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4 UNITED STATES DISTRICT COURT  
5 FOR THE EASTERN DISTRICT OF CALIFORNIA  
6

7  
8 MARGARET A. SHEPHERD

9 Plaintiff,

10 v.

11 OFFICER GARRETT CRAWFORD, et  
12 al.,

13 Defendant.

1:08-CV-00128 OWW DLB

MEMORANDUM DECISION AND  
ORDER RE DEFENDANTS' REQUEST  
FOR ATTORNEYS FEES (DOC. 96)

14  
15 I. INTRODUCTION

16 Prevailing Defendants, individual Police Officers  
17 with the City of Modesto Police Department, seek to  
18 recover attorney's fees incurred defending themselves  
19 against a civil complaint brought by Plaintiff Margaret  
20 A. Shepherd. Defendants assert they are entitled to  
21 attorney's fees pursuant to Federal Rule of Civil  
22 Procedure 37(c)(2), because Plaintiff denied certain  
23 requests for admission regarding her allegations of  
24 liability. Doc. 96 at 10-11. Alternatively, several of  
25 the Officer Defendants move to recover their defense  
26 costs as sanctions under Federal Rule of Civil Procedure  
27 11, on the ground that Plaintiff continued to prosecute  
28

1 her case against them despite clear evidence confirming  
2 they were "uninvolved" in her arrest. *Id.* at 11-13.  
3 Finally, Defendants rely on California Code of Civil  
4 Procedure § 1038, which authorizes a court to order  
5 reimbursement of attorney's fees incurred defending  
6 against any claim brought under the California Tort  
7 Claims Act ("CTCA") upon a finding that the claims were  
8 not brought in good faith and with reasonable cause.  
9 Defendants assert that Plaintiff brought her action  
10 against the five "uninvolved" officers without reasonable  
11 cause, and maintained claims against them despite the  
12 fact that discovery "confirmed that only two of the seven  
13 officers ever touched her or were in any way involved in  
14 her arrest." Doc. 96 at 14. Defendants seek a fee award  
15 of \$77,371.25, representing half (50%) of the fees  
16 incurred by Defendants in defending against Plaintiff's  
17 claims. *Id.* at 2.<sup>1</sup>

20 Plaintiff alleged that Defendant Officers used  
21 excessive force incident to her January 14, 2007 arrest  
22 outside a nightclub in Modesto, California, causing her  
23 injuries. She originally asserted four claims based upon  
24

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25  
26 <sup>1</sup> Despite occasionally mentioning "cost" recovery, this motion  
27 does not request any cost award, nor are attorneys fees sought under  
28 42 U.S.C. section 1988. Defendants point out that they separately  
filed a bill of costs on July 2, 2009, in the amount of \$8,171.33,  
to which Plaintiff has filed no objections. Recoverable costs under  
28 U.S.C. sections 1920 and 1921 are not here in issue.

1 allegations of excessive force and wrongful arrest:

- 2 (1) Violation of Title 42, United States Code,  
3 Section 1983 against individual defendants  
4 City of Modesto Police Sergeant Garret  
5 Crawford, and City of Modesto Police  
6 Officers Douglas Griep, David Angarole,  
7 Todd Musto, Joseph Pimental, Tony Scopesi,  
8 and Yair Oaxaca as defendants;
- 9 (2) Assault and battery against all individual  
10 defendants;
- 11 (3) False arrest against all individual  
12 defendants; and
- 13 (4) Violation of Section 1983 against the City  
14 of Modesto related to alleged training  
15 and/or supervision deficiencies.

16 Doc. 1, filed Jan. 25, 2008. Plaintiff voluntarily  
17 dismissed the false arrest claim as to all defendants,  
18 Doc. 37, filed Mar. 30, 2009, as well as all claims  
19 against Officers Angarole and Musto, Doc. 40, filed Mar.  
20 24, 2009.

21 Defendants' motion for summary judgment was granted  
22 in part. Doc. 45, Apr. 7, 2009. Summary judgment was  
23 granted as to all remaining claims against Officers  
24 Pimental, Scopesi, and Oaxaca. *Id.* Although Defendants'  
25 motion for summary judgment as to Plaintiff's *Monell*  
26 claim for municipal liability against the City of Modesto  
27 was denied, the parties stipulated to dismissal of that  
28 claim on May 14, 2009. Doc. 56. Plaintiff's § 1983  
excessive force and state law assault and battery claims  
against Sergeant Crawford and Officer Griep proceeded to

1 trial. See Doc. 50 (Pretrial Order) at 4.

2 A four-day jury trial commenced June 9, 2009, Doc.  
3 84, and the jury returned verdicts in favor of both  
4 Defendants on June 17, 2009, Doc 88.

5  
6 **II. BACKGROUND**

7 Defendants assert that, once depositions were  
8 completed, Plaintiff should have known certain of her  
9 claims were without foundation. The March 30, 2009  
10 summary judgment decision summarizes the incident based  
11 on those depositions:

12  
13 It is undisputed that the events giving rise to  
14 Plaintiff's arrest took place at approximately  
15 1:00 a.m. on January 14, 2007. Compl. at ¶ 6. At  
16 that time, Plaintiff was at a club called the  
17 Copper Rhino Sun in the downtown entertainment  
18 district of Modesto, California, with  
19 approximately ten other individuals celebrating  
20 the twenty-first birthday of Plaintiff's son.  
21 *Id.* It is also undisputed that Plaintiff  
22 consumed three drinks that evening, a small  
23 glass of champagne and two white Russians.  
24 Margaret Shepherd Depo. at 32, 43-44, 47-48. In  
25 almost all other respects, the parties' versions  
26 of the events of that evening are in conflict.

27 According to the owner of the Copper Rhino, Mr.  
28 Leslie Knoll, Plaintiff's group was loud and  
obnoxious, and at least one member of the group  
was insulting other customers. Knoll Depo. at  
13. After unsuccessfully requesting Plaintiff's  
group to quiet down, Mr. Knoll contacted one of  
his private security guards (Defendant Griffin  
Dye) and told him to remove Plaintiff's group  
from the bar. *Id.* at 13-14. Dye then informed  
one of the members of the group, Larry McKenzie,  
that he was being "a problem" and would have to  
be walked outside. Dye Depo. at 21.

According to Plaintiff, Larry ended up on the  
ground with Dye standing over him. M. Shepherd  
Depo. at 77. One of Plaintiff's sons, Lucas

1 Shepherd, hollered at Dye "What are you doing?  
2 He's just wanting to get his hat." *Id.* Then,  
3 according to Plaintiff, there was a lot of  
4 pushing and shoving, with people trying to get  
5 out of the club. *Id.* at 78; see also Amy  
6 Shepherd Depo. at 20. Plaintiff recalls that Dye  
7 then grabbed her son Lucas around the neck in a  
8 choke hold. *Id.* Other witnesses, including  
9 Lucas, recall that Lucas ended up being thrown  
10 to the ground by one of the bouncers, possibly  
11 Dye. Wheeler Depo. at 20-22; L. Shepherd Depo.  
12 at 26, 29-30.

13 In contrast, Dye recalls that Larry began to  
14 leave the premises peacefully and that some  
15 other members of the group began to gather up  
16 their things to leave with him. Dye Depo. at 23.  
17 However, as Dye and Larry were leaving the  
18 club's patio, where Larry and the others had  
19 been socializing, Dye heard someone yelling from  
20 behind him. *Id.* at 23-24. Dye turned around and  
21 observed Lucas, who had just entered the patio  
22 area from the bar, running after him. *Id.* at 24.  
23 The next thing Dye saw was "the ground." He  
24 cannot recall whether Lucas knocked him to the  
25 ground, or whether he was knocked to the ground  
26 by the rush of others leaving the club. *Id.* at  
27 25.

28 According to Knoll, the club's owner, the  
situation escalated, resulting in individuals  
within Plaintiff's group hitting the security  
guards. Knoll Depo. at 19.

At some point, either while the party was moving  
outside or shortly after, officers from the  
Modesto Police Department began arriving on the  
scene. One of the first officers to arrive was  
Sergeant Crawford, who observed what he  
characterized as "a large melee." Crawford Depo.  
at 41. Crawford noticed eight or nine  
individuals actively engaged in fighting with  
security guards on the sidewalk. In response,  
the security guards were attempting to place  
handcuffs on certain individuals and trying to  
arrest the assailants. *Id.* at 32.

A number of police officers eventually responded  
to the scene, including at least two on  
horseback. These officers became occupied with  
the apprehension of various individuals and/or  
restoring order to the scene.

According to Sergeant Crawford, as he approached  
the crowd, his attention was drawn to a white,

1 female adult (later identified as Plaintiff),  
2 because she was on the back of a security  
3 officer (Dye). She appeared to have her right  
4 arm around the security officer's throat,  
5 holding him in a head lock. Crawford recalls  
6 that Plaintiff's feet were off the ground, as  
7 though she was "riding" on the security  
8 officer's back. *Id.* at 33, 46. Crawford observed  
9 that the same security officer was attempting to  
10 place handcuffs on a male subject. *Id.* at 46-47.  
11 In response, Sergeant Crawford claims he  
12 approached Plaintiff, grasped her free (left)  
13 arm with his left hand, and identified himself  
14 loudly as a Modesto Police Officer. *Id.* at 33.  
15 She did not respond. *Id.* Plaintiff remained on  
16 the guard's back, screaming: "Let go of my son."  
17 *Id.* at 47.

18 Crawford believed that the guard was in "obvious  
19 distress" during this altercation, because he  
20 was in a headlock while trying to handcuff  
21 someone. *Id.* at 47. Crawford again yelled in  
22 Plaintiff's presence that he was a police  
23 officer, while still holding on to her left arm  
24 with his left hand. *Id.* at 49-50. Crawford then  
25 took Plaintiff's left arm and pulled it up  
26 behind her back. *Id.* at 50. He ordered her for a  
27 third time to release the guard and again told  
28 her he was a police officer. *Id.* at 52. Crawford  
then put his right hand on her right shoulder  
and pulled it straight back, away from the  
security officer. *Id.* Her arm came out from  
around the guard's neck, and she fell backward.  
*Id.* at 53. According to Crawford, Plaintiff  
landed on her feet at first, but then stumbled  
and bumped into someone else, knocking that  
person to the ground and falling on top of that  
person. *Id.* That caused Crawford to lose his  
grip on her. *Id.*

21 At this point, according to Crawford, Plaintiff  
22 became hysterical, screaming about why her son  
23 was being arrested, flailing her arms and feet  
24 "in all directions, striking out, hitting and  
25 kicking anybody in the area." *Id.* at 56.  
26 Crawford asserts that "[t]rying to gain control  
27 of [Plaintiff's] hands and feet was quite  
28 dangerous at that point." *Id.* at 57. Crawford  
was standing on his feet, bending over at his  
waist, trying to grab her hands and place her in  
handcuffs. *Id.* Although he was able to get one  
of her hands, he could not grab the other one.  
*Id.* That is when Officer Grieppe approached. *Id.*  
Crawford waived him over to assist. Grieppe was  
able to grab the other arm. *Id.* She was still

1 screaming hysterically and resisting arrest. She  
2 managing to pull away several times as they  
placed her in handcuffs. *Id.* at 64-64.

3 Crawford maintains that neither officer placed  
4 his knees on her back. *Id.* at 64. Crawford  
5 asserts that he purposefully avoided doing so,  
6 because lowering himself to the ground would  
7 have allowed her flailing arms and feet to hit  
8 his body. *Id.* Crawford was also concerned about  
a nearby horse, belonging to a mounted  
policeman. Crawford did not want to go any lower  
on the ground, to avoid potential contact with  
the horse. *Id.*

9 Once Plaintiff was ultimately restrained,  
10 Officers Crawford and Grieppe escorted Plaintiff  
11 to a patrol car and placed her in the back seat  
of that car, where she stayed until being  
transported to another police vehicle for  
transport to jail. *Id.* at 68:8-19.

12 Crawford's version of events is corroborated by  
13 Knoll, who testified that he personally observed  
14 "the police dragging a lady off who was trying  
15 to choke [Dye]." Knoll Depo. at 20-21. Knoll  
16 stated: "It looked like she was on the pile and  
was trying to either hit or choke him. I just  
caught a glimpse of it, so I don't know  
exactly." *Id.* at 21.

17 For his part, Dye does not recall anyone trying  
18 to choke him that evening, nor does he have any  
recollection of Plaintiff. Dye Depo. at 33.

19 Plaintiff's recollection of the arrest is  
20 dramatically different [from] Crawford's. She  
21 asserts that she was propelled outside the club  
22 onto the sidewalk with the rush of bodies  
23 leaving the club. M. Shepherd Depo. at 83.  
24 Observing one of the security guards with his  
25 arm around her son Lucas' neck, she yelled:  
26 "What are you doing to my son?" *Id.* The guard  
27 did not acknowledge her. *Id.* She then reached up  
28 to touch the bouncer's arm in order to get his  
attention because she wanted to know what he was  
doing to her son. *Id.* at 82. Then, with no  
warning or provocation, someone pulled her right  
arm back and she felt a pain in her shoulder.  
*Id.* at 88. Then, her feet left the ground and  
she was slammed face first into the ground, onto  
her chest. *Id.* at 89. Plaintiff then recalls  
feeling a great deal of pressure and pain in her  
back. *Id.* at 91. She felt a weight on her back  
and her arms were pulled behind her. *Id.* at 92.

1 She recalls that she "couldn't breathe," and her  
2 arms felt like they were going to be pulled off.  
3 *Id.* at 92-93. She was trying to gasp for air and  
4 then "started seeing stars." *Id.* at 93. Next,  
5 she felt pain on her wrists. She assumes this  
6 was caused by the officers putting handcuffs on  
7 her. *Id.* at 94. She was "yanked up to [her]  
8 feet," at which time she realized police  
9 officers were present. *Id.* at 95-96. She was  
10 then guided to a police car. *Id.* at 96-97.

11 One witness recalls that Crawford "jumped down  
12 onto [Plaintiff's] back, and [ ] had his knees  
13 in her back." Wheeler Depo. at 25. Others  
14 corroborate that at least one of the officers  
15 had his knees in her back. A. Shepherd Depo. at  
16 29; D. Shepherd Depo. at 45.

17 It is undisputed that at the time of the  
18 incident, Plaintiff was over 50 years of age, was  
19 5 feet, 4 inches tall, and weighed 150 pounds.  
20 *Id.* at 80. Crawford was 5 feet, 10 inches tall,  
21 and weighed 230 pounds.

22 Ultimately, Plaintiff was cited for a violation  
23 of California Penal Code section 148 for  
24 delaying and obstructing a police officer. The  
25 police report states:

26 On 1-14-07 at approximately 0051 hours I  
27 responded to a report of a fight at the  
28 Copper Rhino on 10th St. On arrival I saw a  
security guard attempting to handcuff a  
suspect on the sidewalk (D) grabbed the  
security guard around the neck from behind  
and attempted to pull him from her son,  
Andrew Shepherd. I ordered (D) to release  
the guard and she refused. I pulled (D) by  
her arms away from the guard and she fell to  
the ground on top of a bystander. (D) began  
to punch and kick at anyone she could while  
on the ground. I told (D) she was under  
arrest and to stop fighting. (D) refused and  
continued to fight. (D) was handcuffed by  
Officer Griep and myself. (D) booked to  
Stanislaus County jail.

Arrest Report prepared by Sergeant Crawford, Ex.  
P to Gilbert Decl. , Doc. 30-4 through 30-10.

Doc. 43 at 2-8, 2009 WL 839943, \*1-\*4 (E.D. Cal Mar. 30,  
2009).



1           The March 30, 2009 Summary Judgment decision also  
2 reviewed deposition evidence regarding the claims against  
3 Officers Pimental, Scopesi, and Oaxaca. Plaintiff could  
4 not specifically recall "which officers did what":

5           I don't know which officers did what. I just  
6 know one or two of them threw me to the ground  
7 and wrenched my arms back so hard I thought they  
8 were going to be ripped from the sockets at my  
9 shoulders and then excruciating pain in my back  
10 making my body bow up backwards and being unable  
11 to breath. Then being yanked up by the handcuffs  
12 on my wrists, shoved to a police care (sic) and  
13 thrown into the back of it. When I tried to  
convey many times the pain I was in and that I  
couldn't breath, at one point I was told, "If I  
could open my big mouth, I could breath." and  
while being transported in the police car, I  
stated the bouncer should not have touched my  
son; the officer replied "Maybe you should have  
stayed out of our town."

14           2009 WL 839943 at \*5 (record citations omitted). No  
15 person testified that any other officer interacted with  
16 Plaintiff, except Crawford and Griepf.

17           The March 30, 2009 Decision rejected Plaintiff's  
18 argument that Pimental, Scopesi, and Oaxaca could be held  
19 liable for failing to intercede on her behalf, reasoning  
20 that the undisputed facts did not support imposition of  
21 liability on this theory:

22           Plaintiff has not identified any facts  
23 suggesting any of the three officers were in any  
24 way involved in her physical restraint and/or  
25 arrest. Instead, she argues that Officers  
26 Pimental, Scopesi, and Oaxaca must have been  
27 aware that she was being subjected to  
"constitutionally unreasonable force during her  
arrest," but "did nothing to prevent the abuse"  
and therefore should be "subject to personal  
liability for their failure to act." Doc. 342 at  
28 8. In support of her theory of liability,

1 Plaintiff cites *Byrd v. Clark*, 783 F.2d 1002,  
2 1007 (11th Cir. 1986), abrogation on other  
3 grounds recognized by *Nolen v. Isbell*, 207 F.3d  
4 1253, 1255-56 (11th Cir. 2000), which held that  
5 when "a police officer, whether supervisory or  
6 not, fails or refuses to intervene when a  
7 constitutional violation such as an unprovoked  
8 beating takes place in his presence, the officer  
9 is directly liable under Section 1983."

10 Defendants rejoin by citing a line of California  
11 cases which stand for the proposition that  
12 police officers do not generally owe a duty of  
13 care to protect members of the public, unless a  
14 special relationship is established. For  
15 example, *Davidson v. City of Westminster*, 32  
16 Cal. 3d 197 (1982), held that officers  
17 conducting surveillance of a business were under  
18 no duty to warn an innocent third party known to  
19 be alone on the premises of the arrival of a  
20 suspected assailant. Neither the decision to  
21 conduct the surveillance, the observation of the  
22 potential assailant in the victim's presence,  
23 nor the recognition of the assailant as the  
24 likely perpetrator of a previous assault created  
25 a "special relationship" between the victim and  
26 the police that gave rise to a duty to act or  
27 warn. *Id.* at 206-207; see also *Williams v.*  
28 *State*, 34 Cal. 3d 18 (1983) (California state  
highway patrol officer has the right, but not  
the duty to investigate accidents, or come to  
the aid of stranded motorists, and that stopping  
to aid an injured or stranded motorist does not,  
in itself, create a special relationship which  
gives rise to an affirmative duty to secure  
information or preserve evidence for civil  
litigation between the motorist and third  
parties).

But, the Ninth Circuit recognizes that "police  
officers have a duty to intercede when their  
fellow officers violate the constitutional  
rights of a suspect or other citizen."  
*Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th  
Cir. 2000).... "[O]fficers can be held liable  
for failing to intercede only if they had an  
opportunity to intercede." *Cunningham*, 229 F.3d  
1289. If an officer was not present, or had "no  
realistic opportunity to intercede," no  
liability will attach. *Id.*

There is scant authority applying "failure to  
intercede" liability in the context of the use  
of excessive force. In the corrections context,  
a prison guard has an affirmative duty to

1 intervene on behalf of a prisoner if other  
2 officers are violating the prisoner's  
3 constitutional rights in his presence, or if he  
4 knows that the prisoner's rights are being  
5 violated. *Robins v. Meecham*, 60 F.3d 1436, 1442  
6 (9th Cir. 1995). However, there must be a causal  
7 connection between the defendant and the  
8 deprivation of a constitutional right. *Johnson*  
9 *v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). In  
10 the policing context, where defendant officers  
11 failed to act in the presence of an alleged use  
12 of excessive force by other officers, "factors  
13 such as whether the defendant had reasonable  
14 time to intervene, and whether the defendant had  
15 tacitly collaborated with the officers using  
16 force should be considered." *Garcia v. Grimm*,  
17 2007 WL 2778360, \*6 (S.D. Cal.2007) (citing  
18 *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir.  
19 1988). The reasoning of the Second Circuit in  
20 *O'Neill* is instructive:

21 In this case, the claim that [Officer]  
22 Conners became liable for use of excessive  
23 force by failing to intercede must be  
24 assessed separately with respect to the acts  
25 of [Officers] Fiorillo and Krzeminski in  
26 striking O'Neill and the act of Krzeminski  
27 in dragging O'Neill across the floor by his  
28 throat. Even when the evidence is viewed in  
the light most favorable to the plaintiff,  
there is insufficient evidence to permit a  
jury reasonably to conclude that Conners'  
failure to intercede was a proximate cause  
of the beating. The three blows were struck  
in such rapid succession that Conners had no  
realistic opportunity to attempt to prevent  
them. This was not an episode of sufficient  
duration to support a conclusion that an  
officer who stood by without trying to  
assist the victim became a tacit  
collaborator. With respect to the subsequent  
dragging of O'Neill across the floor,  
however, the case against Conners is  
adequate to create an issue of fact for the  
jury. Having seen the victim beaten, he was  
alerted to the need to protect O'Neill from  
further abuse. Though not a guarantor of  
O'Neill's safety in the face of brutality  
administered by other officers, Conners can  
be found liable for deliberately choosing  
not to make a reasonable attempt to stop  
Krzeminski.

*Id.* at 11-12. Critically, the evidence in  
O'Neill subjected the officer to liability for

1 "deliberately choosing not to make a reasonable  
2 attempt" to stop another officer's allegedly  
3 unconstitutional conduct because he actually  
4 observed that conduct.

5 Here, in contrast, the relevant testimony of  
6 Oaxaca, Pimental, and Scopesi, which is  
7 undisputed, indicates that none of the three  
8 officers observed Crawford and/or Grieppe placing  
9 Plaintiff under arrest.

10 Officer Oaxaca, who was Grieppe's partner at the  
11 time of the incident, arrived on the scene with  
12 Grieppe in their police cruiser. As soon as they  
13 got out of the car, Grieppe went to assist  
14 Crawford, and Oaxaca turned in the other  
15 direction to "protect them from the surrounding  
16 crowd." Oaxaca Depo. at 20. Oaxaca did not see  
17 Grieppe and Crawford arrest Plaintiff because he  
18 had his back to them the entire time. *Id.*

19 Plaintiff emphasizes that, according to  
20 Crawford's version of the event, Plaintiff was  
21 screaming hysterically as she was being  
22 handcuffed. Plaintiff argues that even if Oaxaca  
23 had his back to Plaintiff during the arrest,  
24 Oaxaca must have heard her screaming, as it is  
25 undisputed that he was positioned only a short  
26 distance from the site of Plaintiff's arrest.  
27 However, Oaxaca was not asked during his  
28 deposition whether he heard Plaintiff screaming  
over the noise of the melee. Plaintiff's claim  
is based on no more than speculation. Plaintiff  
has no facts to support her assertion that  
Oaxaca actually observed (either visually or  
auditorily) the allegedly unconstitutional  
conduct. Accordingly, no reasonable finder of  
fact could conclude that Oaxaca had a duty to  
intervene on Plaintiff's behalf. Oaxaca is  
entitled to summary judgment on the First Cause  
of Action.

29 Officer Pimental, who responded to the Copper  
30 Rhino on horseback, testified at his deposition  
31 that he observed Plaintiff on top of a "dog  
32 pile" of people. Pimental Depo. 19-20. He  
33 observed Sergeant Crawford arrive on the scene,  
34 but did not have an opportunity to observe any  
35 of Crawford's conduct toward Plaintiff because  
36 his attention was diverted toward other people  
37 coming out of the Copper Rhino. Among other  
38 things, Pimental was distracted by another  
member of Plaintiff's group, Melody Wheeler, who  
was trying to move around his horse toward the  
pile of people. *Id.* at 22. Pimental instructed

1 her not to move around his horse and to back  
2 away, but she did not comply. *Id.* at 23.  
3 Pimental grabbed Wheeler and escorted her away,  
4 at which time he handed her off to a ground  
5 officer to place her in the car for him. He then  
6 placed Wheeler under arrest. *Id.* Again, there is  
7 no evidence which would permit a reasonable  
8 finder of fact to conclude that Pimental had a  
9 duty to intervene on Plaintiff's behalf.

10 Officer Scopesi, who was also on horseback,  
11 trying to control the crowd, observed Plaintiff  
12 "on the back of a security officer" with her  
13 "arm around [his] neck from behind." Scopesi  
14 Depo. at 22. However, that was all he observed  
15 in connection with Plaintiff. He did not see  
16 officer Crawford approach or take any actions in  
17 connection with the arrest, because he was  
18 dealing with the crowd. *Id.* at 25. No reasonable  
19 finder of fact could conclude that Scopesi had a  
20 duty to intervene on Plaintiff's behalf.

21 Plaintiff has no evidence suggesting that  
22 Officers Oaxaca, Pimental, or Scopesi observed  
23 Crawford and Griep's conduct in connection with  
24 her arrest. Defendants Oaxaca, Pimental, and  
25 Scopesi are entitled to summary judgment on the  
26 [Section 1983] Cause of Action.

27 2009 WL 839943 at \*6-\*8. The March 30, 2009 Decision  
28 also concluded that neither Oaxaca, Pimental, nor Scopesi  
could "possibly be liable for assault and battery upon  
Plaintiff, as it is undisputed that none of them touched  
her." *Id.* at \*8 n.3.

Defendants Crawford and Griep's motion for summary  
judgment on the § 1983 excessive force claim on qualified  
immunity grounds was denied because material facts were  
in dispute:

Here, a melee, a potential riot, is a dangerous  
disturbance. However, there are considerable  
factual disputes about the nature of Plaintiff's  
actions prompting the use of force and whether  
she resisted arrest. The reasonableness of the

1 officers' belief that their conduct was lawful  
2 cannot be determined on summary judgment.  
3 Viewing the facts in a light most favorable to  
4 plaintiff, if she was only trying to get the  
5 security guard's attention to make a request and  
6 did not resist arrest, a reasonable finder of  
7 fact could conclude that the force applied in  
8 this case was objectively unreasonable under the  
9 circumstances. This is exactly the type of  
10 factual dispute that is not amenable to summary  
11 adjudication.

12 *Id.* at \*14.

13 Although the state law assault and battery claims  
14 against Crawford and Griep were not directly addressed  
15 in the March 30, 2009 Decision, a similar conclusion can  
16 be implied, as these state law claims would have turned  
17 on the same, disputed material facts.

### 18 III. DISCUSSION

19 As a general rule, a prevailing defendant is entitled  
20 to an attorney's fee award under a civil rights fee  
21 shifting statute only if the plaintiff's claims were  
22 "frivolous, unreasonable, or without foundation, even  
23 though not brought in subjective bad faith."

24 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421  
25 (1978). Because Congress intended to promote vigorous  
26 enforcement of civil rights laws, "a district court must  
27 exercise caution in awarding fees to a prevailing  
28 defendant in order to avoid discouraging legitimate suits  
that may not be 'airtight.'" See *EEOC v. Bruno's  
Restaurant*, 13 F.3d 285, 287 (9th Cir. 1993). The

1 Supreme Court warned in *Christiansburg* against the  
2 "temptation to engage in post hoc reasoning by concluding  
3 that, because a plaintiff did not ultimately prevail, his  
4 action must have been unreasonable or without  
5 foundation." 434 U.S. at 421-22.  
6

7 Perhaps for this reason, Defendants do not rely  
8 directly on a federal fee shifting statute, and instead  
9 base their fee petition on Federal Rules of Civil  
10 Procedure 37 and 11, as well as California Code of Civil  
11 Procedure § 1038. These provisions must be applied in  
12 the usual manner, notwithstanding the general  
13 disinclination for awarding fees to prevailing civil  
14 rights defendants. *Roadway Exp., Inc. v. Piper*, 447 U.S.  
15 752, 763 (1980) (rejecting argument that civil rights fee  
16 shifting statutes supplant other mechanisms of civil  
17 procedure designed to sanction counsel for "dilatory  
18 conduct").  
19

20  
21 A. Rule 37(c)(2) Sanctions.

22 Defendants assert they are entitled to an attorney  
23 fees award pursuant to Federal Rule of Civil Procedure  
24 37(c)(2), because Plaintiff denied certain requests for  
25 admission regarding her allegations of liability. Doc.  
26 96 at 10-11.

27 Throughout her discovery responses, Plaintiff made it  
28

1 clear that she "d[id] not know which officers did what"  
2 to her person. See, e.g., Responses to Interrogatories  
3 No. 1, 7, 8, 9 & 10, quoted in Doc. 96 at 6-7. Plaintiff  
4 refused to admit to the following requests for admission  
5 served by Officer Oaxaca, one of the "uninvolved"  
6 officers:  
7

8 REQUEST FOR ADMISSION NO. 1:

9 Admit that Officer Oaxaca<sup>3</sup> did not contact  
10 Plaintiff at any time during the incident giving  
11 rise to this litigation.

12 RESPONSE TO REQUEST FOR ADMISSION NO. 1:

13 Deny.

14 REQUEST FOR ADMISSION NO. 3:

15 Admit that Officer Oaxaca did not exercise any  
16 force against Plaintiff at any time regarding  
17 the incident giving rise to this litigation.

18 RESPONSE TO REQUEST FOR ADMISSION NO. 3:

19 Deny.

20 REQUEST FOR ADMISSION NO. 4:

21 Admit that Officer Oaxaca is not liable to you  
22 for the incident giving rise to this litigation.

23 RESPONSE TO REQUEST FOR ADMISSION NO. 4:

24 Deny.

25 See Doc. 96 at 7. The other "uninvolved" officers served  
26 similar requests for admission, which Plaintiff likewise  
27 denied. *Id.*

28 A party who fails to admit a request for admission  
risks an award of expenses, including attorneys' fees and  
costs, incurred by the other side in proving the matter



1 at trial. Fed. R. Civ. Proc. 37(c)(2). Rule 37(c)(2)  
2 provides:

3 Failure to Admit. If a party fails to admit what  
4 is requested under Rule 36 and if the requesting  
5 party later proves a document to be genuine or  
6 the matter true, the requesting party may move  
7 that the party who failed to admit pay the  
8 reasonable expenses, including attorney's fees,  
9 incurred in making that proof. The court must so  
10 order unless:

11 (A) the request was held objectionable under  
12 Rule 36(a);

13 (B) the admission sought was of no substantial  
14 importance;

15 (C) the party failing to admit had a reasonable  
16 ground to believe that it might prevail on the  
17 matter; or

18 (D) there was other good reason for the failure  
19 to admit.

20 "The Rule mandates an award of expenses unless an  
21 exception applies." *Marchand v. Mercy Medical Center*, 22  
22 F.3d 933, 936 (9th Cir. 1994).

23 Enforcement encourages attorneys and parties to  
24 identify undisputed issues early to avoid  
25 unnecessary costs. Failure to identify those  
26 issues wastes the resources of parties and  
27 courts.

28 The Federal Rules are intended "to secure the  
just, speedy, and inexpensive determination of  
every action." Fed. R. Civ. P. 1. Parties may  
not view requests for admission as a mere  
procedural exercise requiring minimally  
acceptable conduct. They should focus on the  
goal of the Rules, full and efficient discovery,  
not evasion and word play.

*Id.* (internal citations and footnote omitted).

1 Defendants maintain that the matters denied by  
2 Plaintiff were directly determined by the March 30, 2009  
3 summary judgment ruling that the five uninvolved officers  
4 were not involved in Plaintiffs arrest, did not exercise  
5 any force against Plaintiff, and were not liable to  
6 Plaintiff for the incident giving rise to this  
7 litigation. Doc. 43 at 10-16.

9 In *Marchand*, relied upon by Defendant, plaintiff  
10 became a quadriplegic after doctors failed to diagnose a  
11 fracture in his spine. A jury found several medical  
12 professionals negligent in connection with their  
13 provision of care to plaintiff. One defendant, Dr.  
14 Farris, was asked to admit: "That the care and treatment  
15 provided ... by [Dr.] Farris failed to comply with the  
16 applicable standard of care which existed ... on that  
17 date." Farris responded, "denied." 22 F.3d at 937.

19 Farris argued that Rule 37(c) sanctions should not be  
20 imposed because he had "reasonable ground to believe"  
21 that he might prevail on the negligence issue. Fed. R.  
22 Civ. P. 37(c)(3). After examining the evidence, the  
23 Ninth Circuit concluded that, even though one expert  
24 testified "that Farris satisfied the standard of care in  
25 all respects," Farris, "knowing he removed the cervical  
26 collar before obtaining a full series of cervical spine  
27  
28

1 x-rays, could not under the circumstances have reasonably  
2 denied his negligence." *Id.*

3 Likewise, Farris was also asked to admit: "Marchand's  
4 quadriplegia was caused by movement of his spine that  
5 could have been avoided if proper immobilization had been  
6 maintained after he was admitted." *Id.* at 938. Farris  
7 answered:  
8

9 Defendants object to this Request for Admission  
10 on the grounds that it is compound, ambiguous,  
11 and because the use of the phrase "avoidable  
12 movement" is vague and undefined. Without  
13 waiving such objections, the Request for  
14 Admission, couched in its present form, must be  
15 denied.

16 *Id.* The Ninth Circuit concluded that Rule 37 sanctions  
17 were appropriate:  
18

19 [T]o aid the quest for relevant information  
20 parties should not seek to evade disclosure by  
21 quibbling and objection. They should admit to  
22 the fullest extent possible, and explain in  
23 detail why other portions of a request may not  
24 be admitted.

25 Farris could have provided frank answers to  
26 these requests, which were clearly designed to  
27 establish causation. Or he could have "set forth  
28 in detail the reasons why [he could not]  
truthfully admit or deny the matter." Fed. R.  
Civ. P. 36(a). He did neither, relying on  
unfounded objections to the wording, instead of  
admitting the uncontestable question: were  
Marchand's injuries caused by movement of the  
spine that could have been avoided had proper  
immobilization been maintained?

*Id.* (internal citation omitted).

1. Were Plaintiff's Denials Justified?

Here, Plaintiff denied the requests for admission

1 concerning bodily contact by the "uninvolved officers,"  
2 after all the officers involved had been deposed.  
3 Compare Doc. 96 at 5 (indicating all officer depositions  
4 were completed by August 8, 2008) with Doc. 96-2, Ex. 5  
5 (Plaintiff's October 17, 2008 responses to requests for  
6 admission). At that time, Plaintiff possessed no  
7 evidence that any of the uninvolved officers touched her  
8 person, or played a role in her physical arrest, while  
9 all of the accused "uninvolved" officers testified at  
10 their depositions that they had no physical contact with  
11 Plaintiff during the arrest. In light of these facts and  
12 Plaintiff's clear and repeated explanation in her  
13 interrogatory responses that she had no way of knowing  
14 whether any particular officer had touched her because  
15 she could not see "which officers did what," Plaintiff's  
16 denial of the requests for admission concerning bodily  
17 contact by the "uninvolved officers" was unjustified.  
18 The issue of sanctions will be addressed after all the  
19 challenged responses to requests for admission are  
20 examined.  
21  
22  
23

24 As for the requests that Plaintiff admit that the  
25 uninvolved officers were "not liable to [her] for the  
26 incident giving rise to this litigation," this seeks a  
27 conclusion of law and Plaintiff responded. Plaintiff  
28

1 "had a reasonable ground to believe that [she] might  
2 prevail on the matter." Fed. R. Civ. P. 37(c)(2)(C).  
3 She argued that the "uninvolved officers" could be liable  
4 on a failure to intercede theory. Although her argument  
5 was ultimately rejected, it was not entirely baseless.  
6 Her theory was that, accepting her facts, the other  
7 officers on the scene observing excessive force used on  
8 her by Crawford and Griep, should have acted to protect  
9 her from injury by stopping their actions that injured  
10 her. Sanctions are not warranted in connection with this  
11 request for admission.  
12

13 A similar result is justified for Plaintiff's denial  
14 of requests for admission as to the reasonableness of  
15 force used and Defendants Crawford and Griep:  
16

17 REQUEST FOR ADMISSIONS NO. 8:

18 Admit that the force used by Defendant officers  
19 in arresting you was reasonable.

20 RESPONSE TO REQUEST FOR ADMISSIONS NO. 8:

21 Deny.

22 Doc 96-2, Ex. 6 (Plaintiff's Response to Defendant City  
23 of Modesto's Request for Admissions). She was also asked  
24 to admit the conclusion of law that the two officers were  
25 not liable:

26 REQUEST FOR ADMISSION NO. 5:

27 Admit that Officer Crawford is not liable to you  
28 for the incident giving rise to this litigation.

1                    RESPONSE TO REQUEST FOR ADMISSIONS NO. 5:  
2                    Deny.

3                    Doc 96-2, Ex. 7 (Plaintiff's Responses to Defendants  
4                    Crawford's and Griep's Requests for Admissions).

5                    Plaintiff "had a reasonable ground to believe that  
6                    [she] might prevail on the matter." Fed. R. Civ. P.  
7                    37(c)(2)(C). She gave a different description of her  
8                    conduct and the excessive and violent nature of force  
9                    used against her. These facts were categorically  
10                    disputed. Liability issues turned on resolution of the  
11                    two conflicting versions of the encounter. The excessive  
12                    force claim survived summary judgment, because other  
13                    witnesses in part corroborated her description as facts  
14                    and inferences had to be interpreted in favor of  
15                    Plaintiff. The jury did not accept Plaintiff's version  
16                    and ultimately found for defendants.  
17

18                    Plaintiff's only basis to deny the uninvolved  
19                    officers' requests that she admit that they did not have  
20                    any physical contact with her was based on her inability  
21                    to identify the number and identity of officers with whom  
22                    she interacted. However, this is the purpose of  
23                    discovery. All other challenged denials were justified.  
24

25  
26                    2. Rule 37 Sanctions Are Not Appropriate.

27                    Defendants are entitled to an award of "reasonable  
28                    expenses" incurred to prove that Officer Pimental's,

1 Oaxaca's, and Scopesi's physical contact with Plaintiff  
2 was nonexistent to minimal. Depositions had already been  
3 taken prior to Plaintiff's response to the requests for  
4 admission. No deposition costs are recoverable.

5 In cases of this nature, defense counsel was required  
6 to spend time reviewing the depositions of all witnesses  
7 to determine the extent of any physical contact between  
8 Plaintiff and Officers Pimental, Oaxaca, or Scopesi.

9 Here, however, no evidence, e.g., relevant passages from  
10 the officer's deposition testimony demonstrating that  
11 they never came into contact with Plaintiff, was  
12 presented to the court as part of a motion for summary  
13 judgment and associated statements of fact. Plaintiff  
14 had no evidence of any kind as to these three officers,  
15 except that they were on the scene.

16 Defendants' motion for summary judgment included two  
17 paragraphs on the subject of the uninvolved officers:

18 Plaintiff bears the burden of stating sufficient  
19 facts to support a claim against every named  
20 Defendant. To the extent a Plaintiff fails to  
21 meet this burden, her claims may be challenged  
22 by a Motion for Summary Judgment, which may be  
23 granted if the pleader is unable to produce  
24 facts supporting the claims plead. (De La Cruz  
25 v. Tormey, 582 F.2d 45, 64 (9th Cir. 1978).) The  
26 basic pleading standard for civil rights  
27 complaints calls for inclusion of clear, factual  
28 allegations in support of each cause of action,  
and that such allegations are not vague or based  
on mere conclusions. (Ivey v. Board of Regents,  
673 F.2d 266 (9th Cir. 1982); Sherman v. Yakahi,

1 549 F.2d 1287, 1290 (9th Cir. 1977).) Claims may  
2 be dismissed because they fail to allege  
3 sufficient facts to support any cognizable legal  
4 claim. (Smilecare Dental Group v. Delta Dental  
5 Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir.  
6 1996).) The basic pleading standard for civil  
7 rights complaints calls for inclusion of clear,  
8 factual allegations in support of each cause of  
9 action, and that such allegations are not vague  
10 or based on mere conclusions. (Ivey, 673 F.2d at  
11 266; Sherman, 549 F.2d at 1290.)

12 Here, it is important to note what the factual  
13 allegations in the Complaint do not say. The  
14 allegations do not describe with particularity  
15 the "wrongdoing" by any of the five officers.  
16 The Complaint merely alleges that the five  
17 officers were present during the melee in which  
18 she was arrested. Further, [Plaintiff's] own  
19 allegations confirm that only two officers  
20 (Officers Crawford and Griep) were involved in  
21 [Plaintiff's] arrest. (Plaintiffs Complaint at 7  
22 10.) This is further confirmed by [Plaintiff's]  
23 own testimony and responses to written discovery  
24 wherein she confirms to have no facts or  
25 knowledge pertaining to any improper allegations  
26 by any of the five uninvolved officers.  
27 [Plaintiff's] failure to allege any facts to  
28 support her claims as against the uninvolved  
five officers (Officers Angarole, Musto,  
Pimental, Scopesi or Oaxaca) require Summary  
Judgment to be granted on each of their behalf.

Doc. 30-2, at 9-10.

The portion of Defendant's separate statement  
dedicated to this issue adds little:



**ISSUE 1: Plaintiff has Failed to Allege Any Facts Against the Five Uninvolved Officers: Officers David Angarole, Todd Musto, Joseph Pimental, Tony Scopesi and Yair Oaxaca**

<b><u>UNDISPUTED FACTS</u></b>	<b><u>SUPPORTING EVIDENCE</u></b>
1. Plaintiff's Complaint fails to set forth any facts to support her causes of action as against the five uninvolved officers.	Plaintiff's Complaint generally.
2. Plaintiff admits that the only officers who arrested her and had any physical interaction with her during her arrest were Officers Crawford and Griep.	Plaintiff's Complaint at ¶ 10; Plaintiff's Responses to Officer Crawford's Special Interrogatories, Set One, Nos. 1, 7, 8, 9, 10 and 11.
3. Officers David Angarole, Todd Musto, Joseph Pimental, Tony Scopesi and Yair Oaxaca were not involved in Plaintiff's arrest and did not touch Plaintiff during the incident.	Plaintiff's Complaint at ¶ 10; Plaintiff's Responses to Officer Crawford's Special Interrogatories, Set One, Nos. 1, 7, 8, 9, 10 and 11.

**Doc 30-3 at 2. Defendants' Response dedicated a large section to rebutting Plaintiff's failure to intercede theory, but contained no new argument or facts concerning the simple factual issue of whether Officers Pimental, Scopesi, and/or Oaxaca ever touched Plaintiff. Doc. 34.**

**Instead, the court had to expend considerable judicial resources reviewing the record for relevant evidence. The result of this effort, which is summarized and analyzed in the March 30, 2009 Decision, demonstrated that the undisputed evidence supported the conclusion that Officers Pimental, Scopesi, and/or Oaxaca never came into physical contact with Plaintiff. Given that Defendants provided essentially no record evidence relevant to this inquiry and gave the court no assistance in their papers, it is reasonable to conclude that they**

1 expended no resources "proving" the lack of physical  
2 contact between Plaintiff and Pimental, Scopesi, and/or  
3 Oaxaca; rather, the Court did this work and analysis.  
4 Defendants' request for Rule 37(c) sanctions is DENIED.  
5

6 **B. Rule 11 Sanctions.**

7 Alternatively, the uninvolved officers move to  
8 recover their defense costs as sanctions under Federal  
9 Rule of Civil Procedure 11, on the ground that Plaintiff  
10 continued to prosecute her case against them despite  
11 clear evidence confirming the five officers were  
12 "uninvolved" in her arrest and inferentially presented a  
13 "pleading, motion, or other paper that was not supported  
14 by evidence." *Id.* at 11-13. This motion fails for the  
15 same reason that Plaintiff was entitled to deny the  
16 uninvolved officers' requests for admission regarding  
17 liability. Plaintiff argued that the "uninvolved  
18 officers" could be liable on a failure to intercede  
19 theory. Although her argument was ultimately rejected by  
20 the jury, it was not baseless. Sanctions are not  
21 warranted in connection with her continued prosecution of  
22 claims against these officers.  
23  
24

25  
26 **C. California Code of Civil Procedure § 1038.**

27 Finally, Defendants rely on California Code of Civil  
28 Procedure ("CCCP") § 1038, which authorizes a court to

1 order reimbursement of attorney's fees incurred defending  
2 against any claim brought under the California Tort  
3 Claims Act ("CTCA") upon a finding that the claims were  
4 not brought in good faith and with reasonable cause.  
5 Defendants assert that Plaintiff brought her action  
6 against the five "uninvolved" officers without reasonable  
7 cause, and maintained claims against them despite the  
8 fact that discovery "confirmed that only two of the seven  
9 officers ever touched her or were in any way involved in  
10 her arrest." Doc. 96 at 14.

12 Any recovery of fees under CCCP § 1038 is expressly  
13 limited to expenses incurred defending against the state  
14 law claims brought under the CTCA. See CCCP § 1038  
15 (allowing award of attorney's fees "[i]n any civil  
16 proceeding under the [CTCA]...."). Before denying a  
17 motion for fees brought under CCCP § 1038 a trial court  
18 must find that a "plaintiff brought the action with a  
19 good faith belief in the action's justifiability and with  
20 objective reasonable cause." *Kobzoff v. Los Angeles*  
21 *County Harbor/UCLA Medical Center*, 19 Cal. 4th 851, 862  
22 (1998). The good faith and reasonable cause requirements  
23 pertain not only to the action's initiation but also its  
24 continued maintenance. *Curtis v. County of Los Angeles*,  
25 172 Cal. App. 3d 1243, 1252 (1985).

1           Here, just as it was reasonable for Plaintiff to  
2 maintain her § 1983 excessive force claims against  
3 Officers Crawford and Griep, so too it was objectively  
4 reasonable for her to maintain the assault and battery  
5 claims against them. The relevant facts were disputed.  
6 The required bad faith cannot be established.  
7

8           Even if, *arguendo*, the assault and battery claims  
9 against Pimental, Scopesi, and/or Oaxaca are viewed  
10 differently, once all witnesses and parties had been  
11 deposed, Plaintiff should have known that there was no  
12 evidence to support a finding that any of the three  
13 officers touched her or threatened to touch her in any  
14 way. Plaintiff did not argue that Pimental, Scopesi,  
15 and/or Oaxaca could be liable for assault and/or battery  
16 on some alternative theory not requiring physical contact  
17 or threatened physical contact. Accordingly, Plaintiff  
18 cannot justify maintenance of the assault and battery  
19 claims against Pimental, Scopesi, and Oaxaca from the  
20 close of depositions in August 2008 to the issuance of  
21 the summary judgment decision on March 30, 2009.  
22

23           However, Defendants spent almost no time on this  
24 aspect of the Summary Judgment motion and they have not  
25 reasonably apportioned the time spent. The motion is  
26 DENIED.  
27

1           There is also the matter of the false arrest claim  
2 against all defendants that was voluntarily dismissed  
3 shortly before trial. If force used was excessive in  
4 Plaintiff's version was believed -- there was no reason  
5 for arrest. The motion is DENIED.  
6

7                                   **IV. CONCLUSION**

8           For the reasons set forth above, Defendants' motion  
9 for attorney's fees and/or sanctions is DENIED in its  
10 entirety.  
11

12 SO ORDERED

13 Dated: January 6, 2010

/s/ Oliver W. Wanger  
  Oliver W. Wanger  
  United States District Judge