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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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MARIA R., an individual; KARI R., an individual; VICKY P., an individual; NATASHA P., an individual,

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Plaintiffs,

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v.

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WILLIAM NULICK, an individual; TULARE COUNTY SHERIFF, a California governmental entity; COUNTY OF TULARE, a California governmental entity; and DOES 1 to 50, inclusive,

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Defendants.

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No. 1:15-cv-01378-JAM-EPG

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND/OR STRIKE

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Tulare County Sheriff's Deputy and defendant William Nulick ("Nulick") allegedly exploited his position as a police officer by sexually assaulting plaintiffs Maria R. ("Maria"), Kari R. ("Kari"), Vicky P. ("Vicky"), and Natasha P. ("Natasha") (collectively "Plaintiffs"). At issue in this motion is whether Nulick's employers, defendants County of Tulare ("Tulare") and Tulare County Sheriff ("Sheriff") (collectively "Defendants") are vicariously liable for Nulick's abuse and subsequent efforts to

1 cover-up his wrongdoing. Defendants seek dismissal of
2 Plaintiffs' complaint pursuant to Federal Rules of Civil
3 Procedure ("Rule") 12(b) and 12(f). For the reasons stated
4 below, the Court grants in part and denies in part the motion.¹

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6 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

7 The Court takes the following facts as true for purposes of
8 this motion.

9 Defendants engaged in "continuous, ongoing and systematic
10 abuse of a targeted class of persons [Plaintiffs] . . . who were
11 all sexually violated and repeatedly threatened by Defendants."
12 Compl. ¶ 15. Nulick sexually assaulted Plaintiffs during the
13 course of his duties as a Tulare County Sheriff and the Sheriff's
14 Department engaged in an "intentional cover-up designed to
15 prevent Plaintiffs and other victims from feeling secure enough
16 to come forward in their community and bring a lawsuit for the
17 wrongdoings." Id. ¶ 44. Plaintiffs are still being "harassed,
18 followed, and intimidated" by Defendants. Id. ¶ 18.

19 Vicky claims that Nulick forced her to watch pornography
20 with him when Nulick came to Vicky's home to look for her
21 husband. Id. ¶ 16. Additionally, in April 2013, Natasha and
22 Vicky were pulled over by Nulick for a routine traffic stop. Id.
23 ¶ 19. Nulick separately took Natasha and Vicky to the back of
24 their car and to the right of Nulick's car and conducted a pat-
25 down search during which he sexually groped both Plaintiffs'

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27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for April 5, 2016.

1 vaginas. Id. ¶ 22. Following the incident, Nulick harassed
2 Natasha and Vicky when he saw them on the street and by
3 repeatedly parking outside their homes. Id. ¶ 24.

4 On or about July 2013, Nulick executed an arrest warrant for
5 Kari without probable cause or special permission just after
6 midnight and outside the normal hours for executing an arrest
7 warrant. Id. ¶¶ 26-27. Kari, who was asleep naked in her
8 bedroom, was woken by Nulick, who demanded that she come down to
9 the station. Id. ¶¶ 27-28. Nulick refused to hand Kari clothing
10 so she could get dressed or to turn around to give Kari privacy
11 while she dressed. Id. ¶ 29. Kari was forced to expose her
12 naked body in front of Nulick, who watched her get dressed while
13 biting his lip. Id. After Kari was dressed, Nulick conducted a
14 pat-down where he pulled down Kari's bra and sexually groped her
15 vagina with his palms and fingers. Id. ¶ 30.

16 Maria was driving on or about August 2013 with her boyfriend
17 when she was pulled over by Nulick. Id. ¶ 31. Nulick took Maria
18 to the back of her car and to the front right of Nulick's car.
19 Id. ¶ 32. Nulick, without reasonable suspicion, then demanded
20 that Maria pull down her dress and bra to expose her breasts so
21 that he could look for hidden weapons or drugs. Id. ¶ 33.

22 Nulick then sexually groped Maria's breasts, buttocks, and
23 vagina. Id. ¶ 35. After Nulick groped Maria, he then told Maria
24 that he knew where she lived and propositioned that they have
25 sex. Id. ¶ 36. Maria asked what he was going to do and asked
26 for Nulick's card. Id. ¶ 37. Nulick refused and let her go.
27 Id.

28 Following these incidents, Nulick and other officers engaged

1 in intimidation tactics to cover up Nulick's actions. Id. ¶ 39.
2 For example, after Nulick heard that Natasha and Vicky were
3 questioning the legality of his pat downs, Nulick "barged into
4 the front door" of Natasha's house and verbally threatened that
5 Natasha and Vicky should remain quiet about how Nulick sexually
6 assaulted them. Id. ¶ 40. Nulick also parked outside of
7 Plaintiffs' homes and shined a spotlight into the windows of
8 Natasha, Vicky, and Kari's homes to let them know he was there.
9 Id. ¶¶ 16, 41.

10 Following Nulick's arrest in October 2013, the Sheriff's
11 department continued to "conceal and cover-up its knowledge
12 concerning past complaints made against Nulick." Id. ¶ 43.
13 Sheriff's deputies have also "driven by Plaintiffs' homes for the
14 sole purpose of intimidating and harassing Plaintiffs." Id. ¶
15 44. Plaintiffs' safety and security were threatened by
16 Defendants even up to the time Plaintiffs filed the complaint.
17 Id. ¶ 48.

18 In light of these intimidation efforts, Plaintiffs were
19 fearful to report Nulick's actions. Id. ¶ 49. Defendants were
20 constantly around Plaintiffs, making it difficult for Plaintiffs
21 to report Defendants' wrongdoing. Id. ¶ 50. It was only
22 recently that Plaintiffs, after meeting with counsel and learning
23 of other victims, felt safe enough "to share their stories of
24 sexual violation and departmental corruption." Id. ¶ 46.

25 Plaintiffs' complaint contains the following twelve causes
26 of action: (1) assault; (2) battery; (3) sexual battery; (4)
27 false imprisonment; (5) intentional infliction of emotional
28 distress ("IIED"); (6) violation of civil rights 42 U.S.C. § 1983

1 ("Section 1983"); (7) intentional violation of civil rights -
2 Monell; (8) violations of civil code § 52.1; (9) violations of
3 the Unruh Act; (10) negligent hiring and supervision;
4 (11) negligent training; and (12) negligent infliction of
5 emotional distress ("NIED"). The first through ninth and the
6 twelfth causes of action are brought against all defendants,
7 while the tenth and eleventh causes of action are brought only
8 against Sheriff and Tulare. Id. at 21-25.

9 Sheriff and Tulare (collectively "Defendants") now move to
10 dismiss and/or strike Plaintiffs' complaint (Doc. #26). First,
11 Defendants move to dismiss all causes of action pursuant to Rule
12 12(b)(6) because Plaintiffs failed to file the case within the
13 applicable statute of limitations. Mot. at 5-10. Second,
14 Defendants move to dismiss all causes of action because the
15 claims are time-barred pursuant to the California Government Tort
16 Claims Act ("Tort Claims Act"). Id. at 11. Third, Defendants
17 move to dismiss the ninth cause of action for violation of the
18 Unruh Act. Id. at 12-13. Fourth, Defendants move to dismiss the
19 tenth and eleventh causes of action pursuant to Rule 12(b)(6)
20 because there is no statutory basis for these claims or,
21 alternatively, to strike one of the two causes of action pursuant
22 to Rule 12(f) because they are duplicative. Id. at 13-14.
23 Fifth, Defendants seek dismissal of the twelfth cause of action
24 for failure to state a claim upon which relief can be granted.
25 Id. at 14-15. Plaintiffs oppose the motion in its entirety (Doc.
26 #27).

1 II. OPINION

2 A. Analysis

3 1. Statute of Limitations

4 Defendants move to dismiss the entire case on the basis that
5 the complaint was filed after the two-year statute of limitations
6 expired on all of the causes of action. Mot. at 6-8. Defendants
7 argue that Natasha's allegations that Nulick "verbally threatened
8 and intimidated" her in the "months following" her attack are not
9 actionable because they are conclusory and because verbal
10 harassment is insufficient to state a cause of action under
11 Section 1983. Id. at 7-8. Defendants further argue that the
12 delayed discovery rule does not apply in this case because
13 Plaintiffs "had reason to suspect a factual basis for a claim at
14 the moment of the alleged physical batteries." Id. at 9.
15 Lastly, Defendants argue that the Court should refuse to apply
16 the equitable tolling doctrine because the alleged reasons for
17 failing to file the complaint within the statute of limitations
18 are "bare assertions" that do not specify "what specific
19 statements or acts constituted the threats to their safety and
20 security." Id. at 9-10.

21 In opposition, Plaintiffs argue that they have sufficiently
22 alleged that Defendants engaged in a "pattern of systematic and
23 continuous abuse preventing [Plaintiffs'] ability to come
24 forward" and assert their claims against the Defendants. Opp. at
25 3. Plaintiffs assert that it was not until May 2015 when "they
26 felt safe coming forward and learned Defendants could be
27 responsible for Nulick and Defendants' agents/employees'
28 conduct." Id. Thus, the delayed discovery rule should apply and

1 the date of accrual should be May 2015. Id. at 4.

2 Alternatively, Plaintiffs argue that the statute of limitations
3 should be equitably tolled given that intimidation was used to
4 prevent Plaintiffs from filing their claims. Id. at 5-6.

5 In civil rights cases such as this one, state law determines
6 the length of the statute of limitations period and federal law
7 determines when a claim accrues. Lukovsky v. City & Cty. of San
8 Francisco, 535 F.3d 1044, 1048 (9th Cir. 2008). "Accrual is the
9 date on which the statute of limitations begins to run; under
10 federal law, a claim accrues when the plaintiff knows or has
11 reason to know of the injury which is the basis of the action."
12 Id. Defendants allege, and Plaintiffs do not contest, that the
13 applicable statute of limitations for all of the claims in this
14 case is two years. Since the Complaint was filed on September 9,
15 2015, the date of accrual must be after September 9, 2013, in
16 order for the claims to survive Defendants' challenge.

17 Though Defendants are correct that some instances of
18 Nulick's alleged sexual assaults occurred before September 9,
19 2013, the Complaint also alleges significant and different
20 misconduct after this alleged abuse. For example, Natasha
21 alleges that Nulick "in the months following" the assault on her
22 barged into her door and threatened her. Compl. ¶ 40. All of
23 the Plaintiffs allege that Nulick harassed them on the street
24 after the assaults and would park outside their homes. Id. ¶ 41.
25 Even after Nulick's arrest in October 2013, Defendants allegedly
26 undertook efforts to cover up Nulick's actions and to intimidate
27 Plaintiffs into dropping their lawsuit. Id. ¶¶ 43-44.
28 Plaintiffs specifically allege that even up until the date of

1 filing the Complaint, "Defendants would continue to prey on
2 Plaintiffs and threatened their safety and security." Id. ¶ 48.
3 Read as a whole, the Complaint clearly alleges plausible
4 wrongdoing that accrued after September 9, 2013.

5 Defendants argue that the alleged efforts by County to
6 conceal and cover up Nulick's conduct are not actionable under
7 Section 1983 because Plaintiffs failed to allege that they were
8 deprived of a right. Mot. at 8. Defendants cite two Seventh
9 Circuit cases for the proposition that a Section 1983 claim
10 requires allegations of a conspiracy and a deprivation of rights.
11 Id. While these cases are not binding on this Court, even if
12 they were, the Court finds that Plaintiffs have met their burden
13 of alleging that they were deprived of a constitutional right.
14 Plaintiffs allege that "Defendants were acting under color of law
15 and authority in violating Plaintiffs' constitutional
16 rights . . . under the Fourth Amendment." Compl. ¶ 98.
17 Plaintiffs also specifically allege that Defendants violated
18 their Fourth Amendment rights to be free from unreasonable
19 searches and seizures when Defendants "intentionally intruded
20 within Plaintiffs' intimate space by means of improper and
21 unwanted touching and forcible sexual assault in the absence of
22 probable cause." Id. ¶ 102. These allegations meet Defendants'
23 proposed requirement that Plaintiffs plead that they were
24 deprived of their rights in order to raise a plausible Section
25 1983 claim. For these reasons, Defendants' motion to dismiss
26 based on Plaintiffs' alleged failure to abide by the applicable
27 statute of limitations is denied.

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1 2. Government Claims Act

2 Defendants separately move to dismiss all of Plaintiffs'
3 state law causes of actions on the basis that Plaintiffs did not
4 present their claims to Defendants within six months of the time
5 the cause of action accrued, as is required by the Government
6 Claims Act. Mot. at 11; see Cal. Gov't Code § 911.2. Plaintiffs
7 argue that the delayed discovery rule applies and that their
8 claims were appropriately submitted within six months of the time
9 that Plaintiffs discovered their causes of action. Opp. at 4.

10 Plaintiffs have pleaded that they properly complied with the
11 Government Claims Act. Paragraph 54 of the complaint clearly
12 states that "Plaintiffs timely served Defendants with a claim for
13 damages pursuant to Government Code Section 910 on June 5, 2015.
14 A response was received by risk management for Defendants
15 returning them without action." Compl. ¶ 54. While all of the
16 causes of action may have accrued prior to six months before June
17 5, 2015, this Court cannot reach such a conclusion without
18 further factual development. At this stage of the proceedings
19 the Court is precluded from engaging in such factual development
20 and, instead, must assume that all allegations made in the
21 complaint are true, i.e., Plaintiffs only bear the responsibility
22 to plead a plausible claim. Bell Atlantic Corp. v. Twombly, 550
23 U.S. 544,570 (2007) (A plaintiff must plead "enough facts to
24 state a claim to relief that is plausible on its face.").
25 Plaintiffs have met this burden, and the Court therefore denies
26 Defendants' motion to dismiss the state law claims due to an
27 alleged failure to comply with the Government Claims Act.

1 3. Unruh Act

2 Plaintiffs' ninth cause of action for violations of the
3 Unruh Act alleges that Defendants "denied full and equal
4 accommodations, advantages, facilities, privileges and/or
5 services to Plaintiffs" because of Plaintiffs' "sex, race,
6 ancestry, and/or national origin." Compl. ¶¶ 127-128.
7 Defendants seek dismissal of this claim for two reasons. First,
8 Defendants argue that they cannot be liable under the Unruh Act
9 because that law applies only to "business establishments" and
10 Sheriff and Tulare are not business establishments. Mot. at 12-
11 13. Second, Defendants argue that Plaintiffs fail to allege
12 "any conduct preventing [them] from accessing public
13 accommodations," which is also required by the Unruh Act. Id.
14 at 13. Plaintiffs argue in their opposition that Nulick was a
15 "member of an establishment" that discriminated against them
16 based on their sex in a way that denied them equal
17 accommodations. Opp. at 7.

18 The Unruh Act entitles all individuals to "full and equal
19 accommodations, advantages, facilities, privileges, or services
20 *in all business establishments of every kind whatsoever.*" Cal.
21 Civ. Code § 51(b) (emphasis added). Whether and when public
22 entities are covered by the Unruh Act is well-litigated.

23 Some courts have exempted public entities from Unruh Act
24 liability. However, these cases do not stand for the categorical
25 rule proposed by Defendants that "public entities are not
26 considered business entities under the Act." Mot. at 5. The
27 cases cited by Defendants only deal with state prisons or
28 legislative acts, not actions taken by counties or law

1 enforcement agencies. See, e.g., Qualified Patients Ass'n v.
2 City of Anaheim, 187 Cal.App.4th 734, 765 (2010) ("Because the
3 terms of the Unruh Act expressly apply to business
4 establishments, we see no room for its application to the city's
5 legislative action here."); Carter v. City of Los Angeles, 224
6 Cal.App.4th 808, 825 (2014) ("A state prison is not a business
7 establishment for purposes of the act unless it engages in
8 behavior involving sufficient businesslike attributes.");
9 Taormina v. Cal. Dep't of Corr., 946 F. Supp. 829, 834 (S.D. Cal.
10 1996) (stating that "a prison does not qualify as a business
11 entity under Cal. Civ. Code section 51"); Gaston v. Colio, 883 F.
12 Supp. 508 (S.D. Cal. 1995) ("[P]laintiffs cite no authority, nor
13 any reasonable argument, that a state prison qualifies as a
14 'business establishment' for the purposes of the statute.").
15 Defendants have provided the Court with no cases that are
16 directly on point to the case presently before the Court.

17 A more compelling analysis can be found in Gibson v. Cty. of
18 Riverside, 181 F. Supp. 2d 1057, 1090 (C.D. Cal. 2002), in which
19 the District Court concluded that "persons and entities who are
20 not themselves business establishments are subject to" the Unruh
21 Act. The court pointed out that the text of the Unruh Act
22 clearly states that discrimination is barred "in all business
23 establishments," not *by* all business establishments. Id.
24 (emphasis in original). The court explained that "the provision
25 only defines *who* is protected and where they shall be free from
26 discrimination; it does not define--and limit--*what* persons are
27 liable for such discrimination." Id. Moreover, as pointed out
28 by the Gibson court, "*whoever* denies . . . or makes any

1 discrimination or distinction contrary to Section 51 . . . is
2 liable." Id. (citing Cal. Civ. Code § 52(a) (emphasis in
3 original)). And Section 52(c) describes how to bring a civil
4 action whenever "any person or group of persons is engaged in
5 conduct of resistance to the full enjoyment of any of the rights
6 hereby secured." Id. (citing Cal. Civ. Code § 52(c) (emphasis in
7 original)). This statutory language supports the conclusion that
8 "the term 'business establishments' must properly be interpreted
9 in the broadest sense reasonably possible." Harrison v. City of
10 Rancho Mirage, 243 Cal.App.4th 162, 173 (2015) (citing Curran v.
11 Mount Diablo Council of the Boy Scouts, 17 Cal.4th 670, 689
12 (1998)).

13 Several courts have concluded that public entities may be
14 held liable for Unruh Act violations even when they are not
15 strictly considered to be business entities. For example,
16 "public schools are business establishments within the meaning of
17 the Unruh Act." Nicole M. By & Through Jacqueline M. v. Martinez
18 Unified Sch. Dist., 964 F. Supp. 1369, 1388 (N.D. Cal. 1997);
19 Walsh v. Tehachapi Unified Sch. Dist., 827 F. Supp. 2d 1107, 1123
20 (E.D. Cal. 2011) ("[S]everal federal courts have concluded that a
21 plaintiff's allegation that a public school failed to adequately
22 respond to his or her complaints of harassment gives rise to a
23 cognizable claim under the Unruh Civil Rights Act. This Court
24 follows the lead of those courts."). At least one lower state
25 court has similarly concluded that a county's legislative action
26 is also subject to the Unruh Act. Travis v. Cty. of Santa Cruz,
27 2007 WL 294132, at *14 (Cal. Ct. App. Feb. 2, 2007) ("In the
28 circumstances here, which involve claims of discrimination in

1 housing, we believe the County's Ordinance is subject to the
2 Unruh Act.").

3 In light of the compelling textual analysis of the Gibson
4 court and the multiple cases finding that public entities may be
5 liable for Unruh Act violations, this Court concludes that
6 Defendants are not exempt from liability for violations of the
7 Unruh Act based on Defendants' argument that "Plaintiffs do not
8 allege conduct by any business establishment." Mot. at 13.

9 The Court also disagrees with Defendants' argument that
10 Plaintiffs were required but failed to adequately plead that
11 they were subject to intentional discrimination in public
12 accommodations. Mot. at 13. Plaintiffs specifically pleaded
13 that they were denied "full and equal accommodations." Compl.
14 ¶ 127 and the Unruh Act does not simply bar discriminatory
15 actions that prevent access to places of public accommodations.
16 The Act also establishes that all individuals are entitled to
17 equal privileges and services. Cal. Civ. Code § 51. The
18 allegations set forth in the complaint adequately describe
19 multiple instances in which Defendants failed to provide equal
20 services to Plaintiffs because of Plaintiffs' sex and/or
21 ethnicity. For all these reasons, the Court denies Defendants'
22 motion to dismiss the Unruh Act cause of action.

23 4. Negligent Hiring and Supervision; Negligent
24 Training

25 Plaintiffs' tenth cause of action for negligent hiring and
26 supervision alleges that Defendants "failed to use reasonable
27 care in hiring and supervising their employees . . . creat[ing]
28 a dangerous environment for the general public, including

1 Plaintiffs." Compl. ¶ 137. Plaintiffs' eleventh cause of
2 action for negligent training alleges that Defendants "neither
3 had in place nor implemented an adequate system or procedure for
4 investigating, training, and supervising employees . . . to
5 prevent or remedy sexual abuse of its citizens." Id. ¶ 151.

6 Defendants argue that the tenth and eleventh causes of
7 action should be dismissed because they are direct liability
8 claims and "there is no statutory basis for declaring a public
9 entity liable for negligence in its training, hiring, and
10 supervision practices." Mot. at 13-14. Alternatively,
11 Defendants move to strike one or both of the causes of action
12 because they are duplicative. Id. at 14. Plaintiffs oppose the
13 motion and argue that Defendants have an established duty to
14 protect Plaintiffs and "to not expose them to the danger of
15 sexual abuse and threats [or] intimidation by its employees."
16 Opp. at 6. Plaintiffs contend that the only issue is whether
17 this duty was breached, which is a factual issue that cannot be
18 decided at this stage of the proceeding. Id.

19 California case law makes it clear that public entities are
20 not directly liable for negligent hiring, supervision, or
21 training. de Villers v. Cty. of San Diego, 156 Cal.App.4th 238,
22 252 (2007) ("We find no relevant case law approving a claim for
23 direct liability based on a public entity's allegedly negligent
24 hiring and supervision practices."); Shoval v. Sobzak, 2009 WL
25 2780155, at *4 (S.D. Cal. Aug. 31, 2009) ("California courts have
26 repeatedly held that there is no statutory basis for direct
27 claims against a public entity for negligent hiring and
28 supervision practices."). Yet, as this Court pointed out in

1 Avila v. California, 2015 WL 6003289, at *6 (E.D. Cal. Oct. 14,
2 2015), "public entities can be held *vicariously* liable for the
3 conduct of their employees when committed within the scope of
4 their employment." (emphasis added). California law
5 specifically states that a "public entity is liable for injury
6 proximately caused by an act or omission of an employee of the
7 public entity within the scope of his employment if the act or
8 omission would, apart from this section, have given rise to a
9 cause of action against that employee or his personal
10 representative." Cal. Gov. Code § 815.2.

11 Plaintiffs clearly allege that Defendants are vicariously
12 liable pursuant to Section 815.2. Compl. ¶¶ 134, 146
13 ("Plaintiffs also contend that Defendants are vicariously liable
14 for the tortious sexual acts of Defendant Nulick flowing from his
15 employment with Defendants."). However, "in order to state a
16 proper claim for negligent hiring or supervision" based on
17 vicarious liability against a public entity, the plaintiff "must
18 identify, if not join, the specific employee whose negligence is
19 alleged and the specific negligent conduct underlying the claim."
20 Avila, 2015 WL 6003289, at *6. Plaintiffs have not satisfied
21 this pleading requirement and the motion to dismiss the tenth and
22 eleventh causes of action is granted. Because Plaintiffs might
23 be able to cure this defect, the Court dismisses these two causes
24 of action without prejudice and with leave to amend. Eminence
25 Capital, LLC v. Aspeon Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)
26 ("Dismissal with prejudice and without leave to amend is not
27 appropriate unless it is clear on de novo review that the
28 complaint could not be saved by amendment.").

1 5. Negligent Infliction of Emotional Distress

2 Defendants move to dismiss Plaintiffs' twelfth cause of
3 action for negligent infliction of emotional distress ("NIED"),
4 arguing that Plaintiffs have not adequately pleaded facts that
5 would support either a bystander or non-bystander NIED claim.
6 Mot. at 7-8. Plaintiffs oppose dismissal by arguing that an
7 employer may be vicariously liable for the torts of its
8 employees and that Plaintiffs have therefore pled sufficient
9 facts to state an NIED claim. Opp. at 7.

10 NIED is not an independent tort in California, but a subset
11 of negligence. Burgess v. Superior Court, 2 Cal.4th 1064, 1072
12 (1992). As such, Plaintiffs must adequately plead the
13 "traditional elements of duty, breach of duty, causation, and
14 damages." Id.; Hall v. Apollo Grp., Inc., 2014 WL 4354420, at *6
15 (N.D. Cal. Sept. 2, 2014) ("The elements of a claim of negligent
16 infliction of emotional distress are: (1) the defendant engaged
17 in negligent conduct; (2) the plaintiff suffered serious
18 emotional distress; and (3) the defendants' negligent conduct was
19 a cause of the serious emotional distress").

20 There are two possible theories of liability in an NIED
21 cause of action: the bystander theory and the direct victim
22 theory. Burgess, 2 Cal.4th at 1071. Plaintiffs do not seek
23 relief under a bystander theory because they allege that they
24 were directly harmed, not harmed due to witnessing another's
25 injury. Instead, Plaintiffs seek relief under the direct victim
26 theory. In direct victim cases, a duty may be imposed by law, be
27 assumed by the defendant, or exist by virtue of a special
28 relationship. Potter v. Firestone Tire & Rubber Co., 6 Cal.4th

1 965, 985 (1993); Burgess, 2 Cal.4th at 1073 (liability for NIED
2 can be imposed for "a breach of duty owed the plaintiff that is
3 assumed by the defendant or imposed on the defendant as a matter
4 of law, or that arises out of a relationship between the two").
5 Additionally, "public policy considerations are relevant in
6 determining whether a particular plaintiff may recover damages
7 for emotional distress." Christensen v. Superior Court, 54
8 Cal.3d 868, 885 (1991).

9 [I]n considering the existence of 'duty' in a given
10 case several factors require consideration including
11 the foreseeability of harm to the plaintiff, the
12 degree of certainty that plaintiff suffered injury,
13 the closeness of the connection between the
14 defendant's conduct and the injury suffered, the moral
15 blame attached to the defendant's conduct, the policy
of preventing future harm, the extent of the burden to
the defendant and consequences to the community of
imposing a duty to exercise care with resulting
liability for breach, and the availability, cost, and
prevalence of insurance for the risk involved."

16 Id. at 885-86 (1991) (citations omitted).

17 Here, Defendants seek dismissal of this cause of action
18 solely for the reason that "Plaintiffs do not allege any . . .
19 factual circumstances" that may give rise to a direct liability
20 NIED claim, including the "negligent breach of a duty arising out
21 of a preexisting relationship." Mot. at 14-15. However,
22 Plaintiffs have clearly alleged that Defendants had a special
23 relationship with Plaintiffs and that Nulick was responsible for
24 maintaining this relationship. Compl. ¶ 159. Plaintiffs further
25 allege that a duty may have been assumed by Defendants. Id. ¶¶
26 159-161. Additionally, the Christensen factors weigh in favor of
27 concluding that a duty may be imposed in this case. The alleged
28 emotional harm caused by Defendants' actions was foreseeable and

1 certain, the alleged actions are morally blameworthy, and the
2 possibility of preventing future harm is compelling. For these
3 reasons, the Court denies Defendants' motion to dismiss the NIED
4 cause of action.

5
6 III. ORDER

7 For the reasons set forth above, the Court GRANTS
8 Defendants' motion to dismiss the tenth and eleventh causes of
9 action with leave to amend and DENIES Defendants' motion to
10 dismiss the other causes of action. If Plaintiffs desire to cure
11 the defects identified in their tenth and/or eleventh causes of
12 action, Plaintiffs' amended complaint must be filed within twenty
13 days from the date of this Order. Defendants' responsive
14 pleadings are due within twenty days thereafter. The Court
15 advises that failure to cure the defects identified in this Order
16 may be grounds for dismissal of those claims without further
17 leave to amend. Dick v. Am. Home Mortgage Servicing, Inc., 2013
18 WL 5299180, at *6 (E.D. Cal. 2013).

19 Finally, Defendants' reply brief is two pages longer than
20 the page limit allowed by the Court (Doc.#19-1). In accordance
21 with this Order Re Filing Requirements, Defendants counsel is
22 sanctioned in the amount of \$100 which is to be paid within five
23 days of the date of this Order.

24 IT IS SO ORDERED.

25 Dated: May 11, 2016

26
27 
28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE