UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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BRANDON OLIVERA and STEVEN ORTMANN,

Plaintiffs,

v.

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

Defendants.
_____/

NO. CIV. 2:10-1747 WBS GGH

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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This case is before the court on defendants Mark Siemens and the City of Rocklin's motion to dismiss plaintiffs Brandon Olivera and Steven Ortmann's Third Amended Complaint ("TAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. To avoid repetition, the court will refrain from reciting the general facts underlying plaintiffs' lawsuit, which can be found

in the court's decisions granting defendants' prior motions to dismiss, Olivera v. Vizzusi, No. 2:10-1747, 2011 WL 219592 (E.D. Cal. Jan. 19, 2011), and Olivera v. Vizzusi, No. 2:10-1747, 2010 WL 4723712 (E.D. Cal. Nov. 15, 2010).[1]

In short, when plaintiffs were employed as City of Rocklin police officers, they were intoxicated while off duty and ultimately arrested one evening, resulting in an internal affairs investigation. (TAC ¶¶ 9-10, 17-21.) After completion of the investigation and resulting report about the incident, Siemens, who was the Chief of Police for the Rocklin Police Department,[2] allegedly allowed another officer to disclose the internal affairs investigation report to other police officers and "third persons, entities and agencies." (Id. ¶¶ 29-34.)

In their TAC, plaintiffs assert five claims under 42 U.S.C. § 1983 for violations of their informational privacy, Fourth Amendment, substantive due process, procedural due

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[1] Although the TAC still includes claims against Brian Vizzusi, the City of Lincoln, and the Lincoln Police Department, plaintiffs dismissed their claims against those defendants with prejudice on December 28, 2010, after the court determined that those defendants reached a settlement with plaintiffs in good faith. (Docket Nos. 40, 43.)

[2] Plaintiffs have also named the City of Rocklin Police Department as a defendant. Municipal departments and sub-units of local governments, however, are generally not considered "persons" for the purpose of § 1983 liability. See United States v. Kama, 394 F.3d 1236, 1239 (9th Cir. 2005) (Ferguson, J., concurring) (municipal police departments and bureaus are generally not considered "persons" within the meaning of § 1983); Wade v. Fresno Police Dep't, No. 09-0588 AWI DLB, 2010 WL 2353525, at *4 (E.D. Cal. June 9, 2010) (holding a police department is not a "person" under § 1983); Vance v. Cnty. of Santa Clara, 928 F. Supp. 993, 995-96 (N.D. Cal. 1996) (naming a municipal department as a defendant "is not an appropriate means of pleading a § 1983 action against a municipality"). The proper defendant, which plaintiffs have also named, is the City of Rocklin.

process, and equal protection rights, a claim under 42 U.S.C. § 1985, Monell claims against the City of Rocklin, and numerous state law claims. Defendants now move to dismiss the TAC in its entirety.

I. Legal Standard

To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," Ashcroft v. Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009), and where a complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). In deciding whether a plaintiff has stated a claim, the court must assume that the plaintiff's allegations are true and draw all reasonable inferences in the plaintiff's favor. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation mark omitted).

Although the court is generally limited to considering the complaint when deciding a motion to dismiss, a court may consider outside materials if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged the existence of the materials in the complaint or the complaint

"necessarily relies" on the materials. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). Defendants have again asked the court to consider a document titled "Rocklin Police Department Internal Affairs Investigation 03-09" ("IA Document"), which they submitted under seal. (Siemens Decl. Ex. A (Docket No. 45).)

Although the TAC refers to and even quotes from a report that appears to be the IA Document, the report does not form the exclusive basis of plaintiffs' claims. For example, the TAC also alleges that plaintiffs' rights were violated when "defendants" allegedly made "oral and written statements about the contents of the report and exhibits to third persons who were not entitled to have access to said documents, report and attached exhibits." (TAC ¶ 19.) The IA Document that defendants submitted also appears to be incomplete, as the TAC and the IA Document itself refer to exhibits that include video tapes, recordings, and transcripts, and such exhibits are absent from the IA Document. (See id. ¶ 18; Siemens Decl. Ex. A at 1-3.) Accordingly, the court will not consider the IA Document because evaluating it would result in an incomplete assessment of plaintiffs' allegations.

II. Claims Under 42 U.S.C. § 1983

In relevant part, § 1983 provides:

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

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

In their First Amended Complaint and Second Amended Complaint, plaintiffs based their § 1983 claims on alleged violations of their informational privacy and Fourth Amendment rights. In their TAC, plaintiffs again allege violations of these rights and also add § 1983 claims based on alleged violations of their substantive due process, procedural due process, and equal protection rights.

A. Informational Privacy

The Ninth Circuit has held that the Constitution protects an "individual interest in avoiding disclosure of personal matters," which courts have generally referred to as the right to informational privacy.[3] In re Crawford, 194 F.3d 954,

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[3] One day after this court issued its last decision granting defendants' motion to dismiss, the Supreme Court decided a case in which the plaintiffs claimed a violation of their informational right of privacy. NASA v. Nelson, --- U.S. ----, ----, 131 S. Ct. 746, 751 (2011). The Court explained that, "[i]n two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy 'interest in avoiding disclosure of personal matters.'" Id. (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977) and Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977)). In resolving the case before it, the Court "assume[d], without deciding, that the Constitution protects a privacy right of the sort mentioned in Whalen and Nixon," referring to the right as an "'interest in avoiding disclosure' that may 'arguably ha[ve] its roots in the Constitution.'" Id. (quoting Whalen, 429 U.S. at 599, 605) (alteration in original). Likewise, this court assumes, without deciding, that such a right exists.

In his dissent, joined by Justice Thomas, Justice Scalia criticized the majority for declining to decide the issue

958 (9th Cir. 1999) (internal quotation marks omitted). "[C]ourts have construed this right narrowly, limiting it to those rights which are 'fundamental or implicit in the concept of ordered liberty.'" Carver v. Rathlesberger, No. 04-1918 DFL PAN, 2005 WL 3080856, at *2 (E.D. Cal. Nov. 11, 2005) (quoting St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1375 (9th Cir. 1981)); accord Lee v. City of Columbus, --- F.3d ----, ----, 2011 WL 611904, at *12-13 (6th Cir. 2011). To merit constitutional protection, the information disclosed must be of such a "highly personal or sensitive nature that it falls within the zone of confidentiality." Flanagan v. Munger, 890 F.2d 1557, 1570-71 (10th Cir. 1989).

For example, courts have held that individuals have a protected informational privacy interest in medical information obtained from tests for syphilis, pregnancy, and sickle cell trait, Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269-70 (9th Cir. 1998), prior sexual relationships that have no bearing on job performance, Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983), and HIV status or AIDS diagnosis, Doe v. Att'y Gen. of U.S., 941 F.2d 780, 796 (9th Cir. 1991). On the other hand, courts have held that individuals lack a constitutional right to informational privacy in the disclosure of a police department reprimand and the reasons for the reprimand, Flanagan, 890 F.2d at 1570-71, and the collection and disclosure of Social Security numbers in documents filed with the

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and concluded that the "invented" "federal constitutional right to 'informational privacy' does not exist." Id. at 764 (Scalia, J., dissenting).

bankruptcy court. In re Crawford, 194 F.3d at 960.

In its prior two orders, this court granted defendants' motions to dismiss plaintiffs' § 1983 claims based on their rights to informational privacy because plaintiffs' allegations were too conclusory and general. The court explained that, "[i]n order for the court to determine whether the allegedly disclosed information rose to the level required to amount to a violation of the Constitutional right of privacy, the nature and substance of that information must be set forth in the complaint." Olivera, 2011 WL 219592, at *4; see also Olivera, 2010 WL 4723712, at *4. The court further emphasized that plaintiffs' conclusory and general allegations prevented it from characterizing Siemens's alleged conduct in order to determine whether he was entitled to qualified immunity. Olivera, 2011 WL 219592, at *4.

Now, in their fourth complaint in this case, plaintiffs again attempt to allege violations of their informational privacy rights. In addition to maintaining their prior allegations that the court held were too conclusory, such as allegations that the disclosures included "statements about intoxication, sexual view points, sexual orientation, sexual relations, arrest records, and discrimination against third persons," (TAC ¶ 19), plaintiffs have added new allegations about the disclosures in their TAC. The new allegations generally cover five topics: 1) the specific documents and materials disclosed; 2) plaintiffs' potentially sexually-suggestive conduct and one's possible views on sexual orientation; 3) plaintiffs' alleged intoxication and demeanor the night of the incident; 4) the use of ethnic slurs; and 5)

information about Olivera's relationship with his cousin.[4]

First, with respect to the specific documents and materials disclosed, the TAC alleges that the report included:

> various exhibits, including video surveillance tapes by the Humboldt County Sheriff's Office and a video tape which had been edited by the Blue Lake Indian Cassino [sic], the Humboldt County Sheriff's Office dispatch tape, communications between dispatchers and deputies, interrogatory [sic] records of both OLIVERA and ORTMANN, transcripts of the audio tapes of the internal affairs investigation interviews of OLIVERA and ORTMANN, as well as transcripts of audio tapes of various witnesses. It also contained a copy of the booking from the Blue Lake Police Department, copies of the bookings from the Humboldt County Sheriff's Office, copies of photographs of OLIVERA's pickup truck, and copies of the interrogation records of OLIVERA AND ORTMANN.

(Id. ¶ 18.) The mere release of these particular documents and exhibits does not give rise to a violation of the informational right to privacy unless the content of the documents merits protection under the right to informational privacy. See Flanagan, 890 F.2d at 1570-71 (discussing Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981)). Similarly, the mere disclosure of plaintiffs' names and "the charges against [plaintiffs], the specific General Orders allegedly violated, and a conduct unbecoming charge," (TAC ¶ 18), do not implicate their rights to informational privacy. See Flanagan, 890 F.2d at 1570-71.

Next, the TAC added allegations that the report disclosed conduct by plaintiffs that could be interpreted to be of a sexual nature, alleging that the "videos showed Plaintiffs

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[4] Plaintiffs also allege that the report "disclosed the identities and telephone numbers of non-law enforcement witness [sic]." (TAC ¶ 22.) Plaintiffs undoubtedly lack a protected privacy interest in information about unrelated third parties.

having contact with females inside the Blue Lake Casino, [and] showed 'shadow games' with females." (TAC ¶ 19.) First, it is unclear what plaintiffs mean by "contact with females" or "shadow games." Second, even if such allegations could be considered sexually suggestive, the potential sexual nature of the conduct does not rise to the level that courts have found protected. See, e.g., Thorne, 726 F.2d at 471; Bloch v. Ribar, 156 F.3d 673, 685-86 (6th Cir. 1998).

The TAC also alleges that the videos showed plaintiffs "playing with a guy's ear lobes, other activities with males in the bar, . . . and use of the derogatory term 'faggot.'" (TAC ¶ 19.) Presumably, plaintiffs are attempting to suggest that the report contained information relating to homosexual activity, which might, under the right set of facts, come within the protections of informational privacy. The court will not, however, guess what plaintiffs mean by "activities with males in the bar" or whether plaintiffs referred to someone else or were themselves referred to as a "faggot." Plaintiffs' allegations cannot rise to the level of plausibility by relying on innuendo and suggestive language.

Plaintiffs' third set of new allegations indicate that the report disclosed disparaging information about their alleged intoxication and demeanor the night of the incident:

> [The report] is descriptive of a confrontation and fights in the Casino bar . . . [and] of the alleged public intoxication of OLIVERA and states that he was drunk in public and in his vehicle. It describes Plaintiffs' demeanor as rude, uncooperative and argumentative. They are described as saying "they were better cops than anyone who was there at the incident." It shows a video tape of the alleged bar fight in the Blue Lake Casino. They are described as being "bullies" and trying to look

> for fights with everyone. There are at least eight(8) statements in the internal affairs report from officers, deputies and security personnel at the Blue Lake Casino that paint the conduct of the Plaintiffs as derogatory, uncooperative, drunk and very belligerent . . . and that they showed their badges while off-duty.

(TAC ¶¶ 20-22.) While plaintiffs may understandably be embarrassed about their alleged conduct that night, nothing about their alleged level of intoxication or rude or combative behavior in a public place involves matters of a highly personal or sensitive nature to merit constitutional protection. Not only did plaintiffs allegedly engage in this conduct in public, see Flanagan, 890 F.2d at 1570-71 (emphasizing plaintiffs' lack of a protected informational privacy interest when their conduct occurred in public), the Constitution simply does not provide "a free-standing right not to have the world know bad things about you." Nelson v. NASA, 568 F.3d 1028, 1053 (9th Cir. 2009) (denying rehearing en banc) (Kozinksi, J., dissenting).

Fourth, plaintiffs allege that "ethnic slurs were allegedly made to Hispanic customers in the bar." (TAC ¶ 19.) Again, plaintiffs lack a protected privacy right in inappropriate comments they may have made in a public setting.

Lastly, the TAC alleges that the report "contained information about OLIVERA's family and personal relationship with his female cousin." (Id. ¶ 20.) Similar to plaintiffs' allegations about "activities with males at the bar," this allegation uses such broad and ambiguous language that the court cannot determine whether it gives rise to a right to informational privacy. As the Sixth Circuit explained in Kallstrom, while constitutional protection has been extended to

family relationships, a right to informational privacy exists only if the release of the information would "seriously infringe upon the intimate decisionmaking incidental to the protection of the family." Kallstrom, 136 F.3d at 1061. Although the court could surmise information about Olivera's family and personal relationship with his cousin that might plausibly give rise to a protected interest, it can just as easily--if not more easily--surmise information that would not.

Accordingly, because the allegations in plaintiffs' TAC either fail to give rise to a cognizable right to informational privacy claim or are still too broad for the court to evaluate, the court will again grant defendants' motion to dismiss plaintiffs' § 1983 claims based on alleged violations of their informational privacy rights.

B. Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. art. IV. "Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" and a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

Plaintiffs allege that Siemens violated their Fourth Amendment rights when their "employment records were illegally seized and used by the Defendants." (TAC ¶ 73.) In attempting to assess the plausibility of this claim, the court has difficulty fitting it within the Fourth Amendment context of a seizure, especially because the internal affairs report was created and maintained by the Rocklin Police Department and Siemens had a copy of the report and knew about its content before the alleged "seizure" occurred. (See TAC ¶ 19.) It is precisely these types of circumstances--when "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right"--about which the Supreme Court was thinking of when it reversed its prior precedent and held that courts could assume a constitutional violation occurred and examine whether the official is entitled to qualified immunity. Pearson v. Callahan, 555 U.S. 223, ----, 129 S. Ct. 808, 818 (2009).

"[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" Pearson, 129 S. Ct. at 815 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The test for qualified immunity is: (1) identification of the specific right being violated; (2) determination of whether the right was so clearly established as to alert a reasonable officer to its constitutional parameters; and (3) a determination of whether a reasonable officer would have believed that the policy or decision in question was

lawful." McDade v. West, 223 F.3d 1135, 1142 (9th Cir. 2000).

The clearly established inquiry "serves the aim of refining the legal standard and is solely a question of law for the judge." Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1085 (9th Cir. 2009). As the Supreme Court has recognized, whether the unlawfulness of certain conduct is clearly established "depends largely 'upon the level of generality at which the relevant "legal rule" is to be identified.'" Wilson v. Layne, 526 U.S. 603, 614 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)). The right must be defined in a "particularized, and hence more relevant, sense," requiring a court to strike a balance between defining a right too generally so that the definition necessarily leads to the conclusion that the right is clearly established and defining the right too narrowly so that prior precedent must mirror the facts of the case in order to conclude that the right has been clearly established. Saucier v. Katz, 533 U.S. 194, 202-03 (2001).

If the court concludes a right is not clearly established, the official is entitled to qualified immunity. Id. at 202. If a right is clearly established, an official is not entitled to qualified immunity unless a reasonable official would not have known that his conduct violated the clearly established right. See Anderson, 483 U.S. at 640. The reasonableness inquiry recognizes 'that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude' that their conduct comports with the Constitution and thus shields officials from liability when their mistake is reasonable. Anderson, 483 U.S. at 641.

While different conclusions can be reached on the clearly established and reasonableness inquires, the two inquiries are usually intertwined, and the Supreme Court has explained that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202; see also Anderson, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Given the overlap of the two inquiries, many courts treat the analysis as a single inquiry. See, e.g., Pearson, 129 S. Ct. at 816 ("If the court finds the constitutional right was clearly established such that a reasonable officer would be aware that his or her conduct was unconstitutional, then the officer is not entitled to qualified immunity.").

Initially, the court has serious doubts that authorizing an internal affairs report containing personal information about plaintiffs to be communicated to others could constitute a "search" or "seizure" within the meaning of the Fourth Amendment under any stretch of existing law. Nevertheless, for purposes of the qualified immunity analysis, the court will assume, without deciding, that it did in fact constitute a Fourth Amendment violation. The court is unable to find--and plaintiffs have not cited--a single case with similar facts in which a Fourth Amendment violation was found. While "it is not necessary that a case be on 'all fours' with the facts of the instant case," the "contours of the right" must be

"sufficiently clear that a reasonable official would understand that what he is doing violates that right." Rogers v. County of San Joaquin, 487 F.3d 1288, 1297 (9th Cir. 2007) (quoting Saucier, 533 U.S. at 202) (internal quotation marks omitted). Here, the lack of case law combined with facts that do not come within a traditional idea of a "seizure" under the Fourth Amendment would prevent a reasonable officer from believing that his conduct violated the Fourth Amendment.

In contrast to the lack of any precedent suggesting a violation, the Supreme Court has repeatedly recognized that the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." Engquist v. Or. Dep't. of Agric., 553 U.S. 591, 599 (2008); see also City of Ontario v. Quon, --- U.S. ----, ----, 130 S. Ct. 2619, 2628 (2010).

The Ninth Circuit has also explained that "the application of the Fourth Amendment to the employment context presents special issues[and, w]hile 'policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights,' the Constitution does not afford public employees greater workplace rights than those enjoyed by their private sector counterparts." Aguilera v. Baca, 510 F.3d 1161, 1167 (9th Cir. 2007) (quoting Garrity v. New Jersey, 385 U.S. 493, 500 (1967)). In rejecting police officers' claim that they were seized when they were ordered to remain at their station of duty pending questions about possible misconduct, the Ninth Circuit in Aguilera concluded that "a law enforcement agency has the authority as an employer to direct its officers to remain on

duty and to answer questions from supervisory officers as part of a criminal investigation into the subordinates' alleged misconduct." Id. at 1168, 1170-71.

After the conduct at issue in this case occurred, the Third Circuit rejected somewhat analogous Fourth Amendment claims by police officers in Roberts v. Mentzer, 382 Fed. App'x 165 (3d Cir. 2010). Although decisions issued after the conduct at question in this case could not put an officer on notice that his conduct is violating clearly established law, a court's rejection of such claims--even after the conduct in question--illustrates that clearly established law still does not exist. In Roberts, police officers claimed a Fourth Amendment violation based on the police department's release of their personnel records to attorneys working on a case in which the officers were going to testify as witnesses. Id. at 161. In rejecting the officers' Fourth Amendment claims, the Third Circuit explained that plaintiffs failed to provide the court "with any case law indicating that employees have a privacy interest in the personnel files maintained by their employers," and ultimately concluded that the officers lacked a reasonable expectation of privacy in their personnel files. Id. at 165.

Based on the absence of precedent finding a constitutional violation in similar situations and the backdrop of case law distinguishing the inquiry when the government is acting as an employer, the court concludes that plaintiffs' Fourth Amendment rights were not clearly established such that a reasonable officer would know that his "seizure" of the internal affairs report about plaintiffs ran afoul of the Fourth

Amendment. Accordingly, the court will grant defendants' motion to dismiss plaintiffs' § 1983 claim based on the Fourth Amendment because Siemens is entitled to qualified immunity on that claim.

C. Remaining Constitutional Rights

When the court granted plaintiffs leave to amend on two prior occasions, it expected plaintiffs to improve their § 1983 claims based on their alleged informational privacy rights. Instead of making a genuine effort to improve the allegations supporting that claim, plaintiffs' counsel decided to throw in the gamut of new constitutional claims in the TAC to see what might stick. With such a haphazard approach, it is not surprising that the allegations in each of the new constitutional claims fail to even recognize the fundamental aspects unique to the different constitutional rights.

First, "[a] threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994). For a substantive due process claim, a plaintiff must generally "show a government deprivation of life, liberty, or property" that is regarded as "fundamental." Brittain v. Hansen, 451 F.3d 982, 990-91 (9th Cir. 2006) (internal quotation marks omitted). A protected liberty or property interest giving rise to a procedural due process claim generally requires that the "individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law." Wedges/Ledges of Cal., Inc., 24 F.3d at 62; see also Paul

v. Davis, 424 U.S. 693, 710-11 (1976) ("[Liberty or property interests] attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . . .").

In their § 1983 claims based on their substantive and procedural due process rights, however, plaintiffs allege only that they "were not given Notice of the Release of their confidential personal and personnel information by the Defendants." (TAC ¶¶ 86, 92.) Plaintiffs fail to allege that they had a protected liberty or property interest in the information released. To the extent plaintiffs' alleged substantive due process rights rely on a protected right in the privacy of the disclosed information, plaintiffs' claim is merely duplicative of their claim based on violations of their right to informational privacy and fails for the reasons previously discussed. See, e.g., Lee, --- F.3d ----, ----, 2011 WL 611904, at *12 (describing the informational privacy right as "rooted in the substantive due process protections") (internal quotation marks omitted).

Moreover, any injury plaintiffs allegedly experienced to their reputation as a result of the disclosure of the internal affairs report is insufficient to merit constitutional protection. See Johnson v. Barker, 799 F.2d 1396, 1399 (9th Cir. 1986) ("Paul v. Davis[, 424 U.S. 693 (1976),] teaches that damage to reputation, standing alone, cannot state a claim for relief under section 1983 because reputation is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."). Without an alleged protected property or

liberty interest, plaintiffs' claims based on the alleged violations of their substantive and procedural due process rights fail and defendants' motion to dismiss those claims must be granted.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). "The first step in equal protection analysis is to identify the [defendants'] classification of groups." Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) (quoting Country Classic Dairies, Inc. v. Mont. Dep't of Commerce Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988)) (alteration in Freeman);.

Plaintiffs' TAC fails to allege that plaintiffs were a part of some "identifiable group," as is required in a traditional equal protection claim. Instead, plaintiffs simply allege that "they were treated differently than other officers, who were employed by the Defendants." (TAC ¶ 97.) This allegation appears to rely on the "class of one" theory of equal protection in which a plaintiff claims to have "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in

treatment." Willowbrook v. Olech, 528 U.S. 562, 563 (2000).[5] The Supreme Court has held, however, that "the class-of-one theory of equal protection has no application in the public employment context" based, in part, on the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." Engquist, 553 U.S. at 599 (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)) (internal quotation marks omitted). Accordingly, given the insufficiency of plaintiffs' allegations, the court must also grant defendants' motion to dismiss plaintiffs' § 1983 claim based on their alleged equal protection rights.[6]

D. Monell Claims

As § 1983 does not provide for vicarious liability, local governments "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 693 (1978). "Instead, it is when execution of a government's policy or custom, whether made

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[5] At oral argument, plaintiffs' counsel indicated that, since there are two plaintiffs in this case, he is not arguing under a "class-of-one" theory because there is a class of two here. This superficial distinction does not create an identifiable group giving rise to a traditional equal protection claim. See Thornton v. City of St. Helens, 425 F.3d 1158, 1166-67 (9th Cir. 2005) ("The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified. An equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff.") (internal quotation marks omitted).

[6] Because the court will grant defendants' motion to dismiss all of plaintiffs' § 1983 claims, the court must also grant defendants' motion to dismiss plaintiffs' § 1985 claim. See Thornton, 425 F.3d at 1168 ("The absence of a [42 U.S.C. §] 1983 deprivation of rights precludes a [42 U.S.C. §] 1985 conspiracy claim predicated on the same allegations.") (internal quotation marks omitted).

by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id.

A finding that Siemens did not violate plaintiffs' constitutional rights "precludes section 1983 municipal liability regardless of whether there was a County policy." Dixon v. Wallowa Cnty., 336 F.3d 1013, 1021 (9th Cir. 2003). The court must therefore dismiss all of plaintiffs' Monell claims with the exception of their Monell claim based on the Fourth Amendment.

With respect to their § 1983 claim against the City of Rocklin based on the Fourth Amendment, plaintiffs allege only that the City of Rocklin

> maintained a custom, practice and policy of allowing . . . their officers, officials and employees, including VIZZUSI and SIEMENS, to unlawfully, illegally, intentionally and willfully seize, use and disclose the private personal information and private peace officer confidential personnel records of the Plaintiffs, and other similarly situated employees, without authorization, permission and/or a court order.

(TAC ¶ 76.)

Since Iqbal, such conclusory allegations that merely allege the existence of a policy without providing factual content from which one could plausibly infer that such a policy exists have been repeatedly rejected. See, e.g., Palermo v. Town of North Reading, 370 Fed. App'x 128, 131 n.4 (10th Cir. 2010) (dismissing a Monell claim when "the complaint as a whole contained no factual assertions whatsoever regarding Town policy"); Dimming v. Pima Cnty., No. CV-09-189-TUC-CKJ, 2011 WL 855797, at *2-3 (D. Ariz. Mar. 11, 2011) (same); Haley v. Gipson, No. CV 11-787, 2011 WL 838919, at *2 (C.D. Cal. Feb. 28, 2011)

(same); Telles v. City of Waterford, No. 1:10-cv-00982 AWI SKO, 2010 WL 5314360, at *4 (E.D. Cal. Dec. 20, 2010) (same).

Accordingly, given the insufficiency of plaintiffs' conclusory allegations, the court will grant defendants' motion to dismiss plaintiffs' Monell claim based on an alleged violation of their Fourth Amendment rights.

E. Leave to Amend

Generally, the "standard for granting leave to amend is generous" and the court should not dismiss a complaint without leave to amend if it "could conceive of facts that would render plaintiff's claim viable." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990) (internal quotation marks omitted). The lenient standard reaches its limits, however, when a plaintiff repeatedly fails to allege sufficient facts, especially in light of repeated orders from the court identifying, in detail, the deficiencies of plaintiffs' allegations. See, e.g., Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996) ("Considering that [plaintiff] filed four complaints and yet continued to allege insufficient facts, the district court properly dismissed his action without leave to amend.").

Here, plaintiffs are now on their fourth attempt to allege a violation of their right to informational privacy. While plaintiffs' vague and suggestive language invites creativity on behalf of the court to surmise facts that could give rise to a such a right, the court has clearly told plaintiffs on two prior occasions that they must include the facts in their complaint. At oral argument, the court also asked plaintiffs' counsel if he had included all the facts he could in

the TAC, and he indicated that he had. Without the possibility of additional facts to allege disclosures of information that could conceivably give rise to a protected interest, any further amendment would be futile. Accordingly, the court will dismiss plaintiffs' § 1983 and Monell claims based on their right to informational privacy with prejudice.

As plaintiffs' § 1983 claims based on their substantive due process, procedural due process, and equal protection rights appeared for the first time in the TAC, the court will not dismiss those claims, or plaintiffs' Monell claim based on the Fourth Amendment, with prejudice. However, the court has serious doubts about whether plaintiffs can sufficiently allege those claims and expects plaintiffs' counsel to file a fifth complaint only if it addresses the insufficiencies discussed herein and violations of those constitutional rights are plausible given the facts of this case.

F. State Law Claims

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction . . . ." 28 U.S.C. § 1367(c)(3); see also Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) ("[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in § 1367(c)."). Factors for a court to consider in deciding whether to dismiss supplemental state claims include judicial economy, convenience, fairness, and comity. Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1309 (9th

Cir. 1992). "[I]n the usual case in which federal law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims." Reynolds v. Cnty. of San Diego, 84 F.3d 1162, 1171 (9th Cir. 1996), overruled on other grounds by Acri, 114 F.3d at 1000.

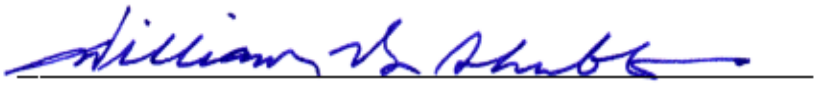
Plaintiffs' case has been pending for less than nine months and, although the court issued a Status (Pretrial Scheduling) Order in December, the case has yet to proceed beyond the motion to dismiss stage. As none of the parties have posed any extraordinary or unusual circumstances suggesting that the court should retain jurisdiction over plaintiffs' state law claims in the absence of any federal claims, unless plaintiffs can successfully amend their complaint consistent with this Order, the court will decline to exercise supplemental jurisdiction under § 1367(c)(3) over plaintiffs' state law claims and will accordingly grant defendants' motion to dismiss those claims.

IT IS THEREFORE ORDERED that defendants' motion to dismiss plaintiffs' Third Amended Complaint in its entirety be, and the same hereby is, GRANTED, and plaintiffs' § 1983 and Monell claims based on their right to informational privacy are dismissed with prejudice.

Plaintiffs have seven days from the date of this Order to file an amended complaint alleging § 1983 claims based on their substantive due process, procedural due process, or equal protection rights, a Monell claim based on the Fourth Amendment, and any state law claims from their TAC. The court expects

plaintiffs to file a Fourth Amended Complaint only if they can actually allege cognizable claims under one or more of those constitutional rights. The leave granted to plaintiffs is limited to the aforementioned claims and is not a carte blanche invitation for plaintiffs to see if they can conjure up more new claims.

DATED: March 31, 2011



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE