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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BRANDON OLIVERA and STEVEN
ORTMANN,

NO. CIV. 2:10-1747 WBS GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

BRIAN VIZZUSI; MARK SIEMENS;
CITY OF LINCOLN; CITY OF
ROCKLIN; LINCOLN POLICE
DEPARTMENT; and ROCKLIN POLICE
DEPARTMENT,

Defendants.

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Plaintiffs Brandon Olivera and Steven Ortmann filed this action against Brian Vizzusi, Mark Siemens, City of Lincoln, City of Rocklin, Lincoln Police Department, and Rocklin Police Department arising from the alleged disclosure of plaintiffs' personnel records. City of Rocklin ("Rocklin"), Rocklin Police Department ("Rocklin PD"), and Mark Siemens (collectively "Rocklin defendants") now move to dismiss the First Amended

1 Complaint ("FAC") pursuant to Federal Rule of Civil Procedure
2 12(b)(6) for failure to state a claim upon which relief can be
3 granted.

4 I. Factual and Procedural Background

5 On or around October 30, 2003, Rocklin PD Sergeant
6 Vizzusi allegedly conducted an administrative investigation of
7 plaintiffs, who were Rocklin PD police officers,¹ and prepared an
8 internal affairs investigation report ("report"). (FAC ¶ 17
9 (Docket No. 16).) Vizzusi then transmitted the report to Rocklin
10 PD Chief of Police Siemens, but allegedly retained a copy of the
11 report. (Id. ¶¶ 18-19.) The investigation was subsequently
12 closed. (Id. ¶ 17.)

13 The FAC alleges that the report consisted of over
14 twenty pages (id. ¶ 39) and contained: "confidential personnel
15 information" (id. ¶ 17) and "private personal information" (id. ¶
16 27) about plaintiffs, "significantly more detailed information
17 concerning the alleged misconduct than available in any public
18 record" (id. ¶ 39), "both Olivera's and Ortmann['s] names,
19 positions at Rocklin PD, and a detailed description of alleged
20 misconduct" (id. ¶ 42), "summaries of interviews" with plaintiffs
21 (id. ¶ 43), "complaints and investigations of complaints" (id. ¶
22 48), and "names of the individuals involved . . . , the
23 allegations of misconduct against them, witness statements,
24 analysis of the evidence and recommendations on the disposition."
25 (Id. ¶ 49.) The FAC alleges that the report was confidential
26

27 ¹ Olivera is currently employed as a County of Placer
28 District Attorney investigator. (FAC ¶ 9.) Ortmann is still a
police officer for Rocklin PD. (Id. ¶ 10.)

1 pursuant to state law regarding peace officers' personnel
2 records. (Id. ¶¶ 40-41, 52, 84, 89.)

3 In 2004, Vizzusi left Rocklin PD and was hired by City
4 of Lincoln ("Lincoln") as a Lincoln Police Department ("Lincoln
5 PD") lieutenant. (Id. ¶ 20.) Vizzusi allegedly took a copy of
6 the report with him to Lincoln PD, which Siemens allegedly
7 "authorized, permitted, or otherwise allowed." (Id. ¶¶ 23, 28.)
8 Vizzusi was eventually appointed as Lincoln PD Chief of Police in
9 2006. (Id. ¶¶ 21-22.)

10 On or around June 15, 2007, Vizzusi met with Lincoln PD
11 Lieutenant Paul Shlegren and Lincoln PD Sergeant Brendan
12 Lebrecht. (Id. ¶ 25.) Vizzusi provided them with a paper copy
13 of the report and emailed them a copy immediately after the
14 meeting. (Id. ¶¶ 25-26.) Vizzusi allegedly told Shlegren and
15 Lebrecht that Siemens had given him permission to distribute the
16 report to members of the Lincoln PD. (Id. ¶ 25.) The FAC
17 alleges that the emailed copy was not redacted and contained
18 plaintiffs' names, positions, a detailed description of
19 plaintiffs' alleged misconduct, and summaries of interviews with
20 plaintiffs. (Id. ¶¶ 42-43.) The FAC does not allege whether the
21 paper copy given to Shlegren and Brendan was redacted or
22 contained this same information.

23 The disclosure to Shlegren and Lebrecht allegedly
24 "result[ed]" in further disclosures of the report and it "became
25 widely known throughout the Lincoln PD, law enforcement
26 communities in the region, and to other third persons and
27 agencies." (Id. ¶ 30.) In January of 2010, a peace officer for
28 Placer County "revealed the disclosure" to plaintiffs. (Id. ¶

1 34.) On or about January 27, 2010, plaintiffs' counsel requested
2 that Siemens "take appropriate steps to investigate the Police
3 Department's apparent breach of its duty to safeguard its
4 employees' personnel files." (Id. ¶ 34.) Plaintiffs' counsel
5 also requested that the Lincoln City Manager account for all
6 copies of plaintiffs' "personnel files," destroy all electronic
7 copies, return all physical copies, and provide a sworn affidavit
8 from Vizzusi² attesting that all copies had been destroyed or
9 returned to plaintiffs. (Id. ¶ 35.)

10 On February 12, 2010, Lincoln confirmed that Vizzusi
11 had "disseminated" plaintiffs' "personnel records," indicated the
12 records would be destroyed, and agreed to provide the physical
13 copy of the records to plaintiffs' counsel. (Id. ¶ 36.) On
14 March 18, 2010, Lincoln provided the requested signed declaration
15 from Vizzusi to plaintiffs' counsel. (Id. ¶ 37.) Plaintiffs
16 allege that electronic copies are still maintained on Lincoln
17 PD's computers. (Id. ¶ 38.) Plaintiffs also allege that they
18 have been stigmatized, humiliated, and embarrassed. (Id. ¶ 32.)

19 On July 7, 2010, plaintiffs filed an initial complaint
20 alleging various federal and state law claims. (Docket No. 1.)
21 On September 9, 2010, plaintiffs filed the FAC, asserting federal
22 claims pursuant to 42 U.S.C. §§ 1983 and 1985. The FAC also
23 asserts state law claims for violations of California
24 Constitution Article I, section 1 (right to privacy), California
25 Penal Code section 832.7 (confidentiality of peace officers'
26 personnel records), California Government Code section 6254

27
28 ² In or about January of 2010, Vizzusi was "separated"
from his employment with Lincoln and Lincoln PD. (FAC ¶ 51.)

1 (California Public Records Act's exemptions), common law
2 intrusion into private affairs, California Civil Code section
3 1798.42 (California Information Practices Act of 1977), common
4 law negligent infliction of emotional distress, common law
5 intentional infliction of emotional distress, and common law
6 negligent hiring, supervision, and retention. The Rocklin
7 defendants now move to dismiss the FAC pursuant to Rule 12(b)(6).

8 II. Discussion

9 To survive a motion to dismiss, a plaintiff must plead
10 "only enough facts to state a claim to relief that is plausible
11 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
12 (2007). This "plausibility standard," however, "asks for more
13 than a sheer possibility that a defendant has acted unlawfully,"
14 and where a complaint pleads facts that are "merely consistent
15 with" a defendant's liability, it "stops short of the line
16 between possibility and plausibility." Ashcroft v. Iqbal, ---
17 U.S. ----, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks
18 omitted) (quoting Twombly, 550 U.S. at 556-57). In deciding
19 whether a plaintiff has stated a claim, the court must assume
20 that the plaintiff's allegations are true and draw all reasonable
21 inferences in the plaintiff's favor. Usher v. City of L.A., 828
22 F.2d 556, 561 (9th Cir. 1987). However, the court is not
23 required to accept as true "allegations that are merely
24 conclusory, unwarranted deductions of fact, or unreasonable
25 inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055
26 (9th Cir. 2008) (internal quotation marks omitted).

27 A. Section 1983 Claims against the Rocklin Defendants

28 In relevant part, § 1983 provides:

1 Every person who, under color of any statute, ordinance,
2 regulation, custom, or usage, of any State . . . ,
3 subjects, or causes to be subjected, any citizen of the
4 United States . . . to the deprivation of any rights,
5 privileges, or immunities secured by the Constitution and
6 laws, shall be liable to the party injured in an action
7 at law, suit in equity or other proper proceeding for
8 redress

9 42 U.S.C. § 1983. Section 1983 itself is not a source of
10 substantive rights; it provides a cause of action against any
11 person who, under color of state law, deprives an individual of
12 federal constitutional rights or limited federal statutory
13 rights. 42 U.S.C. § 1983; Graham v. Connor, 490 U.S. 386, 393-94
14 (1989). Here, plaintiffs allege violations of the right to
15 privacy apparently based on the First, Fourth, Fifth, Ninth, and
16 Fourteenth Amendments. (See FAC ¶ 57 (“a penumbra of
17 constitutional rights”).)

18 The Ninth Circuit has held that the Constitution
19 protects an “individual interest in avoiding disclosure of
20 personal matters.” In re Crawford, 194 F.3d 954, 958 (9th Cir.
21 1999) (internal quotation marks omitted); see, e.g., Nelson v.
22 NASA, 530 F.3d 865, 879 (9th Cir. 2008) (“Information relating to
23 medical treatment and psychological counseling fall squarely
24 within the domain protected by the constitutional right to
25 informational privacy.”), cert. granted, --- U.S. ----, 130 S.
26 Ct. 1755 (2010); Crawford, 194 F.3d at 958 (agreeing that public
27 disclosure of social security numbers may implicate the right to
28 informational privacy in “an era of rampant identity theft”);
Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269
(9th Cir. 1998) (“The constitutionally protected privacy interest
in avoiding disclosure of personal matters clearly encompasses

1 medical information and its confidentiality."); Thorne v. City of
2 El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (holding that
3 questioning police applicant about her prior sexual activity
4 violated her right to informational privacy).

5 While the constitutional right to privacy includes the
6 "individual interest in avoiding disclosure of personal matters"
7 Whalen v. Rose, 429 U.S. 589, 599 (1977), the "courts have
8 construed this right narrowly, limiting it to those rights which
9 are 'fundamental or implicit in the concept of ordered liberty.'" "
10 Carver v. Rathlesberger, No. 04-1918 DFL PAN, 2005 WL 3080856, at
11 *2 (E.D. Cal. Nov. 11, 2005) (quoting St. Michael's Convalescent
12 Hosp. v. Cal., 643 F.2d 1369, 1375 (9th Cir. 1981)); see also
13 Nelson v. NASA, 568 F.3d 1028, 1053 (9th Cir. 2009) (denying
14 rehearing en banc) (Kozinski, J., dissenting) (noting an
15 important distinction recognized by other circuits between
16 "information that pertains to a fundamental right" and a
17 "free-standing right not to have the world know bad things about
18 you" and stating that the former right seems to stand on "far
19 sounder constitutional footing").

20 In Kallstrom v. City of Columbus, 136 F.3d 1055, 1061
21 (6th Cir. 1998), the Sixth Circuit addressed disclosure of police
22 officers' personal information in their personnel records, which
23 involved undercover police officers who investigated a drug
24 conspiracy among gang members and testified against them at
25 trial. There, the court held that the officers' privacy
26 interests were of a constitutional dimension because they
27 implicated a fundamental interest "in preserving their lives and
28 the lives of their family members, as well as preserving their

1 personal security and bodily integrity." Id. at 1062; see also
2 Flanagan v. Munger, 890 F.2d 1557, 1570-71 (10th Cir. 1989)
3 (holding that fact that police officers were reprimanded for off-
4 duty ownership of store that sold, inter alia, adult videos was
5 not of such a "highly personal or sensitive nature that it falls
6 within the zone of confidentiality").

7 Here, plaintiffs' allegations of the content of the
8 report are conclusory and general. (See, e.g., FAC ¶¶ 17, 27,
9 39, 42-43, 48-49.) Considering the nature of the allegations,
10 the court is unable to plausibly infer that defendants disclosed
11 information that implicates "rights which are 'fundamental or
12 implicit in the concept of ordered liberty,'" Carver, 2005 WL
13 3080856, at *2 (quoting St. Michael's Convalescent Hosp., 643
14 F.2d at 1375), or disclosed information that is of such a "highly
15 personal or sensitive nature that it falls within the zone of
16 confidentiality." Flanagan, 890 F.2d at 1570-71. The FAC does
17 not even allege facts about the report that are contained in the
18 public record, which the FAC suggests exists when it alleges that
19 the report contained "significantly more detailed information
20 concerning the alleged misconduct than available in any public
21 record." (FAC ¶ 39.) The FAC thus fails to sufficiently allege
22 a constitutional violation.

23 Because plaintiffs fail to sufficiently allege a
24 constitutional violation, plaintiffs have also not sufficiently
25 alleged Monell liability. Monell liability requires an
26 underlying constitutional violation. Dixon v. Wallowa Cnty., 336
27 F.3d 1013, 1021 (9th Cir. 2003); see also Murray v. City of
28 Carlsbad, No. 08-2121, 2010 WL 2839477, at *8 (C.D. Cal. July 19,

1 2010) ("Monell liability cannot be imposed on the City in the
2 absence of a constitutional violation by police officers.").
3 Accordingly, the court will grant the Rocklin defendants' motion
4 to dismiss the § 1983 claims.³

5 B. State Law Privacy Claims against the Rocklin Defendants

6 Plaintiffs' fourth claim alleges violations of
7 California Constitution Article I, section 1 (right to privacy),
8 California Penal Code section 832.7 (confidentiality of peace
9 officers' personnel records), and California Government Code
10 section 6254 (California Public Records Act's exemptions). The
11 fifth claim is for common law intrusion into private affairs.

12 A plaintiff alleging a California constitutional
13 privacy claim must establish three elements. Hill v. Nat'l
14 Collegiate Athletic Ass'n, 7 Cal. 4th 1, 39-40 (1994). First,
15 the plaintiff must establish a legally protected privacy
16 interest. Id. 39-40. Second, the plaintiff must establish "a
17 reasonable expectation of privacy in the circumstances." Id.
18 The court must look to "customs, practices, and physical settings
19 surrounding particular activities" and the opportunity to be
20 notified in advance and consent to the intrusion. Id. at 36-37.
21 Third, the plaintiff must establish "conduct by defendant
22 constituting a serious invasion of privacy." Id. at 39-40.
23 "Actionable invasions of privacy must be sufficiently serious in
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25 ³ The § 1985 claim will also accordingly be dismissed.
26 See Thornton v. City of St. Helens, 425 F.3d 1158, 1168 (9th Cir.
27 2005) ("The absence of a [42 U.S.C. §] 1983 deprivation of
28 rights precludes a [42 U.S.C. §] 1985 conspiracy claim predicated
on the same allegations.") (internal quotation marks omitted);
see also Caldeira v. Cnty. of Kauai, 866 F.2d 1175, 1182 (9th
Cir. 1989).

1 their nature, scope, and actual or potential impact to constitute
2 an egregious breach of the social norms underlying the privacy
3 right." Id. at 37.

4 There are two elements for a common law privacy claim:
5 "First, the defendant must intentionally intrude into a place,
6 conversation, or matter as to which the plaintiff has a
7 reasonable expectation of privacy. Second, the intrusion must
8 occur in a manner highly offensive to a reasonable person."
9 Hernandez v. Hillside, Inc., 47 Cal. 4th 272, 286 (2009). The
10 second element "essentially involves a policy determination" as
11 to whether the intrusion was "highly offensive under the
12 particular circumstances," considering such factors as the degree
13 and setting of the intrusion and the defendant's motives and
14 objectives. Id. at 287 (internal quotation marks omitted).

15 While Rosales v. City of L.A., 82 Cal. App. 4th 419,
16 428 (2d Dist. 2000), held that section 832.7 does not authorize a
17 private cause of action for improper disclosure of peace
18 officers' personnel records,⁴ that court applied the California
19 constitutional right to privacy to a city and its counsel's
20 disclosure of a police officer's personnel record to someone
21 suing the city based on the police officer's alleged sexual
22 misconduct. Id., 82 Cal. App. 4th at 427. The city and its
23 counsel "concede[d] that the personnel files were improperly
24 disclosed, without compliance with the applicable statutory
25 procedures." Id. at 423 n.1. The Rosales court held, "[the

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27 ⁴ Records that section 832.7 prohibits from disclosure
28 are exempt from disclosure pursuant to California Public Records
Act's section 6254. Copley Press, Inc. v. Super. Ct., 39 Cal.
4th 1272, 1284-86 (2006).

1 plaintiff] has failed to state a claim for invasion of privacy
2 because he could not have a reasonable expectation that his
3 personnel records would not be disclosed in the litigation
4 relating to the [alleged misconduct]." Id. at 428-29. The
5 Rosales court also "conclude[d] that disclosure during the course
6 of litigation is not the serious and egregious breach that would
7 meet the standard for a privacy claim." Id. at 429.

8 Here, plaintiffs have sufficiently pled state law
9 privacy claims. Unlike in Rosales, the FAC's factual allegations
10 plausibly suggest that plaintiffs had a "reasonable expectation
11 that [their] personnel records would not be disclosed." Id. at
12 428-29. The FAC alleges that the report was confidential
13 pursuant to state law (FAC ¶¶ 40-41, 52, 84, 89) and that
14 circumstances did not exist that would permit disclosure under
15 state law, such as litigation. (Id. ¶¶ 44-47, 50, 69.)
16 Accordingly, the court will deny the Rocklin defendants' motion
17 to dismiss the state law privacy claims.

18 C. Claim for Violation of California Civil Code Section
19 1798.42 against the Rocklin Defendants

20 California Civil Code section 1798.42 provides: "In
21 disclosing information contained in a record to an individual, an
22 agency shall not disclose any personal information relating to
23 another individual which may be contained in the record." Cal.
24 Civ. Code § 1798.42. Section 1798.53 authorizes a civil action
25 against persons acting outside the scope of employment for the
26 state or a local agency. Cal. Civ. Code § 1798.53. Section
27 1798.45 authorizes a civil action against an "agency" for a
28 violation, Cal. Civ. Code § 1798.45, and section 1798.3 defines

1 an agency as a "state office, officer, department, division,
2 bureau, board, commission, or other state agency" and expressly
3 excludes from this definition a "local agency." Cal. Civ. Code §
4 1798.3(b)(4).

5 Thus, section 1798.42 "only applies to state agencies.
6 Local agencies such as cities, as well as their officers, are
7 exempt from prosecution." Bush v. Klein, Nos. 08-3456, 08-3459,
8 2008 WL 4614438, at *4 (N.D. Cal. Oct. 16, 2008) (citation
9 omitted); see also McCole v. S.F. Housing Auth., No. 02-5810,
10 2007 WL 1575883, at *15 (N.D. Cal. May 29, 2007) (declining to
11 grant summary judgment to the housing authority based on the
12 definition of agency because the housing authority had indicated
13 it was a consortium of federal, state, and local actors).
14 Because it is not alleged that the individual defendant was
15 acting outside the scope of his employment, this claim stated
16 against him fails. The claim as against Rocklin and Rocklin PD
17 also fails because they are not state agencies. Accordingly, the
18 court will grant the motion to dismiss this claim.

19 D. Remaining State Law Claims

20 Plaintiffs' remaining claims against Rocklin, Rocklin
21 PD, and Siemens are for negligent infliction of emotional
22 distress, intentional infliction of emotional distress, and
23 negligent hiring, supervision, and retention of Siemens and
24 Vizzusi. Plaintiffs' remaining state law claims against Rocklin
25 and Rocklin PD rely on respondeat superior. Section 815.2
26 provides that "[a] public entity is liable for injury proximately
27 caused by an act or omission of an employee of the public entity
28 within the scope of his employment if the act or omission would,

1 apart from this section, have given rise to a cause of action
2 against that employee" Cal. Gov't Code § 815.2. Public
3 employees are liable to the same extent as private individuals.
4 Cal. Gov't Code § 820.

5 1. Common Law Claim for Negligent Infliction of
6 Emotional Distress against the Rocklin Defendants

7 "The negligent causing of emotional distress is not an
8 independent tort but the tort of negligence. The traditional
9 elements of duty, breach of duty, causation, and damages apply."

10 Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48
11 Cal. 3d 583, 588 (1989). A plaintiff must show "(1) a legal duty
12 to use reasonable care, (2) breach of that duty, and (3)
13 proximate cause between the breach and (4) the plaintiff's
14 injury." Mendoza v. City of L.A., 66 Cal. App. 4th 1333, 1339
15 (2d Dist. 1998). Here, plaintiffs allege that they have been
16 stigmatized, humiliated, and embarrassed by the disclosure of the
17 report. (FAC ¶ 32.) The FAC alleges that the report was
18 disclosed despite plaintiffs' reasonable expectation of privacy
19 in the report. Plaintiffs have sufficiently alleged facts that
20 plausibly suggest negligent infliction of emotional distress.
21 Accordingly, the court will deny the Rocklin defendants' motion
22 to dismiss this claim.

23 2. Common Law Claim for Intentional Infliction of
24 Emotional Distress against the Rocklin Defendants

25 A claim for intentional infliction of emotional
26 distress requires: "(1) extreme and outrageous conduct by the
27 defendant with the intention of causing, or reckless disregard of
28 the probability of causing, emotional distress"; (2) "the

1 plaintiff's suffering severe or extreme emotional distress"; and
2 (3) "actual and proximate causation of the emotional distress by
3 the defendant's outrageous conduct." Christensen v. Super. Ct.
4 54 Cal. 3d 868, 903 (1991) (internal quotation marks omitted).
5 "Conduct to be outrageous must be so extreme as to exceed all
6 bounds of that usually tolerated in a civilized community." Id.
7 (internal quotation marks omitted). Here, the FAC alleges that
8 Siemens gave Vizzusi permission to disclose the report to members
9 of the Lincoln PD (FAC ¶ 25) despite plaintiffs' reasonable
10 expectation of privacy in the report. The report then allegedly
11 "became widely known throughout the Lincoln PD, law enforcement
12 communities in the region, and to other third persons and
13 agencies." (Id. ¶ 30.) Taking the alleged facts as true, it is
14 plausible that plaintiffs will be entitled to relief.
15 Accordingly, the court will deny the Rocklin defendants' motion
16 to dismiss this claim.

17 3. Common Law Claims for Negligent Hiring,
18 Supervision, and Retention of Siemens and Vizzusi
19 against Rocklin and Rocklin PD

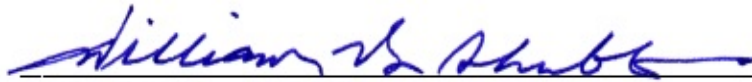
20 California recognizes the tort of negligence in hiring,
21 supervising, and retaining an employee who is incompetent or
22 unfit. See Delfino v. Agilent Techs., Inc., 145 Cal. App. 4th
23 790, 815 (6th Dist. 2006); see also Jarbo v. Cnty. of Orange, No.
24 05-00202, 2010 WL 3584440, at *18 (N.D. Cal. Aug. 30, 2010)
25 ("County's and the Sheriff's decisions regarding the hiring,
26 retention, and training of [deputy] are purely operational.
27 Thus, they are not subject to discretionary act immunity.").
28 Here, considering the alleged facts in the light most favorable

1 to plaintiffs, it is plausible that Siemens and Vizzusi were
2 negligently hired, supervised, or retained. Accordingly, the
3 court will deny the Rocklin defendants' motion to dismiss these
4 claims.

5 IT IS THEREFORE ORDERED that the Rocklin defendants'
6 motion to dismiss be, and the same hereby is, GRANTED with
7 respect to the § 1983 claims, § 1985 claim, and claim for
8 violation of California Civil Code section 1798.42 and DENIED
9 with respect to the other claims.

10 Plaintiffs have twenty days from the date of this Order
11 to file an amended complaint, if they can do so consistent with
12 this Order.

13 DATED: November 12, 2010

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15 WILLIAM B. SHUBB
16 UNITED STATES DISTRICT JUDGE
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