ¶ 41. Defendant Craft, the Cal Expo police chief, told plaintiffs they were being arrested for trespassing because they had refused to leave when asked. *Id.* ¶ 47.

FN3. Section 602(o) provides in relevant part that one is guilty of trespass for "[r]efusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and upon being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession.... Section 602.1(a) provides in relevant part: "Any person who intentionally interferes with any lawful business or occupation carried on by the owner or agent of a business establishment open to the public, by obstructing or intimidating those attempting to carry on business, or their customers, and who refuses to leave the premises of the business establishment after being requested to leave by the owner or the owner's agent, or by a peace officer acting at the request of the owner or owner's agent, is guilty of a misdemeanor...." Section 602.6 provides: "Every person who enters or remains in, or upon, any state, county, district, or citrus fruit fair buildings or grounds, when the buildings or grounds are not open to the general public, after having been ordered or directed by a peace officer or a fair manager to leave the building or grounds and when the order or direction to leave is issued after determination that the person has no apparent lawful business or other legitimate reason for remaining on the property, and fails to identify himself or herself and account for his or her presence, is guilty of a misdemeanor."

In *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir.2010), *cert. denied* —— U.S. ——, 132 S.Ct. 112, 181 L.Ed.2d 37 (2011), Norse was removed from a Santa Cruz City Council meeting and arrested after he gave a Nazi salute. In a subsequent meeting he was ejected for whispering to another person in attendance. He sued city officials challenging the council's decorum policy, facially and as applied, and the sergeant-at-arms who ejected him, claiming false arrest and excessive force. The court recognized that to prevail on a claim of false arrest brought under § 1983, a plaintiff must demonstrate there was no probable cause for the arrest. *Id.* at 978. Plaintiff's complaint

had alleged that he had spoken in violation of the rules of decorum as the council attempted to eject him. The court concluded that a reasonable officer could have believed that probable cause existed to arrest Norse for causing a disturbance of a public meeting or assembly because the violation of the council's rules gave rise to probable cause to arrest for a violation of a penal statute. *Id.*

***7** In *Way v. County of Ventura*, 445 F.3d 1157 (9th Cir.2006), the plaintiff was arrested for being under the influence of cocaine and taken to Ventura County Jail where she was subjected to a strip search in conformance with jail policy, even though she was not released into general population. *Id.* at 1158. The Ninth Circuit agreed with the district court that the blanket policy, not based on individualized suspicion, was unconstitutional, but concluded that the officers were entitled to qualified immunity, as the right was not clearly established at the time of the search. The court said it could "not conclude that a reasonable officer would necessarily have realized that relying on a Department policy ... and subjecting Way to a strip search with visual cavity inspection to it, was unconstitutional," in light of the fact that the law was not clearly established at that time. *Id.* at 1163. In *Way*, then, the officers' reliance on departmental policy to undertake a search entitled them to qualified immunity.

In *Reza v. Pierce*, No. CV 11–01170–PHX–FJM, 2011 WL 5024265 (D.Ariz., Oct.21, 2011), the President of the Arizona State Senate directed that plaintiff not be allowed into the Senate building because of earlier disruptive behavior. When plaintiff again entered the building, public safety officers told him he was not allowed in the building, and told him he was trespassing, handcuffed and arrested him. *Id.* at * 1. Plaintiff brought a § 1983 action claiming the officers did not have probable cause to arrest him; the officers asserted qualified immunity. The court agreed with the officers, noting that rules of the Senate gave the President the authority to bar someone from the building and a reasonable officer would rely on the President's direction in determining that plaintiff was trespassing. *Id.* at *2. *See also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.1994) (existence of ordinance justifying the action supports conclusion that reasonable officer would find conduct in conformance with it constitutional).

This case is similar to those reviewed above: given Cal Expo's Free Speech Guidelines, the individual defendants could reasonably have believed that plaintiffs' protest activities without a permit-occurring during a time when it appeared that the grounds were not open as a public forumviolated the guidelines and plaintiffs' continued protest, after plaintiffs were told they could not come onto the grounds without a permit and had been asked to leave the area of the circus tent in Parking Lot A constituted a trespass in violation of Penal Code §§ 602(o), 602.1 and 602.6. Defendants are entitled to qualified immunity for plaintiffs' Fourth Amendment claims based on the arrest; even viewing the allegations of the complaint in the light most favorable to plaintiffs, defendants' belief was reasonable, whether or not it was mistaken. *Hunter*, 502 U.S. at 228–29. The motion to dismiss this portion of the complaint is granted without leave to amend.

B. *Other Claims*

***8** Although defendants argue in conclusory fashion they are entitled to qualified immunity for plaintiffs' § 1983 claim, they analyze only the claims relating to the arrest and detention. Plaintiffs have also argued that defendants' actions interfered with their First Amendment rights to speech and against retaliation for the exercise of their right to protest, the right to due process, the right to be free from malicious prosecution and the right to equal protection of the laws. They also argue that defendants violated their Fourth Amendment right by confiscating their protest materials and refusing to return them in a timely fashion and that officers used excessive force against plaintiff Bolbol. Defendants' general argument—that plaintiffs must plead around qualified immunity—does not substitute for an analysis of how defendants' actions as described in the complaint entitle them to qualified immunity on these disparate claims. *See, e.g.*, *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir.1999) (elements of First Amendment claim); *Skoog v. County of Clackamas*, 469 F.3d 122, 1234–35 (9th Cir.2006) (First Amendment retaliation claim may proceed even when there is probable cause for arrest); *but see Reichle*, 132 S.Ct. at 2093; *Spingola v. Regents of the University of California*, No. C–99–1076 CRB, 2000 WL 1780260, at *8 (N.D.Cal. Nov.21, 2000) (analyzing claim that arrest violated First Amendment rights by examining time, place, and manner restrictions).

C. *Defendants Menard, Robillard, Bartosik, and May*

Defendants argue the complaint does not connect these defendants with plaintiffs' arrest. For example, plaintiffs allege only that they faxed a letter about their protest activities to Bartosik; that May told them they had to comply with the Free Speech Guidelines; and that Menard and Robillard filled out some forms and asked questions after plaintiffs were arrested. They do name Menard in that part of the cause of action claiming excessive force against Bolbol, but do not name him in the paragraph describing the officers' actions against her. *Compare* ECF No. 2 ¶ 49 with ¶ 109g. These allegations do not connect these defendants with the alleged deprivations of plaintiffs' rights. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982) (conclusory allegations of official participation in civil rights violation not sufficient to withstand motion to dismiss).

Plaintiffs argue, however, that these defendants are liable because they conspired with the other defendants; as discussed below, however, their conspiracy claims are similarly insufficient. This portion of the complaint is dismissed but plaintiffs are given leave to amend if they are able to do so subject to Federal Rule of Civil Procedure 11.

IV. *Conspiracy Under 42 U.S.C. §§ 1983 And 1985 (Second Claim)*

Plaintiffs allege that defendants conspired to adopt the " 'trespassing speech-denial policy," to threaten and arrest plaintiffs and confiscate their property, which led to their being denied access to public property to hold banners and distribute leaflets and videotape, which in turned violated their constitutional rights. ECF No. 2 ¶¶ 114–116.

***9** Defendants argue that the conspiracy claims are too vaguely pleaded, that they are barred by the intra-corporate conspiracy doctrine, and that the § 1983 conspiracy claim fails because there are no viable underlying § 1983 claims. They also argue that the § 1985 conspiracy claim is not based on a discriminatory animus.

The elements of a conspiracy claim under § 1983 are (1) the existence of an agreement, either express or implied, to deprive plaintiffs of their constitutional rights and (2) a deprivation of rights resulting from the agreement. *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir.2010). In addition, although the conspiratorial agreement need not be overt, a complaint must include some factual basis to support the inference that defendants' acts were propelled by the agreement. *Mendocino Environmental Center*, 192 F.3d at 1301; *Harris v. Clearlake Police Dept.*, No. 12–0864–YGR, 2012 WL 304294, at *9 (N.D.Cal. July 25, 2012). The plaintiffs "must state specific facts to support the existence of the claimed conspiracy." *Burns v. County of Kings*, 883 F.2d 819, 821 (9th Cir.1989); *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.1992). As plaintiffs' complaint says only that the defendants conspired with each other and provides no facts supporting even an inference that defendants conspired, the complaint is insufficient. Plaintiffs will be given leave to amend this portion of the complaint if they are able.

A conspiracy claim under § 1985 has four elements: " '(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of privilege of a citizen of the United States.' " *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir.1992) (quoting *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 828–29, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). In connection with the second element, a plaintiff not only must identify a legally protected right but must also allege a deprivation of that right "motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.' " *Id.* (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)); *Maric v. Fresno County*, No. 1:12–cv–00102 LJO GSA, 2012 WL 1301222, at *6 (E.D.Cal. Apr.13, 2012). As plaintiffs' complaint contains no suggestion that any of the complained-of acts were motivated by a class-based animus, the motion to dismiss is granted. *See Cuviello v. City of Stockton*, No. Civ. S–07–1625 LKK/KJM, 2009 U.S. Dist. Lexis 4896, at *62 (E.D.Cal. Jan.26, 2009) (a group of people attempting to exercise a protected right is not a "class" for § 1985 purposes). As this is not the first time plaintiffs have raised this claim without sufficiently alleging it, the court declines to grant them leave to amend this portion of the complaint.

V. *Violation Of Article 1, Section 2(a) Of The California Constitution (Third Claim)*

***10** Article 1, section 2(a) of the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press ."

Defendants argue that the California Supreme Court has held that this section does not create a private right of action and also that various immunities in the Civil Code apply to constitutional rights of action. Plaintiffs contend, however, that the Supreme Court's decision cannot be read as holding broadly that there is no private right of action and that the determination must be made by applying a number of factors.

In *Degrassi v. Cook*, 29 Cal.4th 333, 127 Cal.Rptr.2d 508, 58 P.3d 360 (2002), the plaintiff, a city councilwoman, alleged that city officials interfered with the performance of her duties and brought a suit for money damages claiming that the defendants' actions violated her California constitutional right to liberty of speech. The court recognized that the section supports an action "by a private plaintiff against a proper defendant" for declaratory or injunctive relief. *Id.* at 338, 127 Cal.Rptr.2d 508, 58 P.3d 360 (internal citation & quotation marks omitted). It "decline[d] to recognize a constitutional tort action for damages to remedy the asserted violation of article I, section 2(a), alleged in the present case. This does not mean that the free speech clause, in general, never will support an action for money damages." *Id.* at 344, 127 Cal.Rptr.2d 508, 58 P.3d 360.

Approaching the question, the California Supreme Court employed the analytical framework it developed in *Katzberg v. Regents of the University of California*, 29 Cal.4th 300, 127 Cal.Rptr.2d 482, 58 P.3d 339 (2002). In the first step, a court must determine whether there is evidence suggesting an intention to authorize or withhold a damages remedy. *Id.* at 317, 127 Cal.Rptr.2d 482, 58 P.3d 339. It turned first to the language of the provision, observing the free speech clause "does not speak to or manifest any intent to include a damages remedy...." *Degrassi v. Cook*, 29 Cal.4th at 338, 127 Cal.Rptr.2d 508, 58 P.3d 360. From there, it examined the legislative history of the provision, concluding that the history did not show the voters "considered, much less intended either to create or foreclose, a damages remedy...." *Id.* at 364. It concluded by finding no support in the common law history suggesting that the constitutional provision created a damages action. *Id.* at 341, 127 Cal.Rptr.2d 508, 58 P.3d 360.

If the court finds no affirmative intent regarding a damages remedy, the court must then "undertake the 'constitutional tort' analysis adopted by *Bivens [v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)]...." *Katzberg*, 29 Cal.4th at 317, 127 Cal.Rptr.2d 482, 58 P.3d 339. Factors relevant to this inquiry include "whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision." *Id.* If those factors "militate against recognizing the constitutional tort, our inquiry ends." *Id.* If they favor recognizing the tort, however, the court must examine "any special factors counseling hesitation ... including deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." *Id.; Motevalli v. Los Angeles Unified School Dist.*, 122 Cal.App.4th 97, 119, 18 Cal.Rptr.3d 562 (2004) (courts consider whether damages are readily ascertainable). Although the California Supreme Court found that the factors militated against finding a constitutional tort, it also examined the special factors and concluded that the potential for interference in what were essentially legislative functions counseled against recognizing a damages remedy. *Degrassi*, 29 Cal.4th at 343, 127 Cal.Rptr.2d 508, 58 P.3d 360.

***11** Although this court may rely on the California Supreme Court's conclusion that there is no affirmative intent concerning a damages remedy embodied in the free speech clause, it does not adopt that court's constitutional tort analysis, for this case and thus the analysis to be undertaken are much different. In their initial briefing, defendants simply cited to *Degrassi* and *Motevalli* as conclusive and in their reply chided plaintiffs for doing no more than simply reciting the *Motevalli* factors. *See* ECF Nos. 10–1 at 17, 19 at 7. Defendants' own discussion in their reply brief is only a little less conclusory. ECF No. 19 at 7. Because the parties' examination of the second *Katzberg* factor is conclusory, the court is not equipped to undertake a nuanced constitutional tort

analysis. *See Adams v. Kraft*, No. 5:10–CV–00602 LHK, 2011 WL 3240598, at * 16 (N.D.Cal. July 29, 2011) (declining to determine whether a damages remedy is available under § 2 because of inadequate briefing on the *Katzberg* factors; collecting cases which did the same).

Defendants next argue that California's statutory immunities, California Penal Code § 847 and California Government Code §§ 820.6 and 821.6, apply to this constitutional tort and thus require dismissal of this cause of action. They cite several cases, none of which apply these provisions to this particular constitutional provision, and ask this court to extend these cases to the instant situation. *See Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 392, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995) (rejecting store owner's attempt to bring inverse condemnation action for property damage sustained during police apprehension of a suspect; court said plaintiff's remedy was tort action, subject to Government Code immunities); *Jacob B. v. County of Shasta*, 40 Cal.4th 948, 961, 56 Cal.Rptr.3d 477, 154 P.3d 1003 (2007) (litigation privilege in Cal. Civ.Code § 47 barred action based on constitutional right to privacy); *RichardsonTunnell v. Schools Ins. Program for Employees*, 157 Cal.App.4th 1056, 1066, 69 Cal.Rptr.3d 176 (2007) (constitutional right to privacy does not limit scope of preexisting statutory immunity; relied on *Jacob B.*, which based its conclusion on an examination of the legislative history of the privacy provisions). The court declines to undertake the analysis, which was defendants' to perform.

Defendants' motion is denied as to this claim.

VI. *Challenge To Cal Expo's Free Speech Guidelines (Fifth Claim)*

Defendants have withdrawn their challenge to this cause of action upon plaintiffs' clarification they are not seeking damages.

VII. *California's Statutory Immunities And The State Law Claims* [FN4] *(Sixth Through Eighth Claims)*

> FN4. All statutory citations in this section are to the California Codes.

Defendants argue they are immune from all, or at least most, of the state law claims because of an interlocking group of statutory immunities, which are part of California's Tort Claims Act and the Penal Code. They also argue that various causes of action fail to state a claim either completely or against certain defendants.

A. *Intentional Infliction Of Emotional Distress (Sixth Cause of Action)*

***12** Plaintiffs' claim for intentional infliction of emotional distress stems from their arrest, the confiscation of their protest materials and subsequent refusal to return them, their fear of being arrested again when they returned to protest on the sidewalk and defendants refused to define the boundary, and their resulting inability to gain access to circus patrons to communicate their message. ECF No. 2 ¶ 132.

Defendants argue that plaintiffs' complaint is deficient in that they do not plead that they suffered severe or extreme emotional distress. Plaintiffs do not address the deficiencies in their pleading of emotional distress claims. Defendants also claim that they are completely or partially immune under Penal Code § 847(b) and Government Code §§ 820.6 and 821.6.

1. *Penal Code § 847(b)*

Penal Code § 847(b)(1) provides in relevant part that [t]here shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer ... or law enforcement officer ..., acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest" if "[t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." Defendants have cited nothing that extends this exemption from liability to an intentional infliction of emotional distress claim derivative of the false arrest cause of action, and do not otherwise explain why this particular immunity should extend beyond the tort named in the statute. *Compare Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1048, 55 Cal.Rptr.3d 158 (2007) (immunity under Government Code § 821.6 is not limited to malicious prosecution but extends to other causes of action arising from conduct protected under the statute, including intentional infliction of emotional distress).

2. *Government Code § 820.6*

Government Code § 820.6 provides that "[i]f a public employee acts in good faith, without malice, and under apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not

liable for an injury caused thereby....”

In *O'Toole v. Superior Court*, 140 Cal.App.4th 488, 44 Cal.Rptr.3d 531 (2006), relied upon by defendants, the California Court of Appeal held that this provision provided immunity to campus police officers who arrested and removed a protestor from the Mesa College campus because he did not have a permit, as required by college policy. The court found that even though the policy was constitutionally suspect, the defendants were entitled to immunity because of their good faith reliance on it. *Id.* at 505–06, 44 Cal.Rptr.3d 531.

As plaintiffs point out, however, the parties in *O'Toole* conceded that the policy qualified as an enactment within the meaning of § 820.6, a concession plaintiffs here are not making. *Id.*, at n. 9. They cite to *Hansen v. California Dept. of Corrections*, 920 F.Supp. 1480, 1501–02 (N.D.Cal.1996), where the court found that a Department of Corrections policy, adopted in conformance with a regulation, did not qualify as an enactment within the meaning of § 820.6. *See also* GOV'T CODE §§ 810.6, 811.6 (an enactment is a constitutional provision, statute, charter provision, ordinance or regulation; a regulation is a rule, regulation, order or standard having the force of law adopted under the federal or state administrative procedures); *Tilton v. Reclamation Dist. No. 800*, 142 Cal.App.4th 848, 862, 48 Cal.Rptr.3d 366 (2006) (Army Corps of Engineers' manual not a “regulation” and so is not an “enactment”). Because defendants were not acting under apparent authority of an unconstitutional enactment, this provision does not apply.

3. *Government Code § 821.6*

***13** Government Code § 821.6 provides that “[a] public employee is not liable for an injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” It does not provide immunity for false arrest or imprisonment,[FN5] but does extend not only to the filing of a criminal complaint but also to “ ‘[a]cts taken during an investigation prior to the institution of a judicial proceeding’ “ even if the authorities later decide not to file charges. *County of Los Angeles v. Superior Court (West)*, 181 Cal.App.4th 218, 229, 104 Cal.Rptr.3d 230 (2009) (“*West*”). In *West*, officers seized the parties' property under the authority of a search warrant and retained some of it despite the parties' repeated requests that it be released. The Court of Appeal concluded that the officers were entitled to immunity under § 821.6 for retaining the seized property. In this case as well the officers are entitled to qualified immunity for any claim arising from retention of the protest materials seized in connection with the arrest and held until the charges were dropped. *Gillan*, 147 Cal.App.4th at 1048, 55 Cal.Rptr.3d 158.

> FN5. In California, false arrest and false imprisonment are not separate torts. *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 753 n. 3, 63 Cal.Rptr.2d 842, 937 P.2d 273 (1997).

Even though defendants are not entitled to immunity as to the complete claim, the complaint as currently drafted is insufficient. To state a claim for intentional infliction of emotional distress, plaintiff must allege “(1) extreme and outrageous conduct by [defendants] with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.” *Hughes v. Pair*, 46 Cal.4th 1035, 1050, 95 Cal.Rptr.3d 636, 209 P.3d 963 (2009) (quotations omitted). “A defendant's conduct is ‘outrageous' when it is so ‘extreme as to exceed all bounds of that usually tolerated in a civilized community’ [and] the defendant's conduct must be ‘intended to inflict injury or engaged in with the realization that injury will result.’ “ *Id.* at 1050–51, 95 Cal.Rptr.3d 636, 209 P.3d 963 (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1001, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993)). Plaintiffs' complaint says only that plaintiffs were “emotionally distressed” by the officers' actions. ECF No. 2 ¶ 132. This is insufficient.

To the extent the sixth claim rests on the seizure and retention of the protest materials, the complaint is dismissed without leave to amend. Otherwise, plaintiffs will be given the opportunity to file an amended claim.

B. *False Imprisonment (Seventh Claim)*

In California, the tort of false imprisonment requires “nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.” *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 715, 30 Cal.Rptr.2d 18, 872 P.2d 559 (1994) (citation, quotation marks omitted). Alt-

hough the restraint need not be accomplished by physical force, there must be some unreasonable duress that prevents a person from leaving. *Id.*

***14** The complaint does not allege that defendants Bartosik or May were at all involved the application of any duress or other means of confining plaintiffs. *See, e.g., Bolbol v. City of Daly City*, 754 F.Supp.2d 1095, 1113–14 (N.D.Cal.2010) (dismissing defendant whose only role was telephone call with plaintiff before the protest). Moreover, Penal Code § 847(b)(1) provides that an officer may not be civilly liable for false imprisonment or arrest when he reasonably believed that the arrest was lawful. *Blankenhorn v. City of Orange*, 485 F.3d 463, 486–87 (9th Cir.2007). As noted above, even accepting the complaint in the light most favorable to plaintiffs, the officers here reasonably believed they were entitled to arrest the plaintiffs for trespassing after plaintiffs acknowledged they did not have a permit for their protest activities and then refused to leave the premises. Because the officers are immune, Cal Expo is as well: Government Code § 815.2(b) provides "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." *Tacci v. City of Morgan Hill*, No. C–11–04684 RMW, 2012 WL 195054, at *9 (N.D.Cal. Jan.23, 2012).

C. *Bane Act (Eighth Claim)*

California's Bane Act, Civil Code § 52. 1, provides that a person "whose exercise or enjoyment" of constitutional rights has been interfered with "by threats, intimidation, or coercion" may bring a civil action for damages and injunctive relief. The essence of such a claim is that "the defendant, by the specified improper means ... tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or force the plaintiff to do something he or she was not required to do." *Austin B. v. Escondido Union School Dist.*, 149 Cal.App.4th 860, 883, 57 Cal.Rptr.3d 454 (2007).

Defendants first argue that the complaint alleges only that Bartosik received a fax and that May talked to plaintiffs about their intention to protest. Accordingly the complaint does not show that these two defendants interfered with plaintiffs' rights, much less by "threats, intimidation or coercion." *See Kenner v. Kelly*, No. 11–CV–2520 BEN (BGS), 2012 WL 553943, at *2 n. 3 (S.D.Cal. Feb.21, 2012) (speech alone does not qualify as threat, coercion or intimidation).

Defendants next argue they are immune as to any portion of the claim based on the arrest or confiscation of materials. As noted above, defendants have not shown that any immunity for false arrest under Penal Code § 847(b)(2) extends to derivative claims or that any arrest was based on an invalid enactment. To the extent that this cause of action is based on the retention of plaintiffs' protest materials, Civil Code § 821.6 provides immunity to the individual defendants and Civil Code § 815.2(b) provides immunity to Cal Expo. *Gillan*, 147 Cal.App.4th at 1050, 55 Cal.Rptr.3d 158; *Robinson v. County of Solano*, 278 F.3d 1007, 1016 (9th Cir.2002).

***15** This claim is granted as to Bartosik and May for failing to state a claim and as to all defendants because they are immune to liability for their retention of plaintiffs' materials. It is denied as to plaintiffs' claims for improper arrest and confiscation of their materials.

VIII. *Punitive Damages*

Finally, defendants argue that plaintiffs have not adequately pleaded their entitlement to punitive damages.

Punitive damages are available in a civil rights action under § 1983 when defendants' conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). In California, punitive damages are available where clear and convincing evidence establishes that a defendant is guilty of oppression, fraud, or malice. CAL. CIV. CODE § 3294(a). In light of the fact that plaintiffs are being given leave to amend certain portions of their complaint, any evaluation of their claim for punitive damages is premature. Defendants' motion in this respect is denied without prejudice.

IT IS THEREFORE ORDERED that:

1. Defendants' motion to dismiss is granted in part and denied in part as set forth in the body of this order; and

2. Plaintiffs' amended complaint is due within twenty-one days of the filing date of this order.

E.D.Cal.,2012.
Cuviello v. Cal Expo
Slip Copy, 2012 WL 4208201 (E.D.Cal.)

END OF DOCUMENT