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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KARI BODE and GINA NASTASI,

Plaintiffs,

v.

CITY OF FULLERTON, OFFICER ALBERT RINCON, OFFICER CHRISTOPHER WREN, and DOES 1 TO 100, Inclusive,

Defendants.

Case No.: SACV 10-0835-AG (MLGx)
Judge: Hon. Andrew J. Guilford
Dept.: Courtroom 10D

PLAINTIFFS' [REDACTED] OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

DATE: September 26, 2011
TIME: 10:00 a.m.

Complaint Filed: December 17, 2009
Trial: November 8, 2011

TO THE HONORABLE COURT, DEFENDANTS AND THEIR ATTORNEYS OF RECORD HEREIN:

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I. INTRODUCTION

Plaintiffs have brought claims against Officer Albert Rincon ("Rincon") and his employer, the City of Fullerton ("the City"), for claims arising from his sexual assault against Plaintiffs. Rincon's sexual assault of Plaintiff Nastasi ("Nastasi") occurred on August 1, 2008. Rincon's sexual assault of Plaintiff Bode ("Bode") occurred approximately three months later on November 14, 2008. Discovery has revealed that, in addition to Plaintiff's claims, at least four other female arrestees reported similar misconduct by Rincon in 2008. Discovery has further revealed that Rincon had a pattern of repeatedly violating City policy by: (1) turning off his required "digital audio recorder" ("DAR") during arrests of females, so that no record of the event was kept; and (2) not requesting the presence of a female officer, or any officer, during pat-down searches of female arrestees. With full knowledge of at least six reported similar acts of improper sexual conduct, as well as Rincon's repeated violation of the specific policies designed to protect the public from this type of abuse, the City refused to investigate further to seek out additional victims during the tenure of Rincon's employment and refused to remove Rincon.

In its Motion for Summary Judgment, the City does not offer any evidence disputing the facts surrounding the sexual assaults.[1] The City, for purpose of the Motion, concedes that the two incidents occurred. Instead, the City argues that it is not liable for Rincon's actions. The City is wrong.

The City contends that it cannot be held directly liable under the state law claims for Rincon's conduct. The City, however, admits that it may be held liable

[1] It is unclear precisely who is bringing the Motion for Summary Judgment. Although the caption for the Motion states: "Defendant**s'** Notice of Motion and Motion for Summary Judgment" (emphasis added), the Separate Statement and Proposed Order suggest that the Motion is only being filed by the City. Separate Statement, Docket No. 20-1, p. 1 line 26; Propose Order, Docket No. 20-6, p. 1, line 22. As the content of the Motion only addresses the City's liability, Plaintiffs will assume the Motion for Summary Judgment is only brought on behalf of the City.

for Rincon's actions under the doctrine of respondeat superior. See Motion for Summary Judgment, p. 13, line 6-7 ("a public entity can be held vicariously liable for the actions of its employees.") This admission alone defeats the City's motion for summary judgment on the assault, battery, false imprisonment, negligence, and intentional infliction of emotional distress claims. Because these claims arise out of Rincon's actions during the course and scope of his employment, Plaintiffs are entitled to pursue the claims against the City to the same extent they are entitled to pursue the claims against Rincon. Mary M. v. City of Los Angeles, 54 Cal.3d 202 (1991) (City could be held liable for the actions of on-duty police officer in raping the plaintiff in the course of a traffic stop under doctrine of vicarious liability); Munoz v. City of Union City, 120 Cal.App.4th 1077 (1st Dist. 2004) (city was liable for officer's use of force under doctrine of vicarious liability).

The City further contends that Plaintiffs' 1983 claim lacks merit because there is no liability under Monell. The City is wrong for two reasons. First, Plaintiffs have presented sufficient evidence under Monell that the City had a custom or practice of condoning the sexual abuse of arrestees. Second, the City has refused to produce documents or evidence relating to the other complaints and Plaintiffs will be filing a Motion to Compel production of the relevant records. The facts and circumstances regarding the other complaints will shed additional light on the City's deliberate indifference towards the aforementioned conduct. Accordingly, the Court should deny the Motion for Summary Judgment as to the 42 U.S.C. § 1983 claim. If the Court is inclined to consider the issue, it should defer its ruling under FRCP Rule 56 until after Plaintiffs' Motion to Compel is decided.

II. FACTUAL AND PROCEDURAL BACKGROUND

The City hired Rincon in the capacity of a police officer in 2006. Exhibit D[2], Rincon Deposition, 30:1-8. The City's police officers are required to wear Digital

[2] Unless otherwise noted, all references to "Exhibit" shall be to exhibits attached to

Audio Recorders ("DAR") at all times and to have them turned on whenever they are in contact with a suspect. Id. at 35:15–36:7. This policy is mandatory. Exhibit E, City Deposition, 57:4-8; 60:19-22 (emphasis added). The City's policy and procedures, Section 1202.3, requires "[w]henever practical, a pat-down of an individual should be conducted by an officer of the same sex as the person being searched. Absent the availability of a same sex officer, it is recommended that a witness officer be present during any pat-down search of an individual of opposite sex as the searching officer." Exhibit F (emphasis added).

a. Gina Nastasi

On August 1, 2008, Nastasi was a bartender at Bananas Bar and Grill in Fullerton. Exhibit A, Nastasi Deposition, 36:8-10. Nastasi was at the end of her shift and was standing outside the bar. Id. at 57:17-18. She was dressed for work in a bikini top and short mini-skirt. Id. at 108:2-8; 110:19-22; 111:8-12. At that time, Rincon spotted Nastasi and approached her. Id. at 57:17-18. After a short conversation, Rincon took her into the bar and searched her purse. Id. at 87:7-11. He found nothing unlawful. Id. Rincon then searched a bucket which was on a table in the bar and claimed to find an illegal substance in a pack of cigarettes therein. Id. at 92:18-23; 94:20–95:15. Neither the cigarette pack nor the bucket were Nastasi's property and Rincon had no basis to believe they were. Id.

Despite a lack of any probable cause, Rincon arrested Nastasi, handcuffed her, led her to his car, and performed a pat down search. Exhibit A, 97:1-10; 99:22–100:10; 106:25–108:1. He did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2. Rincon "could clearly see that she had no visible weapons or anything dangerous on her and she was not an officer safety threat at that time based on that contact." Id. at 181:2-8.

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the Declaration of Jason McDaniel in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

Nevertheless, Rincon slid his hands up Nastasi's bare legs from her ankles, to the inside of her thighs, to her crotch. Exhibit A, 108:2-8; 110:19-22; 111:8-12. Thereafter, Rincon then ran his hands underneath Nastasi's breasts and "felt her up." Id. He then seat-belted her into his patrol car and moved her bikini top, which exposed her right breast. Id. at 113:8-12; 113:20-25. Despite requests by witnesses and Nastasi, Rincon refused to cover her exposed breast. Rincon left Nastasi's breast exposed the entire trip to the Fullerton jail. Id. at 116:1–118:16. While driving her to the Fullerton jail, Rincon made numerous sexually harassing comments, including the following: asking Nastasi multiple times if her breasts were real or fake; commenting that she had beautiful breasts; and asking her if she would perform oral sex upon him. Id. Upon arriving at the Fullerton jail, Rincon covered Nastasi's breast and removed her from the vehicle by grabbing her crotch with one hand and handcuffs with the other. Id. at 117:9-17. Nastasi was not prosecuted for this arrest. Exhibit D, 186:19-21. (emphasis added).

Discovery has revealed that Rincon activated his DAR during the initial contact with Nastasi, but he turned it off while searching and transporting Nastasi to the station. Exhibit D, 158:15-18; 159:2-8. He then reactivated his DAR once inside the station. Id. Rincon has no explanation for this clear violation of policy. Id.

Rincon approached Nastasi again at Bananas Bar approximately one to two months after her August 1, 2008 arrest. Exhibit D, 187:13–188:8; Exhibit A, 159:20–160:13. Rincon told Nastasi not to make any trouble for herself and that he got the District Attorney to drop some of the charges. Exhibit A, 159:20–160:13. He also told her that she was a beautiful girl and that he did not want there to be any hard feelings. Id.

b. Kari Bode

On November 14, 2008, Bode was in her vehicle exiting the parking lot of

Bananas Bar and Grill. Exhibit B, Bode Deposition 26:1-5. Rincon targeted Bode as she left the bar and pulled her over for allegedly not having her lights on while in the parking lot. Id. at 20:15-16. After conducting field sobriety tests, Rincon arrested Bode and belted her into the back seat of his patrol car. Id. at 41:21–42:8. He then entered the back seat of the vehicle, exposed Bode's breast, fondled her breasts, and placed his finger in her vagina under the pretext of searching her groin area. Id. at 59:19-21; 61:25. He did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2. Rincon's sexual assault caused bruising on Bode's thigh and part of her breast. Exhibit B, 121:4-16. After at least five minutes of sexually assaulting Bode, Bode's daughter arrived on the scene, thereby interrupting Rincon. Id. at 56:7-8; 50:10-13; 63:10-13. Rincon then transported Bode to the Fullerton jail. Id. at 73:7-10. In transit, Rincon made comments about Bode's daughter stating that she was hot and asked if he could get a date with her. Id. Bode was similarly not prosecuted for this arrest. Exhibit D, 234:3-9 (emphasis added).

Discovery has revealed that Rincon activated his DAR during the initial contact with Bode, but he turned it off while searching and transporting her to the station. Exhibit D, 204:8-18. He has no explanation for this clear violation of policy. Id.

On October 21, 2010, Rincon stopped Bode and her husband, Louis Hayes, while they were in the parking lot of Bananas Bar. Exhibit B, 146:12–147:11. Despite not operating a vehicle, Bode's husband was given sobriety tests, which he passed. Id. 156:18. Nevertheless, Rincon testified that he did give a citation to Bode's husband. Exhibit D, 226:21–227:4; 232:11-17.

c. Discovery

Discovery in the form of Requests for Production, Interrogatories, and Depositions, as well as investigation has revealed an alarming pattern of misconduct and indifference on the part of Rincon and the City.

i. Deposition of OCDA Investigator Curtis McLean

On August 4, 2011, Investigator Curtis McLean ("McLean") of the Orange County District Attorney's Office ("OCDA") was deposed by Plaintiffs. Exhibit C, McLean Deposition. Investigator McLean testified that on or about November 17, 2008, the OCDA received the request from the City to investigate sexual misconduct allegations against Rincon. Id. at 15:14-16; 37:8-14. At that time, the allegations included those set forth above by Nastasi and Bode, along with additional allegations by Ms. Jean Tavianini. Id. at 37:17-24. The OCDA assigned McLean to conduct the investigation. Id. at 30:9-11. At issue for the OCDA was whether to prosecute Rincon for his alleged sexual misconduct. Id. at 69:21–70:13.

In addition to investigating the specific allegations of Bode, Nastasi, and Tavianini, Investigator McLean decided to look further to determine if any similar conduct occurred with other women detained by Rincon. Exhibit C, 23:21–24:1. In this regard, McLean attempted to interview women arrested by Rincon during 2008. Id.

As a result of this limited investigation, McLean identified at least three additional victims; for a total of six. McLean testified that he alone interviewed over 30 people during his investigation of Rincon. Exhibit C, 32:11-25. His practice was to digitally record the interviews and prepare a written report. Id. at 35:5-14; 64:17–65:13.

ii. Cynthia Escartin

According to Investigator McLean, Cynthia Escartin reported that when she was arrested in April of 2008, Rincon stopped his patrol car, removed her from the backseat, and searched her by taking his hands on the flesh of her legs up into her groin area and also over her breasts. Exhibit C, 22:4-18. At some point after her

arrest of Ms. Escartin, Rincon's DAR was turned off. Id. at 47:18-25. Rincon did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2. A recording, as well as a report, were made by the OCDA of the interview with Ms. Escartin, but Defendants have refused to produce same. Exhibit C, 26:13-16; Declaration of Jason A. McDaniel ("McDaniel Dec.") ¶¶ 1-6. Ms. Escartin was not prosecuted for her arrest. McDaniel Dec. ¶ 8 (emphasis added).

iii. Delia Flores

Also according to Investigator McLean, Ms. Delia Flores reported that when she was arrested by Rincon, he made sexual propositions to her. Exhibit C, 23:1-9. McLean noted in his deposition that he did not want to confuse the victims "because there was so many of them." Id. at 23:12-17. Investigator McLean did not have a DAR for the arrest of Flores. Id. at 51:14. Rincon did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2. The OCDA interviewed Ms. Flores and digitally recorded it, but Defendants have refused to produce same. Exhibit C, 25:24–26:7; McDaniel Dec. ¶¶ 1-6. Ms. Flores was not prosecuted for her June 14, 2008 arrest. McDaniel Dec. ¶ 9 (emphasis added).

iv. Jean Tavianini

Investigator McLean learned from the City that Ms. Jean Tavianini reported that when she was arrested by Rincon, he touched her breasts. Exhibit C, 18:15-20; 37:15-24. Tavianini's arrest was on October 9, 2008. Defendants' Motion for Summary Judgment pg. 9. Investigator McLean noted that there was only a partial digital recording of the arrest from Rincon, but the DAR "goes off" as Ms. Tavianini was walked to Rincon's car. Exhibit C, 53:16-19. Rincon did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2.

v. Angela Dibuono

According to Investigator McLean, Ms. Dibuono reported that when she was arrested in November 2008, Rincon put his hands around her breasts, put her in his

car and looked down her top. Exhibit C, 20:5–22:3. Rincon did not request the presence of a female officer during the search. Exhibit D, Rincon Deposition, 255:23–256:2. The OCDA made a recording and a report of the interview with Ms. Dibuono, but Defendants have refused to produce same. Exhibit C, 25:1-8; McDaniel Dec. ¶¶ 1-6. Angela Dibuono was not prosecuted for her November 7, 2008 arrest. McDaniel Dec. ¶ 10 (emphasis added).

Of particular note from Investigator McLean was Rincon's improper use of his DAR: "I know that dealing with this case, there always seemed to be a point in time where it would go off." Exhibit C, 49:18-19. "[I]t was Rincon's practice to arrest somebody, and once the handcuffs are on and they're placed in the car, he would turn off his DAR…the consensus was, this was a pattern." Id. at 56:16–57:4. Despite this obvious improper behavior by Rincon, the OCDA investigation only included Rincon's arrests of females in 2008, or approximately 12 females. Id. at 23:21–24:1; 28:13-19. Without explanation, the OCDA did not investigate any other females arrested by Rincon prior to 2008 despite Rincon starting with the City in 2006. Id. at 30:1-8.

vi. OCDA Refused to Prosecute Rincon

Upon completion of its limited investigation, Investigator McLean relayed his findings to District Attorney Andre Manssourian. Exhibit C, 70:6-10. Despite full knowledge that at least six different women had reported six different events of Rincon's unlawful sexual conduct, the OCDA refused to prosecute Rincon and did not investigate further to identify any of Rincon's potential victims in 2006 and 2007. Id. at 69:21–70:13; 30:1-8; Exhibit E, City Deposition 172:20-21.

vii. OCDA Reported to the City

Investigator McLean prepared a file that contained all of his investigative materials, interview reports, audio files, items provided to him during the investigation by the City, and he provided that file to the City. Exhibit C, 67:12-20. Investigator McLean made no determinations as to veracity in his summary of

findings; he provided no conclusions; and he gave no opinions as to credibility. Id. at 65:1-20. The file was sent to the City in February 2009. Id. at 67:21–68:2. Despite these materials, and full knowledge of the above facts, the City refused to terminate Rincon. Defendants' Motion for Summary Judgment, p. 3. Moreover, the City failed to investigate to determine if any other women had been victimized by Rincon in 2006 and 2007. Id. at 180:23–181:6. Indeed, the City stuck its head in the proverbial sand. In addition, Defendants have refused to produce that entire OCDA file. McDaniel Dec. ¶¶ 1-6.

viii. Deposition of Albert Rincon

Plaintiffs' deposed Rincon on July 25, 2011. Exhibit D, Rincon Deposition. The City hired Rincon as a police officer in 2006. Id. at 13:10-11. On duty, he carries a DAR to record his contacts with the public, which he can turn on and off. Id. at 33:9–34:2. Rincon admitted he is required to keep the DAR on from the beginning of a contact with a suspect until the end of the contact, which is when he is no longer in physical custody of the person. Id. at 35:15–36:7. At the end of his shift, Rincon is required to transfer the audio files from his DAR to the City's computers. Id. at 38:19-22. Rincon had no explanation for his clear violation of the DAR. Id. at 158:12-22; 204:8-18.

Rincon admitted to violating the City's policy with regard to the arrests of both Plaintiffs. Against policy, Rincon testified his DAR was not activated through the entire contact with Nastasi on August 1, 2008. Exhibit D, 158:15-18; 159:2-8. Rincon was on duty at the time of Plaintiffs' arrests. Id. at 84:16-20; 187:19-20. He also testified that he turned his DAR off during contact with Bode on November 14, 2008. Id. at 204:8-18.

Rincon was also in violation of the City's policy Section 1202.3c with regard to pat-down searches of female suspects. Exhibit F. He testified that he was familiar with Section 1202.3c of the City policy and procedure manual and that he has conducted pat-down searches of female suspects when a female officer was not

present. Exhibit D, 115:24–116:4. In fact, there have been instances Rincon searched female suspects when he was the only officer present. Id. at 118:2-5. In his career, Rincon never called a female officer to perform a pat-down search of a female suspect, which was against policy. Id. at 255:23–256:2 (emphasis added).

ix. Deposition of the City

On July 26, 2011, Plaintiffs deposed the City through its FRCP 30(b)(6) witness. Exhibit E, Deposition of City. At some point, the City requested that the OCDA investigate Rincon's sexual misconduct, but the City does not know when the investigation started or ended. Id. at 226:12-16. The OCDA criminally investigated Rincon, but made no determinations whether Rincon should be disciplined. Exhibit C, 69:21–70:13. The City did not know if it had the OCDA investigation findings. Exhibit E, 174:13-20. Shockingly, the City did not know why the OCDA declined to prosecute Rincon. Id. at 175:7-10. Yet, the City assumed that since the OCDA did not prosecute Rincon, that the findings of the victims were unfounded. Id. at 175:3-6 (emphasis added). In its determination whether Rincon would remain patrolling its streets, the City relied heavily upon the OCDA investigation despite not knowing why the OCDA declined to prosecute Rincon. Id. at 187:19-25; 175:7-10. In actuality, the City knowingly abdicated its responsibility to investigate Rincon.

When asked if there had been similar complaints of sexual assault by Rincon prior to August 1, 2008, the City refused to answer. Exhibit E, 201:14-24 (emphasis added). When asked if they were aware of any complaints with regard to Rincon of sexual misconduct against female arrestees, the City refused to answer. Id. at 202:5-17 (emphasis added). The City then falsely claimed it was not aware of any other allegations made by anyone other than Bode or Nastasi against Rincon prior to November 14, 2008. Id. at 203:25–204:4. Notably, the City now claims it was aware of the Tavianini and Nastasi incidents on November 3, 2008. Defendants' Motion for Summary Judgment p. 9-10. The City falsely claimed it was "not aware of any other

complaints." Exhibit E, 205:20-21. Inexplicably, the City did not read the findings regarding Rincon from its own internal affairs. Id. at 173:24-25.

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III. STANDARDS ON SUMMARY JUDGMENT

On a motion for summary judgment, "the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a

genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court must view the facts and the reasonable inferences drawn from them "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"[T]he moving party must produce either evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. ... If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything." Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos. Inc., 210 F.3d 1099 (9th Cir. 2000) (citations omitted). "[A] moving party may not require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence." Id. at 1105.

IV. THERE ARE TRIABLE ISSUES OF FACT REGARDING THE CITY'S LIABILITY UNDER MONELL

Under the Civil Rights Act, a municipality may not be held liable under a respondeat superior theory for the acts of its employees. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). Rather, a local government may be liable for a constitutional tort committed by its officials through municipal policy, practice, or custom pursuant to 42 U.S.C. § 1983. Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000) (citing Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978)).

Defendant moves for summary judgment on two main grounds: First that Plaintiff allegedly did not plead a direct civil rights violation against the City in its Complaint, and, second, that The City allegedly does not have a policy, practice or

custom that led to the instant civil rights violation. Both contentions are misplaced.

First, with respect to the pleading issue, Plaintiff's Complaint plainly contains as its Eighth Cause of Action a claim for "Violation of Civil Rights (42 U.S.C. 1983)" that is addressed to all Defendants, including the City. It is well settled that a Monell claim need not be pled with particularity. Karim- Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988); Shah v. County of Los Angeles, 797 F.2d 743, 747 (9th Cir. 1986). Moreover, to the extent that Defendant sought a more particular pleading, they should have filed a motion under Rule 12(b), rather than Answering the Complaint as they did. In any event, Plaintiff's Complaint was sufficient to put Defendant on notice that they should file a Motion for Summary Judgment as to its Monell liability, which it did.

Second, it is well settled that a municipality's failure to correct the constitutionally offensive actions of its employees can rise to the level of a custom or policy "if the municipality tacitly authorizes these actions or displays deliberate indifference" towards the misconduct. Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987).

A municipality can be held liable for the constitutional violations of its employees where there is a practice of sexual assaults and displayed a deliberate indifference toward them. Harris v. City of Pagedale, 821 F.2d 499 (8th Cir 1987); Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1189 (7th Cir. 1986) (finding the City liable where sexual harassment of female employees was an "on-going and accepted practice at the East Chicago Fire Department," which constituted a custom for purposes of municipal liability under 1983); Oliver v. City of Berkley, 261 F.Supp.2d 870 (ED MI 2003).

"[A] municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct" for which a municipality may be held liable under Monell. Henry v. County of Shasta, 132 F.3d 512, 520 (9th Cir. 1997); see also City of Canton v. Harris, 489 U.S. 378, 396 (1989) (O'Connor, J.,

concurring in part and dissenting in part) ("Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of Monell are satisfied.").

Deliberate indifference may be inferred where "the need for more or better supervision to protect against constitutional violations was obvious," Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995) but the policymaker "fail[ed] to make meaningful efforts to address the risk of harm to plaintiffs," Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007).

"Sufficiently numerous prior incidents of police misconduct, for example, may tend to prove a custom and accession to that custom by the municipality's policymakers." McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir. 1989).

Furthermore in the Ninth Circuit, "'post-event evidence' may be used to prove the existence of a municipal policy in effect at the time" of the incident. Henry, 132 F.3d at 518-519 (finding that officers' post-incident conduct toward other victims is admissible, relevant, and highly probative to establish 1983 liability.)

"Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these." Spell v. McDaniel, 824 F.2d 1380, 1391 (4th Cir. 1987).

In Grandstaff v. City of Borger, 767 F.2d 161, 171 (1985), the Fifth Circuit stated,

> An injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker. **Prior incidents of abusive police conduct tend to prove a pattern or custom and the accession to that custom by the policymaker.**

Id. at 171 (emphasis added)

For example, in Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987), the court held that the city was liable under Monell where it had received complaints of sexual misconduct by its officers in the past and acted in deliberate indifference the pattern of police misconduct.

As another example, the court in Bohen, 799 F.2d at 1189 found municipal liability under Monell where the police department was generally aware of prior sexual misconduct by its officers through complaints by other victims and tolerated the harassment.

In the instant action, Rincon's numerous incidents of sexual misconduct committed in 2008 alone are offensive:

- Cynthia Escartin, arrested by Rincon on April 12, 2008, reported that during the arrest he touched her legs, breasts, and groin. Exhibit C, 22:4-18.
- Delia Flores, arrested by Rincon on June 14, 2008, reported that during the arrest he propositioned her for sex. Exhibit C, 23:1-9.
- Gina Nastasi, arrested by Rincon on August 1, 2008, was touched on her breasts and groin by him, propositioned sexually by him, and had her breast exposed by him during that arrest. Exhibit A, 108:2-8; 110:19-22; 111:8-12; 113:8-12; 113:20-25; 116:1–118:16.

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- Jean Tavianini, arrested by Rincon on October 9, 2008, reported that during the arrest he touched her breasts. Exhibit C, 18:15-20; 37:15-24; Defendants' Motion for Summary Judgment p. 9.
- Angela Dibuono, arrested by Rincon on November 7, 2008, reported that during the arrest he put his hands on her breasts and looked down her

top. Exhibit C, 20:5–22:3.

This escalating pattern of sexual misconduct by Rincon clearly demonstrates an ongoing and accepted practice by the City. The complete lack of supervision or enforcement of the City's policies to protect against these egregious violations is staggering. Not to be forgotten is the fact that Escartin, Flores, Nastasi, Bode, and Dibuono were not prosecuted for their arrests. McDaniel Dec. ¶¶ 8-10; Exhibit D, 186:19-21; Exhibit D, 234:3-9.

Still, the City falsely claimed it was not aware of any other allegations made by anybody other than Bode or Nastasi against Rincon prior to November 14, 2008. Exhibit E, 203:25–204:4; Defendants' Motion for Summary Judgment p. 9-10 (emphasis added). When asked if there have been similar complaints of sexual assault against Rincon prior to August 1, 2008, the City refused to answer. Id. at 201:14-24. When asked if they were aware of any complaints with regard to Rincon of sexual misconduct against female arrestees, the City refused to answer. Id. at 202:5-17. Caught in its contradiction about prior Rincon victim Tavianini, the City was forced to concede in its Motion that it was on notice of Tavianini's reported assault 11 days prior to Bode's assault. Defendants' Motion for Summary Judgment p. 9-10.

Now, the City would have the Court believe that "[t]he **very first complaint**, of a somewhat similar misconduct alleged in this complaint against Officer Rincon, was on or about November 3, 2008 by Jean (Jen) Tavianini." Defendants' Motion for Summary Judgment p. 9. Not unsurprisingly, Defendants falsely claim in their Motion that Chief Hamilton made a declaration confirming Tavianini's was the "very first complaint." His declaration states no such thing. Also not out of character is the unsupported claim that Curtis McLean confirmed Tavianini's was the "very first complaint." In fact, Defendants conveniently omit all support that Tavianini's was the "very first complaint" they received about Rincon's sexual misconduct. Regarding prior similar complainants, Defendants failed to produce discovery, they

falsely claimed there were no such complainants, they refused to answer such questions at depositions, and they omit support from their Motion for Summary Judgment all in spite of the long list of Rincon's victims. McDaniel Dec. ¶¶ 1-6.

Moreover, evidence of post-incident constitutional violations are relevant to establishing a policy and practice under Monell. Henry v. County of Shasta, supra, 132 F.3d 512 is instructive on this point.

In Henry, the plaintiff sued the County for sexual assault (strip searching) and other constitutional violations committed by an officer during an arrest. In response to the County's motion for summary judgment, Plaintiff offered evidence of post-incident constitutional violations on others to establish a policy and practice under Monell. The district court nonetheless granted summary judgment. The Ninth Circuit reversed.

The Ninth Circuit held that declarations from other victims, Burns and Mays, who were subjected to the same type of treatment after the plaintiff's incident, were relevant to establishing a Monell claim.

> May's detention occurred only two and one-half months after Henry's. Such close proximity in time of the two events lends further supports [sic] to Henry's claim that his treatment was not an isolated event but was instead inflicted in accordance with county policy.
>
> In holding that the May and Burns declarations may be used to establish municipal liability although the events related therein occurred after the series of incidents that serves as the basis for Henry's claims, we reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry.

Henry v. County of Shasta, supra, 132 F.3d at 518.

Here, the evidence of Rincon's similar sexual assaults on other victims, whether before or after the incidents at issue in this case, is directly relevant to

establish that his actions were conducted pursuant to a policy and practice.

Given that Defendant has falsely testified about its knowledge of Rincon's on duty sexual misconduct, the jury is entitled to disbelieve everything they say, and the only way to resolve this credibility dispute is to present this matter to the jury.

Moreover, according to Chief Hamilton, **"**the city under takes a number of measures to monitor and ensure that unlawful arrests or other acts of misconduct do not occur. They include… b) close monitoring, review and supervision of police officers… f) disciplinary proceedings and measures… [and] h) compliance with P.O.S.T. standards." Declaration of Chief Hamilton, ¶ 11. As in Grandstaff and Harris, there are multiple patterns of policy violations by Rincon, which are directly responsible for the injuries inflicted upon Plaintiffs.

The City had custody and control of the partial digital audio recordings from Rincon's arrests of the above-mentioned female victims. Exhibit D, 38:19-22; Exhibit E, 71:13–72:2. In the course and scope of his employment with the City, Rincon had a pattern of violating the City's policy regarding the usage of his DAR. Exhibit C, 56:16–57:4. As Chief Hamilton makes clear, failing to monitor, review and supervise Rincon invites acts of misconduct. If the City had bothered to monitor, review and supervise Rincon's arrest of females, they would have discovered that he was habitually editing these recorded contacts. If the City had instituted the "disciplinary proceedings and measures" or ensured Rincon's "compliance with P.O.S.T. standards," as Chief Hamilton states, then Rincon would have been disciplined and properly trained long before his last victim, Kari Bode.

The City's Policies, Section 1202.3 requires "[w]henever practical, a pat-down of an individual should be conducted by an officer of the same sex as the person being searched. Absent the availability of a same sex officer, it is recommended that a witness officer be present during **any** pat-down search of an individual of opposite sex as the searching officer." Exhibit F (emphasis added). Rincon admitted to violating this policy his entire career with the City. Exhibit D, 255:23–256:2. It is

clear that the City woefully ignored and was indifferent to Rincon's pattern of sexual misconduct. In closely monitoring, reviewing and supervising Rincon's arrests of female suspects, which Chief Hamilton declares the City does, it would have been clear that Rincon was habitually violating Policy 1202.3. Either the City knew and did not care, or they remained derelict in their duty to ensure misconduct did not occur.

As set forth in Grandstaff and Harris, there are multiple patterns of policy violations by Rincon, which are directly responsible for the injuries inflicted upon Plaintiffs. Notwithstanding the egregious breach of City policy regarding the recording of contacts or the pat-down of female suspects, the long line of Rincon's victims merely encompasses 2008. For no particular reason, the investigation merely peered into Rincon's 2008 female arrests, despite the fact that he had worked for the City since 2006. Exhibit C, 30:1-8.

V. THE CITY HAS NOT SUBMITTED ADMISSIBLE EVIDENCE TO SHIFT THE BURDEN OF PROOF ON THE MONELL CLAIM

The City's sole evidence on the Monell claim is the declaration of Chief Kevin Hamilton [Docket No. 20-5]. The Declaration of Chief Hamilton is inadmissible for two primary reasons. First, for reasons detailed in Plaintiffs' Objections, the Declaration of Chief Hamilton is inadmissible because it is unsigned. See Charlebois v. Angels Baseball, LP, 2011 U.S. Dist. LEXIS 71452, at *24 (C.D. Cal. June 30,2011)(J. David O. Carter) ("the Court declines to consider any evidence submitted by Plaintiff that comes by way of an unsigned declaration ...."); Ellerd v. County of L.A., 2010 U.S. Dist. LEXIS 86960, at *3-4 (C.D. Cal. July 28, 2010) ("the five declarations from putative class members proffered by plaintiff are unsigned and therefore inadmissible"); Lawrence v. City of Chin, 2006 U.S. Dist. LEXIS 96876, at * 14 n.3 (C.D. Cal. Aug. 24, 2006) ("Although Plaintiffs dispute this fact, they offer only an unsigned declaration as controverting evidence. Plaintiffs have not offered

any admissible evidence in support of their arguments"); Davenport v. Bd. of Trs. of the State Ctr. Cmty. College Dst., 654 F. Supp. 2d 1073, 1083 (E.D. Cal. 2009) (rejecting unsigned declaration for the purposes of summary judgment motion). See also 28 U.S.C. § 1746 (requiring signed statement).

Second, many portions of the Declaration of Chief Hamilton are not admissible because they constitute vague, self-serving, legal conclusions.

For example, Chief Hamilton's testimony, in Paragraph 9 of his Declaration, that "the City of Fullerton, by and through its police department, did not set in motion, a series of acts by others, or knowingly refuse to terminate a series of acts by others, which it knew or reasonably should have known or was plainly obvious, would cause others to inflict constitutional injury" is nothing but a self-serving, legal conclusion.

Such statements are nothing but bare legal conclusions, bereft of any factual support. Accordingly, they are inadmissible. Federal Rules of Evidence, Rule 704; Torres v. County of Oakland, 758 F.2d 147, 151 (6th Cir. 1985) (admission of lay witness' testimony in Title VII case that plaintiff had not been discriminated against because of her national origin was error; such testimony was a legal conclusion); Christiansen v. National Sav. and Trust Co., 683 F.2d 520 (D.C. Cir. 1982) (lay legal conclusions are inadmissible in evidence).

VI. AT A MINIMUM, THE COURT SHOULD DEFER RULING ON THE MONELL ISSUE UNTIL PLAINTIFFS HAVE BEEN AFFORDED AN OPPORTUNITY TO COMPLETE DISCOVERY

The City has refused to provide documents and evidence regarding complaints made by other victims relating to Rincon. Accordingly, the City has deprived Plaintiffs with essential information and evidence on the Monell issue. Plaintiffs will be filing a motion to compel shortly to obtain the information and documents.

The City falsely claimed it was not aware of any other allegations made by

anybody other than Bode or Nastasi against Rincon prior to November 14, 2008. Exhibit E, 203:25–204:4. Additionally and without any evidentiary support, Defendants proclaim that Tavianini's report was the "very first complaint." Defendants' Motion for Summary Judgment p. 9. To date, Defendants have refused to produce any documents regarding when Escartin, Flores, Dibuono, or any other alleged Rincon victim reported sexual misconduct, Tavianini notwithstanding. McDaniel Dec. ¶¶ 1-6.

In the event the Court is inclined to grant summary judgment on the 42 U.S.C. § 1983 claim, pursuant to FRCP Rule 56(d), it should defer its ruling on the Monell issue until after Plaintiffs' motion to compel is heard and after Plaintiffs have been provided the relevant documents and information relating to the other complaints.

VII. GOVERNMENT CODE SECTIONS 815.2(A) AND 820 PROVIDE STATUTORY AUTHORITY TO HOLD THE CITY LIABLE FOR RINCON'S ACTIONS

Government Code section 820 provides in relevant part that except as otherwise statutorily Provided, "a public employee is liable for injury caused by his act or omission to the same extent as a private person." (Gov. Code § 820(a).)

Section 815.2(a) provides in pertinent part that the 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 . . . have given rise to a cause of action against that employee . . . ." (Gov. Code § 815.2(a); see also § 815.4 [stating the same as 815.2 but as to independent contractors].)

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* for any injury which its employee causes to the same extent as a private employer. See Leger v. Stockton Unified School District, 202 Cal.App.3d 1448, 1461 (3d Dist. 1988) citing Societa per Azioni de Navgazione Italia v. City of Los Angeles, 31

Cal.3d 446, 463 (1982).

VIII. THE CITY MAY BE HELD LIABLE FOR RINCON'S STATE LAW TORTS UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR

Additionally, the City moves for summary judgment on the grounds that it has no liability, as a matter of law, for state law claims of assault, battery, battery by peace officer, false imprisonment, negligence, and intentional infliction of emotional distress.

It is well settled, however, that a public entity, such as the City, can be held vicariously liable when a police officer acting in the course and scope of employment sexually assaults an arrestee. Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 215 ("The issue in this case is: When a police officer on duty, by misusing his office authority, rapes a woman whom he has detained, can the public entity that employs him be held vicariously liable for his misconduct? We conclude that the employer can be held liable under the doctrine of respondeat superior."); See also Munoz v. City of Union City, 120 Cal.App.4th 1077.

While the City, troublingly, does not cite any of these cases, it does concede that it may be held vicariously liable for the acts of its on duty officers. City's Motion for Summary Judgment, p. 13:6-7. Moreover, the City does not dispute, nor can it dispute, that that sexual assaults at issue were committed by Rincon while he was acting within the course and scope of his employment (i.e., while arresting people).

It nevertheless moves for summary judgment on these claims on the grounds that it cannot be held liable on the state law claims alleged in the Complaint. This is plainly wrong. Indeed, following Mary M., the Ninth Circuit has rejected

Defendant's exact argument on at least two occasions. See e.g., Blankenhorn v City of Orange, 485 F.3d 463, 488 (9th Cir 2007); Robinson v. Solano County, 278 F.3d 1007, 1016 (9th Cir. 2002).

In sum, the City is liable to Plaintiffs on the state law claims for battery, assault, assault by a peace officer, false imprisonment, negligence, and intentional infliction of emotional distress to the same extent Rincon is liable for the torts. The City has not offered any evidence suggesting that Rincon is not liable for the above-referenced torts. Accordingly, the City is not entitled to summary judgment on any of the claims.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendant's Motion for Summary Judgment.

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