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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,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

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. Plaintiffs have voluntarily dismissed City of
Lincoln, Lincoln Police Department, and Brian Vizzusi from this
action. City of Rocklin, Rocklin Police Department ("Rocklin PD"

1 and collectively "Rocklin defendants"), and Mark Siemens now move
2 to dismiss the three federal claims in the Second Amended
3 Complaint ("SAC") pursuant to Federal Rule of Civil Procedure
4 12(b)(6) for failure to state a claim upon which relief can be
5 granted.

6 I. Factual and Procedural Background

7 On or around October 30, 2003, Rocklin PD Sergeant
8 Vizzusi conducted an administrative investigation of plaintiffs,
9 who were Rocklin PD police officers,¹ relating to an incident in
10 Humboldt County, California, and prepared an internal affairs
11 investigation report ("report"). (SAC ¶¶ 17, 24 (Docket No.
12 30).) Vizzusi then transmitted the report to Rocklin PD Chief of
13 Police Siemens, but obtained or retained a copy of the report.
14 (Id. ¶¶ 18-19.) The investigation was subsequently closed. (Id.
15 ¶ 17.)

16 The SAC alleges that the report consisted of "over
17 twenty pages" (id. ¶ 39) and contained plaintiffs' names,
18 plaintiffs' positions at Rocklin PD, a "detailed" description of
19 alleged misconduct, and summaries of interviews with plaintiffs.
20 (Id. ¶¶ 42-43.) The report allegedly "disclosed various personal
21 information, such as intoxication, fighting, sexual view points,
22 sexual orientation, sexual relations, arrest records, medical
23 conditions, and discrimination against third persons." (Id. ¶
24 43.) The report also contained witness statements, analysis of
25 the evidence, and recommendations on the disposition. (Id. ¶

26
27 ¹ Olivera is currently employed as a County of Placer
28 District Attorney investigator. (Second Am. Compl. ("SAC") ¶ 9
(Docket No. 30).) Ortmann is still a police officer for Rocklin
PD. (Id. ¶ 10.)

1 49.) The SAC alleges that the report was confidential pursuant
2 to state law regarding police officers' personnel records and
3 records maintained by police departments. (Id. ¶¶ 40-41, 48, 52,
4 84.)

5 In 2004, Vizzusi left Rocklin PD and was hired by City
6 of Lincoln as a Lincoln Police Department ("Lincoln PD")
7 lieutenant. (Id. ¶ 20.) Vizzusi allegedly took a copy of the
8 report with him to Lincoln PD. (Id. ¶ 23.) Siemens allegedly
9 "authorized, permitted, or otherwise allowed Vizzusi to obtain
10 and maintain a copy of Plaintiffs' personnel records and personal
11 information after ending his employment" with City of Rocklin and
12 Rocklin PD. (Id. ¶ 28.) Vizzusi was appointed to the position
13 of Lincoln PD Chief of Police in 2006. (Id. ¶¶ 21-22.)

14 On or around June 15, 2007, Vizzusi met with Lincoln PD
15 Lieutenant Paul Shlegren and Lincoln PD Sergeant Brendan
16 Lebrecht. (Id. ¶ 24-25.) Vizzusi provided them with a paper
17 copy of the report and emailed them a copy immediately after the
18 meeting. (Id. ¶¶ 25-26.) Vizzusi allegedly told Shlegren and
19 Lebrecht that Siemens had given him permission to distribute
20 plaintiffs' "personnel records" to members of the Lincoln PD.
21 (Id. ¶ 25.) The SAC alleges that the disclosure of the report
22 was "accompanied by oral statements." (Id. ¶ 42; see also id. ¶
23 18 ("Oral and written statements were also made by the Defendants
24 to third persons about intoxication, sexual view points, sexual
25 orientation, sexual relations, arrest records, medical
26 conditions, and discrimination against third persons.").)

27 The disclosure to Shlegren and Lebrecht allegedly
28 "result[ed]" in plaintiffs' "confidential personnel records and

1 confidential personal information bec[oming] widely known
2 throughout the Lincoln PD, law enforcement communities in the
3 region, and to other third persons and agencies." (Id. ¶ 30.)
4 In January of 2010, a peace officer for Placer County "revealed
5 the disclosure" to plaintiffs. (Id. ¶ 33.) On or about January
6 27, 2010, plaintiffs' counsel requested that Siemens "take
7 appropriate steps to investigate the Police Department's apparent
8 breach of its duty to safeguard its employees' personnel files."
9 (Id. ¶ 34.) Plaintiffs' counsel also requested that City of
10 Lincoln's City Manager account for all copies of plaintiffs'
11 "personnel files," destroy all electronic copies, return all
12 physical copies, and provide a sworn affidavit from Vizzusi
13 attesting that all copies had been destroyed or returned to
14 plaintiffs. (Id. ¶ 35.)

15 On February 12, 2010, City of Lincoln confirmed that
16 Vizzusi had "disseminated" plaintiffs' "personnel records,"
17 indicated the records would be destroyed, and agreed to provide
18 the physical copy of the records to plaintiffs' counsel. (Id. ¶
19 36.) On March 18, 2010, City of Lincoln provided a signed
20 declaration from Vizzusi to plaintiffs' counsel. (Id. ¶ 37.)
21 Plaintiffs allege that electronic copies are still maintained on
22 Lincoln PD's computers. (Id. ¶ 38.) Plaintiffs also allege
23 that they have been and will continue to be stigmatized,
24 humiliated, and embarrassed and that the disclosure of personal
25 information has resulted in "risks to their status as law
26 enforcement officers." (Id. ¶ 32.)

27 On July 7, 2010, plaintiffs filed an initial complaint
28 alleging various federal and state law claims. (Docket No. 1.)

1 On September 9, 2010, plaintiffs filed the First Amended
2 Complaint ("FAC"), asserting three federal claims pursuant to 42
3 U.S.C. §§ 1983 and 1985 for constitutional privacy violations and
4 state law claims. (Docket No. 16.) On November 15, 2010, the
5 court granted the Rocklin defendants and Siemens' motion to
6 dismiss with respect to the federal claims and the claim for
7 violation of California Civil Code section 1798.42 (California's
8 Information Practices Act of 1977) and denied it with respect to
9 the other state law claims. (Docket No. 29.) Plaintiffs then
10 filed the SAC, which asserts three § 1983 and § 1985 claims and
11 numerous state law claims. The Rocklin defendants and Siemens
12 now move to dismiss the three federal claims in the SAC pursuant
13 to Rule 12(b)(6) for failure to state a claim upon which relief
14 can be granted. (Docket No. 36.)

15 II. Discussion

16 To survive a motion to dismiss, a plaintiff must plead
17 "only enough facts to state a claim to relief that is plausible
18 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
19 (2007). This "plausibility standard," however, "asks for more
20 than a sheer possibility that a defendant has acted unlawfully,"
21 Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009),
22 and where a complaint pleads facts that are "'merely consistent
23 with' a defendant's liability, it 'stops short of the line
24 between possibility and plausibility of entitlement to relief.'" Id.
25 (quoting Twombly, 550 U.S. at 557). In deciding whether a
26 plaintiff has stated a claim, the court must assume that the
27 plaintiff's allegations are true and draw all reasonable
28 inferences in the plaintiff's favor. Usher v. City of L.A., 828

1 F.2d 556, 561 (9th Cir. 1987). However, the court is not
2 required to accept as true "allegations that are merely
3 conclusory, unwarranted deductions of fact, or unreasonable
4 inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055
5 (9th Cir. 2008) (internal quotation mark omitted).

6 The Rocklin defendants and Siemens have provided, as an
7 exhibit to a declaration from Siemens, a copy of a document that
8 purports to be the report and a news article about plaintiffs'
9 alleged misconduct. (Docket No. 45.) While not addressing its
10 authenticity, Plaintiffs argue that the alleged copy of the
11 report should not be considered. (Pls.' Opp'n to Mot. to Dismiss
12 SAC at 3:11-20 (Docket No. 44).) The Rocklin defendants and
13 Siemens argue that the court may consider the report because it
14 is incorporated by reference into the SAC. (Defs.' Mem. of P. &
15 A. in Supp. of Mot. to Dismiss SAC ("Defs.' Mot.") at 7:4-8:15
16 (Docket No. 45).) The SAC, however, does not incorporate the
17 report by reference. The report is neither attached to the SAC,
18 nor does the SAC purport to quote the substance of the report.

19 The Ninth Circuit has held that when ruling on a
20 12(b)(6) motion a court may "consider certain materials--
21 documents attached to the complaint, documents incorporated by
22 reference in the complaint, or matters of judicial notice--
23 without converting the motion to dismiss into a motion for
24 summary judgment." United States v. Ritchie, 342 F.3d 903, 909
25 (9th Cir. 2003). Here, there is no foundation for the court to
26 conclude that the report submitted by defendants is what "forms
27 the basis" of plaintiffs' claim. Id. Accordingly, the court
28 declines to consider the attachments to Siemens' declaration.

1 In relevant part, § 1983 provides:

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

10 42 U.S.C. § 1983. Section 1983 itself is not a source of
11 substantive rights; it provides a cause of action against any
12 person who, under color of state law, deprives an individual of
13 federal constitutional rights or limited federal statutory
14 rights. 42 U.S.C. § 1983; Graham v. Connor, 490 U.S. 386, 393-94
15 (1989).

16 The Ninth Circuit has held that the Constitution
17 protects an "individual interest in avoiding disclosure of
18 personal matters."² In re Crawford, 194 F.3d 954, 958 (9th Cir.
19 1999) (internal quotation marks omitted). However, the "courts
20 have construed this right narrowly, limiting it to those rights
21 which are 'fundamental or implicit in the concept of ordered
22 liberty.'" Carver v. Rathlesberger, No. 04-1918 DFL PAN, 2005 WL
23 3080856, at *2 (E.D. Cal. Nov. 11, 2005) (quoting St. Michael's
24 Convalescent Hosp. v. Cal., 643 F.2d 1369, 1375 (9th Cir. 1981)).

25 In its Order filed November 15, 2010, this court
26 dismissed the § 1983 claims in plaintiffs' First Amended
27 Complaint, because the allegations were too conclusory and
28 general. The court noted that it was unable to plausibly infer
that defendants disclosed information that implicates "rights

29 ² Plaintiffs also allege a Fourth Amendment violation.
The Fourth Amendment applies to government employers. O'Connor
v. Ortega, 480 U.S. 709 (1987).

1 which are 'fundamental or implicit in the concept of ordered
2 liberty,'" Carver, 2005 WL 3080856, at *2 (quoting St. Michael's
3 Convalescent Hosp., 643 F.2d at 1375), or disclosed information
4 that is of such a "highly personal or sensitive nature that it
5 falls within the zone of confidentiality." Flanagan v. Munger,
6 890 F.2d 1557, 1570-71 (10th Cir. 1989). Plaintiffs have failed
7 to cure those deficiencies in their SAC.

8 In order for the court to determine whether the
9 allegedly disclosed information rose to the level required to
10 amount to a violation of the Constitutional right of privacy, the
11 nature and substance of that information must be set forth in the
12 complaint. This is especially true where, as here, defendants
13 have raised the defense of qualified immunity. An essential step
14 in any qualified immunity analysis is to characterize the
15 defendant's alleged conduct, so that the court can determine
16 whether that conduct violated clearly established law. See
17 Pearson v. Callahan, --- U.S. ----, ----, 129 S. Ct. 808, 815,
18 (2009)(holding that the doctrine of qualified immunity protects
19 government officials "from liability for civil damages insofar as
20 their conduct does not violate clearly established statutory or
21 constitutional rights of which a reasonable person should have
22 known.") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))
23 (internal quotation marks omitted). Where the assailed conduct
24 is the disclosure of information, a proper characterization of
25 that conduct depends upon a proper understanding of what
26 information was allegedly disclosed.

27 On that score, plaintiffs continue to make conclusory
28 allegations. (See SAC ¶ 43 (The report "disclosed various

1 personal information, such as . . . sexual orientation, sexual
2 relations, . . . [and] medical conditions"; id. ¶ 18
3 ("Oral and written statements were also made by the Defendants to
4 third persons about . . . sexual orientation, sexual relations, .
5 . . [and] medical conditions"); id. ¶ 63 ("These
6 disclosures involved personal matters, including information
7 relating to counseling").) With no more than those
8 conclusory allegations, the court is unable to conclude that the
9 factual allegations in the SAC plausibly suggest a constitutional
10 privacy violation, or that the defendants are not entitled to
11 qualified immunity. See Iqbal, 129 S. Ct. at 1949.

12 Accordingly, the court must grant the motion to dismiss
13 the § 1983 claims against the Rocklin defendants and Siemens.³
14 The court will also dismiss the § 1985 claim. See Thornton v.
15 City of St. Helens, 425 F.3d 1158, 1168 (9th Cir. 2005) ("The
16 absence of a [42 U.S.C. §] 1983 deprivation of rights precludes a
17 [42 U.S.C. §] 1985 conspiracy claim predicated on the same
18 allegations.") (internal quotation marks omitted).

19 IT IS THEREFORE ORDERED that the Rocklin defendants and
20 Siemens' motion to dismiss the § 1983 and § 1985 claims be, and
21 the same hereby is, GRANTED.

22 Plaintiffs have twenty days from the date of this Order
23 to file an amended complaint, if they can do so consistent with
24

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

1 this Order.

2 DATED: January 18, 2011

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A handwritten signature in blue ink, reading "William B. Shubb", is written over a horizontal line.

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

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